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

100th Session **Judgment No. 2494**

The Administrative Tribunal,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr F.d. J. on 25 February 2004, Mr P.L. (his second) and Mr J.P. (also his second) on 26 February, Mr M.B., Mr P.C., Mr N.D. (his second), Mr G.F. and Mr A.P. on 27 February, Mr E. van I. on 28 February and Mr S.R. (his second) on 26 March 2004, the Agency's single reply of 15 April 2005, the complainants' rejoinder of 30 June and Eurocontrol's surrejoinder of 22 September 2005;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainants' application for hearings;

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

A. At the material time the complainants were employed as Clerical Assistants 1st or 2nd class (at grades C2 or C3 respectively) in one of the two Integrated Initial Flight Plan Processing System Units (IFPUs) within the Central Flow Management Unit (CFMU). Facts relevant to this case are given under A in Judgment 2387, delivered on 2 February 2005, and in Judgments 2493 and 2495, also adopted this day. The complainants took part in the strike action referred to in those judgments, which the Eurocontrol section of the European Civil Service Federation (hereinafter referred to as "FFPE-Eurocontrol") had called for the period 10-14 March 2003 and as a result of which the complainants abandoned their posts in the course of their shift.

In March 2003 the Director of Human Resources sent a memorandum to each of the ten complainants inviting them to attend a hearing in the context of "possible disciplinary action". A report listing the charges against them was attached to the memorandum. All the complainants asked the Director General to communicate to each of them the precise grievances held against them individually, to have the relevant documents translated into French so that their lawyer could answer the case against them, and to fix a later date for the hearing. The Director of Human Resources rejected their requests but gave them until 24 March to ask for a later hearing date, failing which they would be presumed to have waived their right to be heard. Five of the complainants took no action. The others were heard between 26 March and 11 April 2003. On 23 May the Director General issued a reprimand to each complainant as a disciplinary measure for having participated in an unlawful industrial action.

On dates ranging between 26 July and 6 September, the ten complainants, as well as their twenty-two colleagues whose cases are dealt with in Judgment 2493, each filed internal complaints based on a standard text against those decisions. On 22 October 2003 the Joint Committee for Disputes issued an opinion concerning the complaints of all of these thirty-two officials who worked in one or the other of the two IFPUs. It concluded that the pleas put forward by the complainants were unfounded but, emphasising the "social impact" of imposing disciplinary measures following industrial action, it recommended rescinding these measures and removing all reference to them in the officials' personnel files "as a gesture of goodwill". It also noted "the absence of a clear legal basis for the right to strike at Eurocontrol". On 19 November 2003 the Director of Human Resources, acting on behalf of the Director General, forwarded this opinion to the complainants. He rejected their internal complaints and refused to withdraw the disciplinary measures.

B. The complainants contend that the Director General has no authority to decide whether a strike is lawful or not and accuse him of abusing his authority by bringing pressure to bear on the staff. They submit that strike action is a fundamental right which cannot be unilaterally restricted by the executive, and point out that the exercise of that right at Eurocontrol was not governed by any general agreement or rule when the strike began. They deny contravening Article 11 of the Staff Regulations governing officials of the Agency, since the obligation to ensure continuity of the service is suspended in the event of a strike. They also allege unequal treatment, on the grounds that some of those who took part in the strike were not penalised. They complain of procedural flaws insofar as they were given no precise indication of the charges levelled at them individually, since the document of March

2003 enclosed with the memorandums from the Director of Human Resources was a report containing general accusations sent out to most of the strikers across the board. They submit that to initiate disciplinary proceedings solely on the basis of such a document would constitute a breach of defence rights. Although some of the complainants were heard, they deplore the fact that the hearings did not take place before the disciplinary measures were imposed. Lastly, they argue that the decisions of 23 May 2003 subjecting them to disciplinary measures were not properly substantiated since they refer to the report attached to the summons to a hearing which, as already pointed out, contained only general and collective charges.

Each complainant asks the Tribunal to set aside the decisions of 23 May and 19 November 2003 concerning him or her, and to order Eurocontrol to pay him or her 4,000 euros for moral injury (concern for their freedom of association, their freedom to strike and the future of their careers) and 4,000 euros in costs.

C. In its reply Eurocontrol submits that the Director General had both the authority and the duty to warn CFMU officials that, by following FFPE-Eurocontrol's call to industrial action, they were participating in an unlawful strike leaving them liable to disciplinary measures, which he did in a memorandum dated 10 March 2003. The industrial action concerned was in fact a call to disobedience and constituted "unacceptable interference" in the smooth running of an operational service. The Director General therefore neither abused nor exceeded his authority. The Agency explains that, while it recognises the principle of the right to strike, this right must be compatible with the operational environment in some of its services and with the need to ensure the safety of air navigation. It maintains that each official who was proved to have taken part in the industrial action was penalised. It rejects the complainants' allegation that they were not notified of the precise charges against each of them individually. The report preceding the hearing was sufficiently precise and there was nothing unusual in the fact that an identical text was sent to all participants, since the action was collective. It denies having breached defence rights and considers that the five complainants who did not act upon the invitation of the Director of Human Resources to request a later date for a hearing cannot complain that they were not heard. It argues that the impugned decisions are sufficiently substantiated since they refer explicitly to the reasons given in the aforementioned report, which itself referred to those circulated on 10 March 2003 to all CFMU staff. Lastly, it rejects the allegation of moral injury arising from concern for the future of their careers, noting that one of the complainants has since been promoted.

The Agency contends that one of the complaints is time-barred and hence irreceivable, since the complainant filed it on 26 March 2004, that is, more than one month after the three-month period allowed by the Staff Regulations for appealing to the Tribunal against a decision.

D. In their rejoinder the complainants accuse Eurocontrol of considering any inconvenient strike unlawful and of recognising the
principle of strike action only where such action has been duly authorised. They submit that this is unacceptable. They point out that the Director General did not "warn" officials that the strike was unlawful but simply "declared" it to be so on the basis of criteria decreed for the occasion. Moreover, they argue that, although the Director General notified CFMU staff on 10 March that the continuation of the strike was to be seen as the resumption of an unlawful industrial action and that disciplinary measures would be taken against those striking, he did so only at around 5.40 p.m., in other words, after the strike had started. Those on strike became aware of the Director General's position only after they had returned to work. They refer to a statement in a related case, given to the Disciplinary Board by the Director of CFMU during a videoconference which took place on 12 March 2003. In this statement, the Director did not challenge the lawfulness of the strike and declared that no disciplinary measures would be taken against the strikers. With regard to the reasons stated in the decisions of 23 May 2003, they point out that the report attached to the memorandums sent out in March – referred to by the Agency – is contested precisely because it did not indicate the specific charges against them individually, and that the memorandum of 10 March was addressed to "all CFMU staff". Although strike action is inherently collective, a disciplinary measure must be individual. The complainants submit that it is hardly surprising that the industrial action consisted in acts of disobedience, since that is "the case in most if not all strikes". They maintain their allegation that several officials who took part in the strike, one of whom they name, were not penalised. With regard to the five officials who were not heard, the complainants consider that the Director of Human Resources was mistaken in assuming that they did not want a hearing, since they had clearly indicated that they wished it to be held at a later date. As far as moral injury is concerned, the complainants contend that this cannot seriously be denied.

They refer to opinions delivered on 30 April and 17 May 2004 by two Disciplinary Boards in the cases of two supervisors/colleagues who took part in the strike action. They remark that those Boards described the actions

concerned as strikes and considered that the officials had been unable to obtain any information as to whether the strike was unlawful until it was all over.

As for the complaint which the Agency deemed irreceivable, the complainants point out that the complaint challenges a decision dated 19 November 2003 that was notified to the complainant concerned only on 27 December 2003. They submit that the defendant cannot deny this unless it produces a receipt showing otherwise.

E. In its surrejoinder the Agency considers that it is "entitled to ensure that the exercise of the right to strike remains compatible with the very special nature of the duties carried out by Eurocontrol, particularly with regard to the safety of air navigation". In this case, however, it is adamant that the action conducted by FFPE-Eurocontrol was not a strike but an unlawful industrial action. It emphasises that Disciplinary Boards only offer opinions to the Director General and that their appraisal of the facts, such as their view that the industrial action in question constituted a "strike", is theirs and theirs alone. It points out that the complainants "could and should have known earlier the content of the message" sent out on 10 March by the Director General. Furthermore, they did receive a substantiated reply to their internal complaints, together with a copy of the opinion of the Joint Committee for Disputes. The Agency explains that if it had not penalised some officials, this was because it had been unable to establish with certainty that they had taken part in the industrial action concerned. Lastly, it submits that should the Tribunal see fit to set aside the impugned decisions, that in itself would provide sufficient compensation for the alleged moral injury, bearing in mind that the disciplinary measure imposed was the second least severe of those contained in the Regulations.

The defendant maintains its objection to the receivability of one of the complaints. It argues that it is hardly believable that the complainant concerned received the decision of 19 November 2003 only on 27 December 2003 and notes that the complainant himself does not offer any explanation. In its view, moreover, the Disciplinary Boards' opinions in the cases of the two supervisors/colleagues are not relevant to the present case.

CONSIDERATIONS

1. On 23 May 2003 ten Eurocontrol officials working in CFMU were issued a reprimand – the disciplinary measure provided for in Article 88(2)(b) of the Staff Regulations – on the grounds that they had participated in an industrial action which management considered to be unlawful and for abandoning their post in the course of their shift. They all challenge before the Tribunal the decisions taken by the Director of Human Resources on behalf of the Director General on 19 November 2003 to reject the internal complaints they had filed against those disciplinary measures.

2. These ten complaints, which are similarly drafted and based on the same pleas, seek the same redress. They are, therefore, joined to form the subject of a single judgment.

3. The circumstances surrounding the collective actions in which the officials subjected to disciplinary measures participated are set out in Judgment 2493 also delivered this day, which may be referred to as necessary. The disciplinary measure taken against the complainants, that is, a reprimand provided for in Article 88(2)(b) of the Staff Regulations, was more severe than the mere written warning, provided for in Article 88(2)(a) of the regulations, issued to the officials concerned in Judgment 2493. The Director General considered that, in addition to having participated in an illegal strike, which amounted to absence without authorisation, the complainants had abandoned their post in the course of their shift and had thereby "seriously disrupted the functioning of the CFMU".

4. The complaints are receivable. Eurocontrol contends that Mr R.'s complaint is time-barred because it was filed more than three months after the notification of the decision rejecting his internal complaint. However, the Agency has produced no evidence of the date on which that decision was effectively notified. Failing such evidence, which it is the Agency's responsibility to provide, that complaint must be regarded as having been filed in good time.

5. The complainant's pleas that the Agency committed procedural irregularities, that the Director General had no authority to take the general measures required by the circumstances and that the Agency breached the principle of equal treatment fail for the reasons given in Judgment 2493. However, the complainants are justified in pleading that the Director General was wrong to consider that they had taken part in an unlawful strike action and had thus

been “absent without authorisation”. Tribunal Judgment 2493 may be consulted in this regard.

6. However, a further reason is given for the impugned disciplinary measures, based on the fact that the complainants abandoned their post in the course of their shift. Eurocontrol is right to point out, as it did in its reply, that “in an operational environment it is essential that the person who reports for duty in order to work a scheduled shift should work that shift and not abandon it at will”. Considering Eurocontrol’s special missions relating to the safety of air navigation, the right to strike – the lawfulness of which is not disputed – must not lead to sudden stoppages of activity such as occur when shift work is abandoned. The complainants do not deny the charges made against them in this respect. The Tribunal therefore considers that, while the first ground mentioned by the Agency – namely, participation in unlawful strike action – could not legally justify the contested disciplinary measure, this second ground did justify a penalty.

7. In these circumstances, the impugned decisions must be set aside, though not definitively, since one of the grounds may lawfully support a charge against the complainants. Should Eurocontrol consider it appropriate, the disciplinary procedure may be reinitiated, which implies that the issue of which disciplinary measure should be taken against the complainants must be re-examined solely on the basis of the charge that can legally be held against them.

8. In view of the above and in the absence of any definitive outcome regarding the disciplinary procedure, the complainants shall not be granted the compensation for moral injury which they claim (see Judgment 2391 in this respect).

9. As the complainants partially succeed, the Agency shall pay each of them 500 euros in costs.

DECISION

For the above reasons,

1. The decisions issuing the complainants a reprimand and those rejecting their internal complaints are set aside.

2. The complainants are referred back to the Agency in order that the latter may reinitiate the disciplinary procedure against them, if it deems such action to be appropriate.

3. Eurocontrol shall pay each of the complainants 500 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2005, 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 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.