Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

107th Session **Judgment No. 2850**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. V W. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 16 May 2008 and corrected on 23 June, the Agency's reply of 17 October, the complainant's rejoinder of 21 November 2008 and Eurocontrol's surrejoinder of 13 March 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch national born in 1975, joined Eurocontrol on 1 December 2003, at grade C5, on an appointment for a limited period of three years. He performed the duties of Clerical Assistant in the Sickness Insurance Department of the Maastricht Upper Area Control Centre.

His first appraisal report covered 2004. The overall assessment section indicated that his performance did not fully meet all the requirements of his job and that an improvement plan was needed. On 15 December 2005 the Director of the Maastricht Centre sent an

internal memorandum to the Director of Human Resources in which he proposed that the complainant's contract be extended for another year, i.e. until 30 November 2007, in order to see whether any improvement was taking place. On 11 January 2006 the complainant's contract was therefore extended for a year. In the appraisal report for 2005 the complainant received the same overall assessment as in the previous report. The assessment in the report for 2006 indicated that, in general, he had failed to meet the requirements of his post.

On 18 July 2007 the Director General, considering that it was not in the interest of the service to renew the appointment of the complainant, whose performance was unsatisfactory, decided that this appointment should expire on 30 November 2007. On 8 August the complainant submitted an internal complaint against this decision, in which he argued that no reasons had been adduced for it, that "contrary to practice" he had not been given one year's notice of the non-renewal of his contract and that his appraisal reports for 2005 and 2006 had not been finalised. He requested the cancellation of this decision, the conversion of his appointment into an appointment for an unlimited period and the opening of an investigation into harassment by one of his superiors. He was informed in writing on 11 December 2007 that a preliminary investigation of his complaint of harassment would be conducted.

In its opinion of 25 January 2008 the Joint Committee for Disputes unanimously found that sufficient reasons had been adduced for the decision not to renew the complainant's contract, since it was predicated on his unsatisfactory performance as evidenced by his appraisal reports. Two of its members recommended that the internal complaint should be dismissed as unfounded, whereas the other two recommended that the complainant's contract should be renewed for a year to allow "the finalisation of all the proceedings under way". These two members questioned the nature of the complainant's contract – the fact that he held a contract for a limited rather than an unlimited period – and also considered that the applicable period of notice had not been respected. The Director of Human Resources notified the complainant by a letter of 20 February 2008 that his

internal complaint had been dismissed as legally unfounded. That is the impugned decision.

On 25 April 2008 the Director General wrote to the complainant to inform him that, having studied the report of the investigation, he had decided not to take any further action on his complaint of harassment and that the case was therefore closed.

B. The complainant acknowledges that his appraisal report for 2004 contained several critical comments, but emphasises that the Director of the Maastricht Centre stated in the internal memorandum of 15 December 2005 that his performance was good. He submits that the decision not to renew his contract was taken before his appraisal reports for 2005 and 2006 had been finalised and in breach of Annex X to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, which sets forth special provisions of the Staff Regulations applicable to servants appointed for an undetermined or limited period from 1 May 2002. He takes the Director General to task for having dismissed his internal complaint despite the divided opinion of the Joint Committee for Disputes.

The complainant asks the Tribunal to set aside the decision of 20 February 2008 and to rule that the Agency terminated his appointment "unlawfully". He claims 25,000 euros and 12,500 euros respectively in compensation for the material and moral injury which he believes he has suffered, together with interest. Lastly, he claims costs in the amount of 5,000 euros.

C. In its reply the Agency gives its version of the facts. It states that in February 2006 the complainant was questioned by the Director of the Maastricht Centre in connection with some racist e-mails which had been sent from his professional e-mail address. On 10 July he was questioned by the Director General; according to the Agency, the complainant then admitted to being the author of the e-mails in question. He was informed on 5 October that the Director General had decided to refer the matter to the Disciplinary Board; the complainant secured the postponement of the hearing until 6 February 2007.

The Agency adds that the complainant was absent from work on health grounds from 26 January until 30 November 2007, the date on which his contract expired. However, the doctor whom it had instructed to conduct a health examination considered that the complainant was fit for work. As the complainant disputed this doctor's findings, an Invalidity Committee was convened in accordance with Article 59(3) of the General Conditions of Employment, but this committee could not be set up because the doctor designated by the complainant refused to participate. After 14 March the complainant's absence was no longer covered by a medical certificate. The home visit which was organised could not take place because the complainant was absent. He was then urged to report to the examining doctor, which he did only after he had been informed that if he failed to do so his remuneration would be suspended. The disciplinary proceedings could not go ahead in these circumstances.

