Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A. (No. 3)

v.

Eurocontrol

136th Session **Judgment No. 4694**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 7 February 2019 and corrected on 18 March 2019, Eurocontrol's reply of 26 June 2019, the complainant's rejoinder of 14 August 2019 and Eurocontrol's surrejoinder of 26 November 2019;

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

Having examined the written submissions;

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

The complainant challenges the decision confirming his fitness for work and instructing him to resume his duties.

The complainant joined the Eurocontrol Agency, the secretariat of the Organisation, on 16 September 1991. In 2013, through his treating physician, Dr G., the complainant submitted a request to the Organisation's Medical Adviser for his working hours to be reduced to 80 per cent due to a medical condition. This request was granted for the period from 5 March to 5 April 2013. In November 2015, the complainant's condition worsened after he fell on the stairs at home. On 30 March 2016, in view of the number of days when the complainant had been absent due to illness, the Director General set up an Invalidity Committee to determine the extent of his invalidity. This Committee consisted of the

Organisation's Medical Adviser (Dr V.), the complainant's treating physician (Dr G.) and a third doctor selected by the other two (Dr M.). The Committee asked for two expert medical consultations to be carried out, one psychiatric and the other physical, before it issued its opinion.

By letter of 27 February 2017, the complainant was informed that the Invalidity Committee had met on 9 February 2017 and had concluded that he did not have a permanent invalidity that could be considered as total and that would prevent him from performing the duties corresponding to a post within his grade. As a consequence, the complainant was required to return to work. His psychiatrist subsequently supplied a new certificate of unfitness for work and signed him off for a period of two months. On 14 April 2017, the complainant, who had produced further medical certificates, was asked by the Medical Service to attend a medical examination to be carried out by Dr M. The latter found that nothing new had transpired since the Invalidity Committee had met on 9 February 2017 and that the complainant's situation was unchanged, "or, if anything, better".

The complainant produced new medical certificates covering the period from 1 June to 31 August 2017. By letter of 29 June 2017 from the Directorate of Human Resources, the complainant was informed that, as a result of Dr M.'s opinion issued in April 2017 which confirmed that his condition had not changed since the Invalidity Committee had issued its opinion on 9 February, he was required to return to work, failing which his absence would be regarded as unjustified. By letter of 26 July 2017, the complainant was informed that his absences would be taken out of his annual leave entitlement and then deducted from his salary on the grounds that he had failed to return to work. He was also advised that disciplinary proceedings could be instituted if he did not return to work by mid-August.

The complainant returned to work on 1 September 2017 but also requested a part-time working arrangement, namely 50 per cent of his normal working hours, on the basis of a medical certificate. Although it would normally be for the Medical Adviser to authorise such an arrangement, the Organisation allowed the complainant to work on a 50 per cent basis between 1 September and 8 October 2017 as the

Medical Adviser was unavailable during that period. An appointment with the Medical Adviser was scheduled for 9 October 2017. On 5 October 2017, the complainant was admitted to hospital emergency and issued with a certificate of unfitness for work for the period from 5 to 10 October. For this reason, he was unable to attend the appointment for his medical examination with the Organisation's Medical Service. When the complainant's treating physician issued a further medical certificate valid until 30 November 2017, the Administration reopened the procedure for reviewing the Invalidity Committee's opinion.

In the meantime, by letter of 20 October 2017, the complainant was informed by the Directorate of Human Resources that, as he had missed his medical appointment on 9 October, subsequently rescheduled to 12 October, no medical certificate could be accepted to justify his absences, which would therefore be deducted from his annual leave entitlement.

On 19 January 2018, the complainant underwent a medical examination as a result of which Dr M. concluded that he was fit for work. By an internal memorandum of 20 March 2018 addressed to the Principal Director of Resources, the Medical Adviser also concluded that the complainant was fit for work, notwithstanding the further medical certificates supplied since the Invalidity Committee's opinion. On 30 March 2018, the complainant was invited to return to work. By a letter of 10 April 2018, which made reference to the earlier letter of 30 March, the Head of the Human Resources and Services Unit again invited the complainant to return to work, stating that all future absences would be regarded as unjustified.

On 16 April 2018, the complainant submitted a request to work on an administrative part-time basis. By decision of the Director General of 8 May, the complainant was authorised to work on a 50 per cent basis from 1 April to 31 December 2018 and, as a consequence, his remuneration was also reduced by 50 per cent. In his internal complaint lodged on 10 July 2018, the complainant challenged the decision of 10 April 2018 confirming that he was fit for work and instructing him to resume his duties, as well as the decision of 8 May 2018 reducing his salary to 50 per cent in line with his part-time hours. On 18 July, the

Administration acknowledged receipt of his internal complaint and conveyed it to the Joint Committee for Disputes, informing the complainant that this constituted a "decision upon the claim" – within the meaning of the Tribunal's case law – the effect of which was to interrupt the 60-day period on the expiry of which an implied rejection decision may arise under Article VII, paragraph 3, of the Statute of the Tribunal.

Considering that his internal appeal was paralysed, the complainant filed a complaint with the Tribunal on 7 February 2019, challenging an implied decision to reject it.

The Joint Committee for Disputes met on 15 January 2019 and issued an opinion on 29 March 2019 in which it unanimously concluded that the internal complaint was unfounded. By internal memorandum of 9 May 2019, the Head of the Human Resources and Services Unit, acting by delegation of power from the Director General, endorsed the Committee's opinion and rejected the complainant's internal complaint on the grounds that it was unfounded.

In his complaint, the complainant asks the Tribunal to set aside the decision of 10 April 2018 confirming that he was fit for work and instructing him to resume his duties. In his rejoinder, he also asks for the setting aside of the decision of 9 May 2019, which expressly rejected his internal complaint and which was taken while the proceedings were ongoing. He seeks damages in the amount of 45,111.60 euros for the material injury he considers he has suffered. In addition, he seeks an award of 20,000 euros for the moral injury he alleges he has suffered, together with costs.

Eurocontrol asks the Tribunal to declare the complaint irreceivable and, subsidiarily, to dismiss it as entirely unfounded.

CONSIDERATIONS

1. In his brief, the complainant asks the Tribunal to set aside the implied decision rejecting his internal complaint of 10 July 2018. He describes the object of his complaint as being "to set aside the decision

of 10 April 2018 that declared the complainant fit for work and instructed [him] to resume his duties; to order the Organisation to compensate the complainant for material and moral injury; [and] to order the Organisation to pay all the costs".

The complainant had described his internal complaint of 10 July 2018 as challenging the decision of 10 April 2018 and the decision of 8 May 2018 which adversely affected him, and stated that it was made on the basis of Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency. In the internal complaint, the complainant also referred, this time citing Article 92(1) of the Staff Regulations, to the application he had made to be considered eligible for the arrangements for part-time work on medical grounds ("PTWMG") provided for in Article 2(1)(b) of Rule of Application No. 48 relating to medical part-time.

2. Article 92(1) and (2) of the Staff Regulations provides as follows:

> "1. Any person to whom these Staff Regulations apply may submit to the Director General a request that he takes a decision relating to him. The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.
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> 2. Any person to whom these Staff Regulations 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 he has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. The period shall start to run:
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> - on the date of publication of the act if it is a measure of a general nature;
> - 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; if, however, an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of

that other person on the date on which he receives notification thereof but in no case later than the date of publication;

- on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided in paragraph 1.

The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 93."

Article 2(1)(b) of Rule of Application No. 48 provides as follows:

"Article 2
Arrangements for part-time work on medical grounds

1. On establishing the first period of PTWMG and following confirmation of each extension of PTWMG provided for in paragraph 5 of Article 1 of this Rule of Application, the Medical Adviser must specify one of the following arrangements:

[...]

b) PTWMG involving a reduction in the number of full days or half-days to be worked: this results in the granting of PTWMG absence days calculated in accordance with the PTWMG percentage and duration. The number of days' absence on PTWMG must be less than or equal to half of the number of working days in the concerned week. The full-days or half-days of work, as stipulated by the Medical Adviser when granting authorisation for PTWMG, must comply with the period of PTWMG specified. During the full-days/half-days worked, compliance with the rules applicable to morning and/or afternoon core time shall be mandatory.

[...]"

3. Eurocontrol submits that the complaint is irreceivable because the complainant did not comply with the requirements under Article VII, paragraph 1, of the Statute of the Tribunal to exhaust the internal means of redress available to him as an official of the Organisation. However, the Tribunal notes that, pursuant to the last sentence of Article 92(2) of the Staff Regulations, an implied decision rejecting the complainant's internal complaint, challengeable before the Tribunal, arose on the expiry of four months from the date on which that internal complaint was lodged, namely on 10 November 2018. Therefore, on 7 February 2019, the date on which the complainant filed

his complaint with the Tribunal, the internal means of redress available to him had indeed been exhausted. The complaint is therefore receivable and the objection to receivability raised by the Organisation will be dismissed.

4. The opinion of the Joint Committee for Disputes on the complainant's internal complaint of 10 July 2018 was delivered on 29 March 2019, subsequent to the date on which he had filed his complaint with the Tribunal, and an express decision rejecting the internal complaint was taken on 9 May 2019 by the Head of the Human Resources and Services Unit, acting by delegation of power from the Director General and endorsing the unanimous recommendation of the Committee that the internal complaint was unfounded. In his rejoinder, the complainant therefore also challenges that decision.

Since the parties have had ample opportunity to comment in their submissions on the express decision to reject the complainant's internal complaint of 10 July 2018, the Tribunal considers it appropriate to treat the complaint as being directed against that decision.

5. The complainant also requests an oral hearing. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and the relevant evidence. The request for an oral hearing is therefore dismissed.

6. The Tribunal observes from the outset that there is some confusion surrounding the object of the complainant's internal complaint of 10 July 2018 and the object of the present complaint.

On the one hand, the internal complaint purports to challenge both the decision of 10 April 2018, which confirmed to the complainant that he was fit for work and, as a consequence, that he was required to resume his duties, and the decision of 8 May 2018, which resulted from the complainant's request to work on an administrative part-time basis and which confirmed that the Director General had authorised him to work for 50 per cent of his normal working hours for the period from

1 April to 31 December 2018, with his remuneration reduced to 50 per cent.

On the other hand, in his complaint before the Tribunal, the complainant seeks the setting aside of the decision of 10 April 2018 only and does not mention the decision of 8 May 2018, although the claim for material damages, in the sum of 45,111.60 euros, corresponds to 50 per cent of his remuneration for the period from 1 April to 31 December 2018.

Lastly, in his internal complaint of 10 July 2018, the complainant states that it includes an application for him to be regarded as eligible for the arrangements for part-time work on medical grounds, made on the basis of Article 92(1) of the Staff Regulations, but this is not mentioned in his complaint before the Tribunal. Nonetheless, the express rejection decision of 9 May 2019, which ultimately constitutes the impugned decision, states that the Administration has refused to allow the complainant to work part-time on medical grounds, based on the findings of the Organisation's Medical Adviser which stated that his situation was stable compared with the situation assessed on 9 February 2017 by the Invalidity Committee, whose findings the complainant did not formally challenge.

7. The Tribunal turns first of all to the application to be regarded as eligible for the arrangements for part-time work on medical grounds made by the complainant in his internal complaint of 10 July 2018, but not reiterated in his complaint before the Tribunal. In view of the fact that the complainant stated in his internal complaint that his request was made pursuant to Article 92(1) of the Staff Regulations, it must be noted that the only decision expressly rejecting that request is the decision of 9 May 2019.

Where such a request is made, Article 92(1) provides that if no reasoned decision has been provided to the complainant within four months from the date of the request, this is deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with Article 92(2). Therefore, regardless of whether a

decision rejecting such a request is implied or express, it must give rise to a new internal complaint on the part of the complainant.

8. However, the submissions show that no internal complaint challenging this implied or express decision to refuse to regard him as eligible for the arrangements for part-time work on medical grounds was ever made by the complainant at the relevant time, and therefore he did not exhaust the relevant internal means of redress, thus contravening the requirements of Article VII, paragraph 1, of the Statute of the Tribunal.

Furthermore, the Tribunal notes that, in the present case, any claim to be eligible for the arrangements for part-time work on medical grounds provided for in Rule of Application No. 48 would be incompatible with the request that the complainant himself made on 16 April 2018, which was instead a request for administrative part-time, submitted on the form prescribed for this purpose and established pursuant to Article 55a and Annex IIa to the Staff Regulations.

It is clear from the submissions that it was the complainant who made a request for administrative part-time, who chose to fill in the corresponding form and who signed the request stating that he wanted a standard 2.5 day part-time arrangement. He phrased his request in accordance with the provisions of Article 55a of the Staff Regulations, which allows all officials to make such a request, as follows:

> "1. An official may request authorisation to work part-time.
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> The Director General may grant such authorisation if this is compatible with the interests of the service."

In response to this request for administrative part-time, in the decision of 8 May 2018 the Head of Staff Administration Services, acting on behalf of the Director General and by delegation of power, authorised the complainant to work for 50 per cent of his normal working hours for the period from 1 April to 31 December 2018, his remuneration being reduced to 50 per cent. As the Organisation notes in its submissions, the complainant submitted a request for administrative part-time and this request was granted on the basis of the arrangements he had asked for.

In the circumstances, the Joint Committee for Disputes was right to state in its opinion, which was subsequently endorsed by the Organisation, that the complainant had implicitly withdrawn his request for part-time work on medical grounds.

It follows that, no matter from which angle the complainant's application to be considered eligible for the arrangements for part-time work on medical grounds is viewed, the request is both irreceivable and unfounded.

9. Turning next to the complainant's claim that the decision of 10 April 2018 be set aside to the extent that it confirmed that he was fit for work and required him to resume his duties, the Tribunal notes that, in all the arguments he raised during the period from 1 April to 31 December 2018, the complainant did not actually dispute his fitness for work or his ability to resume his duties, even though that was the sole and specific object of the decision of 10 April 2018.

It must be noted that, neither in his request for administrative part-time, which he submitted on 16 April 2018, nor in his request to be regarded as eligible for medical part-time, to which his counsel refers in the internal complaint of 10 July 2018, does the complainant dispute his fitness for work or his ability to resume his duties. What he is contesting, in actual fact, is the requirement for him to work under any arrangements other than the arrangements for part-time work on medical grounds for the period from 1 April to 31 December 2018; however, that requirement did not result from the decision of 10 April 2018 but from the decision of 8 May 2018, which was taken in response to the complainant's own request to be allowed to work part-time.

With regard to the complainant's fitness for work, the Tribunal also notes that, according to the submissions, the Organisation confirmed to the complainant on 10 April 2018 that he was fit for work in accordance with an earlier letter of 30 March 2018, which made reference to the follow-up medical examination carried out by Dr M. on 14 April 2017. That examination had, in turn, confirmed the content of the Invalidity Committee's opinion of 9 February 2017 regarding his fitness for work.

However, there is nothing in the submissions to suggest that the complainant made any objection to the Invalidity Committee's opinion of 9 February 2017, to the opinion provided by Dr M. following the medical examination of 14 April 2017, or to the Medical Adviser's findings of 30 March 2018 confirming what had already been established by the Committee's opinion and the doctor's medical examination.

Lastly, the material damages claimed by the complainant represent the difference between the partial remuneration that he received and that which he would have received if his remuneration had not been reduced. However, no compensation claim of this sort was made in his internal complaint of 10 July 2018 or addressed in the subsequent opinion of the Joint Committee for Disputes of 29 March 2019 or in the impugned decision of 9 May 2019.

It follows that this further claim is also irreceivable, since it was never raised in the context of the complainant's internal appeal procedures, in addition to being unfounded, since the complainant was paid 50 per cent of his remuneration precisely as he himself had requested (see, by way of a comparable precedent, Judgment 4547, consideration 11).

10. In his submissions, the complainant also maintains that insufficient reasons were provided for the contested decision of 10 April 2018. However, since this decision makes specific reference to the previous letter of 30 March 2018 and to the Medical Adviser's decision annexed thereto, which referred to the findings of Dr M. being unchanged, and since the chronology of events drawn up by Dr M. on 8 March 2018 and the note of 20 March 2018 from the Organisation's Medical Adviser, Dr V., had been notified to the complainant, the Tribunal considers it beyond doubt that, when he received the impugned decision of 10 April 2018, the complainant was fully able to understand the reasons why it had been taken and to determine the consequences thereof so that he could take the necessary steps in the circumstances, if appropriate.

Furthermore, the impugned decision of 9 May 2019 rejecting the complainant's internal complaint of 10 July 2018 contains a detailed and clear statement of reasons which makes reference to both the opinion of the Joint Committee for Disputes of 29 March 2019 and the situation as assessed by the Invalidity Committee on 9 February 2017.

It follows that neither the decision of 10 April 2018 nor the impugned decision is flawed for insufficient reasoning. This plea is unfounded.

11. Lastly, in support of his claim for the decision of 10 April 2018 to be set aside, the complainant relies, in his complaint, on what he describes as blatant errors of assessment on the part of Eurocontrol and errors in relation to the procedural safeguards to which he was entitled, in that the Organisation disregarded the reports from the medical expert he had appointed and from his psychiatrist. In this regard, he refers to a psychiatric report of 28 February 2018, of which Dr M. did indeed take account in his note of 30 March 2018, and to a report of 14 February 2018, which is in fact a technical note from the insurance company's doctor intended for use in the case management of the complainant's file and which deals with consolidation of his permanent incapacity.

In Judgment 4580, consideration 19, the Tribunal recalled that, when decisions have been taken on the basis of expert evidence, it is not the Tribunal's role to substitute its assessment for that of an expert, unless that assessment is affected by a blatant error (see also Judgments 4464, consideration 7, 4277, consideration 20, and 4278, consideration 16). However, far from establishing the existence of a blatant error, the arguments set up by the complainant against the Organisation's medical evidence amount instead to a request for the Tribunal to substitute its assessment for that of the Organisation in relation to a medical matter.

In this case, not only does the complainant misunderstand the Tribunal's role in this regard, but it must also be noted that the file does not contain any medical certificates that would justify his inability to work for more than 50 per cent of his hours. The medical certificates or expert medical reports to which the complainant refers in his submissions

cover periods either after 31 December 2018 or before 1 April 2018, or they concern reports or prescriptions relating to different periods.

Consequently, this plea is also unfounded.

12. As for the moral injury which the complainant alleges he has suffered but for which no further evidence is provided in his submissions, the Tribunal notes that since, as can be seen from the foregoing, there is nothing unlawful in the impugned decision, the Organisation cannot be accused of having done anything wrong. The claims for damages under this head must therefore be dismissed.

13. Finally, in relation to the unreasonable delay in dealing with his internal complaint, to which the complainant refers in his rejoinder, given that the internal complaint was dated 10 July 2018, the opinion of the Joint Committee for Disputes was dated 29 March 2019 and the Organisation's express decision rejecting the internal complaint was dated 9 May 2019, the Tribunal does not consider it appropriate to award the complainant any compensation under this head. Even though it is true that the period that elapsed between the date on which the internal complaint was lodged and the date of the express decision rejecting that complaint exceeded the period provided for in Article 92(2) of the Staff Regulations, the Tribunal considers that the delay in question cannot be regarded as unreasonable in the circumstances of the case. What is more, the complainant has adduced no evidence of any injury that could result from this delay.

14. It follows from all the foregoing considerations that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