

**NINETY-EIGHTH SESSION**

**Judgment No. 2424**

The Administrative Tribunal,

Considering the complaint filed by Ms N. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 December 2003 and corrected on 3 March 2004, the Agency's reply of 14 May, the complainant's rejoinder of 24 August and Eurocontrol's surrejoinder of 15 October 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 British national born in 1963, was recruited by the Agency on 1 November 1999 on a limited-term appointment, for a period of five years. She was appointed as secretary, at grade C4, in the Procurement Office of the Finance Directorate. When this directorate was completely reorganised, she was transferred, with effect from 1 May 2001, to the post of secretary to the chief of one of the new units in that directorate. Her appraisal report for the period from 1 March to 31 December 2001 was drawn up on 12 April 2002. It included an improvement plan in respect of three areas.

Office Notice 12/02 dated 30 April 2002 informed staff concerning new provisions of the service regulations relating to Eurocontrol's employment policy. Annex IX of the document contained temporary provisions of the Staff Regulations relating to the conversion of "limited-term appointments valid on [1 May 2002]" into "appointments for an unlimited period". Paragraph 1 of this annex was worded as follows:

"An official appointed for a limited period which has not expired on 1.5.2002 may be granted an appointment for an unlimited period, provided that his performance is satisfactory and that the duties associated with his post are not of a temporary nature.

If the Director General does not intend to convert the appointment of an official appointed for a limited period, he shall consult the Joint Committee."

As these provisions would concern the complainant, the Agency considered whether an appointment for an unlimited period would be suitable in her case. In a memorandum of 22 July 2002 from the Director of Human Resources the complainant was informed that, in view of the opinion of the Director of Finance and on account of the performance appraisal referred to above, the Director General had decided to request the opinion of the Joint Committee before deciding whether or not to convert her limited-term appointment into an appointment for an unlimited period.

The Joint Committee heard the complainant on 11 October. In a memorandum of 31 October 2002 from the Director of Human Resources the complainant was informed that, due to the non-satisfactory nature of her performance, the Joint Committee had recommended to the Director General that her current appointment should not be converted into an "appointment for an unlimited period" and that it would end on 31 October 2004.

On 6 February 2003 the complainant filed an internal complaint. On 4 July she was summoned by telephone to attend a hearing before the Joint Committee for Disputes on 7 July 2003. On 5 July she advised the Agency that she could not appear before the Committee on 7 July, particularly because she had been declared unfit for work. In a letter of 16 July the Chairman of that Committee informed her that it had not seemed necessary to reschedule the hearing and that the Committee had reached an opinion of which she would soon be notified. The Joint Committee for Disputes recommended rejecting her internal complaint as unfounded. The report of its meeting of 7 July was drawn up on 20 August. In a memorandum of 25 September 2003, which constitutes the impugned decision, the Director of Human Resources, acting on behalf of the Director General, informed the complainant that her

complaint was rejected; he enclosed the report of the Committee's meeting of 7 July.

B. The complainant accuses the Agency of abuse of authority on the grounds that it disregarded the requirements of due process as well as her rights of defence. In her view, she never had the opportunity to give a substantiated presentation of her arguments. During her hearing by the Joint Committee, for instance, she could not be assisted and was unable to organise her defence "because of imprecisions in her appraisal report" of 12 April 2002. She also points out that she was not heard by the Joint Committee for Disputes. She adds that at no stage did she have "an opportunity to see [her appraisal] report" or the documents which served as a basis for the challenged decision.

The complainant contends furthermore that the decision under challenge was not based on valid reasons, since it was taken without consideration being given to all her appraisal reports or to the opinion of the staff member who replaced her supervisor on several occasions. She concludes that the procedure was flawed.

She also considers that the challenged decision is tainted with obvious errors of judgement. Referring to the Tribunal's case law, she recognises that an organisation enjoys discretionary authority in assessing the performance of members of its staff, but she points out that the Tribunal will censure any decision based on mistaken facts. She maintains that the appraisal report of 12 April did not mention faults or unsatisfactory services; on the contrary, it indicated that, even though improvements were needed in certain areas, some objectives had been achieved. She argues that, despite the improvement plan contained in the report, her supervisors gave her no chance to improve. In this respect the Agency failed in its duty of good faith.

The complainant accuses her supervisor of showing hostility and even personal animosity towards her. She maintains that he did not hesitate to make untruthful statements about her, particularly with regard to her professional skills, in order *post facto* to justify the content of the appraisal report for 2002, which was drawn up in June 2003. In so doing, he seriously harmed her reputation.

She asks the Tribunal to set aside the impugned decision, to convert her appointment into one of unlimited duration and to award her 17,500 euros for moral and material injury, and costs.

C. In its reply the Agency refers to Articles 92(2) and 93(3) of the Staff Regulations governing officials of the Agency in arguing that the complaint is time-barred and therefore clearly irreceivable. In its view, facts occurring after the decision of 31 October 2002 are not relevant.

Subsidiarily, the defendant argues that the complainant had the opportunity to express her views both on her appraisal report, which she countersigned on 12 April 2002, and in the course of the procedure before the Joint Committee. The fact that she was not heard by the Joint Committee for Disputes does not affect the lawfulness of the procedure since that Committee has no obligation to hear the parties. Moreover, the complainant was perfectly aware of the criticism levelled at her. Eurocontrol concludes that there was no breach of due process, that her rights of defence were respected, and that no abuse of authority can be shown.

The Agency contends that the decision of 31 October 2002 was based on a correct analysis of the facts and did not rely only on the appraisal report of 12 April 2002, since the opinion of the Director of Finance was also taken into account. It considers that the testimony of the person who replaced the complainant's supervisor should not be given too much importance in view of the short periods of replacement involved. The complainant had no automatic right to have her appointment converted. In that respect the new statutory provisions left the Director General broad discretion and included the proviso that the performance of the staff member had to be "satisfactory". According to the Agency, however, the complainant's inadequate performance was manifest as soon as she took up service and was confirmed over time. She did not have a single good report. She was given several opportunities to prove herself and the accusation of personal animosity she levels at her supervisor is unwarranted.

Eurocontrol concludes that the decision of 31 October 2002 is in no way unlawful and that, since the complaint is irreceivable and unfounded, the claim for compensation for moral and material injury must be rejected.

D. In her rejoinder the complainant endeavours to demonstrate that her complaint is indeed receivable according to the relevant articles of the Staff Regulations and the Statute of the Tribunal.

She notes that in its reply the Agency merely gives free reign to its untruthful allegations. In her eyes, the Agency has not produced the slightest evidence of her alleged professional shortcomings. Nor has it proved that the principles of due process, objectivity and fairness were observed in her performance appraisals or that its analysis

of the facts is correct. The complainant accuses the Agency of wanting to get rid of her and of failing to take account of her supervisor's "blatant hostility", which now appears to amount to real harassment.

E. In its surrejoinder the defendant reiterates that the complaint is irreceivable.

In reply to the complainant's accusations that it made untruthful statements, the Agency maintains that its position is supported by much documentary evidence, all of which was disclosed to the complainant. It repeats that the latter was perfectly aware of her shortcomings but did not avail herself of the many opportunities she was given to improve her performance. The decision not to convert her appointment into one for an unlimited period was therefore justified. That decision, moreover, was based on the concurring and practically unanimous opinion of those responsible for assessing the general level of her performance. Eurocontrol also points out that the complainant merely denounces a "general breach of due process" without specifying precise instances and that her accusations are therefore more akin to systematic denigration than to genuinely substantiated criticism.

## CONSIDERATIONS

1. In her complaint filed on 23 December 2003 the complainant asks the Tribunal to set aside the decision not to convert her limited-term appointment, to convert that appointment into one of unlimited duration, and to award her 17,500 euros for the moral and material injury she claims she has suffered, as well as costs.

In support of her complaint, she argues that the impugned decision is tainted with abuse of authority insofar as the defendant has disregarded the requirements of due process and her rights of defence.

She also submits that that decision was not based on valid reasons and that it was tainted with obvious errors of judgement insofar as the defendant drew mistaken conclusions from certain facts.

2. For its main plea the defendant contends that the complaint is time-barred and therefore clearly irreceivable. It argues that according to Article 92(2) of the Staff Regulations if no reply has been given to an internal complaint within four months from the date on which the complaint was lodged, this shall be deemed to constitute an implied decision rejecting it. In this case, the complainant's internal complaint was dated 6 February 2003. The Agency's failure to reply within four months, by 6 June 2003, therefore constituted an implied decision to reject it.

Article 93(3) of the Staff Regulations provides that a complaint to the Tribunal must be filed within three months, and that that period shall begin:

“– on the date of notification of the decision taken in response to the [internal] complaint;

– on the date of expiry of the period prescribed for the reply, where the complaint [to the Tribunal] concerns an implied decision rejecting [an internal] complaint submitted pursuant to Article 92 (2); nevertheless, where [an internal] complaint is rejected by express decision, after being rejected by implied decision, but before the period for lodging an appeal has expired, the period for lodging a complaint [with the Tribunal] shall start to run afresh.”

The defendant concludes from the above that the complaint, which was lodged on 23 December 2003, was filed after the appeal period had expired and should therefore be found irreceivable. It submits that the time allowed for challenging the implied decision to reject the internal complaint ended on 6 September 2003 and the express rejection was notified to the complainant on 25 September 2003.

3. In accordance with its case law (see Judgment 941 in particular), the Tribunal considers that the defendant may not plead its own failure to act with regard to the complainant, who had good reason to infer that her internal complaint was still under review since she had been informed by a letter of 16 July 2003 that the Joint Committee for Disputes had reached an opinion of which she would soon be informed.

The plea of irreceivability must therefore fail.

4. According to the complainant, the defendant has not shown that the principles of due process, objectivity and fairness were observed in the procedures concerning her performance appraisals. She adds that she was unable to present her arguments before the Joint Committee for Disputes and that her rights of defence were therefore

breached.

The defendant replies that the complainant had the opportunity to argue her case, both during the procedure for the conversion of appointments and during the internal appeal procedure.

5. On examining the submissions the Tribunal finds that, while the complainant was given an opportunity to argue her case before the Joint Committee during the procedure relating to the conversion of appointments, the same was not true before the Joint Committee for Disputes. The latter refused the complainant's request to reschedule her hearing, yet her request for postponement was justified by the fact that she was declared unfit for work and that the date of the hearing was so close (she was summoned on 4 July in the afternoon for a hearing to be held on 7 July) that it did not leave her time either to prepare her defence properly or to be assisted by a counsel of her own choosing. The Tribunal rejects the reasons given for the refusal to reschedule the hearing, which were that, since the complainant had already been heard by the Joint Committee during the procedure relating to the conversion of appointments, and since the members of the Joint Committee for Disputes considered that the case file provided them with sufficient information, a hearing before the latter Committee was unnecessary. But considering that it was the Joint Committee for Disputes itself which took the initiative of summoning the complainant to a hearing, it could hardly have deemed that hearing to be "unnecessary".

Since the procedure relating to the conversion of appointments and the internal appeal procedure before the Joint Committee for Disputes are different and are not subject to the same rules, it is reasonable to conclude from the above that the complainant was denied her right to be heard in the course of the internal appeal procedure and that therefore her rights of defence were not respected, regardless of the reference made to Office Notice 6/95.

The final decision of 25 September 2003, on which the Tribunal is to give a ruling, is based on the opinion of the Joint Committee for Disputes resulting from a flawed procedure. This decision therefore cannot stand.

On the other hand, since only the internal appeal procedure was conducted improperly, the validity of the decision of 31 October 2002 is not in question.

As the complainant filed her internal complaint correctly, the Agency must restart the procedure before the Joint Committee for Disputes (see Judgment 999).

6. Since the procedural flaw has already had the effect of postponing a final judgment in this case and has in itself caused injury to the complainant, the Agency must be ordered to pay her a lump sum of 2,000 euros in compensation for that injury.

7. The complainant is entitled to an award of 2,000 euros in costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the Organisation for it to resume consideration of the complainant's internal complaint.
3. The Agency shall pay the complainant 2,000 euros in compensation for the injury suffered.
4. It shall also pay her 2,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.