Eurocontrol contends that the reasons adduced for the decision of 18 July 2007, though succinct, met the requirements established by the Tribunal's case law. It stresses that the complainant knew that his performance had consistently been deemed unsatisfactory since 2004 and that his performance in 2005 and 2006 would be crucial for any renewal of his contract. Moreover, it points out that disciplinary proceedings had been instituted against the complainant for acts incompatible with the dignity of his office and likely to sully the Agency's reputation. It also draws attention to the complainant's absenteeism and especially to his unauthorised absence for two and half months. It maintains that he had no right to a renewal of his contract and that the Director General had sufficient grounds for considering that it was not in the interest of the service to renew his appointment. In the Agency's opinion, since the impugned decision lay within the Director General's wide discretionary authority, it is subject to only limited review by the Tribunal.

The defendant states that it is not bound to give one year's notice before the non-renewal of an appointment. Annex X to the General Conditions of Employment mentions notice only in the event of premature termination of an appointment. The Agency points out that

the complainant was notified of the decision of 18 July 2007 almost four and a half months before the one-year extension of his contract expired, which is perfectly reasonable and therefore consonant with the case law. It emphasises that the complainant had been appointed for a limited period, contrary to the unsubstantiated assertions of two members of the Joint Committee for Disputes.

The Agency admits that the appraisal report for 2005 was not given to the complainant for a second signature and to enable him, if appropriate, to request its referral to the Joint Committee on Appraisals, but it considers that this does not invalidate the assessments which it contained. The report for 2006 was sent to the complainant's home address in order that he might see it, fill in the relevant sections and make any comments. However, in reply to a reminder from the head of his unit, he indicated in writing that he refused to return it.

D. In his rejoinder the complainant asserts that in fact he worked for the Agency as from 1 October 2001 as a temporary employee and that his working relations with his immediate superior were always "very difficult", which affected his health. He adds that at the beginning of 2007 his state of health deteriorated considerably owing to harassment by his immediate superior and the "do nothing attitude" of his second-level superior. He says that he supplied several medical certificates, which he annexes to his submissions, but the Administration "improperly withdrew" all his annual leave and then "withheld payment of his salary for June 2007". He indicates that by a decision of 7 November 2008 the Agency paid all his annual leave, although until then it had always refused to do so.

The complainant maintains that no reasons have been adduced for the impugned decision. He asserts that his performance was satisfactory and that "his output was excellent". He argues that his immediate superior used his appraisal reports to "blacken his name" and that although his other superiors were aware of this situation, they did not react.

The complainant emphasises that his duties were of a lasting nature and that he should therefore have been appointed for an undetermined period, in accordance with Chapter 1 of Annex X to the General Conditions of Employment. He also considers that he was entitled to reasonable notice. He points out that although Article 5(4) of Annex X stipulates that the period of notice may not begin to run during sick leave, he was notified of the decision of 18 July 2007 while he was on sick leave.

The complainant contends that the appraisal report for 2005 was never given to him to sign a second time and that he has therefore never been able to request its referral to the Joint Committee on Appraisals, as the Agency itself acknowledges. He received the report for 2006 while he was on sick leave and he was unable to react appropriately to the assessments it contained.

He comments that no disciplinary board has been convened and that the accusations regarding the improper use of his professional e-mail have never been proved; moreover he has never had an opportunity to prove his innocence.

E. In its surrejoinder the Agency acknowledges that the complainant worked at the Maastricht Centre between 2001 and 2003, but points out that his situation was then governed by Dutch labour law. It underlines that he did not challenge his appointment for a limited period either in 2003 or when it was extended. His argument in this connection is therefore irreceivable and irrelevant. It adds that an organisation is at liberty to grant appointments for a limited period as it sees fit. In other respects the Agency maintains the arguments which it put forward in its reply.

CONSIDERATIONS

1. The complainant was recruited by Eurocontrol on 1 December 2003 for a limited period of three years.

The first appraisal report on his work, covering the 2004 calendar year, showed that his performance was deemed to be unsatisfactory.

