

H.

v.

Eurocontrol

122nd Session

Judgment No. 3663

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. S. H. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 July 2013 and corrected on 16 September 2013, Eurocontrol's reply of 9 January 2014, the complainant's rejoinder of 18 April 2014 and corrected on 12 May, and Eurocontrol's surrejoinder of 25 July 2014;

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 alleges that his dignity was impaired in the context of his various transfers.

The complainant joined Eurocontrol in September 1997. Following a reorganisation he was transferred in March 2010 and participated in a training programme to assist with his new duties. In September 2010 he applied for early termination in accordance with the early termination of service scheme (ETS), which was open to all staff with an open-ended contract and aged 55 or over between 1 January 2011 to 31 December 2012. His request was granted and he separated from service on 1 January 2013.

In the meantime, in February 2011, pursuant to a reorganisation of the Unit in which he worked, he was offered a new position which he refused. The Director General decided on 1 March 2011 to transfer him with immediate effect to the DSR Flexible Resource Management Unit, which was a unit established (like in all Directorates) to place staff who were “in transition” following reorganisation of the units to which they were assigned until new permanent functions or suitable tasks were found. On 1 June 2011 the complainant wrote to the Director General complaining about the fact that he had not been given a justification for his transfer despite his request and stating that since the transfer he had been without any assigned job or task. He asked that he be appointed to a post commensurate with his grade and professional competencies. The Director General replied on 13 July 2011 that the reasons for his transfer had been properly explained to him by his supervisor and indicating that proposals for suitable new opportunities were under discussion with him.

On 17 April 2012 the complainant wrote two letters to the Director General. In one he made several requests pursuant to Article 92, paragraph 1, of the Staff Regulations. He asked to be appointed to a job commensurate to his competencies for at least two consecutive years before leaving on the ETS, indicating that this was necessary for him to have a fair chance of finding a suitable job upon separation from service and underlining that the long period of non-activity was damaging to him and his future chances. He also asked again for the justification for his transfers in 2010 and in 2011, and that he be compensated for the “distress and damage” resulting from his non-activity and being “totally sidelined”, and having been denied the opportunities for promotion available to other staff. In the other letter he claimed that his dignity had been impaired by the changes that had occurred in his career since 2010 (transfers, lack of appraisals in particular) and that he had suffered bullying and harassment. He therefore requested the Director General to order that an investigation be conducted, as foreseen by the Policy on Protecting the Dignity of Staff.

The Director General replied to both letters on 11 September 2012 finding that the complainant’s claim of violation of his dignity was unfounded. With respect to his request for a decision in accordance with

Article 92 of the Staff Regulations, he had decided that the complainant would remain assigned to the same Unit. He also stated that Eurocontrol was not obliged to prepare the complainant for “prospective employment” he might take up while on ETS, that he had been given reasons for his various transfers, that he had not been deprived of opportunities, and that his claim for compensation was therefore rejected. He explained that Eurocontrol had faced successive reorganisations and all affected staff had to adapt. He highlighted that a comprehensive re-skilling programme had been drawn up for him, detailed in his draft appraisal for 2010 and that, as he had refused the offer made to him in February 2011 for an important role, there was no alternative but to place him in the DSR Flexible Resource Management Unit.

On 10 December 2012 he filed an internal complaint with the Director General challenging the decision of 11 September, and was informed by a letter of 18 January 2013 that his internal complaint would be examined with all due care by the service concerned.

The complainant filed his complaint with the Tribunal on 9 July 2013 against the implied rejection of the internal complaint of 10 December 2012.

The complainant asks the Tribunal to order that he be appointed to a position at his grade or higher in Eurocontrol Brussels and within his area of competence, that he remain employed until 65 years old, that he be given “real justifications” for his transfers in March 2010 and 2011, and that an investigation be conducted, in accordance with the Policy on Protecting the Dignity of Staff, with respect to his allegation of affront to his dignity. He also seeks financial compensation (225,000 euros for psychological distress; and 311,000 euros for not having been given the same professional opportunities as other officials).

Alternatively, he asks the Tribunal to order that he be appointed to a position at his grade or higher in Eurocontrol Brussels and within his area of competence, that he remain in that position for two years before separating on the basis of the ETS; that he be given “real justifications” for his transfers in March 2010 and 2011, that an investigation be conducted, in accordance with the Policy on Protecting the Dignity of Staff, with respect to his allegation of affront to his dignity. He also seeks financial compensation (225,000 euros for psychological distress;

435,000 euros for not having been given the same professional opportunities as other officials; and 320,000 euros for the detrimental effect of having been “sidelined” on his future employment opportunities).

