Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

O. C.

v.

Eurocontrol

125th Session **Judgment No. 3926**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. O. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 14 May 2014, Eurocontrol's reply of 5 September, the complainant's rejoinder of 21 November, corrected on 4 December 2014, and Eurocontrol's surrejoinder of 6 March 2015;

Considering the applications to intervene filed on 6 October 2014 by:

– Names removed –

and the letter of 21 November 2014 in which Eurocontrol stated that it had no objection to these applications;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant, who was recruited on 15 May 2000 as a student air traffic controller, challenges the application of provisions adopted after his recruitment.

At that time, the student controllers whom Eurocontrol recruited each year underwent training that normally lasted up to three years before being appointed as Agency servants and ultimately becoming established.

By Office Notice No. 12/02 of 30 April 2002, a new employment policy was adopted and incorporated into the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. One of the main changes introduced by this policy, which entered into force on 1 May 2002, related to the rules governing termination of service. Article 41 of the General Conditions of Employment – which provided for generous entitlements in the event of early termination of service – was replaced by Article 5 of Annex X, which was less generous and applied to staff members appointed for an undetermined period after 1 May 2002.

By a decision of 23 August 2002, the complainant was appointed for an undetermined period with retroactive effect from 9 August 2002. On 1 May 2003 he became established. On 1 July 2013, relying on Article 91(1) of the General Conditions of Employment, he wrote to the Director General asking for "confirm[ation]" that Article 41 still applied to him. On 9 October he was informed that Annex X alone was applicable to him. On 18 December 2013 he lodged an internal complaint in which he requested a reconsideration of the matter and confirmation that Article 41 applied to him.

Although he was informed on 4 February 2014 that his internal complaint would be considered by the competent service, the complainant filed a complaint with the Tribunal on 14 May 2014, challenging the implied decision to reject his internal complaint. He asks the Tribunal to set aside that decision and to order Eurocontrol to recognise that the version of Article 41 that was in force at the time of his recruitment applies to him, and also to pay him 3,000 euros in costs.

In its reply, Eurocontrol requests that the Tribunal dismiss the complaint as irreceivable on the grounds that it is time-barred and, subsidiarily, as unfounded.

In his rejoinder the complainant advises the Tribunal that on 5 August 2014 the Joint Committee for Disputes, which met to consider his internal complaint and that of 33 other servants, delivered a divided opinion. Endorsing the opinion of two members of that Committee, the Director General dismissed those internal complaints on 2 October 2014 as irreceivable because they were time-barred and, subsidiarily,

as unfounded. The complainant reiterates his claims and additionally asks the Tribunal to award him 3,000 euros in damages.

In its surrejoinder Eurocontrol maintains its position and adds that the complaint is irreceivable for lack of a cause of action.

CONSIDERATIONS

1. The complainant requests the Tribunal to set aside the implied decision rejecting his internal complaint of 18 December 2013 and to order Eurocontrol to recognise that Article 41 of the General Conditions of Employment applies to him.

2. Eurocontrol asks the Tribunal to dismiss the complaint as irreceivable on the grounds that it is time-barred or that the complainant lacks a cause of action. It considers that he should have challenged, within three months from the date of its notification, the decision of 23 August 2002 appointing him as an Agency servant for an undetermined period and specifying that his appointment was governed by the provisions of Annex X of the General Conditions of Employment. It adds that the time limit of three months, which has already expired, cannot be reopened by the submission to the Director General on 1 July 2013 of a request pursuant to Article 91(1) of the General Conditions of Employment seeking "confirm[ation]" that Article 41 applied to his appointment and the Director-General's reply of 9 October 2013 stating that it did not. That reply simply confirmed the decision of 23 August 2002. Eurocontrol submits that the complainant has no cause of action, as there is no real risk of his interests being adversely affected since it has not put in place measures implementing Article 41 or initiated any procedure concerning that article at the Eurocontrol Maastricht Centre. In the complainant's view, since he was unaware when he was appointed on 23 August 2002 of the different conditions of employment granted to some of his colleagues, his cause of action arose when he discovered the unequal treatment in his respect. He submits that the sole purpose of the decision of 23 August 2002 was to appoint him as an Agency servant, whereas the reply of 9 October 2013 aimed to deny his

entitlement under Article 41 of the General Conditions of Employment and to explain the reasons why. He does not consider that reply to be a confirmatory decision.

3. Article VII, paragraph 1, of the Statute of the Tribunal provides that a complaint is not receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable staff regulations. In accordance with the Tribunal's case law, to satisfy this requirement the complainant must not only follow the prescribed internal procedure for appeal but must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure (see, in particular, Judgments 3296, under 10, and 3870, under 1).

4. Under Article 91(2) of the General Conditions of Employment, "[a]ny person to whom these provisions apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where it has failed to adopt a measure prescribed by the General Conditions of Employment. The complaint must be lodged within three months. The period shall start to run: [...] on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person [...]."

In the decision of 23 August 2002 appointing the complainant as an Agency servant for an undetermined period, the Director General clearly stated that his appointment was governed by the provisions of Annex X of the General Conditions of Employment. The complainant was hence informed on that date of the rules applicable to him, namely Annex X and not Article 41, which concerned only staff members appointed before 1 May 2002. He therefore ought to have lodged an internal complaint with the Director General within a period of three months from 23 August 2002, in accordance with Article 91(2) of the General Conditions of Employment, challenging the application to his appointment of Annex X of the aforementioned Conditions. Since he did not do so within that period, his internal complaint was time-barred.

5. The request submitted to the Director General on 1 July 2013 is irrelevant in this respect, because the decision contained in the reply thereto dated 9 October 2013 was purely confirmatory and did not therefore have the effect of reopening the time limit for challenging the decision of 23 August 2002 (see, in particular, Judgments 2707, under 3, and 2011, under 18). The complaint must therefore be dismissed as irreceivable.

6. Since the complaint is dismissed, the applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 16 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