Although the report indicated that the complainant handled a sufficient number of claims, it contained various critical remarks about his poor knowledge of French, his negative attitude to administrative tasks, his failure to observe rules on working hours, his frequent absences from work and his intensive use of the Internet for private purposes during working hours.

In an internal memorandum of 15 December 2005 to the Director of Human Resources, the Director of the Maastricht Centre nonetheless proposed a one-year extension of the complainant's appointment in order to see whether any improvement was taking place. The complainant's contract was therefore extended until 30 November 2007 by a decision of the Director General of 11 January 2006.

2. However, the complainant's appraisal report for 2005, which was drawn up in April 2006, echoed the earlier criticism of his work and even recorded a drop in the number of claims handled by the complainant compared with the previous year.

In the meantime the complainant had been questioned on 8 February 2006 by the Director of the Maastricht Centre, who had asked him to explain how it had come about that racist e-mails had been sent to an Internet forum from his professional e-mail address. As the complainant subsequently admitted to being the author of these messages, he was informed on 5 October 2006 that the Director General had decided to refer his case to the Disciplinary Board.

Having secured the postponement of his hearing, the complainant was summoned to appear before the Board on 6 February 2007, but in the event he was on sick leave as from 26 January 2007, and this leave was extended continuously until 30 November 2007. Thus, the complainant never returned to work at Eurocontrol before his contract expired. The Organisation, which doubted the genuineness of this sick leave and the successive extensions thereof, had the complainant examined twice, on 29 January and 15 June 2007, by a doctor who on both occasions considered that he was fit for work. The Agency further submits – while not establishing this irrefutably in view of the

evidence furnished by the complainant in this connection – that his absence from 14 March to 31 May 2007 was not properly covered by medical certificates. As will be shown later, the Agency did not follow through on proceedings which might have made it possible to compel the complainant to return to work by referring the dispute to the Invalidity Committee. As a result, it was never possible to pursue the disciplinary proceedings initiated against him.

3. On 20 June 2007, while the complainant was on sick leave, his appraisal report for 2006 was sent to him at his home address in order that he might add any comments he wished to make. The assessment of his merits was even worse than in the previous reports inasmuch as the overall assessment placed him, for the first time, in the lowest category of the evaluation scale used by the Agency.

The complainant was again asked to submit his comments on this report on 13 July 2007, but he declined this invitation and informed the Agency in an e-mail of 18 July that, on the advice of his union, he refused to take any steps which might be detrimental to his interests.

4. By a decision likewise dated 18 July 2007 the Director General terminated the complainant's appointment with effect from 30 November 2007, which meant that his contract would not be renewed on its expiry.

Pursuant to Article 91 of the General Conditions of Employment the complainant filed an internal complaint against this decision on 8 August 2007. This complaint was examined by the Joint Committee for Disputes on 22 November 2007. The Committee issued a divided opinion. Although two of its members proposed that the complaint should be dismissed as unfounded, the other two recommended that the complainant's contract should be renewed for a year in order to permit the "finalisation of all the proceedings under way".

On 20 February 2008 the Director of Human Resources, acting on behalf of the Director General, endorsed the former viewpoint and dismissed the internal complaint. That is the decision which is impugned before the Tribunal.

5. It must be pointed out that, although the complainant principally seeks the setting aside of the decision not to renew his contract, he is not asking the Tribunal to order his reinstatement within the Organisation. He is, however, claiming compensation amounting to 25,000 euros and 12,500 euros respectively for the material and moral injury which he considers he has suffered. He is also requesting that interest be added to these sums and that the Organisation be ordered to pay him costs in the amount of 5,000 euros.

6. According to firm precedent, a decision not to renew a fixed-term contract lies within the discretion of the organisation concerned and may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if it is established that there has been abuse of authority. Furthermore, the Tribunal has consistently held that when a contract is not renewed on account of unsatisfactory performance, it will not substitute its own view of the complainant's fitness for duty for the organisation's assessment (see, for example, Judgments 1262, under 4, and 1741, under 11).

7. In the present case the complainant essentially submits that no reasons were adduced for the decision not to renew his contract, that insufficient notice was given and that the decision was predicated on appraisal reports which were drawn up under unlawful conditions. These pleas, all of which relate to formal or procedural flaws, come within the scope of the Tribunal's power to review a decision of this kind.