As a further alternative, he asks the Tribunal to order that he be given “real justifications” for his transfers in March 2010 and 2011, that an investigation be conducted with respect to his allegation of affront to his dignity in accordance with the Policy on Protecting the Dignity of Staff, and that he be awarded financial compensation (225,000 euros for psychological distress; 572,000 euros for not having been given the same professional opportunities as other officials; 546,000 euros for the detrimental effect of having been “sidelined” on his future employment opportunities).

Eurocontrol annexed to its reply a letter of 16 July 2013 by which the Principal Director of Resources, acting with delegation from the Director General, informed the complainant that he had endorsed the opinion of the Joint Committee for Disputes that his internal complaint be rejected as unfounded. Noting the Committee’s recommendation that a reasoned opinion be given with respect to the complainant’s allegation of harassment, he confirmed that the Director General had “summarily dismissed” the allegation on 11 September 2012, as permitted by the Policy on Protecting the Dignity of Staff due to the fact that no evidence that harassment took place was provided, and consequently no further investigation was warranted. The complainant indicates in his rejoinder that he was made aware of the letter of 16 July 2013 for the first time when it was forwarded to him with Eurocontrol’s reply before the Tribunal. He adds that he claims costs.

Eurocontrol asks the Tribunal to dismiss the complaint as irreceivable and unfounded. It stresses that since the complainant is no longer in active employment at Eurocontrol he cannot be appointed to a position in Eurocontrol.

CONSIDERATIONS

1. The proceedings, which have culminated in the present complaint, were formally initiated by two correspondences, each dated

17 April 2012, which the complainant addressed to the Director General. In those correspondences he complained about having been reassigned in March 2010 and March 2011, and that his performance appraisals for 2010 and 2011 had not been done; that he had not been given “a professional role, job, tasks, responsibilities, contacts as well as colleagues for now more than 410 days”. He further stated that those experiences had “been very destructive and [...] most distressing and painful” and that he had felt discriminated against for a very long time as he had not been given the same opportunities as other staff members. The latter is essentially a complaint of harassment.

2. The complainant contested the 2010 and 2011 reassignments and requested justification for them. He also requested that he be appointed to a post commensurate with his qualifications “and corresponding to [his] recruitment and employment at EUROCONTROL, i.e. to a post and job in or above [his] grade and within [his] areas of professional competencies and/or specialities”. He also requested that he be permitted to fill the post for two consecutive years before he would leave the employment of Eurocontrol under the early termination of service scheme (ETS).

3. It is observed that the complainant had applied for early termination in September 2010 under the ETS. This scheme was intended to reduce the staff complement of Eurocontrol and was open to staff members who were 55 years old and over during the period 1 January 2011 to 31 December 2012. His request was granted with effect from 1 January 2013 at which time he left the employment of Eurocontrol. Under the ETS, he then became entitled to a transitional monthly allowance equal to about 70 per cent of his final basic salary calculated in accordance with the applicable Staff Regulations.

4. In one of his correspondences of 17 April 2012, the complainant also requested compensation for mental suffering “for the distress and damage caused to [him] for being totally sidelined and non-active from [the] Agency [’s] activities [...] and for not having [been] given [...] the same opportunities [for] promotion as other staff”. In the other correspondence, the complainant referred to the foregoing matters and

further stated that he had “also been subjected to a number of other decisions that ha[d] been to [his] detriment throughout [his] time at EUROCONTROL”. He requested the initiation of an investigation concerning the infringement of his dignity under the scope of Eurocontrol’s Policy on Protecting the Dignity of Staff.

