

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G.

v.

Eurocontrol

133rd Session

Judgment No. 4471

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. G. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 20 February 2017 and corrected on 8 March, Eurocontrol's reply of 23 June, the complainant's rejoinder of 19 September 2017, Eurocontrol's surrejoinder of 18 January 2018, the complainant's further submissions of 8 June and Eurocontrol's final observations thereon of 3 October 2018;

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 challenges the decision to dismiss his complaint of psychological harassment.

At the material time the complainant was assigned to a generic post of advanced supervisor and held, at grade AST7, the post of Sickness Insurance Supervisor in the "People and Finance Operations" unit of the Directorate of Resources. On 10 November 2014 he lodged a complaint of psychological harassment against his supervisor, Ms A. The same day, he asked the Director General what measures he intended to take to put an end to the conduct to which he considered he had been subjected and to protect his health and dignity. On 11 December 2014

the Director General notified the complainant of his decision to initiate a preliminary investigation.

After meeting the Head of People and Finance Operations and the Principal Director of Resources, the complainant was informed by decision of 17 December 2014 that, “[s]olely in view of the interest of the service and after hearing the member of staff concerned”*, he was transferred within the Directorate of Resources with immediate effect and retained his grade, step and generic post.

On 2 March 2015 the complainant requested the Director General to inform him of the investigation’s progress. He also asserted that his transfer was unfair. The Director General replied on 23 March that the investigators – whose appointment had been delayed – were going to begin their investigation. Regarding the transfer, he noted that it had been decided in the interest of the service but also in the complainant’s interest, in response to his request for protective measures.

On 4 June 2015 the complainant’s counsel observed that the complainant “[had] still not been assigned to a post”*. On 25 June the Directorate of Resources, for the Director General and by delegation, replied that, since December 2014, the complainant had been offered a number of posts to which he could have been reassigned, but he had refused all proposals. The Directorate of Resources added that, as the complainant had been assigned to a unit in the “Network Management” Directorate for a period of four months from 1 June, the possibility of offering him a stable position in that unit would be examined at the end of that period.

In December 2015 the investigators, who had interviewed the complainant on 21 September, submitted their report to the Director General. They indicated that between 1 February and 10 November 2014, two instances of improper conduct by Ms A. were established. However, they stated that the conditions which the applicable rules required for improper conduct to be regarded as psychological harassment – that the conduct take place over a period and be repetitive – were not

* Registry’s translation.

satisfied. They therefore concluded that the harassment complaint was unfounded.

On 14 January 2016 the Director General informed the complainant that he had decided to close the case. On 19 February the complainant submitted an internal complaint to the Director General. He alleged that he had been “dismissed from [his] duties”^{*} following the lodging of his complaint of harassment and that he had not held a fixed post since December 2014. He requested that the decision of 14 January 2016 be set aside, that the harassment to which he had been subjected be acknowledged, that protective measures be taken in his regard, that he be sent the preliminary investigation report, that he be reinstated in his position and on the list of promotions for 2014, and that measures be taken against Ms A. Lastly, he claimed the reimbursement of the costs incurred in defending his rights.

The Joint Committee for Disputes, to which the matter was referred, delivered its opinion on 5 October 2016. Two of its members took the view that, since two incidents indicated improper conduct, the complainant had experienced harassment within the meaning of Article 12a of the Staff Regulations governing officials of the Eurocontrol Agency. They also held that the complainant had been subjected to institutional harassment insofar as, in their opinion, the decision to transfer him undermined his dignity. The two other members of the Committee stated that, since the investigators’ report was “not available”^{*}, they were not in a position to give an opinion on the only question that fell within the Committee’s remit, namely whether the Director General had drawn mistaken conclusions from that report. However, they found that the internal complaint was unfounded. Lastly, the Committee concluded unanimously that the situation had not been properly managed, in particular in terms of time, that the manner in which the outcome of the investigation had been communicated was “deficient”^{*} and that the decision of 14 January 2016 was not adequately motivated.

^{*} Registry’s translation.

On 15 December 2016 the Director General notified the complainant of the decision to dismiss his internal complaint as unfounded. He added that a colleague would meet him to inform him of the investigators' findings. That is the impugned decision.

