

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

109th Session

Judgment No. 2938

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. J. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 November 2008 and corrected on 22 December 2008, the Agency's reply of 9 April 2009, the complainant's rejoinder of 19 June and Eurocontrol's surrejoinder of 25 September 2009;

Considering Articles II, paragraph 5, and VII 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 is a German national born in 1969. On entering the service of the Maastricht Upper Area Control Centre in 1994 he was assigned to a post at grade C5. On 21 February 2005, when he was performing the duties of system controller at grade B4, he was granted leave on personal grounds from 1 March 2005 to 28 February 2006. This leave was subsequently extended until 28 February 2007.

After an interview with the Head of the Human Resources Section in the course of which he said that, in order to facilitate his reinstatement, he was prepared to accept a position in a team or division different to those in which he had previously worked, he requested by an e-mail of 26 January 2007 a list of vacant positions matching his profile. He was told that, following the launch of the e-recruitment process, all notices of competition were available on the Agency's website.

On 10 April and 3 October 2007 two notices of competition were published, respectively concerning two system controller posts at grade B5 and three junior system controller posts at grade C4. The complainant applied for these posts but on each occasion his application was rejected. He was informed of this by two e-mails: one dated 24 May and the other 21 November 2007. He lodged an internal complaint on 14 January 2008 against these two decisions, arguing that there had been a breach of Article 40(4)(d) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre which, in the version applicable on 1 July 2007, read as follows:

“[O]n the expiry of his leave a servant must be reinstated in the first post corresponding to his grade which falls vacant in his category and service provided that he satisfies the requirements for that post. [...] Until effectively reinstated he shall remain on unpaid leave on personal grounds.”

In its opinion of 30 June the Joint Committee for Disputes unanimously recommended that the complainant be immediately reinstated and that he be offered appropriate compensation for the injury suffered. By a letter of 28 August 2008, which constitutes the impugned decision, the Director General informed the complainant that, inasmuch as his internal complaint was directed against the decision of 24 May 2007, it was time-barred, and that inasmuch as it was directed against the decision of 21 November 2007, it was groundless because, as the three junior system controller posts were not in category B, Article 40 did not apply. The complainant

was, however, informed that, bearing in mind the unanimous recommendation of the Joint Committee for Disputes, an amicable solution would be sought and that, should he file a complaint with the Tribunal, the Agency would not argue that it was time-barred.

B. The complainant contends that, since the Joint Committee for Disputes and the Director General issued opinions on the validity of the decisions of 24 May and 21 November 2007, a new three-month time limit for filing a complaint against them began on 28 August 2008, even his internal complaint was time-barred inasmuch as it was directed against the decision of 24 May 2007. He draws attention to the fact that, in its letter of 28 August 2008, Eurocontrol expressly announced that, should he file a complaint with the Tribunal, it would not argue that it was time-barred.

On the merits, the complainant submits that the Agency did not honour its obligation under Article 40(4)(d) of the General Conditions of Employment to reinstate him as soon as a post in his category and grade fell vacant and that, in view of this obligation, there was no need to hold a competition. In this connection he emphasises that in Judgment 1074 the Tribunal stated in respect of Article 40 that, if a vacancy occurs and if the servant who should be reinstated fulfils the requirements, “he is entitled to it whether or not others also fulfil them”. In his opinion the Agency did not play the “active role” that it was required to play and, by merely inviting him to consult its website, it breached the General Conditions of Employment.

The complainant considers that he satisfied the requirements of the grade B5 posts advertised, because the duties involved were exactly those which he had been performing before he was granted leave on personal grounds. Since the conditions laid down in Article 40 were therefore met, Eurocontrol should have appointed him to one of these posts. As it did not do so, the principle of *tu patere legem quam ipse fecisti* was breached. The complainant asserts that the Agency also failed to honour the “general duty of care and good faith” which

an organisation owes to its staff and did not state the reasons for its refusal which, in his view, constitutes an “obvious, serious error of judgement”. Moreover, he maintains that his first duties at Eurocontrol were those of a junior system controller and that he was therefore qualified for appointment to such a post. In his opinion, Article 40 did apply, because if a servant is entitled to be reinstated in a post matching his grade, he is equally entitled to be reinstated in a post at a lower grade if he so wishes and if he has the requisite ability.

Lastly, the complainant states that not only is he no longer receiving any pay, but he is also suffering moral injury because, despite his sincere efforts to be reinstated, he finds himself “up against a wall”.

