Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3123**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 September 2010 and corrected on 22 October 2010, the Agency's reply of 28 January 2011, the complainant's rejoinder of 31 March and Eurocontrol's surrejoinder of 24 June 2011;

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, an Italian national born in 1970, joined Eurocontrol in May 2008 as an Air Traffic Flow and Capacity Controller within the Central Flow Management Unit (CFMU) in Brussels. At the end of his probationary period he became an established official with effect from 1 February 2009. At the material time he held grade B*8, step 2. He worked according to a rotating

shift system, and during the period from 2 to 15 June 2009 he was rostered to work from 6 to 11 June inclusive. As he wished to move his residence from his country of origin to Brussels, on 14 April he requested two days' special leave for 6 and 7 June. The request was granted and on 2 June he travelled to Venice (Italy). Having learned that provincial elections were due to be held there on 6 June, he made a request on 4 June for an additional day's special leave in order to exercise his right to vote. This request was granted, so his period of special leave lasted from 6 to 8 June 2009. He was due to return to work on 9 June, but on the evening of 8 June he informed his team leader that he would be on sick leave for the three following days.

When the complainant returned to work on 16 June, his team leader and the Head of Operational Training and Competency asked him to provide explanations, particularly regarding the means of transport he had intended to use in order to be back in Brussels on 9 June. He replied that he had reserved an airline ticket for that purpose, and he was asked to provide a copy of it by 19 June. In an e-mail of 18 June, the complainant told the Head of Operational Training and Competency that, because of his change of residence and removal, he would not be able to provide his ticket the following day. He also explained that he had originally intended to return to Brussels on 7 June by car with a colleague, but had been unable to do so because of his state of health. It was eventually decided that he would have until 10 July to produce the required document, failing which his file would be forwarded to the Directorate of Resources for appropriate action.

As the complainant failed to provide any document in support of his statements, a report dated 14 September was sent by the Director General to the Disciplinary Board, stating that the penalty of removal from post should be imposed on the complainant for his unacceptable behaviour. On 15 December 2009 the Board heard both parties, and it issued its opinion the same day. In its view, the fact that the complainant had been unable to produce any convincing proof of the means of transport he was intending to use on 9 June 2009 showed that he had deliberately planned to absent himself from his work

without justification. Moreover, by repeatedly lying when asked for an explanation, he had abused the confidence placed in him by the Agency. Consequently, the Board decided by a majority that he should be removed from his post.

On 25 January 2010 two officials appointed by the Principal Director of Resources interviewed the complainant, and on 1 February the Director General decided to impose the sanction of downgrading in the same function group, with effect from that date. On 23 April 2010 the complainant lodged an internal complaint against that decision. Having received no reply, he filed a complaint with the Tribunal, impugning the implicit decision to reject his internal complaint.

B. The complainant asserts that there is a contradiction between the second subparagraph of Article 92, paragraph 2, of the Staff Regulations of the Agency and Article VII, paragraph 3, of the Statute of the Tribunal. According to the former provision, failure to reply to a complaint within four months of the date on which it was lodged constitutes an implied decision rejecting it, whereas the time limit in the latter provision is only sixty days.

On the merits, the complainant points out that he was notified on 6 October 2009 of the composition of the Disciplinary Board, that is, 16 days after the Director General had sent his report to the Board. Accordingly, there was a failure to observe the time limit of five days prescribed in Article 2, paragraph 4, of Annex XIV to the Staff Regulations for notifying the official concerned. Moreover, during the disciplinary proceedings he was not heard by the Director General “in person”, contrary to Article 17, paragraph 1, of Annex XIV, and he therefore complains that he was unable to argue his case before “a high-level official” in advance of the decision taken in his case. He notes that the officials who interviewed him on 25 January 2010 acted on the sub-delegated authority of the Principal Director of Resources, and asserts that the Agency has not proved that the Principal Director himself had received any delegated authority from the Director General for that purpose.