The complainant asks the Tribunal to set aside that decision; to acknowledge the harassment to which he considers he has been subjected; to order Eurocontrol to take disciplinary action against Ms A. and the Head of "People and Finance Operations"; to order the disclosure of the preliminary investigation report and the "testimonies and interviews gathered"; to order Eurocontrol to take all the necessary measures to put an end to the harassment to which he is subjected, to protect him and to "assign him a real post and job"; and to order that he be reinstated on the 2014 list of promotions. He also claims 80,000 euros in compensation for the moral injury he considers he has suffered, and costs in the amount of 10,000 euros for the lodging of his harassment complaint, the internal appeal procedure and the proceedings before the Tribunal.

Eurocontrol submits that the claims that disciplinary action be taken against the Head of "People and Finance Operations" and that the complainant be reinstated on the 2014 list of promotions are irreceivable for failure to exhaust internal remedies. For the remainder, Eurocontrol submits that the complaint should be dismissed as unfounded.

CONSIDERATIONS

1. This complaint, the complainant's first, is dated 20 February 2017. The complainant has also filed a second complaint, dated 24 February 2017, which is closely linked to the factual background to the dispute in this case. However, the Tribunal considers it appropriate to render separate judgments in view of the complainant's different claims in each complaint.

* Registry's translation.

2. In this case, Eurocontrol raises several objections to the receivability of certain claims, which must be dealt with at the outset.

3. In the first place, Eurocontrol submits that the complainant's claim that the Organisation be ordered to take disciplinary action against Mr T., the Head of "People and Finance Operations", is irreceivable because the complainant has not first exhausted internal remedies in respect of this aspect of his complaint. Eurocontrol rightly points out that this claim has been made for the first time before the Tribunal, which is contrary to the requirement that internal means of redress be exhausted (see, for example, Judgment 3828, consideration 3). In fact, the complainant's internal complaint of 19 February 2016, which was the subject of the impugned decision of 15 December 2016, does not require any action to be taken against Mr T. Moreover, the Tribunal does not have jurisdiction to order an organisation to take disciplinary action against an official (see Judgment 4241, consideration 4).

The complainant's claim to that effect is indeed irreceivable.

4. In the second place, Eurocontrol requests that the Tribunal dismiss as irreceivable the complainant's claims regarding the 2014 promotion exercise and his reinstatement on the promotion list for that year. Eurocontrol contends that the complainant did not submit that request in accordance with the time limits and procedure specified in Article 92(2) of the Staff Regulations. Under that provision, an internal complaint must be lodged within three months of the act which adversely affected the complainant. The complainant's claim in this respect refers to a promotion list for 2014, whereas the internal complaint that gave rise to the impugned decision of 15 December 2016 was dated 19 February 2016. It should be noted that the complainant submits, on the one hand, that he was "ousted"* from the promotion list in August 2014, and, on the other, that he was denied a promotion by his transfer in December 2014.

* Registry's translation.

The objection to receivability in respect of the 2014 promotion exercise is therefore well founded.

Furthermore, the Tribunal observes that the psychological harassment complaint dated 10 November 2014, which led to this case, requires the Director General to take any measures to protect the complainant from harassment by Ms A., to take against Ms A. the necessary measures to put an end to any harassment and to initiate an investigation in which the complainant can comment on all the incidents of harassment to which Ms A. has subjected him. That harassment complaint did not refer to the 2014 promotion list or anything that might be related to it. Lastly, the submissions show that the complainant's name was included on the list of staff members eligible for promotion in 2014. Thus, his name was not "removed"* from that list; he was simply not promoted. He cannot seek to be reinstated on the list of persons promoted as he was never on it.

5. The Tribunal finds that the complainant's claim to "assign him a real post and job"* is irreceivable, since it is clear from the file that he has neither exhausted the internal means of redress nor lodged an internal complaint in this respect in accordance with the time limits and procedure laid down in Article 92(2). The complainant's internal complaint of 19 February 2016 does not mention a request of this nature; the nearest it comes is to request that the complainant be reinstated in his position, without giving details. At no time in the entire course of events did the complainant lodge an internal complaint against his transfer on 17 December 2014.

The complainant's claim to be assigned a real post and job is therefore also irreceivable.

6. On the merits, the complainant mainly raises two pleas. His first plea is that Eurocontrol failed to comply with procedures, to act with due diligence and to provide a statement of reasons in respect of his psychological harassment complaint. The complainant emphasises

* Registry's translation.

the lack of a rule of application specifying how the provisions dealing with harassment are to be implemented, and the vagueness and obscurity of the document entitled “Protecting the Dignity of Staff at EUROCONTROL” which Eurocontrol applied in this case. He also refers to overly long delays. Lastly, he mentions failure to respect “the adversarial principle and the duty to provide information”*, the investigators’ lack of objectivity and neutrality, and the intimidation which he faced throughout the handling of his harassment complaint. The complainant’s second plea concerns the existence of the harassment that he alleges he experienced. He submits that the Director General’s decision was inconsistent and that the facts prove that there was harassment.

7. Regarding the first plea, on the failure to comply both with procedures and time limits, at the material time Article 12a of the Staff Regulations provided as follows:

- “1. Officials shall refrain from any form of psychological or sexual harassment.
 2. An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the Agency. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the Agency, provided the official has acted honestly.
 3. ‘Psychological harassment’ means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.
- [...]
5. The Director General shall lay down in a Rule of Application the implementing provisions for the above regulations.”

8. First, the complainant is correct in submitting that, despite what Article 12a(5) provides, at the material time the Director General had not laid down in a rule of application the implementing provisions

* Registry’s translation.

for the other paragraphs of this article. However, the Tribunal notes that, as Eurocontrol points out in its submissions, the Organisation had a policy on protecting the dignity of staff (hereinafter “the Policy”) which contains guidance for its staff members on how to assess a psychological harassment complaint. The Policy cannot be described, in the complainant’s words, as “vague and obscure”^{*} or “particularly ineffective”^{*}. While the definitions set out in the Policy are not identical to the definition of psychological harassment in Article 12a(3), they are consistent with it. Moreover, in his submissions, the complainant does not so much criticise Eurocontrol for the content of the Policy as focus on breaches thereof and on what he considers to be the incorrect findings of the report of the preliminary investigation into his complaint of psychological harassment.

Regarding the complainant’s criticism that the process followed was not adversarial, the Tribunal notes that he was assisted at each stage by his counsel and interviewed as part of the investigation. In these circumstances, the fact that, as the complainant states, he was not confronted with his harasser and was interviewed only once by the investigators does not support a conclusion that the process was not adversarial.

The complainant’s allegations on this point do not prove that the impugned decision was unlawful.

9. In respect of delays, the submissions of both parties show the following. The complainant lodged his psychological harassment complaint on 10 November 2014 and the Director General informed him on 11 December 2014 that a preliminary investigation was going to be initiated. However, it was not until May 2015 that two investigators were appointed by the Director General, and the complainant was interviewed by them on 21 September 2015. Subsequently, the preliminary investigation report, which had not been disclosed to the complainant, was sent to the Director General in December 2015 and the latter took his decision to

^{*} Registry’s translation.

close the case on 14 January 2016, which was notified to the complainant the same day.

10. Thus, over one year elapsed between the lodging by the complainant of his psychological harassment complaint and the notification of the decision to close it, which informed him of the outcome of the preliminary investigation. In Judgment 4243, the Tribunal states that harassment cases should be dealt with as quickly and efficiently as possible (see also Judgment 3660, consideration 7). As the complainant rightly points out in his complaint, the Tribunal has consistently held, *inter alia*, in Judgments 3692, consideration 18, and 3777, consideration 7, that an organisation has a duty to conduct a prompt and thorough investigation into harassment complaints. The Policy of Eurocontrol echoes this. It provides that the Director General will, without delay, set up a preliminary investigation to ascertain whether the internal harassment complaint warrants the convening of the Disciplinary Board; it also provides that this investigation will be performed with the minimum of delay consistent with fairness to both parties (paragraph 4.7 of the Guidelines and Procedures to support the Policy). It should be added that the Tribunal emphasises in several judgments that the duty of care requires an allegation of harassment to be investigated promptly (see, for example, Judgments 2636, consideration 28, 3337, considerations 11 and 15, and 3365, consideration 26).

11. A delay of more than one year between the lodging by the complainant of his psychological harassment complaint and the notification of the Director General's decision to close the case does not indicate quick and efficient handling of a harassment case or expeditious action with the minimum of delay consistent with fairness to both parties. The Tribunal's case law recognises the harm that this may cause to a complainant (see, for example, Judgments 3347, consideration 14, and 4241, consideration 4). In its reply, Eurocontrol explains that it proved difficult to appoint investigators owing to potential conflicts of interest with the complainant; that sick leave unexpectedly delayed the appointment of one of the investigators; and that summer holidays and the need to translate the complainant's harassment complaint delayed

his interview until September 2015. In view of Eurocontrol's obligation to act expeditiously with the minimum of delay consistent with fairness to both parties, these explanations relating to internal administrative matters are inadequate. Moreover, the Joint Committee for Disputes unanimously criticised the inappropriate management of the situation in terms of time.

12. On another aspect of the procedure followed, the complainant further contends that he was not informed of the outcome of the investigation, contrary to paragraph 2.6 of the Guidelines and Procedures to support the Policy. In this regard, the Tribunal observes that, in the decision of 14 January 2016 by which the Director General informs the complainant of the findings of the preliminary investigation report and concludes that the case should be closed without disciplinary action against Ms A., the complainant is not informed of anything beyond the fact that two instances of inappropriate conduct were established. In the Director General's subsequent decision of 15 December 2016 dismissing the complainant's internal complaint against the decision of 14 January 2016, the Director General in fact refers to the "reasons put forward in part by [...] two members"* of the Joint Committee for Disputes as grounds for his dismissal of the complainant's requests concerning the harassment and the adoption of measures against Ms A. By contrast, in the decision of 15 December 2016, the Director General allowed the complainant's internal complaint in respect of his request to be provided with the findings of the preliminary investigation report. Thus, the submissions establish that those findings were not provided to the complainant until 2017, long after he had lodged his internal complaint and the Director General had decided to close the case.

13. Furthermore, it should be pointed out that, although the Director General's impugned decision refers to the reasons put forward in part by two members of the Joint Committee for Disputes, the Committee's report of 5 October 2016 actually states that, since the members of the Committee did not have access to the preliminary investigation report,

* Registry's translation.

they could not express an opinion as to whether the Director General drew incorrect conclusions therefrom. They stated unanimously that the communication of the outcome of the investigation was deficient and that the motivation of the decision of 14 January 2016 was not adequate.

14. It is plain from Judgments 4167 and 4217, which also concern complaints of psychological harassment, that a decision is rendered unlawful by the refusal of an organisation's executive head to disclose to the joint appeals body the report of the investigation into the harassment complaint lodged by the official concerned, or at least a redacted copy thereof. Similarly, in the aforementioned Judgment 4217, considerations 4 to 6, the Tribunal points out that, according to settled case law, a staff member must, as a general rule, have access to all the evidence on which the competent authority bases its decision concerning her or him. In this case, the Joint Committee for Disputes, on whose opinion the Director General states he bases his decision of 15 December 2016, was not provided with the investigation report concerned. Nor had the complainant received it by the time he was notified on 14 January 2016 that his psychological harassment complaint had been closed. In Judgment 4081, the Tribunal recalls that the reasons for a decision must be sufficiently explicit to enable the person concerned to understand why it was taken and the Tribunal to exercise its power of review. In the present case, the Director General neither provided information nor referred to the Committee's reasons that would allow the complainant to understand why the decision was taken.

15. The accumulation of excessive delays in conducting the investigation, the failure to make available the findings or content of the investigation report – or at least a redacted copy thereof – to the complainant and the Joint Committee for Disputes, and the inadequate motivation of the Director General's decision to dismiss the complainant's internal complaint on 15 December 2016 render the Director General's decision unlawful. It must therefore be set aside.

This first plea of the complainant, relating to the failure to comply with procedures and time limits, is thus well founded.

16. At this stage of its findings, the Tribunal should in principle remit the case to the Organisation for a fresh examination of the complainant's internal complaint of 19 February 2016. However, in view of the evidence in the file and the time that has elapsed, it appears more appropriate not to remit the case but to examine the lawfulness of the decision central to the dispute, that is, the Director General's decision of 14 January 2016 to dismiss the psychological harassment complaint and to close the case (see, for a comparable case, Judgment 4167, consideration 5). That is what the complainant focuses on in his second plea, according to which the Director General's decision of 14 January 2016 is inconsistent as to the existence of the harassment of which he complains and there was mainly an error in assessing the various incidents that the complainant brought to the investigators' attention.

17. In their submissions, the complainant and Eurocontrol provide numerous details in support of their respective claims in this regard. The main questions in this case are whether, under the definition of psychological harassment in Article 12a of the Staff Regulations, there was "improper conduct" or simply inappropriate conduct, and whether that conduct can be described as "tak[ing] place over a period, [...] repetitive or systematic".

18. The Tribunal has repeatedly drawn attention to a number of important general principles applicable to harassment. In Judgment 4241, consideration 9, the Tribunal states that the question whether harassment occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the acts complained of. The judgment refers to the need for corroboration by specific facts. However, in the present case, the preliminary investigation report that is central to the dispute is not fully available. The Joint Committee for Disputes did not have access to it. Neither did the complainant, save in part, long after his harassment complaint was closed. At most, in its reply, Eurocontrol chose to provide pages 26 to 34 of the report. On 12 April 2017 Eurocontrol also provided the complainant with part of pages 36 and 37 concerning the report's findings. The Tribunal therefore

does not have access to the first 25 pages of the report and part of pages 35 and 36.

19. Since the Tribunal's role is to determine whether the Director General and the preliminary investigation report on which he based his decision of 14 January 2016 demonstrate a careful examination of the objective circumstances surrounding the acts complained of, it is clear that the Tribunal is not in a position to do so without having the entire investigation report available. It follows that, although the Director General's decision of 15 December 2016 must be set aside, the Tribunal is not able to examine itself the lawfulness of the decision of 14 January 2016 which led to the complainant's internal complaint of 19 February 2016 and the impugned decision of 15 December 2016.

20. In such a situation, the Tribunal could therefore only remit the case to the Organisation for a fresh examination of the complainant's harassment complaint for it to be properly handled. However, in view of all the circumstances of the case, the Tribunal does not consider such a referral appropriate owing to the time that has elapsed since the psychological harassment complaint was lodged in November 2014. Rather, the proper course in this case is for the Tribunal to confine itself to compensating the complainant adequately for the harm caused to him by the decision of 15 December 2016, as it did in Judgment 4167.

21. The harassment alleged by the complainant occurred in 2014 and 2015, and it is not appropriate to conduct a fresh examination of the facts more than seven years later. Similarly, it should be recalled that the complainant did not lodge an internal complaint in accordance with Article 92 of the Staff Regulations challenging his transfer which took place in December 2014. Moreover, the complainant was assigned to another position on 1 March 2016. He has retained his grade, step and generic post. In these circumstances, the correct remedy is an award of compensation for the harm caused by the unlawful decision of 15 December 2016.

22. It follows from the foregoing that the complainant was denied the right to have his harassment complaint dealt with within a reasonable time, to receive an adequate motivation for its dismissal and to have a copy of the preliminary investigation report concerning that complaint provided in a timely and appropriate manner. This has inevitably caused him considerable moral injury which must be redressed (see, concerning acknowledgement of moral injury in such circumstances, Judgments 4167, consideration 9, 3314, consideration 20, and 2973, consideration 18). In this case, the Tribunal considers it fair to set compensation at 20,000 euros.

23. Among his various claims, the complainant asks to be provided with the complete preliminary investigation report. The Tribunal notes that the Organisation has already disclosed various parts thereof to the complainant. However, as stated in consideration 14, above, it was in fact required to disclose the entire report, even if that meant redacting it to the extent necessary to maintain the confidentiality of some aspects of the investigation, in particular to protect the interests of third parties. The Tribunal will therefore make such an order.

The complainant also requests access to all “testimony and interviews gathered”*. However, given the requirement of confidentiality recalled above, the Tribunal will not grant this request.

24. As the complainant succeeds for the most part, he is entitled to costs, which the Tribunal sets at 5,000 euros.

The complainant has sought an award of costs in relation to his harassment complaint and internal complaint. However, as the circumstances of the case are not exceptional, the Tribunal will dismiss this request (see Judgments 4341, consideration 8, and 4220, consideration 15).

* Registry’s translation.

DECISION

For the above reasons,

1. The decisions of the Director General of Eurocontrol of 15 December 2016 and 14 January 2016 are set aside.
2. Eurocontrol shall provide to the complainant the preliminary investigation report subject to the conditions referred to in consideration 23, above.
3. Eurocontrol shall pay the complainant 20,000 euros in moral damages.
4. Eurocontrol shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