He principally asks the Tribunal to set aside the decision of 24 May 2007, the appointments to the two system controller posts at grade B5 and the decision of 28 August 2008. He also seeks reinstatement within a fortnight of the date of the delivery of the judgment on this case and “backdated to the date on which he ought to have been appointed”, as well as the payment, on pain of a fine, of arrears of salary and other benefits, or, alternatively, reinstatement within a fortnight of the date of the delivery of this judgment and the payment, on pain of a fine, of compensation equal to the salary and benefits which he should have received as from the date of the appointments following the notice of competition of 10 April 2007.

Subsidiarily, the complainant asks the Tribunal to set aside the decision of 21 November 2007, the appointments to the three junior system controller posts at grade C4 and the decision of 28 August 2008. He also seeks reinstatement within a fortnight of the date of the delivery of the judgment in this case and “backdated to the date on which he ought to have been appointed”, as well as the payment, on pain of a fine, of arrears of salary and other benefits, or, alternatively, reinstatement within a fortnight of the date of the delivery of this judgment and the payment, on pain of a fine, of compensation equal to the salary and benefits which he should have received as from the date of the appointments following the notice of competition of 3 October 2007.

Still more subsidiarily, the complainant claims compensation equal to the salary and benefits which he should have received as from the date on which he ought to have been appointed to the post of system controller at grade B5 until his actual reinstatement.

Extremely subsidiarily, he requests the setting aside of the impugned decision and compensation equal to the salary and benefits which he would have received had he been reinstated as from the date on which he should have been appointed to the post of junior system controller at grade C4 until his actual reinstatement.

In each case he claims 5,000 euros in moral damages and 5,000 euros in costs.

C. In its reply the Agency informs the Tribunal that on 23 March 2009 it offered to reinstate the complainant as from 1 April 2009 in a grade B*6 post, which corresponds to his former grade of B4. On 27 March 2009 the complainant provisionally accepted this offer and said that he would withdraw his complaint if Eurocontrol awarded him “adequate compensation” for his loss of earnings since March 2007 and undertook in writing to give him “absolute priority” when the next system controller post fell vacant. He explained that he was even prepared to accept assignment to a similar post at a lower grade or step. By a fax of 31 March 2009 the Deputy Head of the Legal Service notified the complainant that he did not have a right to be reinstated in a system controller post, that the offer of reinstatement in the above-mentioned B*6 grade post was “perfectly consistent” with Article 40(4)(d) and that no priority could be given to his candidature when the next system controller post fell vacant, since that would amount to discrimination against other servants interested in that post. Since the Agency wished to find an amicable solution, it offered to pay the complainant the sum of 12,000 euros. The defendant asks the Tribunal to acknowledge the fact that it reinstated the complainant on 1 April 2009 in compliance with the provisions of the aforementioned subparagraph (d).

On the merits, the Agency contends that the complainant’s claims for reinstatement and for the cancellation of the appointments to the

five posts for which he applied must be regarded as having been satisfied, since he has been reinstated.

It explains that in 2005, after the complainant took leave on personal grounds, the requirements of system controller posts changed considerably as a result of the entry into force at the Maastricht Centre of Edition 2.0 of the “Eurocontrol Safety Regulatory Requirement” regarding Air Traffic Management Services’ Personnel (hereinafter referred to as “ESARR 5”). Since then, new system controllers have been recruited as junior system controllers in category C and they receive 15 months’ intensive training until they obtain the ESARR 5 certificate of competence and are qualified to work without supervision as system controllers. When the vacancies for the grade B5 posts were announced, ESARR 5 had been in force for two years. When considering whether the complainant could be reinstated in one of these posts, it was thought that it would be a very long and expensive process to give him 15 months’ training before he could obtain the certificate in question, especially as some of his former colleagues already held it. That was why it was concluded that the complainant did not possess the “requirements for th[e] post” within the meaning of Article 40(4)(d) and why it had proved necessary to publish a notice of competition specifying that candidates must “have successfully completed the [Centre] internal training programme for System Controller”, in other words that they must comply with ESARR 5. The Agency therefore considers that it was right not to reinstate the complainant in one of these posts.

Lastly, the defendant states that it was not obliged to contemplate the complainant’s reinstatement in one of the junior system controller posts because, as they were at grade C4, these posts did not meet the requirements of the above-mentioned subparagraph (d).

D. In his rejoinder the complainant points out that three new system controller posts were advertised on 15 April 2009, but that his candidature was rejected by an e-mail of 25 May. He makes it clear

that in the proceedings before the Tribunal he is also challenging this rejection – against which he lodged an internal complaint on 15 June 2009 – as well as the appointments to the three posts in question.