The complainant contends that the Disciplinary Board considered the facts in a subjective and arbitrary manner, and has not irrefutably proved that his three days' sick leave were unjustified. He points out that he produced a medical certificate for the Board even though he was not bound to do so, since Article 59 of the Staff Regulations provides that a certificate is obligatory only as from the fourth day of absence. Moreover, if the Agency had any doubts about his sickness, it should have required him to undergo a medical examination. As for the means of transport which he intended to use in order to be back in Brussels on 9 June, he contends that he did not make any false statement since he honestly believed he had reserved an airline ticket for that date.

He concludes that the case against him has not been proved; that, since according to Article 88 of the Staff Regulations any disciplinary action against an official presupposes a failure on the part of that official to comply with his obligations under the Regulations, there has been a violation of that provision; that the sanction imposed on him is disproportionate to the gravity of the misconduct attributed to him, and that it is based on an obvious error of judgement. He claims that he has suffered significant moral injury from the harmful repercussions for his health resulting from the lack of impartiality on the part of the Disciplinary Board, inter alia.

As a preliminary request, he asks the Tribunal to decide whether the second subparagraph of Article 92, paragraph 2, of the Staff Regulations is compatible with Article VII, paragraph 3, of the Statute of the Tribunal, and, subsidiarily, to find that the former provision is unlawful. On the merits, he requests the Tribunal to set aside the decision of 1 February 2010 and, to the extent necessary, the implied decision to reject his internal complaint. He also asks the Tribunal to order the Agency to reinstate him in his former grade and step, to reconstitute his career, to pay him the difference, plus interest as determined by the Tribunal, between the salary he would have received if he had not been downgraded and the salary he has actually received since 1 February 2010, and to remove from his personal file

any record of the disciplinary procedure and the decision resulting from it. He claims compensation of 25,000 euros for moral injury as well as 7,500 euros for costs. He also claims 1,650 euros for legal expenses incurred during the disciplinary procedure.

C. In its reply the Agency asserts that in Judgment 1096 the Tribunal held that the second subparagraph of Article 92, paragraph 2, of its Staff Regulations was compatible with Article VII, paragraph 3, of the Statute of the Tribunal. It states that on 2 November 2010 the Principal Director of Resources communicated to the complainant the opinion of the Joint Committee for Disputes and informed him that his internal complaint was dismissed.

On the merits, it contends that the complainant's right to challenge the composition of the Disciplinary Board was not infringed even though he was notified of it belatedly. It also asserts that on the basis of Decision No. XI/14 (2009) of 1 February 2009, the Principal Director of Resources had a delegated authority from the Director General, and that the said Decision also empowered him to sub-delegate his authority to officials in his department.

In the defendant's view, the Disciplinary Board has established that the intention of the complainant was to absent himself from work in a fraudulent manner in order to obtain additional leave. The medical certificate which he produced for the first time when interviewed on 15 December 2009 is not valid because it does not state that he was unfit for work, and it could not therefore serve to justify his absence. Moreover, he stated during the interview that he was in fact already sick on the morning of 8 June 2009. He should therefore, according to Article 59 of the Staff Regulations, have notified the Agency as soon as possible and produced a medical certificate from the fourth day of his absence, i.e. on 11 June. As he did not do this, the Agency had no means of verifying whether his illness was genuine.

The defendant also takes the view that the complainant was lying when he asserted, on several occasions, that he had an airline ticket for 9 June, and that in fact he had no means of transport available to him

to be in Brussels on that date. The Agency therefore submits that there were substantial, precise and concordant grounds for presuming that he had been guilty of misconduct.

Considering that there were no flaws in the disciplinary procedure and that the complainant's conduct warranted a penalty, which moreover was wholly proportionate given the circumstances of the case, the defendant claims that the moral injury alleged by the complainant does not exist.

D. In his rejoinder the complainant points out that, contrary to the Agency's assertion, the Tribunal did not declare in its Judgment 1096 that the second subparagraph of Article 92, paragraph 2, of the Staff Regulations and Article VII, paragraph 3, of the Statute of the Tribunal were compatible. He submits that a clarification by the Tribunal would dispel the present legal uncertainty on this point.

