

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session

Judgment No. 3349

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr M. Y. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 25 August 2011 and corrected on 19 September, Eurocontrol's reply of 21 December 2011, the complainant's rejoinder of 2 April 2012 and Eurocontrol's surrejoinder of 6 July 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, 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, who was born in July 1957, has been employed by Eurocontrol since 1993. At the material time, he was a member of the operational support staff of the Central Flow Management Unit (CFMU) and was assigned to the E1 group, comprising posts aimed at ensuring the continuous operation of the CFMU; the other group, known as E2, comprises posts for staff providing operational support.

As part of a plan to reduce the cost-base, Eurocontrol had introduced a policy in 2009 aimed at limiting the replacement of

staff who had reached the retirement age. In 2010 it also introduced a temporary early termination of service (ETS) scheme for staff members who met certain criteria set forth in Annex XVI to the Staff Regulations governing officials of the Eurocontrol Agency. The ETS provided for the payment of a transitional allowance equivalent to 70 per cent of the amount of the basic salary and a contribution to the pension scheme until the person concerned reached the maximum percentage of 70 per cent in terms of pension rights or, at the latest and depending on the type of appointment, the age of 63 or 65. The ETS was applicable on a voluntary basis to officials holding an employment contract for an unlimited period who would reach the age of 55 between 1 January 2011 and 31 December 2012, but not to officials at the Eurocontrol Maastricht Centre. According to Article 3 of Annex XVI, the Director General was to draw up a list of officials who would benefit from the ETS scheme, having obtained the opinion of the relevant line managers, in the light of the requirements of the service and taking into consideration the selection criteria that he had previously laid down in an Office Notice. The latter, dated 22 June 2010 (No. 22/10), stipulated that “ETS [did] not constitute a right for officials” and that “[s]taff leaving on ETS [could] be replaced only by internal redeployment and [could not] therefore result in headcount increase”. By an e-mail of the same date, the Principal Director of Resources and the Director of the CFMU informed CFMU staff members that, given that the policy implemented in 2009 was not applicable to them, it had been decided, in order to avoid the risk of jeopardising the functioning of what was a critical operational service, that they could not take advantage of the ETS scheme.

As he considered that he met the conditions laid down in Annex XVI, the complainant submitted a request to take advantage of the scheme. His application, like those submitted by other officials belonging to the E1 group of the CFMU, was not approved, as attested by the list contained in the Director General’s decision – No. I/24(2010) – of 15 October 2010 showing the names of the officials who would benefit from the scheme. The complainant had received an e-mail the previous day from the Director of the CFMU

explaining that the decision to turn down his application was warranted by the specific operational requirements of the CFMU.

On 3 January 2011 the complainant filed an internal complaint. Citing the opinion delivered by the Joint Committee for Disputes, the Director General informed the complainant, by a memorandum of 9 June 2011 which constitutes the impugned decision, that he had decided to dismiss his complaint as unfounded but would promptly send him a reasoned individual decision, which he did on 5 July 2011. The decision stated that “every effort [would] be made as soon as possible to find a solution consistent with the desire of some members of the operational staff for early termination of their service”.

B. Referring to well-established case law, the complainant contends that the decision of 15 October 2010 fails to meet minimum standards of substantiation. It merely lists by name those officials who had been admitted to the ETS scheme, rejecting implicitly, and hence without giving any reasons, the applications of those officials whose names are not included. He further submits that the individual decision of 5 July 2011 provides no additional explanation and is therefore manifestly inadequate.

In addition, the complainant considers that the decision of 15 October 2010 breached the principle of equal treatment. While the ETS scheme was open in principle to all officials subject to certain conditions, Office Notice No. 22/10 stated that “[w]here a member of the CFMU operational staff [was] concerned, so as to ensure that his/her early departure on ETS [did] not jeopardise the proper functioning of this critical operational service, its staffing situation and its operational requirements [would] be carefully analysed”. The different treatment, in legal terms, of CFMU operational staff members and other officials is also discernible from the e-mail of 22 June 2010 informing the former that the scheme would definitely not be open to them. The complainant further asserts that the non-replacement of officials admitted to the ETS scheme, which is mentioned in the e-mail of 14 October 2010 and again in the decision of 5 July 2011, constitutes a new selection criterion that is manifestly

inconsistent with those established by Office Notice No. 22/10, which provides for replacement through internal redeployment. The principle of equal treatment was also breached by the fact that the applications of officials belonging to the E2 group were accepted although, according to the complainant, the differences between the E1 group and the E2 group are minimal, as the latter are recruited primarily from among the former. The complainant requests the setting aside, with all the legal consequences that this entails, of the decisions of 9 June 2011, 5 July 2011 and 15 October 2010, and an award of 1,000 euros in costs.

C. In its reply Eurocontrol points out that the ETS scheme was not open to operational and technical staff at the Maastricht Centre and that it was, in addition, subject to the principle of replacement by internal redeployment, so that many posts occupied by technical or operational specialists, including those of the complainant and his colleagues in the E1 group, were excluded. As the Tribunal has accepted that the reasons for a decision may be stated in related documents, Eurocontrol considers that the reasons of a general nature set forth in the e-mail of 14 October 2010 were appropriate and sufficient. The individual decision of 5 July 2011 “confirm[ed]” that the reason for the rejection of the applications submitted by E1 group staff members was the impossibility of replacing them.

The argument alleging unequal treatment of E1 group staff and other officials employed by Eurocontrol must be dismissed. As E1 group staff held professional qualifications acquired externally, the principle of replacement by redeployment precluded, in practice, the replacement of officials who took advantage of early termination of service and therefore justified the decision not to open the scheme to such officials. Moreover, as it rejected all applications from E1 group staff members, Eurocontrol considers that it displayed consistency by treating them in an identical manner. The argument alleging unequal treatment of E1 group and E2 group staff must also be dismissed. Aside from the fact that the complainant has failed to discharge the burden of proof, Eurocontrol maintains that there is in fact, due

to the operational context, an essential difference between the two groups. While the E1 group staff members are required to maintain a minimum complement in order to guarantee the safety of the operations for which they are responsible, this is not the case for members of the E2 group, some of whom could thus be admitted to the ETS scheme, since the necessary level of efficiency could be maintained by reducing and sharing support functions.

D. In his rejoinder the complainant enlarges on his pleas. He points out that, while the Tribunal agrees that the reason for a decision may be stated in another document and that a higher authority can endorse the reasoning of a lower one, this is so only if the higher authority refers implicitly or explicitly to the other document. That condition has not been met in the present case. According to the complainant, the restriction on access to the ETS scheme imposed on CFMU staff and staff at the Maastricht Centre is contrary to Annex XVI. Furthermore, the different treatment of group E1 and group E2 staff members without any justification stemming from their respective functions causes the former economic injury in terms of career advancement.

E. In its surrejoinder Eurocontrol reiterates its arguments. It affirms that the e-mail of 14 October 2010 stated in advance the reasons for the official decision published the following day and that the CFMU staff were precluded *de facto* from taking advantage of the ETS scheme owing to the implementation of the principle of replacement by internal redeployment.

CONSIDERATIONS

1. On 22 June 2010 the Director General of Eurocontrol circulated an Office Notice to the Organisation's staff announcing the entry into force of a temporary early termination of service (ETS) scheme. The new scheme, which was not applicable to staff at the Maastricht Centre, formed part of a fundamental review of activities,

costs and staffing levels and was designed to reduce staff costs by complementing the provisions of the service regulations limiting the replacement of staff leaving through natural attrition.

The temporary ETS scheme was applicable to officials with an open-ended contract aged 55 and over during the period from 1 January 2011 to 31 December 2012. The beneficiaries were to receive an allowance expressed as a percentage of their basic salary until such time as they began to receive payment of the whole or part of their pension. The officials concerned were invited to “indicate their intention to volunteer, by letter addressed to the Director General”, by 15 September 2010.

The Office Notice emphasised that “ETS [did] not constitute a right for officials”. It was up to the Director General to take a decision on the applications, inter alia on “having obtained the opinion of the relevant line managers”, and to set “[t]he effective date of the early termination of service [...] between 1.1.11 and 31.12.12, also in the light of requirements and the interests of the service, and if possible in accordance with the wishes of the officials concerned”. Any official who was unable to agree with the date thus set could not take advantage of the ETS scheme. The Director General was to draw up the list of beneficiaries of the scheme by 15 October 2010.

2. The application submitted in due form by the complainant, who met all the conditions laid down in the Office Notice, was not included in the list published on 15 October 2010 by the Director General, who basically stated, in an e-mail sent to those concerned that same day, that he had taken into consideration CFMU’s operational requirements, the need to make savings, the expectations of the staff concerned and of Eurocontrol’s stakeholders, and an evaluation of Eurocontrol’s business needs, since succession planning was a crucial means of ensuring that the key knowledge and skills of officials benefiting from the ETS scheme would be retained. The 37 applications submitted by the complainant’s colleagues, who, like him, were members of the E1 group of CFMU operational staff, were

also rejected. A different approach was adopted to other employees belonging to the E2 group, whose functions were not deemed to be of critical operational importance for the service.

On receiving an internal complaint, the Director General confirmed this decision, following the unanimous opinion delivered by the Joint Committee for Disputes.

3. The complainant seeks the setting aside of this decision, which was notified on 9 June 2011 and supplemented on 5 July 2011, as well as the initial decision of 14/15 October 2010. He invokes in support of his claims the failure to provide adequate reasons, unequal treatment, on the one hand, of CFMU staff and other Eurocontrol officials and, on the other, of E1 group and E2 group staff, as well as the addition of a criterion that was not mentioned in the Office Notice of 22 June 2010.

4. The last plea, which is undeniably well-founded, must be accepted. The Tribunal notes that on 22 June 2010, i.e. the very day on which the aforementioned Office Notice was circulated, the Director of the CFMU and the Principal Director of Resources sent a joint e-mail to the CFMU staff informing them of the decision that members of the CFMU operational staff would be excluded, in principle, from the ETS scheme, whereas the Office Notice indicated in paragraph 6 of Attachment 2 that their applications would be considered on a case-by-case basis. It follows that the signatories to the e-mail unlawfully prevented this category of officials from taking advantage of the scheme on the basis of a criterion that was not mentioned in the Office Notice. It is clear from the submissions that the impugned decision is based on this criterion. It is therefore tainted with an error of law and must be set aside on that ground, without there being any need to rule on the complainant's other pleas.

5. Since he succeeds, the complainant is entitled to payment of the 1,000 euros that he claims in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. Eurocontrol shall pay the complainant the sum of 1,000 euros in costs.

In witness of this judgment, adopted on 1 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