

The Administrative Tribunal,

Considering the complaint filed by Mr R. D. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 October 2004, the Agency's reply of 28 January 2005, the complainant's rejoinder of 22 April and Eurocontrol's surrejoinder of 29 July 2005;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Belgian national born in 1962, works as a supervisor at grade B2 in the Flight Data Operations Division of the Central Flow Management Unit (CFMU) in Brussels.

From 10 to 14 March 2003 part of the CFMU staff went on strike. On 13 March 2003 the complainant accepted the invitation of one of the Agency's trade union organisations, the Eurocontrol section of the European Civil Service Federation (hereinafter referred to as "FFPE-Eurocontrol"), to accompany its president to a meeting with the Director General that same evening. The meeting ended around 10.20 p.m. and the complainant left the Agency at one minute past midnight. According to the shift-roster, he should have returned to work on 14 March at 6.30 a.m., but he failed to appear.

By a memorandum of 17 March 2003 the Director of Human Resources invited him to attend a hearing in the context of "possible disciplinary action". In a report attached to the memorandum it was specified that the matters on which he was invited to present his views were, firstly, his participation in the "illicit" strike action and, secondly, his non-performance of duty in breach of Article 11, paragraph 2, of the Staff Regulations governing officials of the Eurocontrol Agency.\* By a memorandum of 19 March the hearing was set for 24 March 2003.

By letter of 20 March addressed to the Director General, the complainant requested that the charges held against him personally be communicated to him, that all relevant documents be translated into French and that a later date be arranged for the hearing in order to allow him time to prepare his defence. These requests were denied that same day by the Director of Human Resources. The complainant did not appear at the hearing on the set date.

The complainant was informed in a memorandum of 18 July that the Director General had referred the matter to the Disciplinary Board by submitting a report on the charges held against him, a copy of which was attached to the memorandum. The Board issued its opinion on 19 December 2003, after hearing witnesses in the presence of the complainant and his counsel. The Board found that the complainant had not taken part in the strike but concluded by a majority that he had been absent without authorisation and had thus breached the statutory provisions governing absences and the continuity of the service. It recommended a deferment of his advancement to a higher step, a disciplinary measure provided for in Article 88(2)(c) of the Staff Regulations, for a period of six months from the date of notification of the sanction.

In an e-mail of 14 January 2004 the Director of Human Resources invited the complainant to attend a hearing that same day, before a disciplinary measure was taken against him. The complainant replied that he preferred the hearing to be arranged with his counsel at a later date so that the latter could be present. On the same day counsel requested that it be postponed *sine die*. The Director of Human Resources agreed by fax to postpone the hearing by one day, adding that if the complainant did not appear at the specified time he would be deemed to have waived his right to be heard. As the complainant did not appear on 15 January, the Director of Human Resources, delegated by the Director General, applied the proposed sanction that same day.

On 13 April 2004 the complainant filed an internal complaint against that decision, and the matter was referred to

the Joint Committee for Disputes. It delivered its opinion on 16 July, concluding that, while a sanction for unauthorised absence was justified, the level of the sanction was not proportionate to the charges against the complainant. It therefore recommended that he should only incur one of the first two disciplinary measures provided for in Article 88(2) of the Staff Regulations.

In a memorandum of 22 July 2004, which constitutes the impugned decision, the Director of Human Resources, acting on behalf of the Director General, informed the complainant that his internal complaint was dismissed as unfounded.

B. The complainant puts forward four pleas in support of his complaint. Firstly, he argues that the procedure was flawed insofar as the report which he was sent on 17 March 2003 did not make clear the charges held against him personally. He also asserts that those charges were not specified subsequently either. He denounces a breach of Article 89 of the Staff Regulations, according to which an official must be heard before the disciplinary procedure is initiated. He accuses the Director of Human Resources of having rejected all his requests, in particular for a postponement of the prior hearing of 24 March 2003, despite being aware of the fact that the complainant was supposed to be on leave that day, which in his view reflects a serious breach of the Agency's duty of care and a complete disregard for his defence rights.

He complains that he was never able to defend his case before the Disciplinary Board, nor to obtain the testimonies of the witnesses heard by the Board. He also points out that, in breach of Article 9 of Rule of Application No. 12 of the Staff Regulations, the Board's opinion was not signed by all its members.

Moreover, the complainant accuses the Director of Human Resources of having "prejudged" his case. In his view, by refusing to postpone the hearing arranged for 15 January 2004 and by informing him that, if he did not appear, he would be deemed to have waived his right to be heard, the Director disregarded his defence rights and the rules of due process.

He further submits that the deadlines for the procedure were not observed, which according to him invalidates the disputed decision.

Secondly, the complainant puts forward that the Director of Human Resources lacked authority, as he has not proved that the power to order a disciplinary measure had been delegated to him by the Director General. He considers that it is contrary to the principle of good administration, to the guarantee of impartiality and to the duty of care that the same person, namely the Director of Human Resources, should not only have decided what disciplinary measure to apply, but also have replied to his internal complaint.

Thirdly, the complainant argues that he did not fail to comply with his obligations since he was not supposed to work on 14 March 2003 at 6.30 a.m., in accordance with Article 4(3) of Rule of Application No. 29.\*\* He maintains that he cannot be blamed for not having informed his supervisors that he would be absent since not only was he attending a meeting the previous evening with the Director General and the Director of Human Resources, but none of his supervisors was present when he left the Agency at night or would have been present on 14 March by the time he was supposed to resume work. He further submits that the terms of Article 1 of Rule of Application No. 12\*\*\* were breached, since the report submitted to the Disciplinary Board by the Director General made no mention of Article 60 of the Staff Regulations, which contains the rules concerning absence.

Lastly, the complainant considers that, since it has been established that he did not take part in the strike, the impugned decision was not properly substantiated.

The complainant seeks the quashing of the decisions of 15 January and 22 July 2004, repayment with interest of the remuneration withheld for his absence on 14 March 2003 since it has been recognised that he did not take part in the strike, and an order that the Agency pay him 25,000 euros for moral injury and for the damage done to his professional reputation. He claims 2,300 euros for the costs of the disciplinary procedure and 5,000 euros for costs incurred before the Tribunal. He also requests hearings.

C. In its reply Eurocontrol begins by giving its version of the facts concerning what it describes as the illicit industrial action and recalls that, in a message of 10 March 2003, the Director General had warned the staff that disciplinary measures would be taken against any staff members who joined in the strike action. It then contends that the complainant's pleas are unfounded. It asserts that the disciplinary procedure was conducted according to the

rules and that his defence rights were respected. In its view, the complainant shows bad faith in pretending that the report he received on 17 March 2003 did not enable him to understand what he was personally accused of, since the charges against him were indicated in the report.

According to the defendant, the Disciplinary Board has no obligation to attach the transcripts of testimonies to its opinion. Moreover, both the complainant and his counsel were present when the witnesses gave their statements. The Disciplinary Board's opinion was not signed by one of its members only because that member had to be rushed to hospital after attending the Board's meeting and endorsing its conclusions. The Agency considers that it had no obligation to supply a translation of the documents sent to the complainant, who is supposed to have a satisfactory knowledge of the two working languages of the Organisation, namely French and English.

In the Agency's view, the complainant should have made it clear that he had not taken part in the strike action. Yet he did not do so until 19 November 2003, before the Disciplinary Board. It maintains that even if he was on leave on 24 March 2003 he could still have attended the hearing as scheduled. It points out that he argued his case before the Disciplinary Board and chose not to avail himself of the possibility of being heard before his case was referred to the Board and prior to the decision imposing the disciplinary sanction. It accuses both the complainant and counsel of repeatedly delaying the procedure.

As for the Director of Human Resources, he was duly empowered by the Director General to sign both the disciplinary measure and the rejection of the internal complaint.

The Agency contends that the complainant is wrong to consider the time he spent at the meeting of 13 March 2003 as a period of duty in the meaning of Article 4(3) of Rule of Application No. 29. On that occasion he was not performing his duties for the CFMU; he had not been summoned by the Director General and he attended the meeting in his capacity as a member of the trade union. It accuses him of not informing his supervisors of his absence whereas he was materially able to do so and could not seriously suppose that the Director General and the Director of Human Resources, who are not his immediate supervisors, were aware of the details of the shift roster. Since he did not appear for duty on 14 March 2003 and had not requested prior authorisation, he was quite rightly penalised for breaching Article 11 of the Staff Regulations.

The Agency considers that the decision of 15 January 2004 is sufficiently substantiated and that the complainant suffered no injury. It adds that his pay was withheld on account of "non-performance" of duty. It sees no point, moreover, in the hearings requested by the complainant, since it considers he has had ample opportunity to be heard and to argue his defence.

D. In his rejoinder the complainant contends that the application of Article 4(3) of Rule of Application No. 29 is not subject to any authorisation. He also submits that the time spent attending a meeting with the Director General did constitute "working time", for which in fact he was paid. This is confirmed, in his view, by the annex to the Memorandum of Understanding governing relations between Eurocontrol and three representative trade unions, where it is stated that "participation in meetings under [the said] agreement and preparatory meetings by duly authorised trade unions' delegates shall be considered part of their official duties. Their superiors shall be so informed".

E. In its surrejoinder Eurocontrol presses its pleas. It makes it clear that the charge against the complainant was his unjustified absence, especially in view of his supervisor status, and that the charge still held, whether or not he took part in the strike. It points out that the Memorandum of Understanding mentioned by the complainant came into effect only on 16 July 2003 and that in any case the meeting with the Director General was not of the kind referred to in the memorandum. The complainant should not therefore have been paid for that task.

## CONSIDERATIONS

1. The complainant, a grade B2 official at Eurocontrol, works as a supervisor in the Flight Data Operations Division of the CFMU. On 14 March 2003, when the CFMU's operations were being affected by a strike action, he did not report for duty at 6.30 a.m. as required by the shift roster. The Director of Human Resources invited him to attend a hearing by a memorandum of 17 March, to which a report was attached explaining the charges held against him, as against all the officials who had taken part in the strike action. The memorandum indicated that the charges might give rise to disciplinary action. The date of the hearing was set for 24 March. The complainant

requested that the charges against him be communicated to him, that all relevant documents be translated into French and that a later date be set for the hearing so as to allow him time to prepare his defence properly. Since his request was rejected, he did not appear at the hearing.

2. Disciplinary action was then initiated. In a memorandum dated 18 July 2003 the complainant was informed that the Director General had referred the matter to the Disciplinary Board by submitting a report in which the complainant was accused of having taken part in an unlawful industrial action and of having failed to meet his obligation to ensure continuity of service. Appearing before the Disciplinary Board on 19 November 2003, the accused official stated that he had not taken part in the strike action and that his absence on 14 March at 6.30 a.m. was due to the fact that, having left the Agency at one minute past midnight after a meeting with the Director General, he could not be expected to take up a new shift within less than ten hours “after the end of his previous period of duty”, in accordance with the relevant provisions of Rule of Application No. 29 of the Staff Regulations.

3. These arguments led the Disciplinary Board to note that the complainant had stated that he had not taken part in the strike action on 14 March and to find that “the accusations against him concerning his participation in an illicit strike [were] no longer justified”. Nevertheless, the Board considered that the complainant had breached the statutory provisions governing absences and the continuity of service by not requesting prior authorisation for his absence, and concluded that the disciplinary measure consisting in the “deferment of advancement to a higher step” would be the most appropriate sanction in view of the complainant’s supervisory role. The Director of Human Resources, “by delegation” of the Director General, endorsed that position by a decision of 15 January 2004, after inviting the complainant without result to meet him on 14 January and again on 15 January. The immediate consequence was the deferral until 16 July 2004 of the complainant’s advancement to step 6 of grade B2, which was due on 16 January, i.e. on the day after the disciplinary measure was decided upon.

4. The complainant filed an internal complaint, which was referred to the Joint Committee for Disputes. The Committee concluded that a disciplinary measure for unauthorised absence was justified, but it recommended that the Administration impose a less severe penalty. The Director of Human Resources simply rejected the complaint by a decision of 22 July 2004 and confirmed the decision of 15 January 2004.

5. The complainant asks the Tribunal to quash the above-mentioned decisions, to order Eurocontrol to repay with interest the remuneration withheld on account of his absence on 14 March 2003 and to pay him 25,000 euros in compensation for alleged moral injury and costs.

6. The complainant puts forward four pleas in support of his complaint: (1) the procedure followed was flawed; (2) the Director of Human Resources did not have the authority to take the impugned disciplinary measure; (3) the charge of failing to comply with his obligations is unfounded; and (4) the impugned decision is insufficiently substantiated insofar as it refers only to the charges contained in the report annexed to the memorandum of 18 July 2003 accusing him of taking part in the strike action, which are “not relevant”.

7. While there is no doubt that the Director of Human Resources was authorised to take the disputed decisions, which appears to be no longer contested in his rejoinder by the complainant, who now merely refers in that respect to principles of good administration and impartiality and to the duty of care, the accusation that the procedure followed was flawed is much more serious.

It appears from the submissions that the documents on the basis of which disciplinary action was taken against the complainant were the reports sent to him on 17 March and 18 July 2003, in which he was accused of having taken part in the strike action started by the trade union and which management considered unlawful. It is true that the complainant is equally accused of failing to ensure continuity of service, a particularly serious matter for a CFMU supervisor, but the disciplinary action rests on the charge that he took part in an unlawful industrial action, as in the case of other colleagues (see Judgments 2493 and 2494, also adopted this day), and the document which substantiates the charges is essentially drafted in the same terms – apart from the aggravating circumstance arising from his supervisor status – as that which served as the basis for the proceedings against the strikers. Yet it has been established, following statements made by the complainant before the Disciplinary Board which have not been formally contested by Eurocontrol, even though it finds this belated excuse “surprising” considering that the complainant is an “active member” of FFPE-Eurocontrol, that he did not take part in the strike and that his absence was due, in his view, to the application of the rule that periods of duty must be at least ten hours apart. The Disciplinary Board’s finding that the charges brought against the complainant “concerning his participation in an illicit strike [were] no longer justified” should have led it to conclude that the charges mentioned in the report on

which the disciplinary action was based were unfounded and that the disciplinary action could not be pursued on the same basis.

A decision as serious as one imposing a disciplinary measure will be lawful only provided that the rights of the staff members concerned to a fully adversarial procedure have been scrupulously respected. Charges must be precisely worded and notified sufficiently early to enable the staff member concerned to defend his case, particularly by establishing evidence and gathering testimonies which he believes are likely to refute the charges in the eyes of the disciplinary body and of the deciding authority, according to the nature of the charges against him. Eurocontrol rightly points out that the complainant was well aware that he was being accused of failing to appear for duty on 14 March, and on that particular point he had ample time to put forward explanations for his absence, but the fact remains that the charge of participation in an unlawful strike could no longer stand. The Administration could and should have restarted the procedure as soon as it was ascertained that that charge was unfounded. But it did not do so; quite the contrary, the report attached to the memorandum of 18 July 2003 appears in the considerations of the decision of 15 January 2004, which it serves to substantiate, as the defendant admits.

8. In the circumstances, whilst the pleas regarding other procedural errors must be dismissed, and although the delay on the part of the complainant in declaring that he had not been on strike on 14 March 2003 contributed greatly to the error committed, the Tribunal cannot accept the breach of defence rights resulting from the fact that the impugned decision penalised acts other than those with which the staff member concerned was chiefly charged and that he did not have sufficient time to defend himself before the Disciplinary Board against the charges that were ultimately held against him.

9. The complainant is, accordingly, right in maintaining that the procedure was flawed and the Tribunal shall therefore set aside the decision which imposed the disputed disciplinary measure without having to consider its merits and shall order Eurocontrol to restore the complainant's administrative situation with regard to the step increase to which he was entitled on 16 January 2004. However, there are no grounds for ordering repayment of the remuneration withheld on account of the complainant's absence on 14 March 2003 since it has been established that he did not work on that day and that he did not inform his supervisors that he would be absent from duty.

10. This decision to reverse the disciplinary measure shall be deemed compensation for the moral injury the complainant alleges.

11. The complainant is entitled to costs for the procedure before the Disciplinary Board and before the Tribunal, which are set at 2,000 euros.

## DECISION

For the above reasons,

1. The decision of 15 January 2004, confirmed on 22 July 2004, is set aside.
2. Eurocontrol shall restore the complainant's rights with regard to the step advancement to which he was entitled on 16 January 2004.
3. Eurocontrol shall pay the complainant 2,000 euros in costs.
4. All further claims are dismissed.

In witness of this judgment, adopted on 9 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

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\*According to Article 11, paragraph 2, of the Staff Regulations: “On accepting service with the Agency, an official shall undertake, unconditionally, to refrain from any act which might jeopardise the safety of air navigation; he shall be bound to ensure the continuity of the service and shall not cease to exercise his functions without previous authorisation.”

\*\*According to Article 4(3) of Rule of Application No. 29: “An official shall not be assigned to a new shift unless such a shift begins at least ten hours after the end of the previous period of duty.”

\*\*\*Article 1 of Rule of Application No. 12 states in particular that: “A report shall be submitted to the Disciplinary Board by the Director General, stating clearly the facts complained of [...].”