He repeats his submissions and maintains that his medical certificate confirmed that he was prevented by his state of health from returning to work on 9 June 2009. He contends that the failure to observe the time limit prescribed in Article 2, paragraph 4, of Annex XIV of the Staff Regulations caused injury to him because its result was to prolong the disciplinary proceedings concerning him. Lastly, he observes that Decision No. XI/14 (2009) confers delegated authority on the Principal Director of Resources to adopt and sign all the decisions specified in the Staff Regulations, but makes no reference to interviewing officials involved in disciplinary proceedings.

The complainant maintains his claims and also requests the Tribunal to set aside the decision of 2 November 2010.

E. In its surrejoinder the defendant denies that there is any legal uncertainty concerning time limits for appeals. On the merits, it maintains its position and points out that the complainant kept silent as to the date on which his alleged sickness began, and on 8 June 2009 informed the Administration that he would be absent for three days,

whereas the "normal approach" would have been to notify one's absence for the next day, or "at most" for the next two days.

It argues that the five-day time limit set in Article 2, paragraph 4, of Annex XIV to the Staff Regulations is indicative and that failure to observe it does not invalidate the disciplinary measure. Furthermore, the delegated authority of the Principal Director of Resources under Decision No. XI/14 (2009) included the authority to interview an official involved in disciplinary proceedings.

CONSIDERATIONS

1. At the relevant time the complainant, a Eurocontrol official of Italian nationality, held a post at grade B*8, step 2, in the CFMU.

2. In April 2009 he was granted two days' special leave for 6 and 7 June in order to make arrangements for his change of residence from Venice to Brussels. On 4 June, while he was in Italy, he requested an extra day's special leave to enable him to vote in the provincial elections to be held on 6 June. As he was granted this special leave in order to exercise his right to vote, the special leave for the purpose of his change of residence was deferred to 7 and 8 June. He was therefore due to return to work in Brussels on 9 June, at 1.30 p.m.

3. On the evening of 8 June he informed his team leader that he would be absent for the next three days because of sickness. Since he was rostered to be on leave from 12 to 15 June, he did not return to work until 16 June.

4. That day, his team leader and the Head of Operational Training and Competency asked him for explanations as to his illness and the means of transport which he had planned to use in order to return to Brussels on the date originally set for his return to work. He replied that he had purchased an airline ticket in order to be back in Brussels on 9 June, and that he could provide a copy of it.

5. When the complainant failed to produce the document to corroborate his explanation, as he had undertaken to do, the Director General of the Agency decided on 14 September 2009 to submit a report on the case to the Disciplinary Board. The complainant was interviewed by the Board on 15 December 2009 in the presence of his lawyer. The lawyer filed a defence brief annexing inter alia a document dated 9 June 2009, presented as a "certificate", attesting that the complainant was suffering from cervico-dorsal lumbago and needed ten sessions of acupuncture. The Disciplinary Board delivered its opinion on the same date as the interview, with a majority vote in favour of removing the complainant from his post.

Two officials appointed by the Principal Director of Resources interviewed the complainant on 25 January 2010. On 1 February the Director General decided to sanction him by downgrading him, in the same function group, to grade B*7, step 2.

6. On 23 April the complainant lodged an internal complaint against the Director General's decision. No reply was received, and on 10 September 2010 he filed a complaint with the Tribunal.

On 2 November 2010 the Principal Director of Resources communicated to the complainant the opinion of the Joint Committee for Disputes, recommending that the Director General should "allow the complaint insofar as it seeks annulment of the decision to impose the disciplinary penalty of downgrading", and informed him that he had decided to reject the complaint. In view of the fact that this explicit rejection, duly noted by the parties, has occurred in the course of the proceedings and has thus replaced the implicit decision originally impugned before the Tribunal, the complaint is to be regarded as being directed against this new decision.