8. The plea that no reasons were adduced cannot be accepted.

According to the terms of the impugned decision, it rested on the consideration that "it [wa]s not in the interest of the service to renew the appointment of [the complainant], whose performance [wa]s not satisfactory". In the instant case this reason, although succinct, was

quite sufficient to inform the complainant – who was moreover perfectly aware of the criticism levelled at him – of the grounds for this decision and, in particular, to enable him to appeal against it. It therefore satisfies the requirements of the Tribunal's case law on the subject, which does not require that the reasons for a decision must necessarily be stated in the decision itself (see Judgments 1750 and 1817).

9. The complainant's contention that he should have been given one year's notice of the decision not to renew his contract is equally unfounded.

Article 10 of Annex X to the General Conditions of Employment, concerning special provisions of the Staff Regulations applicable to servants appointed for an undetermined or limited period from 1 May 2002, indicates that in fact no notice of non-renewal is required where an appointment for a limited period ends on the contractual expiry date. Relying on another article of the annex, the complainant argues that his initial appointment ought to have been for an undetermined period since his duties were of a lasting nature. However, as he was recruited under a contract for a limited period his situation is in any case governed by the provisions applicable to such contracts, and even on the assumption that his post should normally have been filled by a servant appointed for an undetermined period – which, as can be seen from Judgment 1450, is not a matter which the Tribunal will review – this fact by itself could not lead to a redefinition of his appointment. Furthermore, it should be noted that, in the event of termination of service of a servant appointed for an undetermined period, Annex X stipulates that at least six months' notice must be given.

Thus, in reality the Organisation's sole obligation – and indeed this would be required by the Tribunal's case law even in the absence of a statutory provision – was to give the complainant "reasonable notice" in order that he might exercise his right of appeal and take whatever action might be necessary (see, inter alia, Judgments 2104, under 6, and 2531, under 9). In this case the decision not to renew the complainant's contract, issued on 18 July 2007 and effective as of 30 November, preceded his actual separation from service by more

than four months. The Tribunal is of the view that in the present case that period of time was long enough for it to be deemed to comply with this requirement.

10. By contrast, the plea that the appraisal reports underpinning the impugned decision were drawn up under unlawful conditions is well founded.

When, as in this case, an organisation is minded to refuse the renewal of an official's appointment on the grounds that his/her performance is regarded as unsatisfactory, the case law requires that it take into consideration reports appraising the merits of the person concerned (see, for example, Judgments 1351, under 11, or 2096, under 13). Furthermore, these appraisal reports must naturally have been drawn up in accordance with the procedure applying within the organisation and especially in compliance with instructions designed to ensure the adversarial nature of the reporting process (see, in particular, Judgments 1741, under 15 and 16, or 2172, under 20 and 21).

Although, as stated above, the Tribunal has only limited power to review an organisation's assessment, it must endeavour to ascertain that the conditions established by its case law have been respected in order to be sure that this assessment rests on reliable and objective information.

11. In the instant case the complainant's last two appraisal reports preceding the disputed decision were those for 2005 and 2006, which, as can be seen from the chain of events listed above, had both been drawn up after the decision of 11 January 2006 to extend his initial contract for one year. It is therefore clear that these reports formed part of the vital information on which the Organisation had to base its assessment of whether his appointment should be renewed after this extension.

It must, however, be noted that these two appraisal reports were drafted under conditions which did not comply with Rule

of Application No. 3 of the General Conditions of Employment concerning the drawing up of such staff reports.

12. The appraisal report for 2005 indicates that the complainant had requested, as he was entitled to do, that his direct superior's assessment should be reviewed by his second-level superior as countersigning manager. In addition, he had responded to the assessment of his performance by providing comments in which asked for an interview with the countersigning manager. It is plain from the file that the appraisal procedure was interrupted at that point, although the Organisation should normally have passed the report back to the complainant so that he would have been able at least to challenge it before the Joint Committee on Appraisals.

13. The Organisation acknowledges in its submissions, although it does not explain the causes of this anomaly, that this effectively deprived the complainant of the possibility of referring the matter to the Joint Committee on Appraisals, but it argues that this circumstance does not invalidate the findings regarding his performance which are to be found in the appraisal report in question.

Obviously the Tribunal cannot concur with the Organisation's argument, which is tantamount to negating the Committee's review role. The Organisation set up such a joint body to provide the Director General with an opinion on the accuracy of a staff member's appraisal in the event of disagreement, precisely in order to enable the person concerned to challenge the content of these appraisals, if necessary by questioning the viewpoint unilaterally expressed by his/her superiors. Moreover, Article 8 of the above-mentioned Rule No. 3 emphasises that this committee's opinion shall "inter alia concern[…] the respect for the spirit of equity and objectivity which must prevail in the preparation of the appraisal". In the present case, the fact that the complainant was thus deprived of the possibility of having the disputed appraisal reviewed by this body implies that the preparation of the report in question was procedurally flawed.

14. The Organisation asserts that it did transmit the appraisal report for 2006 to the complainant, because it sent this document to his home address owing to his absence on sick leave; but, as he informed it in the above-mentioned e-mail of 18 July 2007, he then refused to forward his comments. It considers that the hiatus in the normal assessment procedure therefore resulted from the conduct of the complainant himself, and it infers from this that he has no cause to complain of this in the context of the present proceedings.

However, the complainant, who stresses that he was on sick leave at the time, submits that his state of health made it impossible to react in an appropriate manner to the assessments contained in his appraisal report. This may be regarded as a legitimate reason for the complainant's refusal to send his comments to the Organisation at the time in question.

15. The Tribunal is well aware that in this case the Agency had reason to doubt the validity of the medical certificates produced by the complainant to justify his sick leave, given that the examining doctor had twice concluded that the complainant was fit for work. However, as the Organisation itself notes, in these circumstances, pursuant to Article 59(3) of the General Conditions of Employment, it ought to have submitted the dispute arising from the conflicting medical opinions to the Invalidity Committee. Moreover, the evidence on file shows that the complainant himself had expressly requested the convening of this committee in a letter of 19 June 2007 accompanying a certificate from his attending physician which disputed the examining doctor's findings. The Organisation provides no evidence showing that it took any steps in that direction. It merely contends that it tried to set up an Invalidity Committee after the medical examination on 29 January 2007, but that at that juncture its efforts were thwarted by the fact that the doctor designated by the complainant refused to participate. This circumstance alone was not sufficient to exempt the Organisation from taking the requisite steps to convene the Committee if it intended to secure a settlement of the dispute arising from the fresh medical examination conducted on

15 June 2007, which concerned a period for which the complainant had another medical certificate, albeit issued by a different doctor.

Since no such action was taken, the Tribunal will not question the probative value of the medical certificates produced by the complainant and will therefore dismiss the Agency's contention that the complainant was responsible for the unlawful conditions in which the report in question was drawn up.

16. In addition, the Tribunal notes that, in light of the need to provide the complainant with the reasonable period of notice mentioned above, the appraisal report in question was forwarded to him much too late for him effectively to be able to enjoy the safeguards of having his assessment reviewed by the countersigning manager and the Joint Committee on Appraisals. Hence this manner of proceeding did not comply at all with the rules designed to ensure the adversarial nature of the process of drawing up appraisal reports.

The appraisal report for 2006, like the report for 2005, was not therefore drawn up in compliance with the applicable rules.

17. It may be concluded from the above that the Director General's decision of 18 July 2007 not to renew the complainant's appointment was based on an appraisal of the complainant's performance which was tainted with procedural flaws.

This decision, and likewise that of 20 February 2008 dismissing the complainant's internal complaint against it, must therefore be set aside.

18. The complainant is entitled to compensation for all the injury caused by these decisions. The fact that Eurocontrol thus unlawfully refused to renew the complainant's appointment on the basis of an improper assessment procedure undeniably caused him moral injury. It also caused him material injury, but in this regard the Tribunal notes that, regardless of the disputed appraisal reports, the complainant's overall performance as documented in the file obviously makes it highly improbable that the Organisation would

have had any wish to renew his appointment, even if its decision had been taken lawfully. In the circumstances of the case, the Tribunal therefore considers that the complainant's claims for compensation are exorbitant and that all his real injuries caused by the unlawful decision taken in his case may be fairly compensated by awarding him the sum of 10,000 euros, which includes interest.

19. Since his complaint is partly well founded, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The decisions of the Director General of Eurocontrol of 18 July 2007 and 20 February 2008 are set aside.
2. The Agency shall pay the complainant 10,000 euros, which includes interest, in compensation for the injury suffered.
3. It shall also pay him costs in the amount of 2,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet