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

100th Session **Judgment No. 2495**

The Administrative Tribunal,

Considering the fourth complaint filed by Mr J.G. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 October 2004, the Agency's reply of 11 February 2005, the complainant's rejoinder of 13 May, Eurocontrol's surrejoinder of 19 August, the Tribunal's questions sent to the parties by the Registrar on 13 September and the replies returned by the defendant and the complainant on 23 and 26 September 2005 respectively;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Belgian national born in 1951, is assigned to the Human Resources Directorate but serves full time as President of the Eurocontrol section of the European Civil Service Federation (hereinafter referred to as "FFPE-Eurocontrol").

By letter of 7 March 2003 he informed the Director General that FFPE-Eurocontrol, deploring the fact that the management "rejected all discussion", had decided to resume, as from 10 March, the strike at the Central Flow Management Unit (CFMU) which had been launched on 4 January 2003 and suspended on 6 January (see Judgment 2387, under A). On 10 March, around 3.30 p.m., the announced industrial action began among staff of the two Integrated Initial Flight Plan Processing System Units (IFPUs) in Brussels-Haren (Belgium), and in Brétigny-sur-Orge, near Paris (France). At 3.56 p.m., the complainant rang the CFMU System Operation (CSO) help desk to request that there be no "transfer" of work from IFPU 1 in Haren, Brussels, to IFPU 2 in Brétigny-sur-Orge. In a memorandum sent by e-mail around 5.40 p.m., the Director General informed CFMU staff that the strike that was being resumed was illegal and that disciplinary measures would be taken against striking officials, since operational staff – that is IFPU operational staff – were not allowed to abandon their post without the permission of a supervisor.

On 8 April the Director General notified the complainant that he was charged with contravening the provisions of the Staff Regulations governing officials of the Agency and summonsed him to be heard on this matter on 11 April by the Director of Human Resources, to whom the Director General had delegated his authority to that effect. On 11 April the complainant replied that this summons did not satisfy the formal requirements stipulated in the Regulations and requested notification of the precise charges held against him, a later date for the hearing and an undertaking from Eurocontrol that it would comply with Conventions Nos. 87, 135 and 151 of the International Labour Organization. An exchange of correspondence followed in an effort to find a date for a hearing which suited the complainant. Finally, on 5 May he, in agreement with the FFPE-Eurocontrol Council, informed the Director General that he refused to attend the hearing on the grounds that he rejected the actual basis of the proceedings and feared that impartiality would not be guaranteed.

On 13 June the Director General sent the Disciplinary Board a report on the complainant's case. In an opinion dated 19 December 2003, forwarded to the complainant on 6 January 2004, the Disciplinary Board recommended issuing him a reprimand. On 14 January the Director of Human Resources, acting on behalf of the Director General, invited the complainant to a hearing the following day prior to deciding on disciplinary action. On the following day the complainant's lawyer drew attention to the fact that, according to the applicable rules, it was for the Director General to hear his client, and he asked for the hearing to be postponed. On 16 January the Director of Human Resources offered to hear the complainant on 19 January at either 9 a.m. or 5 p.m., adding that he was not prepared to postpone the hearing any further. The complainant's lawyer replied on 18 January that he would not be available the following day and asked for a date to be agreed between them. On 19 January, however, the Director of Human Resources, acting on behalf of the Director General, imposed a disciplinary measure on the complainant

consisting of a relegation in step with effect from 1 February 2004.

The complainant appealed against that decision on 13 April and the Joint Committee for Disputes delivered an opinion on 21 June. It noted that the Director General had imposed a more severe disciplinary measure than that recommended by the Disciplinary Board without giving any reason, however succinct, for his decision. It concluded unanimously that the complainant's conduct had been blameworthy and that the Disciplinary Board had carefully considered the case and had proposed a justified disciplinary measure (a reprimand). The Committee also concluded, by a majority, that the reason put forward in the course of the proceedings by the Director General's representative to justify a more severe measure – namely, responsibility for the illicit action undertaken – "could apply" to the staff members who had agreed to follow the instructions issued, but not to the complainant. Therefore, it reasoned, the decision of 19 January 2004 issuing a relegation in step should be revoked. On 16 July 2004 the Director of Human Resources, acting on behalf of the Director General, rejected the internal complaint and confirmed the disciplinary measure. That is the impugned decision.

B. In support of his complaint, the complainant puts forward seven pleas, some of which are made up of different elements.

He draws attention firstly to procedural irregularities, arising partly from the fact that the Director General brought pressure to bear on the Disciplinary Board, thereby impairing its independence, and partly from the fact that the proceedings before the Board were tainted with several flaws (unsubstantiated refusal to hear witnesses he had called, errors in the minutes, the attitude of and the role played by the secretary of the Board and the presence of the Director of the CFMU who, called as a witness, behaved as representative of the Director General and testified against the complainant), the fact that he was not heard before the disciplinary measure was imposed (the Director of Human Resources having prevented him from defending his case, thereby in his view committing a serious breach of defence rights and of the Agency's duty of care), and lastly, the fact that the time limits for the proceedings were not complied with, since the Disciplinary Board should have delivered a reasoned opinion within one month of the date on which the matter was referred to it (he emphasises that he was not to blame for the delay).

Secondly, he points out that the Director of Human Resources has not proved that he had been delegated by the Director General to adopt the disputed disciplinary measure or to respond to his internal complaint. He adds that it is "contrary to the principles of good administration, to the guarantee of impartiality and to the duty of care" that the same person should both adopt the disciplinary measure and respond to the complaint challenging that measure.

Thirdly, he accuses the Director General of having abused his authorityby declaring the call to strike action illicit since he has no authority to make such a statement. In so doing, the Director General contravened Article 24a of the Staff Regulations – which provides for the right of association within Eurocontrol – thus making him guilty of moral harassment against the complainant. Those are the complainant's fourth and fifth pleas.

In a sixth plea, the complainant contends that he did not breach his professional obligations. He reviews the charges made against him and, as the Agency has produced a recording of his telephone call to the CSO, accuses the latter of having breached the confidentiality of relations between the trade union and staff. He explains that it was a call to strike and not an order, every official remaining free to follow the call or not, and he deplores the "extremely grave" and unproven accusation that he had "tried seriously to disrupt the running of the service". Lastly, he denies any breach of either the Staff Regulations or the Rules of Application, pointing out that it has not been proved that the safety of air navigation was adversely affected, and that the Director General "resorted to extravagant or spurious arguments" to justify a more severe measure and committed errors of law.

For his seventh plea, he denounces a breach of Article 25 of the Staff Regulations on the grounds that no reasons were given for the impugned decision even though that decision imposed a more severe penalty than that recommended by the Disciplinary Board.

In addition to applying for hearings, the complainant asks the Tribunal to set aside the impugned decision and, if necessary, the decision to subject him to a disciplinary measure. He also claims 40,000 euros in damages for moral injury and 10,000 euros in costs for the disciplinary and appeal proceedings.

C. In its reply Eurocontrol counters each of the pleas put forward by the complainant.

Firstly, it denies having committed blatant, serious flaws in the conduct of the disciplinary proceedings. The

Disciplinary Board, which is a joint body (both the administration and the Staff Committee being represented) unanimously reported in its opinion that it had come under no pressure. The Board considered that hearing twelve witnesses as the complainant had requested might have given rise to redundancy, irrelevance or unnecessary delays; its members had received copies of the minutes "redrafted" by the complainant's lawyer; its chairman expressed confidence in the Board's secretary and added that he would see to it that there existed "maximum mutual respect between the parties". As for the testimony of the Director of the CFMU, it was the complainant himself who had called him as a witness. Furthermore, the only reason the complainant was not heard before the disciplinary measure was imposed was that he turned down three opportunities, leading the Director General to the conclusion that he was using the same dilatory tactics as he had for the hearing scheduled for April 2003. The Agency maintains that the complainant has not proved that he was adversely affected as a result of the drawn-out procedure, for which he was largely to blame.

Secondly, Eurocontrol produces the required delegations of powers and signature, which, it recalls, had been circulated to all departments and could be consulted on the Director General's intranet site.

Thirdly, the Agency contends that both the Director of CFMU and the Director General acted in accordance with the Tribunal's case law – whereby a strike is lawful provided that it is "a collective work stoppage" – in stating that, for operational staff, the right to strike could only take the form of "failure to take up shift duty but not abandonment of post in the course of a shift". By issuing "a call to disobedience with potentially serious consequences" for the safety of the European airspace, the complainant failed in his obligations, and he cannot rely on his trade union mandate in order to clear himself of responsibility.

Fourthly, the defendant points out that the disciplinary measure imposed does not infringe the right of association provided for in Article 24a of the Regulations. Fifthly, it rejects the plea of harassment as being "particularly absurd", since no element of harassment appears in this case.

In reply to the complainant's sixth plea, Eurocontrol accuses him of bad faith and explains that the charge against him is two-fold. He used an operational telephone line strictly reserved for professional use to issue trade union directives, and he seriously interfered with the running of an operational service which could have affected the safety of air navigation. It stresses that such acts can entail serious consequences and accuses the complainant of breaching the provisions of Article 11 of the Regulations, whereby "[o]n accepting service with the Agency, an official shall undertake, unconditionally, to refrain from any act which might jeopardise the safety of air navigation". In such an environment, the right to strike can in practice be exercised only subject to what Eurocontrol deems to be obvious limitations. As far as the recording of his conversation is concerned, the complainant could hardly expect it to remain confidential since he was using an operational line which, for security reasons, is continuously recorded.

Lastly, regarding the alleged lack of reasons, which is the complainant's seventh plea, the Agency points out that the Director General did give reasons for imposing the disciplinary measure, which were "admittedly succinct but quite valid according to Tribunal case law", and that in his reply to the internal complaint he explained in great detail the validity and gravity of the charges held against the complainant.

Eurocontrol contends that the complainant is not entitled to compensation for moral injury and that in any case the amount claimed in that respect is out of proportion. It considers that hearings are unnecessary but leaves the matter for the Tribunal to decide.

D. In his rejoinder the complainant accuses the defendant of constantly trying to dramatise the charges against him and to portray him in exaggerated terms. He contends that his telephone call, which had no effect, never jeopardised the safety of air navigation. He points out that the members of the Disciplinary Board took no account of his amended version of the minutes. He does not see how the fact that his lawyer was not available on 19 January 2004 could be considered to be a dilatory tactic. He takes note of the delegation documents produced by Eurocontrol but reiterates his criticism of the fact that it was the same person who adopted the disciplinary measure and responded to his internal complaint.

He maintains that the Agency does in fact deny the right to strike and that the disciplinary action taken against him amounts to an attempt at intimidation. He denies ever having issued a "call to disobedience" or having intended to disrupt the running of the service. He contends that the telephone line he used is not at all reserved for operational needs, since it is the only line giving access to CSO staff. This is shown in his view by the fact that the number he

dialled appears in the Agency's telephone directory opposite the name of a colleague, a member of the FFPE-Eurocontrol Council, whom he was trying to reach. The Agency's accusation in that respect is therefore unfounded. As for the fact that calls on that line are systematically recorded, this does not mean that conversations are systematically listened to and transcribed, as occurred in his case. He furthermore maintains that, contrary to the view expressed by the Agency, precedent has it that decisions by the chief executive of an organisation not to follow a recommendation of the internal appeal body favourable to the staff member must be "fully and adequately motivated" (see Judgment 2339, under 5, and the case law cited therein).

The complainant reiterates his request for hearings in view of the importance of the case, which raises an issue of principle.

E. In its surrejoinder Eurocontrol makes the point that it considered the requests to postpone the hearing of January 2004 dilatory because they were reminiscent of the tactics used in April and May 2003 in connection with the hearing preceding referral to the Disciplinary Board. It argues that the complainant is "playing with words" when he denies that he issued a call to disobedience: his request that no work be transferred from one IFPU to the other was indeed an instruction that contravened the CFMU Handbook. It considers that he clearly exceeded the scope of activity allowed him under his trade union mandate and that, having issued a call to commit illegal acts, he must assume his share of responsibility without it being necessary to ascertain whether that call was followed or whether it had damaging consequences. Lastly, Eurocontrol argues that the decision of 19 January 2004 must be seen in the light of the proceedings which preceded it, in which case its reasons, though succinct, are sufficiently explicit.

CONSIDERATIONS

1. The complainant works as a Senior Administrative Assistant 1st class in Eurocontrol's Directorate of Human Resources but does not perform any other duties than those of President of FFPE-Eurocontrol, a trade union recognised by the Agency.

On 7 March 2003, acting in his capacity as President, he sent the Director General a strike notice concerning CFMU operational staff. According to a brochure produced by the defendant, the CFMU must "meet the objectives of balancing demand and capacity, keeping delays to a minimum and avoiding congestion, bottlenecks and overload". To that end, the CFMU uses a data base "containing flight plan information on every aircraft that is planning to fly in [European] airspace". The main source of this data base is the Integrated Initial Flight Plan Processing System (IFPS). This is also the sole source for the distribution of flight plan and associated messages to all relevant air traffic control units in the European states making up the "IFPS Zone". The IFPS comprises two units referred to by the acronym IFPU. One is located at Haren, Brussels, and the other at Brétigny-sur-Orge, south of Paris. These two units provide a vital contingency back-up system for each other and are responsible for complementary geographic areas. For flights within IFPS airspace, aircraft operators send the flight plan to the IFPS, which acknowledges receipt, processes the data, stores it in the CFMU database and sends the information to the air traffic control units which are responsible for the flights concerned.

The strike announced in the notice of 7 March 2003 was to begin on 10 March for an indefinite period and was to take the form of temporary work stoppages involving all categories of CFMU operational staff. It was specified in the strike notice that staff on duty would refuse to make up the delays caused by work stoppages or to take over the work of staff on strike. The Director General was strongly encouraged to bring the strike notice to the attention of airlines.

2. The strike began as planned on 10 March 2003, around 3.30 p.m. It led to work stoppages amongst staff who were then on duty.

Half an hour after the beginning of the strike (at 3.56 p.m. to be precise), the complainant used an operational line to call a CSO operator, asking to be put through to three officials involved in the strike. The persons concerned were not there. The complainant then asked the person he was speaking to to pass on the instruction that work was not to be transferred from IFPU 1 in Haren to IFPU 2 in Brétigny. He did this in the following terms:

"What we [...] ask you for the moment is not to transfer anything to Brétigny. It doesn't matter because they [...] are not there to take over. But no transfer [...] to Brétigny. That is the only thing we ask you for the moment. Can you

pass it to the people?”

The person at the other end replied as follows:

“I will pass the message to the people [...].”

In a memorandum sent by e-mail around 5.40 p.m. the same day, the Director General informed CFMU staff that he considered the strike to be illegal because it led staff to abandon their posts in the course of their shifts in an operational environment, or accept instructions given by a body external to the CFMU. He referred to Article 11, paragraph 2, of the Staff Regulations, which is worded as follows:

“On accepting service with the Agency, an official shall undertake, unconditionally, to refrain from any act which might jeopardise the safety of air navigation; he shall be bound to ensure the continuity of the service and shall not cease to exercise his functions without previous authorisation.”

3. On 8 April 2003 the Director General notified the complainant that he was considering initiating disciplinary proceedings against him based on that telephone call and that the Director of Human Resources had been delegated to hear him on the subject. After an exchange of correspondence, the Director General sent a report to the Disciplinary Board on 13 June 2003. The Board conducted an adversarial inquiry and on 19 December 2003 delivered a reasoned opinion, deeming it appropriate to impose on the complainant a reprimand, the disciplinary measure provided for in Article 88(2)(b) of the Staff Regulations. The Board found that this disciplinary measure was proportionate to the seriousness of the facts, considering that the complainant had, in its view, “acted irresponsibly by calling for a strike which implied the non-performance of service instructions, despite knowing full well that he lacked the technical knowledge required to assess the possible consequences of his act”.

The Director of Human Resources, acting by delegation from the Director General, took his decision on 19 January 2004. Departing from the Disciplinary Board’s proposal, he opted for a relegation in step, the disciplinary measure provided for in Article 88(2)(d) of the Regulations. This disciplinary measure was to take effect on 1 February 2004, leading to a transfer to step 4 of grade B2 with 16 months’ seniority. The Director of Human Resources considered that the complainant’s act amounted to “serious misconduct affecting the integrity, reputation and interests of Eurocontrol and that this misconduct [had been] deliberate, with the aim of causing maximum disruption to air traffic, and could [have] jeopardise[d] the safety of air navigation”.

On 13 April 2004 the complainant filed an internal complaint against that decision with the Joint Committee for Disputes, as provided for in Article 92(2) of the Staff Regulations. The Joint Committee delivered its opinion on 21 June 2004. It found that the complainant’s conduct had been blameworthy, that the Disciplinary Board had carefully considered the case and that the disciplinary measure it had proposed, namely a reprimand, was justified. It considered by a majority that the reasons given by the Director General for imposing a more severe sanction “could apply to members of staff engaging in the illicit industrial action” but not to the complainant, and that the decision of 19 January 2004 to apply a relegation in step should be revoked.

By decision of 16 July 2004, which constitutes the impugned decision, the Director of Human Resources, still acting by delegation from the Director General, nevertheless confirmed the disciplinary measure decided on 19 January 2004. He was of the view that the joint bodies consulted had not fully appreciated the gravity of the facts.

4. As the parties have presented their arguments at length in their written submissions, hearings are not necessary and the complainant’s request to that effect is disallowed.

5. The complainant contends that the proceedings were “tainted with numerous flaws”.

(a) He alleges firstly that the Disciplinary Board was not as independent as it should have been, partly owing to the content of the report by which the Director General notified it of the case, and partly owing to the unjustified influence allegedly exerted by the Director of the CFMU during the proceedings. In addition, the investigation was flawed because of the blatantly hostile attitude of the Board’s secretary towards him.

These allegations are unfounded.

According to Article 1 of Rule of Application No. 12 of the Staff Regulations, which concerns disciplinary proceedings, when submitting a report to the Disciplinary Board the Director General must clearly state the facts

complained of and, where appropriate, the circumstances in which they arose. He is of course perfectly entitled to offer, from the outset, his assessment of the gravity of the misconduct which in his view justifies the opening of disciplinary proceedings.

Rule No. 12 sets out the official's and the Agency's rights in the proceedings before the Disciplinary Board, in particular the right to call witnesses. In this case, the Director of the CFMU was called at the request of the complainant, who was present during the hearing and in which he participated fully. There is nothing in the minutes of the hearing to suggest that the Disciplinary Board had any other aim than to shed as much light as possible on technical issues which it could not solve without the information given by that witness.

Lastly, the complainant puts forward no evidence to demonstrate that the Board's secretary was hostile to the point of biasing the procedure against him.

(b) The complainant criticises the Disciplinary Board's unsubstantiated refusal to hear some of the witnesses he had asked it to call. He also alleges that the minutes of one of the Board's meetings are not a true reflection of the discussions held.

This criticism is also beside the point.

The acceptance or rejection of an offer of evidence lies at the discretion of the administrative body responsible for issuing an opinion or taking a decision. In its opinion of 19 December 2003, the Disciplinary Board gave the reasons why it had decided not to hear six of the twelve witnesses requested by the complainant. The latter has produced no evidence that this choice amounted to abuse of discretion. Nor has he explained why the Disciplinary Board is wrong to assert that there is no rule of procedure applicable in this case which requires that the reasons for that choice be communicated to the parties prior to the issue of the reasoned opinion, in accordance with the first paragraph of Article 7 of Rule No. 12.

As for the alleged inaccuracies in the minutes of a meeting, the complainant can hardly object, given that he sent in his amendments to the Chairman of the Disciplinary Board, who then submitted them to the members of the Board for examination.

(c) Lastly, the complainant accuses the Disciplinary Board of failing to meet the deadlines allowed under the applicable rules, which, he submits, invalidates the disciplinary measure taken against him.

According to Article 7 of Rule No. 12, the Disciplinary Board must transmit its opinion to the Director General and to the official concerned within one month of the date on which the matter was referred to the Board; this time limit may be extended to three months in cases where the Board orders an inquiry (paragraph 1). The Director General must take his decision within one month (paragraph 3). It ascertained that the second of these time limits was met but that the first was not: the Director General submitted his report to the Disciplinary Board on 13 June 2003 and on 19 December 2003 the latter issued its opinion, which was forwarded to the complainant on 6 January 2004.

However, because of the nature of these time limits, failure to observe them will not always automatically invalidate the disciplinary measure. Such time limits are intended to ensure that the official concerned is not kept too long under the threat of a disciplinary sanction. The Disciplinary Board is not obliged to abide by them strictly if to do so would result in rushed proceedings violating defence rights. This would have been the case if the Board had issued its opinion within one month of receiving the Director General's report.

6. The complainant challenges the formal validity of the decision of 19 January 2004 owing to its lack of reasons. This objection is unfounded since both that decision and the decision of 16 July 2004 give sufficient reasons to satisfy the requirements laid down by the Tribunal in its case law (see Judgment 2339, under 5).

As for the allegation that the complainant was denied the right to be heard, this is equally unfounded in view of the fact that he was invited several times to express his views before the representative of the Director General, as required by Article 7(3) of Rule No. 12. Viewing the circumstances as a whole, the Director General could objectively interpret the successive requests to defer the hearing as reflecting a dilatory intention.

7. The complainant contends that the Director of Human Resources had no authority to subject him to a relegation in step.

This argument is a little odd coming from an official who has been working for many years within the Agency on tasks that are closely related to its organisation and which imply a thorough knowledge of its Staff Regulations. The decisions of 19 January and 16 July 2004 both expressly mention the fact that the Director of Human Resources was acting by delegation from the Director General. Such delegation, moreover, was based on two general decisions taken on 1 March 2000, which were duly published and classified in a compendium accessible to all the staff. There is no doubt that the subject matter of the individual decisions of 19 January and 16 July 2004 falls within the sphere of application of the general decisions of 1 March 2000.

The complainant also maintains, in this connection, that it is "contrary to the principles of good administration, to the guarantee of impartiality and to the duty of care that the same person, namely the Director of Human Resources, should both adopt the impugned disciplinary measure and respond to the complaint challenging that measure". But this is merely a bald assertion supported neither by a reference to the rules nor by a demonstration that the basic principles referred to prohibit a practice that is widely accepted in administrative procedures.

8. On the merits, the complainant accuses the Director General of abuse of authority. He also complains that he suffered harassment and that the right of association recognised by Article 24a of the Staff Regulations was breached.

The impugned decision of 16 July 2004 confirms the opinion expressed by the Joint Committee for Disputes – which itself confirmed the opinion of the Disciplinary Board – whereby the complainant had failed in his professional obligations as defined in Article 11 of the Regulations. Essentially, the Director General considered that the instruction given by the complainant by telephone on 10 March 2003 exceeded the scope of the strike notice of 7 March 2003 and constituted a call to unlawful action seriously affecting the running of the service. The order not to transfer work from IFPU 1 to IFPU 2 constituted external interference with an operational service, which in his view was liable to jeopardise the safety of air navigation. That unlawful act undermined the very purpose of the Agency's responsibility with regard to airspace users.

The complainant submits no convincing argument to dispute these converging views of the Disciplinary Board, the Joint Committee for Disputes and the Director of Human Resources, acting on behalf of the Director General, on the potential impact of the instruction he had given by telephone on the performance of Eurocontrol's tasks relating to air traffic safety within the IFPS Zone. In the circumstances, any review by the Tribunal would unduly restrict the freedom of judgement the Administration must retain in a highly technical field. The same applies, of course, to the above-mentioned bodies' basically similar assessment of the complainant's conduct seen in the light of his duties under Article 11, paragraph 2, of the Regulations.

The adoption of a disciplinary measure did not therefore constitute harassment and did not impair the freedom of action, which, as the Agency recognises, a trade union must be able to exercise even in a situation of conflict.

9. A question remains as to whether the disciplinary measure issued to the complainant breaches the principle of proportionality.

(a) The Director of Human Resources followed neither the opinion of the Disciplinary Board nor that of the Joint Committee for Disputes regarding the seriousness of the complainant's misconduct. The Disciplinary Board had considered that the complainant had not intended to endanger the lives of users of the airspace supervised by Eurocontrol, but that he had hoped to bring about a stoppage in the processing of flight plans in Europe in order to heighten the impact of the strike of which he had given notice on 7 March 2003. In so doing, he had acted "irresponsibly" since he did not have sufficient technical knowledge to assess the possible consequences of his act considering that air navigation is a highly specialised field. In the Disciplinary Board's opinion, therefore, the disciplinary measure of a reprimand would have been appropriate and sufficient. The Joint Committee for Disputes followed a similar reasoning by considering the complainant's behaviour as blameworthy insofar as he had called on staff to disobey the instructions of the CFMU's Handbook. It arrived at the conclusion, however, that responsibility for the unlawful action called for by the complainant's instructions lay not with him but with the officials who had accepted to follow those instructions.

Although this last reason appears to underestimate the role and responsibility voluntarily assumed by the organiser of a strike, the Tribunal need not dwell on this point. What matters is that the Director of Human Resources departed from the opinions of the joint bodies consulted on the grounds that the knowledge, however fragmentary,

that the complainant necessarily had of operational arrangements should have led him to realise the "dramatic nature" of the actions he was recommending. He considered that the impact of the instruction given by telephone was out of proportion with the staff's demands and that the complainant had contravened the provisions of the Regulations deliberately and not through negligence. He concluded that the reprimand advocated by the Disciplinary Board was insufficient as a sanction, and that a relegation in step was justified.

(b) The Director General, when taking a decision at the outcome of disciplinary proceedings, is bound neither by the recommendations of the Disciplinary Board nor by the opinion of the Joint Committee for Disputes. He may therefore depart from them if he considers, in the light of given circumstances, that a solution other than that proposed by those bodies is more appropriate to ensure the satisfactory running of the Agency. The Tribunal cannot substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty. This point now needs to be examined.

(c) A relegation in step is the fourth of the disciplinary measures listed in Article 88(2) of the Regulations, after the written warning, the reprimand and the deferment of advancement to a higher step; it comes just before downgrading and removal from post, which is the most severe disciplinary measure for a serving official. The Director of Human Resources opted for a relegation in step on the grounds that the complainant had acted in full knowledge of the "dramatic nature" of the actions he was recommending, with the intention of "seriously and irrevocably impairing the smooth running and reputation of the Organisation".

This assessment, which suggests that the complainant voluntarily accepted that the safety of air passengers in the IFPS Zone might be jeopardised, rests on no fact established by the submission of evidence. It appears from the file that the instruction the complainant gave by telephone was essentially intended to lend as much effect as possible to the strike of which he had given notice three days earlier. The investigations conducted by the Disciplinary Board and the Joint Committee for Disputes both show that, by acting in this way, the complainant had no intention of deliberately endangering the safety of airspace users. He even expressed his wish to protect the safety of such users when submitting his strike notice to the Director General, since he urged him to warn airlines of the strike action that the Union was intending to take. It is reasonable to assume therefore that, in the eyes of the complainant, the effect of his instruction to avoid transfers from IFPU 1 in Haren, Brussels, to IFPU 2 in Brétigny-sur-Orge should not have been any more dangerous than the effect that might have been produced by a strike order followed simultaneously by the two units. There is nothing in the submissions to indicate that a joint blockage by the two units would have been unlawful according to the general principle on which Article 11, paragraph 2, of the Regulations is based.

The additional information supplied at the Tribunal's request, both by the defendant on 23 September 2005 and by the complainant himself on 26 September 2005, regarding the practical personal effects of the relegation in step imposed in this case show that this penalty is excessive with regard to the complainant's misconduct. It must, therefore, be concluded that the impugned decision breaches the proportionality rule to the extent that it departs from the Disciplinary Board's recommendation.

10. The result is that the impugned decision must be set aside. The case must be referred back to the Agency, which shall reinitiate the disciplinary proceedings and take against the complainant one of the disciplinary measures provided for in Article 88(2) of the Staff Regulations that are less severe than the relegation in step.

11. The complainant claims 40,000 euros in compensation for alleged moral injury. The Tribunal does not consider that claim to be justified insofar as only the proportionality of the sanction is in doubt and not the blameworthy aspect of his behaviour (see Judgement 2391, under 9).

12. As the complainant succeeds in part, he is entitled to receive the sum of 2,000 euros in costs.

DECISION

For the above reasons,

1. The decision to subject the complainant to a relegation in step and the decision rejecting his internal complaint are set aside.

2. The case is referred back to the Agency for it to reinitiate the disciplinary proceedings against the

complainant, as indicated under 10 of this judgment.

3. The Agency shall pay the complainant 2,000 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.