

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**K.**

**v.**

**Eurocontrol**

**137th Session**

**Judgment No. 4768**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. K. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 18 May 2020, Eurocontrol's reply of 14 August 2020, the complainant's rejoinder of 15 October 2020, Eurocontrol's surrejoinder of 8 January 2021, the complainant's further submissions of 9 July 2021 and Eurocontrol's final comments thereon of 7 October 2021;

Considering the Tribunal's request for further submissions of 26 June 2023, the complainant's comments of 10 July 2023, and Eurocontrol's comments of 26 July 2023;

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 impugns what he refers to as decisions concerning Eurocontrol Agency's reorganisation and his transfer following that reorganisation.

The complainant joined Eurocontrol in 2006. At the material time, he was an administrator in the Central IT (CIT) Service of the Central Route Charges Office, Finance and Central IT Directorate (CFI).

By an internal memorandum of 4 July 2019, the Director General notified all staff of a change in the Agency's organisational structure intended to improve organisational efficiency and effectiveness. Among the reasons for the Agency's structural changes, he referred to the staff non-replacement policy approved by Eurocontrol's decision-making bodies and to a related study and its recommendations. Those recommendations focused on reducing the number of units in the Agency and on grouping activities and expertise to build synergies and avoid duplication of tasks in different directorates. The memorandum stated that the reorganisation would come into effect on 4 July 2019, but that it should be implemented by the end of September 2019 "through final organisational decisions at Directorate and Units level" regarding staff moves and the possible publication of competitions among other matters. CIT was among the departments affected by the changes and was transferred to the Technology Division of the Network Management Directorate (DNM).

By an internal memorandum of 5 July 2019, the Network Manager Director informed staff that he was working to implement the Directorate's new structure, to assign staff within the new structure and to identify the possible publication of competitions, all by the end of September 2019. He also designated the managers who would be in charge of the various DNM divisions in the meantime.

On 20 September 2019 the Director General signed Decision No. I/25a (2019) 04/07/2019 concerning Eurocontrol Agency's organisation and Decision No. XVI/4 (2019) 04/07/2019 regarding the organisation of the Network Management Directorate. These decisions stipulated that they would take effect on 4 July 2019.

On 27 September 2019 the Director General took a decision to reassign a number of staff, pursuant to which the complainant was transferred to the IT Organisation, Coordination and Business Relations Management (NMD/TEC/OCB) Unit in the DNM's Technology Division.

On 21 October 2019 the complainant lodged an internal complaint pursuant to Article 92 of the Staff Regulations governing officials of the Eurocontrol Agency against the transfer decision of 27 September

2019 insofar as it concerned him. In the internal complaint, he criticised the “degradation” of his responsibilities and requested a “written individual decision that specific[d] [his] tasks and responsibilities that [were] as a minimum in the scope of [his] previous job with a proper assessment of the grade associated to the new position”.

On 28 November 2019 the Administration acknowledged receipt of the complainant’s internal complaint and forwarded it to the Joint Committee for Disputes. The complainant was informed that this was a “decision upon [the] claim” – within the meaning of the Tribunal’s case law – that had the effect of suspending the 60-day period at the expiry of which an implied rejection decision could arise under Article VII, paragraph 3, of the Statute of the Tribunal.

On 4 and 5 May 2020 organisational charts for the Technology Division were sent to the staff in that division.

The complainant filed a complaint with the Tribunal on 18 May 2020 to impugn an implied rejection decision.

In its opinion of 24 November 2020, which followed a meeting held on 8 October 2020, the Joint Committee for Disputes found unanimously that the complainant’s internal complaint was well founded. It added that he should have been provided with a job description.

On 1 October 2021 the Director General informed the complainant that he did not agree with the Committee’s opinion and that he had decided to dismiss his internal complaint as irreceivable and unfounded.

The complainant asks the Tribunal to set aside the decision of 27 September 2019 transferring him, the Director General’s internal memorandum of 4 July 2019 and the organisation charts dated 4 and 5 May 2020. He also asks the Tribunal to “order [Eurocontrol] to comply” with Articles 7 and 30 of the Staff Regulations and to establish and provide him with a real post and a description of his duties, tasks and responsibilities commensurate with his grade, level and experience. He further claims an award of 25,000 euros in compensation for the moral injury he considers he has suffered, the amount of which he re-assesses in his rejoinder at 50,000 euros. Lastly, he seeks costs, which he assesses at 8,000 euros in his comments of 10 July 2023.

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

### CONSIDERATIONS

1. In his complaint of 18 May 2020, the complainant impugns before the Tribunal the implied decision to reject his internal complaint lodged on 21 October 2019 pursuant to Article 92 of the Staff Regulations governing officials of the Eurocontrol Agency. In that internal complaint, the complainant challenged the collective transfer decision of 27 September 2019 in so far as it transferred him to the NMD/TEC/OCB Unit in the Technology Division of the Network Management Directorate (DNM) following the Agency's reorganisation. According to the complainant, that reorganisation had been carried out without transparency and without proper consultation with him, it had not taken into account the responsibilities to be assigned to each staff member, and it could scarcely be in the service's or staff members' interests owing to its lack of clarity and precision. The complainant also asked the Director General to take an individual written decision setting out his tasks and responsibilities, which should be at least at the level of his previous position, with a proper assessment of the grade associated with this new position. He stated that he would not accept a downgrading of his role and that he expected an adequate and proper dialogue to take place on this subject.

2. Eurocontrol contends that the complaint is irreceivable because the complainant did not exhaust the internal means of redress available to him as an official of the Organisation, contrary to the requirements of Article VII, paragraph 1, of the Statute of the Tribunal. However, the Tribunal notes that, under the last sentence of Article 92(2) of the Staff Regulations, an implied decision rejecting the complainant's internal complaint that could be challenged before the Tribunal arose when four months had passed from the date on which that internal complaint had been lodged, that is on 21 February 2020 (see Judgments 4696, consideration 2, 4695, consideration 2, and 4694, consideration 3).

Consequently, by the date on which the complainant filed his complaint with the Tribunal, the internal means of redress available to him had indeed been exhausted, subject only to consideration 5, below. The Organisation's objection to receivability in this respect must therefore be dismissed.

3. In his further submissions, the complainant raised the point that, after he had filed his complaint with the Tribunal, on 24 November 2020 the Joint Committee for Disputes eventually issued its opinion on his internal complaint of 21 October 2019. This led to the Director General taking the decision of 1 October 2021 explicitly rejecting that internal complaint, in which he stated that he disagreed with the Committee's unanimous opinion and found the internal complaint irreceivable and unfounded.

Since the parties had the opportunity to comment fully in their submissions on the decision expressly rejecting the complainant's internal complaint, the Tribunal considers that, in accordance with its case law, it is appropriate to treat the complaint as if it were directed against that decision (for similar cases, see, in particular, Judgments 4660, consideration 6, 4065, consideration 3, and 2786, consideration 3).

4. In this decision of 1 October 2021, the Director General considered that the complainant's internal complaint of 21 October 2019 was irreceivable because nothing in the Organisation's Staff Regulations and Rules of Application required him to take, as the complainant demanded, "a written individual decision that specifie[d] [the complainant's] tasks and responsibilities that [were] as a minimum in the scope of [his] previous job with a proper assessment of the grade associated to the new position". However, the Director General's determination in fact relates to the merits of the internal complaint and to a right claimed by the complainant in the context of the internal procedure applicable to a reorganisation, not to the receivability of the internal complaint as such. The Tribunal cannot therefore endorse the Director General's conclusion.

5. However, the Tribunal observes that, in his internal complaint of 21 October 2019, in addition to challenging his transfer on 27 September, the complainant – as he himself states in his rejoinder – in effect requested a position complying with the applicable rules and the corresponding job description. In Judgment 4694, consideration 7, in the case of such a request, the Tribunal pointed out that Article 92(1) of Eurocontrol’s Staff Regulations, on which the complainant relies, provides that, if that request is rejected, whether implicitly or explicitly, an internal complaint as referred to in Article 92(2) must be lodged against that rejection before the matter is brought before the Tribunal. In Judgment 4694, consideration 8, the Tribunal further stated:

“However, the submissions show that no internal complaint challenging this implied or express decision to refuse [his request] 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.”

It follows that the challenge to the decision rejecting the request for “a written individual decision that specific[d] [the complainant’s] tasks and responsibilities that [were] as a minimum in the scope of [his] previous job with a proper assessment of the grade associated to the new position” is irreceivable because the complainant failed to exhaust internal remedies. The same applies to the complainant’s claim requesting the Tribunal to order Eurocontrol to establish and provide him with a “real position and a description of the duties, tasks and responsibilities [...] commensurate with his grade, level and experience”.

6. The complainant submits that the organisational charts of 4 May 2020 and 5 May 2020 – which, incidentally, were merely documents appearing on slides used during an internal presentation by the DNM’s Technology Division – are unlawful or invalid. However, these documents post-date the complainant’s internal complaint of 21 October 2019 and he cannot in any event allege that they are unlawful for the first time before the Tribunal. This claim must therefore also be dismissed as irreceivable.

7. The complainant further requests that the Director General’s internal memorandum of 4 July 2019 be set aside, but that claim is irreceivable. Under the Tribunal’s settled case law, a general decision intended to serve as a basis for individual decisions – as is the case of the memorandum at issue – cannot be impugned, save in exceptional cases, and its lawfulness may only be challenged in the context of a challenge to the individual decisions that are taken on its basis (see, for example, Judgments 4734, consideration 4, 4572, consideration 3, 4278, consideration 2, 3736, consideration 3, and 3628, consideration 4).

8. In respect of the complainant’s submission in paragraph 81 of his rejoinder that compliance by Eurocontrol with its obligations “should take the form of the assignment of the post of Head of SQI\*, currently filled by an acting post holder, which should be announced vacant and possibly filled by means of a transfer pursuant to Article 7\*\*”, it must be noted that this request is not one of the claims formally set out by the complainant in his submissions. Moreover, even if this submission were to be construed as a claim, it would in any event be irreceivable as it was not raised by the complainant at any point in his internal complaint of 21 October 2019. The complainant has thus not exhausted the internal means of redress in this respect either.

9. Lastly, the Tribunal considers that the complainant’s claim for Eurocontrol to be “ordered to comply” with Articles 7 and 30 of the Staff Regulations cannot be granted. It is settled case law that it is not for the Tribunal to issue such general declarations or declarations of law, or declaratory orders (see, for example, Judgments 4637, consideration 6, 4492, consideration 8, and 4246, consideration 11).

10. It follows from these various considerations that the complaint is receivable only in that it is directed against the collective transfer notice of 27 September 2019 in so far as it concerned the complainant.

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\* IT Security and Quality.

\*\* Registry’s translation.

11. The complainant's arguments against that decision focus on, firstly, its lack of reasoning; secondly, its failure to respect the principles of legal certainty, transparency and sound administration in the implementation of the Agency's reorganisation, in breach of competitive recruitment procedures and Articles 7 and 30 of Eurocontrol's Staff Regulations; and, thirdly, the frustration of his legitimate expectations concerning the assignment of his post and his job description, and a breach of his right to be heard on this matter.

12. In respect of staff transfers, the Tribunal stated the following in Judgment 4687, consideration 5, which refers to Judgments 4595, consideration 2, and 4427, consideration 2:

“Consistent precedent has it that an executive head of an international organization has wide discretionary powers to manage the affairs of the organization pursuant to the policy directives and its rules, and that such decisions are consequently subject to only limited review. The Tribunal will ascertain whether a transfer decision is taken in accordance with the relevant rules on competence, form or procedure; whether it rests upon a mistake of fact or law, or whether it amounts to abuse of authority. The Tribunal will not rule on the appropriateness of the decision as it will not substitute the organization's view with its own.”

Among the complainant's various pleas against the contested transfer decision, there is one which falls within the limited scope of the Tribunal's power of review thus defined, since it relates to a breach of procedural rules, and is decisive for the outcome of this dispute. This plea concerns a breach of the complainant's right to be heard before the decision was taken.

13. The Tribunal observes in this respect that the submissions and the evidence do not show that the complainant was given any opportunity to give his views on his transfer before it was put into effect by the collective transfer notice of 27 September 2019, although, contrary to the Organisation's submissions, his new duties were not strictly identical to his previous ones.

In Judgment 4609, consideration 8, the Tribunal recalled that its case law “requires that a staff member who is to be transferred be informed in advance of the nature of the post proposed for her or him



and, in particular, of the duties involved, so that she or he is able to comment on those new duties [...] (see, for example, Judgments 4451, consideration 11, 3662, consideration 5, 1556, considerations 10 and 12, and 810, consideration 7)”. Similarly, in Judgment 4399, consideration 9, the Tribunal noted that “a proper consultation with the complainant prior to the decision being taken” was necessary.

While it is true that this case law concerned individual transfers and not a collective transfer as in the present case, the Tribunal considers that the Organisation is wrong to submit that this requirement does not apply here because there is nothing in its Staff Regulations and Rules of Application imposing such an obligation in the context of a collective transfer carried out in the interests of the service.

Firstly, the absence of a binding provision to this effect in the applicable rules cannot permit an organisation to disregard the principles established by the Tribunal’s case law. Secondly, the fact that the transfer was collective rather than individual does not exempt the Organisation from this fundamental requirement. Although the Tribunal’s case law has it that the general principle protecting a staff member’s right to be heard cannot be applied to a general, impersonal decision which is collective in scope (see, for example, Judgments 4593, consideration 7, and 4283, consideration 6), in the present case, even if the impugned decision was collective in scope, it was obviously not impersonal. The Tribunal considers that a decision which, as in this case, notifies specifically identified staff members of their new individual postings with effect from 4 July 2019 cannot be considered an impersonal decision.

The Tribunal is not persuaded by Eurocontrol’s argument that it would not be “conceivable or even possible” for an organisation to consult individually each staff member before a collective transfer on the scale of that at issue in the present case, which affected over 600 staff members. The Organisation cannot refer to the scale of the collective transfer in support of its argument that it was not required to allow every staff member to comment before transferring her or him, even if this was done in a manner that was adapted and appropriate to the particular situation of this major reorganisation.

14. As this plea is well founded, it follows that the Director General's collective transfer decision of 27 September 2019 must be set aside in so far as it affected the complainant, without there being any need to rule on the complainant's other pleas in its respect.

15. The complainant seeks compensation in the amount of 50,000 euros for the moral injury caused to him by the unlawful decisions. The Tribunal considers that, owing to the circumstances in which the complainant's transfer took place, without him being afforded any opportunity to express his views or to be heard before it was put into effect, that transfer was bound to hurt and shock him and thereby cause him substantial and serious moral injury. The Tribunal considers that this moral injury will be fairly redressed by awarding the complainant compensation in the amount of 10,000 euros.

16. The Tribunal finds that, as the complainant argues in his submissions, the delay of 23 months in reaching a decision on his internal complaint was clearly excessive and it was particularly unreasonable that the Director General did not take a decision until more than 10 months after the Joint Committee for Disputes had issued its opinion. As the complainant has not submitted any claim for damages under this head, no specific order will be made. However, the Tribunal wishes to point out to Eurocontrol that such a delay, which it does not convincingly justify in its submissions, is unacceptable.

17. As the complainant succeeds, he is entitled to the sum of 8,000 euros that he claims in costs.

DECISION

For the above reasons,

1. The Director General's collective transfer decision of 27 September 2019 is set aside insofar as it concerns the complainant.
2. Eurocontrol shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay him costs in the amount of 8,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLÉMENT GASCON

MIRKA DREGER