7. As a preliminary request, the complainant asks the Tribunal to rule upon the compatibility of the second subparagraph of Article 92, paragraph 2, setting a time limit of four months for the Director General to reply to an internal complaint, and Article VII, paragraph 3, of the Statute of the Tribunal, according to which the

time limit is only sixty days. Subsidiarily, he asks the Tribunal to rule that the subparagraph in question is unlawful because it is contrary to Article VII, paragraph 3, of the Statute of the Tribunal.

The Tribunal considers it unnecessary to rule upon the preliminary request as framed, since this case raises no issue of receivability depending on the application of these provisions.

8. In support of his claims which are set out in B above, the complainant puts forward several pleas pertaining to procedural issues, including breach of Articles 2 and 17 of Annex XIV to the Staff Regulations, entitled "Disciplinary Proceedings".

9. Article 2, paragraph 4, of Annex XIV states that:

> "Within five days of the notification of the report on which the decision to open disciplinary proceedings or the procedure laid down in Article 22 of the Staff Regulations is based, the chairman of the Board shall notify the official concerned and the individual members of the Board of its composition."

The complainant asserts that this time limit of five days was not observed because, although the report by which the Director General had referred the matter to the Disciplinary Board had been transmitted to its chairman on 24 September 2009, he was not himself informed of the composition of the Board until 6 October 2009.

The defendant admits that the prescribed time limit was not observed. It contends, however, that this time limit is merely indicative and that failure to observe it cannot nullify the disciplinary penalty.

10. This argument cannot be upheld. The Tribunal recalls that an international organisation is bound by the rules which it has itself laid down, as long as it has not modified or repealed them (see Judgment 1896, under 5(d)), and this principle is especially relevant in disciplinary matters.

11. Article 17, paragraph 1, of Annex XIV to the Staff Regulations provides that:

> "After hearing the official, the Director General shall take his decision as provided for in Articles 4 and 5 of this Annex within one month of receipt of the opinion of the Board. […]"

12. In this case, it is not disputed that the Director General did not hear the complainant in person before taking his decision. The file shows that the complainant was interviewed by two officials who were acting, according to the defendant, on the basis of a sub-delegation of authority from the Principal Director of Resources, who was himself acting under the delegated authority of the Director General, by virtue of Decision No. XI/14 (2009) of 1 February 2009.

13. The Tribunal notes that that Decision confers on the Principal Director of Resources delegated authority to make and sign all the decisions provided for in the Staff Regulations, inter alia. However, the Decision does not mention hearings of officials brought before the Disciplinary Board. It follows that the Principal Director of Resources, who did not receive delegated authority from the Director General to hear the complainant, could not sub-delegate an authority he did not possess.

Apart from its finding, under 10 above, that international organisations are bound to observe the rules they have themselves laid down, the Tribunal considers that this violation of above-cited Article 17 may have caused prejudice to the complainant. Had he been heard in person by the Director General, he could have presented arguments such as to prompt the Director General to impose a less severe penalty, or even to forgo altogether the penalty he had intended to impose.

14. It follows from the foregoing, without it being necessary to consider the complainant's other pleas, that the impugned decision, taken following a procedure which was flawed, must be set aside.

15. Without prejudice to any penalty which may be imposed on the complainant as a result of renewed disciplinary proceedings complying with the applicable rules, he must be reinstated in the

administrative situation that was his prior to his downgrading, with all the legal consequences entailed. He will, inter alia, be entitled to be paid the difference between the salary he would have received if that penalty had not been imposed on him and the salary he has actually received, together with interest at 5 per cent per annum.

16. The complainant has suffered moral injury from being the subject of an irregular procedure, and he is therefore entitled to compensation of 1,000 euros.

17. As he partly succeeds, he is entitled to costs fixed at 1,000 euros, including expenses incurred during the disciplinary proceedings.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall reinstate the complainant in his former grade and step, as stated under 15 above.
3. It shall pay him the sums representing the difference between the salary he would have received if he had not been downgraded and the salary he has received until the date of his reinstatement in his former grade and step, together with interest at 5 per cent per annum.
4. It shall pay him compensation of 1,000 euros for the moral injury suffered.
5. It shall also pay him 1,000 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet