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

NINETY-SEVENTH SESSION

Judgment No. 2343

The Administrative Tribunal,

Considering the complaint filed by Mr J. I. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 30 April 2003, the Agency's reply of 5 September, the complainant's rejoinder of 12 November 2003 and Eurocontrol's surrejoinder of 20 February 2004;

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, a Spanish national born in 1956, was assigned at the material time to the Central Flow Management Unit (CFMU) in its CSO Section (CFMU Systems Operations) in Brussels, as a grade C2 network operator. He was also an elected member of the Bureau of FFPE-Eurocontrol, one of the Agency's trade union organisations.

On 24 October 2001 the President of FFPE-Eurocontrol sent the Director General a "register of grievances of CSO staff concerning observance of the provisions of Rule of Application No. 29"*, which was aimed at extending to CSO members the benefits enjoyed by staff members in other CFMU units. He asked for negotiations to be opened immediately and listed the measures the CSO team intended to take if no agreement was reached by 30 November. These measures included a refusal to perform stand-by duties. On 26 November the Director of Human Resources replied that the application of Rule No. 29 was under review and that most of the measures envisaged "would constitute punishable acts of blatant insubordination in breach of the Staff Regulations".

The complainant was on stand-by duty at home from 3 to 9 December 2001 inclusive. Any staff member on stand-by duty must be accessible at all times by means of a pager, especially in order to carry out emergency replacements. On 3, 4 and 5 December 2001, several persons tried unsuccessfully to contact the complainant. One colleague succeeded in reaching him by phone but reported to his superiors that the complainant refused to carry out the stand by duty owing to a trade union directive. In a memorandum of 22 March 2002, the Director of Human Resources sent the complainant a report listing the charges held against him and invited him to come to an interview on 19 April, which might be followed by a disciplinary measure. In a decision dated 16 June, handed to the complainant on 26 June, the Director General issued him a reprimand.

The complainant filed an internal complaint against that decision on 30 September 2002. In an opinion dated 30 January 2003, the Joint Committee for Disputes considered that the complaint was time-barred. Three of the four members found it to be legally unfounded. Two of the four members recommended alleviating the disciplinary measure, suggesting that a written warning be issued instead of a reprimand. The other two members recommended withdrawing the measure altogether "in view of the confused nature of the information" held by the complainant. This opinion was appended to the defendant's decision to reject the internal complaint, which, although dated 10 April, was delivered only on 7 May 2003. The complainant had meanwhile filed the present complaint.

B. The complainant maintains that his refusal to perform stand by duty constitutes strike action, which is in principle lawful. By basing the disciplinary measure on a failure to comply with statutory obligations concerning continuity of service, availability of staff and stand by duties, the defendant infringed the right to strike, a right which is enjoyed by all staff members. By punishing an elected trade union official for an act arising from a trade union directive, it infringed freedom of association. He also accuses Eurocontrol of discrimination, on the grounds that similar strike action in the past did not give rise to any disciplinary proceedings. He believes he was punished

merely because he belonged to a trade union, which constitutes moral harassment. Furthermore, he states that on 13 January 2002 the Agency and the unions reached an agreement on conditions governing the right to strike, which fully cover the conduct with which he was charged. He maintains that the Director General, by punishing him – especially after that agreement had been signed – for conduct which had been recognised as lawful, was guilty of abuse of authority. He argues lastly that insufficient reasons were given for the impugned decision, insofar as the Director General did not explain in what respect exercising the right to strike was unlawful.

The complainant seeks the annulment of the decision of 16 June 2002 issuing the reprimand, and an award of costs, which he estimates at 4,000 euros.

C. In its reply Eurocontrol maintains that the present complaint is time-barred, since the complainant failed to lodge his internal complaint within the three-month time limit stipulated in Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency.

The defendant replies only subsidiarily on the merits. It maintains that the conduct with which the complainant was charged constitutes "blatant insubordination" and that he cannot exonerate himself by relying on an alleged union directive calling for strike action. In its register of grievances, FFPE-Eurocontrol had itself made clear that the measures envisaged "in no way constituted strike action", of which the complainant could not have been unaware. Moreover, many aspects of the conduct of the complainant and of just one of his colleagues (see Judgment 2342 also delivered this day), according to the Agency, constitute not so much strike action as "a lacking performance of normal duties": firstly, the two staff members did not stop work at the same time; secondly, it was a surprise action which caught the administration unprepared; and thirdly, the measures announced in the register of grievances were aimed at disrupting the service – which is in breach of "the principle of continuity of the international public service" – and at damaging Eurocontrol's reputation, so that the action concerned must be considered wrongful and "not in keeping with the spirit of a strike".

It adds that the right of association does not automatically imply a right to strike and does not confer impunity on trade union officials in the event of blatant insubordination. It considers that it is wrong to speak of moral harassment in this case and explains that the strike actions to which the complainant appears to refer were actual collective work stoppages of limited duration, preceded by clear warnings. The allegation of abuse of authority, in its view, rests on the mistaken assumption that an agreement was reached between Eurocontrol and the trade unions, which is not the case. Be that as it may, such an agreement would not have had a retroactive effect. Lastly, it maintains that the documents supplied to the complainant during the disciplinary procedure show that sufficient reasons were given for the impugned decision.

D. In his rejoinder the complainant asks for his case to be joined with that of his colleague, who has been punished for the same reasons (see Judgment 2342), on the grounds that the pleas in the two cases are identical and that the purpose of their claims is the same. He therefore argues that the receivability of his complaint ceases to be an issue.

He points out that he never received a copy of the letter written by the Director of Human Resources to the President of his trade union on 26 November 2001 and that he was therefore unaware of the possible consequences of his conduct. He argues that the right to strike is a fundamental right which is also applicable in the public services. The "cautious language" used by the President of FFPE-Eurocontrol in the register of grievances was aimed at avoiding the union's actions being systematically penalised, but everyone knew that the measures envisaged were part of trade union action and were therefore an exercise of the right to strike. Furthermore, it can hardly be denied, in his view, that the incidents in question constituted collective action, undertaken at the initiative of a recognised trade union and aimed at serving work related claims, and that "the work stoppage was complete, even though it affected only part of the work". The two staff members did not stop work at the same time merely because they were not on stand by duty on the same days. The complainant is surprised at the Agency's statement that it was caught unprepared by their action, since they had given more than one month's notice through the register of grievances. Lastly, the intention was never to cause harm, even though any strike action invariably causes employers some inconvenience. The complainant rejects the obsolete attitude to social relations reflected in Eurocontrol's arguments. He contends that the Agency has not established why the principle of continuity of the service should take precedence over the right to strike, a fundamental right which may be restricted only in certain exceptional circumstances subject to prior negotiation between the social partners. He asserts that it was the defendant which refused, at the last moment, to sign the agreement with the unions, but that the content of the agreement nevertheless provides a "useful" framework for the exercise of strike action.

E. In its surrejoinder the Agency leaves the decision as to whether to join the two cases to the Tribunal, but maintains that the joinder would in any event not relieve the complainant of his duty to comply with the time limits, so that his complaint is in any case clearly irreceivable.

It reiterates its pleas on the merits, arguing that deliberately leaving his pager at the workplace constitutes an act of insubordination which cannot be considered as strike action. The fact that the complainant was not informed of the letter of 26 November is irrelevant. Lastly, the register of grievances cannot be deemed to constitute a clear, unambiguous notice of strike action for a specified period of time.

CONSIDERATIONS

1. The complainant challenges the decision dated 10 April 2003 of the Director of Human Resources, acting on behalf of the Director General, to confirm the disciplinary measure applied to him on 16 June 2002, namely a reprimand, for refusing to comply with the obligations of stand-by duty at home, on the grounds that he was following a call for strike action from his trade union.

2. He asks the Tribunal to set aside the decision to apply that measure, and also the decision to dismiss his internal complaint. Eurocontrol contends that the complaint is time-barred on the grounds that the internal complaint was filed after the time limit and, subsidiarily, maintains that the disciplinary measure imposed on the complainant was justified.

3. It appears from the evidence on file that the internal complaint in question was filed after the three-month time limit stipulated in Article 92(2) of the Staff Regulations: while the complainant was handed the Director General's decision of 16 June 2002 on 26 June 2002, his internal complaint is dated 30 September 2002.

4. These dates are not disputed by the complainant, so that his complaint, as the Organisation contends, must in principle be considered time-barred. He suggests, however, that his complaint should be joined with that of a colleague who is in the same situation as he is, and who has put forward the same pleas and submitted the same claims against a similar reprimand. As his colleague's complaint is receivable and has led to a decision on the merits in Judgment 2342 also delivered this day, the complainant argues that if the two complaints are joined the Tribunal need not rule on the objection to receivability raised by the defendant. In support of his argument, he refers to Judgment 1246 delivered on 10 February 1993, in which the Tribunal ruled, in a case where two complaints were joined, that there was no need to rule on the receivability of one of the complaints so long as the other complaint was receivable. That precedent does not apply in this case, however, because it concerned two complaints filed by the same complainant against two rejections, one implicit and the other explicit. Since the complaint against the explicit rejection was receivable, there was no point in considering whether the complaint against the implicit decision was also receivable. In the case in hand, however, the two complaints have been filed by different staff members, against separate decisions which concern each of them individually, and it is clear that the receivability of one of the complaints can in no way affect the receivability of the other, regardless of whether or not the complaints are joined.

5. At any event, the Tribunal does not consider that in this particular case the complaint should be joined with that which has been ruled on in Judgment 2342. For appeals against disciplinary measures, even though the circumstances of the cases may be identical and the pleas submitted by the complainants similar, as a general rule the facts on the basis of which the disciplinary measures were rightly or wrongly imposed must be examined separately for each case, with regard both to the procedural aspects and to the merits. The Tribunal dismisses the application for joinder and, in view of the late filing of the complainant's internal complaint, must conclude that the latter has failed to exhaust internal remedies in a timely manner. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

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*Rule No. 29 concerning the working conditions and allowances applicable to staff serving at the CFMU performing shift work, stand by duties, and overtime

Updated by PFR. Approved by CC. Last update: 19 July 2004.