The complainant otherwise presses his pleas. He draws attention to the fact that the notice of competition published on 10 April 2007 does not indicate that candidates had to hold the ESARR 5 certificate of competence, and he adds that the Agency did not raise the self-serving argument that his candidature was rejected because he did not possess this certificate until it made its submissions to the Tribunal. He asserts that in May 2007 he was perfectly capable of performing the duties of system controller.

The complainant says that he is experiencing difficulties in performing his new duties, which do not match his skills or grade.

In addition, he contends that the Agency misused its authority and injured his dignity since, in his opinion, Eurocontrol is “tacitly, but certainly determined” not to reinstate him in his former duties, and the grade B*6 post to which he was appointed and which was specially created in order to avoid having to reinstate him in a system controller post corresponds to duties normally performed by category C servants. He considers that he has been “sidelined”. He points out that, having refused to reinstate him in a system controller post on the grounds that his knowledge was out of date, the Agency displayed a contradictory attitude by not appointing him to a junior system controller post, which would have enabled him to refresh his knowledge.

The complainant reiterates his principal and subsidiary claims and adds that he asks the Tribunal to find that his appointment to the grade B*6 post does not constitute valid reinstatement for the purposes of Article 40 of the General Conditions of Employment and to set aside the decision of 25 May 2009, as well as the appointments to the three system controller posts in question. With respect to his claim to be reinstated “backdated to the date on which he ought to have been appointed”, he indicates that the Agency must be ordered, if necessary, to organise suitable training to that end.

E. In its surrejoinder the defendant draws the Tribunal's attention to the fact that internal means of redress have not been exhausted in respect of the decision of 25 May 2009 rejecting the complainant's application for the system controller posts.

On the merits, the Agency fully maintains its position. It explains that it never denied the complainant's right to be reinstated under Article 40(4)(d) of the General Conditions of Employment, but that he was not entitled to be offered the system controller post which he had held earlier, and that, until his reinstatement on 1 April 2009, no vacant post had met all the conditions of the above-mentioned article. It submits that the grade B*6 post in which the complainant has been reinstated perfectly matches his training and encompasses numerous responsibilities demanding a high level of technical competence.

CONSIDERATIONS

1. By a decision of 21 February 2005 the complainant, who was performing the duties of system controller at grade B4, was granted one year's leave on personal grounds as from 1 March 2005. This leave was subsequently extended until 28 February 2007. The complainant announced as soon as 1 November 2006 his intention to return to the Agency at the end of his leave. During an interview with the Head of the Human Resources Section he stressed the fact that he was "flexible" and prepared to accept a position in a team or division different to those in which he had previously worked. By an e-mail of 26 January 2007 he asked to be sent as soon as possible a list of vacant positions matching his profile. On 30 January the Human Resources Section thanked him for the interest he had shown in working for the Organisation and advised him to look on a regular basis at the notices of competition posted on the Web.

2. A notice of competition for two system controller posts at grade B5 at the Maastricht Centre was published on 10 April 2007. It stipulated that candidates must "have successfully completed the

[Centre] internal training programme” for system controllers. The complainant applied, but was informed by e-mail on 24 May that he had not been shortlisted.

Another notice of competition for three junior system controller posts at grade C4 at the Centre was published on 3 October 2007. The complainant again applied, but was informed by an e-mail of 21 November 2007 that his application had been unsuccessful.

3. On 14 January 2008 the complainant lodged an internal complaint with the Director General, challenging the decisions of 24 May and 21 November 2007. He relied on Article 40 of the General Conditions of Employment, in accordance with which he should have been reinstated upon the expiry of his leave.

In its opinion of 30 June 2008 the Joint Committee for Disputes considered that this article required the Agency to plan the reinstatement of servants on leave on personal grounds, identify suitable posts and offer them in a timely manner. While noting that it was not competent to determine whether the complainant satisfied the requirements of the posts that had fallen vacant in his former division since January 2007, the Committee unanimously recommended to the Director General that the complainant be immediately reinstated and that he be offered appropriate compensation for the injury suffered.

On 28 August 2008 the Director General decided not to follow these recommendations. He considered that the internal complaint was time-barred inasmuch as it was directed against the decision of 24 May 2007, and that it was groundless inasmuch as it was directed against that of 21 November 2007. He explained that, bearing in mind the unanimous position of the Joint Committee for Disputes, he had nonetheless decided to explore the possibilities of an amicable solution. Lastly, he stated that, should a complaint be filed with the Tribunal, the Organisation would not argue that it was time-barred inasmuch as the internal complaint was directed against the decision of 24 May 2007. That is the decision that the complainant is impugning.

