

The Administrative Tribunal,

Considering the complaint filed by Mr F. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 1 December 2004, Eurocontrol's reply of 29 April 2005, the complainant's rejoinder of 7 June and the Agency's surrejoinder of 15 July 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The Eurocontrol Experimental Centre (EEC), situated at Brétigny-sur-Orge (France), conducts research and development activities aimed at improving air traffic control in Europe. As part of these activities, it organises simulation exercises, for which it uses the occasional services of professional airline pilots supplied by various temporary employment agencies.

It was in that context that the complainant, a French national born in 1969, undertook occasional work at the EEC between 1997 and 2003 as a simulation pilot. Through various temporary employment agencies, he thus totalled 37.50 hours in 1997, 697.75 hours in 1998, 865.47 hours in 1999, 468.75 hours in 2000, 365 hours in 2001, 353.50 hours in 2002 and 108.50 hours in 2003.

At the beginning of 2004, the complainant initiated proceedings before a French labour court, the *conseil de prud'hommes* of Longjumeau, seeking the reclassification of his contracts for temporary assignments at Eurocontrol as an indefinite appointment starting in 1997. In a judgment of 6 September 2004, the court declined jurisdiction to hear the dispute between the complainant and the Agency on the grounds that, under the terms of the "Eurocontrol" International Convention relating to Co-operation for the Safety of Air Navigation, the ILO Administrative Tribunal has exclusive jurisdiction to hear such cases. It invited the parties to bring their case before an appropriate body. The complainant filed an appeal against that judgment, which is still pending.

B. On the basis of the labour court's judgment of 6 September 2004, the complainant contends that the Tribunal is competent to hear his complaint.

He argues that his temporary contracts were governed by French private law and therefore subject to the mandatory rules of the French Labour Code.

He points out that in a judgment of 21 January 2004 concerning the conditions governing the use of temporary employment, the Social Division of the *Cour de Cassation* (the French supreme court) recalled that temporary employment contracts can neither have as their purpose nor as their effect the filling of positions relating to the normal, ongoing activities of the recruiting enterprise on a long-term basis. According to the complainant, this ruling follows a line of precedent whereby, if an employee is hired in breach of the statutory provisions (with respect, for instance, to the nature of assignments, their duration or any relevant prohibitions), the contract concerned must be reclassified as an indefinite appointment taking effect on the first day of the assignment. He maintains that, according to Article L. 124-7 of the French Labour Code, a temporary employee can sue the recruiting enterprise to have his contract reclassified as an indefinite appointment, adding that this option is available to an employee not only in the course of an assignment but also on completion of temporary assignments.

Arguing that the rules governing the use of temporary employment contracts have not been observed, the complainant contends that he is entitled to the reclassification of his temporary contracts and to the benefits attached to the indefinite appointments of regular Eurocontrol staff members.

The complainant seeks the reclassification of his temporary contracts as an indefinite appointment, retroactive admission with effect from 17 November 1997 as a fully-fledged member of Eurocontrol's staff, and the production by Eurocontrol of any document showing the salaries of staff of the Agency holding equivalent qualifications. He also claims 85,000 euros in additional salary to cover the difference between the pay he received for his temporary assignments and the salary paid to regular staff members of the Agency with equivalent qualifications, 15,000 euros in damages and 3,000 euros in costs.

C. In its reply, after recalling the relevant provisions of Article II of the Statute of the Tribunal, Eurocontrol points out that this case concerns the contractual relationship under private law between the complainant and the various temporary employment agencies which employed him. Since he never had a direct contractual link or position with the Agency, he has no right of access to the Tribunal, especially for a dispute concerning the application of French law. Eurocontrol reminds the Tribunal that it had stated in Judgment 1369 that it will not apply a State's domestic law "save where there is express *renvoi* thereto in staff regulations or contract of employment". The defendant concludes therefore that for this reason the Tribunal does not have jurisdiction over the complaint.

Eurocontrol also argues that the complaint is clearly irreceivable, firstly because the complainant is not an official of the Agency and hence has no *locus standi*, and secondly because he has neither challenged a final decision adversely affecting him nor exhausted the internal remedies.

As a subsidiary argument on the merits, Eurocontrol explains that Article L. 124-2-1 of the French Labour Code contains a list of the only reasons justifying the use of temporary employment, which includes a temporary increase in activity. It also points out that the complainant's services were provided only for specific tasks, which were of limited duration and not part of the Agency's regular activities. It therefore considers that it has in no way infringed the relevant provisions of the French Labour Code.

D. In his rejoinder the complainant recalls that Eurocontrol had insisted before the *conseil de prud'hommes* that it should decline jurisdiction to hear his complaint, relying on a clause attributing jurisdiction to the Tribunal. He therefore considers that the Agency cannot now challenge the Tribunal's jurisdiction without causing a denial of justice.

He reiterates that the dispute before the Tribunal is governed exclusively by French law. In his view, his *locus standi* cannot be denied on the grounds that he is not a Eurocontrol official, since his staff member status is bound to be recognised if his claim for the reclassification of his contracts succeeds.

The complainant disputes that there is no final decision since the Director General of Eurocontrol must have instructed his lawyers to oppose the request for reclassification of his contracts. Since, moreover, the Director General has received copies of the briefs exchanged in the course of the proceedings pending before the French courts, the requirement that internal remedies be exhausted has been met.

E. In its surrejoinder Eurocontrol rejects the complainant's argument that he would be denied justice if the Tribunal were to decline jurisdiction, on the grounds that the complainant still has the option of asking the French courts to rule on the legality of his contractual relations with his direct employer.

The defendant reiterates the arguments it gave in its reply regarding the complainant's lack of *locus standi*. Regarding the failure to exhaust internal remedies, it adds that the proceedings initiated by the complainant before the French courts are to be firmly distinguished from the present complaint, so that his submissions in those proceedings do not relieve him of the obligation to meet the requirements of the Staff Regulations governing officials of the Agency and the Statute of the Tribunal.

## CONSIDERATIONS

1. The complainant worked, via various temporary employment agencies, as a simulation pilot at the Eurocontrol Experimental Centre at Brétigny-sur-Orge from November 1997 to December 2003. He was engaged for occasional temporary assignments totalling 37.50 hours in 1997, 697.75 hours in 1998, 865.47 hours in 1999, 468.75 hours in 2000, 365 hours in 2001, 353.50 hours in 2002 and 108.50 hours in 2003. In 2004 he initiated proceedings before a French labour court, the *conseil de prud'hommes* of Longjumeau, seeking the reclassification

of his contracts for temporary assignments at Eurocontrol as an indefinite appointment starting in 1997. That court, in a ruling of 6 September 2004, declined jurisdiction to hear the case on the grounds that the “Eurocontrol” International Convention relating to Co-operation for the Safety of Air Navigation of 13 December 1960, amended by a protocol dated 12 February 1981, attributed jurisdiction over all disputes between Eurocontrol and its staff to the ILO Tribunal. The court did, however, reclassify as an indefinite appointment the employment relationship between the complainant and the last temporary employment agency by which he had been employed for his work at the EEC, ordered the agency to pay the complainant an indemnity on account of that reclassification and declared the judgment to be provisionally enforceable.

2. In a complaint filed on 1 December 2004, the complainant asks the Tribunal, inter alia, to reclassify his contracts for temporary assignments at Eurocontrol as an indefinite appointment starting from 17 November 1997, to have him admitted retroactively as a staff member of Eurocontrol and to order the Agency to pay him a salary difference estimated at 85,500 euros, as well as 15,000 euros in damages. He contends that, according to the French Labour Code and the case law of the *Cour de Cassation*, temporary employment contracts can neither have as their purpose nor as their effect the filling of positions relating to the normal, ongoing activities of the recruiting enterprise on a long-term basis, and that he is therefore justified in claiming the reclassification of his temporary assignment contracts as an indefinite appointment, with all the related entitlements of a regular official of the Agency.

3. Eurocontrol counters that the Tribunal has no jurisdiction over this case. It adds in a subsidiary argument that the complaint is irreceivable on the grounds that the complainant, who is not an official of the Agency, has no *locus standi* and has not exhausted the internal remedies.

4. The evidence on file shows that the complainant was never an official of Eurocontrol, and the only contracts he has produced are temporary contracts signed with a temporary employment agency and governed by French law. According to Article II of its Statute, the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials or such provisions of the Staff Regulations as are applicable to their case. Since the complainant is not an official of Eurocontrol, and cannot produce any employment contract signed with the latter, it follows, as the Agency rightly contends, that the Tribunal does not have jurisdiction over this dispute. The complainant cannot, moreover, invoke a denial of justice, since the French court before which he filed his case retained jurisdiction to rule on the effects of his employment relationship with the last temporary employment agency which hired him for simulation assignments, and reclassified the contracts between him and that agency.

5. The fact that Eurocontrol relied on its immunity from jurisdiction and on the Tribunal’s competence to hear disputes between the Agency and its staff in order to challenge the jurisdiction of the *conseil de prud’hommes*, cannot deprive it of its right to request that the Tribunal decline jurisdiction in accordance with its Statute.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