5. On 11 September 2012 the Director General rejected all of the foregoing claims as unfounded and informed the complainant that while Eurocontrol was not obliged to prepare him for prospective employment when he took up ETS, it continued to seek tasks and activities in which he could be meaningfully engaged and that he was not entitled to compensation as he had not been deprived of opportunities by Eurocontrol. On 10 December 2012, the complainant submitted an internal complaint against this decision, which was sent to the Joint Committee for Disputes (JCD). On 9 July 2013, he filed the present complaint contesting the decision of 11 September 2012 with the Tribunal. At that time he had not received a decision on his internal appeal from the Director General. His complaint therefore purports to be an appeal against the implied rejection of his internal complaint. It is however observed that the JCD met on 8 April 2013 and delivered its opinion in which it unanimously recommended that the Director General should reject the complainant’s internal complaint. The Director General did so in a letter dated 16 July 2013, seven days after the present complaint was filed in the Tribunal. The issue whether these two documents are admissible in the Tribunal’s proceedings will be considered later in this Judgment.

6. The relief claimed in the present complaint may conveniently be summarized as follows:

- (1) That the complainant be appointed to a post and a job commensurate with his recruitment and employment with Eurocontrol, or, alternatively, that he be appointed to such a post “in or above [his] grade and within [his] areas of professional competencies and/or specialities”;

- (2) That the complainant be fully employed at Eurocontrol until he is sixty years of age, or, alternatively, be allowed to be in a post referred to in (1) above for at least two consecutive years before he left on ETS;
- (3) That he be given real justification for his reassignments on 1 March 2010 and 1 March 2011;
- (4) That, pursuant to the Policy for Protecting the Dignity of Staff at Eurocontrol, an independent investigation be conducted into his claim that his dignity was and had been infringed and abused for a long time at Eurocontrol by the Principal Director of Resources;
- (5) That he be awarded compensation for:
 - (a) “psychological distress, reputational damages, bullying and pain caused to [him] for having been totally isolated, sidelined and left professionally non-active in EUROCONTROL since [1 March 2011]”;
 - (b) not having been given the same professional opportunities as other staff members at Eurocontrol “for many years”, including professional development, performance appraisals and hence promotion;
 - (c) or alternatively, compensation for the detrimental effect upon his future opportunities of employment and earnings as a result of having been totally isolated, side-lined and left professionally non-active in Eurocontrol since 1 March 2011.

7. Eurocontrol raises receivability as a threshold issue, asserting that the complainant’s claims are either time-barred, or without object, or that the complainant has not exhausted internal remedies. The basic consideration for determining receivability was stated as follows in Judgment 3406, under 12 and 13:

“12. As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466, 2722 and 2821, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, because any other

conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar. In particular, the fact that a complainant may not have discovered the irregularity on which he or she purports to rely until after the expiry of the time limit is not in principle a reason to deem his or her complaint receivable (see, for example, Judgments 602, under 3, and 1466, under 5 and 6).

13. It is true that the Tribunal's case law as set forth in Judgments 1466, 2722 and 2821 allows exceptions to this rule where the complainant has been prevented by *vis major* from learning of the impugned decision in good time (see Judgment 21), or where the organisation, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see Judgment 752). However, none of these conditions were met in this case."

8. It is determined that the complainant's claims concerning his reassignments in March 2010 and March 2011 and his related request for "real justification" for these reassignments are irreceivable. The decision to reassign him in 2010 was contained in the correspondence to him dated 9 March 2010. He did not appeal that decision at the time. The decision to reassign him in March 2011 was dated 1 March 2011. On 1 June 2011 he asked the Director General to justify the transfer. The Director General replied by correspondence dated 13 July 2011. When therefore the complainant raised these matters in his correspondences dated 17 April 2012, the internal challenges to those decisions were some months out of time. He had not therefore exhausted his internal remedies in relation to them, and, accordingly, these claims are irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute and must be dismissed.

9. In his correspondences dated 17 April 2012, by which he initiated his internal appeal, the complainant alleged that his performance appraisals for 2010 and 2011 were not done. He proffered this as one of the reasons for his alleged distressing and painful experiences and why he felt discriminated against as not having been given the opportunities as other staff members for professional and career development and for promotion. This claim is irreceivable to the extent that the complainant makes any assertion that the alleged absence of the appraisals was

unlawful. This is because he did not challenge the alleged non-appraisals within the stipulated time and in the prescribed manner. He had not exhausted his internal remedies in relation to this claim.

Additionally, in his internal complaint, he did not raise the issue of the absence of performance appraisal for 2012. He now raises it in the present complaint. To the extent that he makes any assertion that the alleged absence of the appraisal for 2012 was unlawful, that matter is irreceivable because the complainant did not challenge that alleged non-appraisal within the stipulated time and in the prescribed manner. He had not therefore exhausted his internal remedies in relation to it, and, accordingly, that claim must be dismissed pursuant to Article VII, paragraph 1, of the Tribunal's Statute.

10. However, the allegations of the absence of those performance appraisals, as well as his allegations concerning his reassignments of 2010 and 2011, are relevant to the extent that the complainant seeks to rely on them to support his claim that he suffered infringement of his dignity; psychological distress; damage to his reputation; denial of the same professional opportunities as were given to other staff members; and detrimental effects upon his future opportunities of employment and earnings. These matters refer, in effect, to alleged continuing harassment.

11. Inasmuch as the complainant's request for ETS was granted with effect from 1 January 2013, the remedies which he seeks as set out as items (1) and (2) of consideration 6 of this Judgment will be dismissed as the claims he makes in that respect were without object when he filed the present complaint on 9 July 2013. This is because those claims are incompatible with the option which the complainant exercised to take the ETS package thereby having voluntarily left the employment of Eurocontrol. Those claims will accordingly be dismissed.

12. The issue that remains for determination is whether the Tribunal should order an investigation into the complainant's claims that he suffered infringement of his dignity, psychological distress, damage

to his reputation, denial of the same professional opportunities as were given to other staff members, and detrimental effects upon his future opportunities of employment and earnings.

13. First, the complainant argues that the JCD's opinion following its meeting of 8 April 2013 in which it considered the complainant's internal complaint, as well as the decision of 16 July 2013, by which the Director General accepted its recommendations should not be used or be referred to in the present proceedings. This, according to the complainant, is because he was not aware that the JCD had met to consider his internal complaint and he was therefore not there to present his case. He states, in the second place, that he had not seen a copy of the opinion or the letter until he received Eurocontrol's reply in the present proceedings. In response, Eurocontrol states that the documents were posted to the complainant by ordinary mail. The complainant however, insists that, pursuant to Article 26 of the Staff Regulations, Eurocontrol was required to send them to him by registered post or should show evidence that he received them by his signature. To support this argument, the complainant quotes Article 26 of the Staff Regulations as relevantly stating as follows:

"The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- (b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph a) may not be used or cited by the Agency against an official unless they were communicated to him before they were filed.

The communication of any document to an official shall be evidenced by his signing it or, failing that, shall be effected by registered letter to the last address communicated by the official." (Emphasis added.)

14. First, however, this provision does not relate to the opinion by the JCD or the decision by the Director General thereon. Moreover, the Tribunal has consistently stated that where an express rejection has occurred in the course of the proceedings it replaces the implicit decision originally impugned before the Tribunal and the complaint is

to be regarded as being directed against the express decision (see, for example, Judgments 2822, under 2, 3373, under 3, and 3406, under 9).

15. The complainant provides no evidence to support his claims that he was denied the same professional opportunities that were given to other staff members and for detrimental effects upon his future employment opportunities and earning. These claims are therefore unfounded and will accordingly be dismissed.

16. As to the complainant's request that the Tribunal should order an investigation into what is essentially his harassment claim, Eurocontrol's Policy on Protecting the Dignity of staff requires victims of harassment in the workplace to raise their complaints promptly. The Policy came into effect on 1 July 1998. The complainant raised his harassment claim in one of his letters of 12 April 2012 to the Director General. In an internal memorandum dated 11 September 2012, the Director General dismissed this claim "based on the evidence received" as "entirely unfounded".

17. Under Article 4.7 of the Guidelines and Procedures to Support the Policy on Protecting the Dignity of Staff, when a complaint of harassment is made the Director General is to institute a preliminary investigation "to ascertain whether the complaint warrants the convening of the Disciplinary Board" to investigate the complaint. The Article however permits the Director General to dispense with the preliminary investigation in clear-cut cases.

In its opinion, the JCD stated that the Director General's response of 11 September 2012 did not make it clear that the complainant's harassment complaint was summarily dismissed for lack of evidence. The JCD recommended that this should be confirmed. However, it is observed that the impugned decision "confirmed that the plea for harassment was summarily dismissed by the Director General [...] due to the fact that no evidence was provided that such harassment took place" and that "[f]urther investigation into the alleged case was not warranted". The Tribunal finds that the complainant has provided no evidence to show that that decision was wrong or that his harassment

complaint is meritorious. This harassment claim is therefore unfounded and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