4. The Tribunal has determined that a staff member on leave on personal grounds is *ipso facto* no longer performing the duties of his former post and that, although during this leave he continues to be an official, the rights arising from the performance of his duties – remuneration, promotion, guarantee of employment, etc. – are suspended until he is reinstated. In the interests of the service the Agency may therefore use the vacant post (see Judgment 416, under 2). At the end of leave on personal grounds the employer nonetheless has a duty to reinstate the official provided that the two cumulative conditions laid down by the above-mentioned Article 40 are met: firstly, there must be a vacant post and, secondly, the staff member must be qualified for it (see Judgment 2034, under 11). This duty must be fulfilled promptly and with due regard for the dignity of the staff member concerned and the principle of good faith. The procedure to which the Joint Committee for Disputes referred in its opinion of 30 June 2008 reflects these fundamental requirements.

5. In its reply and surrejoinder the Agency explains in detail why, in its opinion, it could not reinstate the complainant in one of the system controller posts at grade B5 which were advertised on 10 April 2007. It points out that, owing to the introduction of ESARR 5 shortly after the complainant had taken leave on personal grounds, he would have had to receive special safety awareness training which he could not have been given within a period of time compatible with the smooth operation of the services concerned.

6. The Tribunal is aware that sudden rapid technological advances can bring about sometimes unforeseeable changes in the requirements of a given professional activity and that, consequently, persons who have engaged in that activity for many years may no longer be able to perform it without suitable training.

However, before he took leave on personal grounds on 1 March 2005 the complainant had served the Organisation for 11 years; he had always worked as a system controller and his career had progressed quite normally. The Human Resources Section had all the more reason to presume that he intended to return to the Organisation at the end of

this leave because its duration was not to exceed one year; in addition, there was nothing to suggest that the complainant had changed his mind on that matter when he requested an extension of this leave until 28 February 2007. Moreover, four months before this new expiry date, the complainant expressed the intention to resume work provided that a position matching his training and abilities was available. In these circumstances, Eurocontrol had a duty to examine carefully what reinstatement possibilities could be offered to the complainant on his return from leave in accordance with the above-mentioned Article 40 and, if necessary, to provide him with suitable training. When vacancies occurred in two posts which were identical, in terms of their responsibilities and grade, to the post which the complainant held before taking leave on personal grounds, the Agency, in deciding to treat him in the same way as any other external candidate, failed to pay due heed to these circumstances. While the Organisation had to bear in mind the entry into force of ESARR 5 when making its assessment, there is nothing in the file to indicate that the complainant, on the strength of his long experience in air traffic control, was not able to attend a suitable training course at least as from the date on which he contacted the Agency, i.e. 1 November 2006. It follows that the Agency failed in its duties towards the complainant under Article 40 of the General Conditions of Employment and that the reasons given to explain why the Director General departed from the recommendation of the Joint Committee for Disputes were irrelevant.

7. Since then, the Agency has offered the complainant a post with a grade and salary matching those of the position which he held before he took leave on personal grounds. However, this development does not make his complaint groundless.

This new position has nothing in common with that of a system controller. The complainant has accepted it, but on certain conditions which the Agency has refused. It cannot be inferred from the fact that he was reinstated that he has abandoned his conditions or the dispute forming the basis of the complaint. He accepted the position in question for the understandable reason that he no longer wished to

be unemployed. He may therefore legitimately contend before the Tribunal that he has been improperly assigned to a post not matching his qualifications, whereas he previously held a position of responsibility in keeping with his intellectual ability, and that the purely administrative work assigned to him is not specifically connected with air traffic control, to which he devoted his career.

8. The complaint must therefore be allowed and the impugned decision must be set aside inasmuch as it upholds that of 24 May 2007, without there being any need to examine the merits of the pleas raised by the complainant against the decision not to appoint him to one of the three junior system controller posts advertised on 3 October 2007.

Eurocontrol will offer the complainant a system controller post for which he possesses the requisite qualifications, as soon as one becomes available.

9. The Agency will pay the complainant, as appropriate, compensation equal to the difference between the remuneration which he would have received had he been reinstated in the first system controller post which fell vacant at the end of his leave on personal grounds and the sums which he will have actually received as salary, allowances and all professional earnings until his reinstatement in a system controller post.

10. Apart from these material damages, the Agency will pay the complainant compensation in the amount of 5,000 euros for the moral injury which he has suffered owing to the treatment which he received in respect of his request for reinstatement.

11. It will likewise pay him costs which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of 28 August 2008 is set aside inasmuch as it upholds that of 24 May 2007.
2. Eurocontrol shall pay the complainant, as appropriate, material damages, as indicated under 9, above.
3. The Agency shall pay the complainant moral damages in the amount of 5,000 euros.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2010, Mr Seydou Ba, Vice-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 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet