

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**D.**

**v.**

**Eurocontrol**

**127th Session**

**Judgment No. 4081**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 13 May 2015, Eurocontrol's reply of 4 September, the complainant's rejoinder of 19 November 2015, Eurocontrol's surrejoinder of 26 February 2016, the complainant's further submissions of 23 March and Eurocontrol's final comments thereon of 4 May 2016;

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 challenges the decision of the Director General not to allow him to carry out an assignment outside the Organisation.

At the material time, the complainant was Head of the Collection, Accounting and Treasury Unit. Until 31 December 2012, he had been Executive Officer of the Eurocontrol Pension Fund. By a letter of 1 July 2014 he was informed of his nomination, with immediate effect, for a three-year assignment as a professional member and expert in pension funds of the Governing Board of the Pension Fund of the European Organization for Nuclear Research (CERN). On 14 July he requested the Director General's permission to carry out this assignment.

He explained that the Governing Board met six times per year and that before applying he had made sure that his supervisor had no objection to his taking up the assignment, having regard to his duties as Head of the Collection, Accounting and Treasury Unit.

By a letter dated 1 August 2014, the Director General told the Chairman of the Governing Board of the CERN Pension Fund that he would greatly appreciate another person being nominated instead of the complainant, since he would rather have the complainant concentrate on his duties as Head of the Collection, Accounting and Treasury Unit. He also explained why he considered that participation in the Governing Board might not be beneficial for Eurocontrol. On 4 August the Director General informed the complainant's supervisor that, owing to the Organisation's shortage of resources, he did not consider it appropriate for the complainant to carry out the assignment and asked him to inform the complainant accordingly, which the supervisor did the following day.

On 5 August the complainant asked the Director General to reconsider his decision, pointing out that he planned to use annual leave in order to carry out the assignment. In an e-mail of 25 August, the Director General explained that, under the current regulations, annual leave days were supposed to be used to rest rather than undertake additional paid activities.

In the meantime, on 18 August 2014, the complainant informed the Chairman of the Governing Board of the CERN Pension Fund that he was not in a position to accept the assignment entrusted to him.

On 30 October 2014 the complainant lodged an internal complaint against the decision of 4 August 2014 claiming compensation for moral and material injury.

On 13 May 2015 he filed his complaint with the Tribunal. He indicates that he is impugning the implied decision to reject his internal complaint, and he seeks the quashing of that decision as well as the decision of 4 August 2014. He also claims compensation for moral and material injury and costs.

Eurocontrol submits that the complaint should be dismissed as unfounded. It informs the Tribunal that, on 30 April 2015, the Joint Committee for Disputes, to which the dispute had been referred, issued its opinion. The Joint Committee concluded that the procedure followed had been “unfortunate and inappropriate”, particularly because the Director General had contacted the Chairman of the Governing Board of the CERN Pension Fund directly, without consulting the complainant beforehand, and because in the first place he had notified the supervisor of the complainant that he would not grant the latter permission to carry out the assignment. In addition, the majority of the Joint Committee members considered that the Director General’s refusal was not properly substantiated. The Committee unanimously recommended that the Director General contact the complainant to set the amount of compensation due for the moral injury suffered. Eurocontrol adds that, on 29 July 2015, the Director General informed the complainant that his refusal was justified by the fact that the complainant had important responsibilities that would not allow him to carry out the assignment, particularly since, in the Director General’s view, the complainant’s absences would probably have been “far more” than six days per year. He added that owing to the late submission of his request, the complainant had “deliberately placed [Eurocontrol] in a situation where it had to take a decision” and, in so doing, he had not observed Eurocontrol’s “codes of ethical conduct”. Lastly, he informed him that the experience he might have gained with the Governing Board would be neither beneficial nor necessary for Eurocontrol, since his term of office with the CERN Pension Fund had ended. Accordingly, the Director General informed the complainant that his internal complaint was dismissed as unfounded.

#### CONSIDERATIONS

1. The complainant asks the Tribunal to set aside, firstly, the implied decision rejecting his internal complaint against the decision of 4 August 2014 and, secondly, the latter decision itself, by which the Director General rejected the complainant’s request for permission to carry out an external assignment, namely a three-year mandate with

the Governing Board of the CERN Pension Fund. He also claims 50,000 euros in moral damages, 100,000 euros in material damages and 4,000 euros in costs.

2. Eurocontrol requests that the Tribunal dismiss the complaint as unfounded.

3. This complaint, which was originally directed against an implied decision to dismiss the complainant's internal complaint, must now be regarded as impugning the express decision of 29 July 2015, taken in the course of the proceedings, by which the Director General informed the complainant of his decision to reject the internal complaint against the aforementioned decision of 4 August 2014 (for a similar case, see, for example, Judgment 3667, consideration 1).

4. The complainant submits that the Director General's decision of 4 August 2014 is insufficiently substantiated. In Eurocontrol's view, the reasons for this decision, albeit brief, were set forth in the decision of 29 July 2015.

5. The Tribunal recalls that, according to its case law, the reasons for a decision must be sufficiently explicit to enable the person concerned to take an informed decision accordingly; they must also enable the competent review bodies to determine whether the decision is lawful and, in particular, the Tribunal to exercise its power of review. How extensive those reasons need be will depend on the circumstances (see Judgments 1817, consideration 6, and 3617, consideration 5).

The Tribunal notes that the reason given to the complainant in the decision of 4 August 2014 to justify the refusal of his request was the Organisation's shortage of resources. However, this explanation was not sufficiently explicit, since it did not contain precise details that would allow the complainant, or indeed a judge, to understand the specific grounds on which the decision was based.

In the present case, it was not until the complainant read the decision of 29 July 2015 that he became fully aware of the reasons why his request had been rejected. The decision of 4 August 2014 itself therefore furnished insufficient reasons.

However, according to the case law, the reasons for a decision need not be stated in the decision itself, but may be contained in other documents communicated to the staff member concerned; they may even be set forth in briefs or submissions produced for the first time before the Tribunal, provided that the complainant's right of appeal is fully respected (see, for example, Judgments 1289, consideration 9, 1817, consideration 6, 2112, consideration 5, or 2927, consideration 7).

In the present case, as stated above, the complainant was notified of an express decision dated 29 July 2015 dismissing his internal complaint and giving a full explanation of the reasons why his request had been rejected. As the insufficient reasoning noted above was thus remedied by such a decision, this plea will be dismissed.

6. The complainant submits that the assignment for which he was nominated was not contrary to the interests of the Organisation and would not interfere with the performance of his duties. He should therefore have been allowed to carry out the assignment in accordance with Article 12b of the Staff Regulations governing officials of the Eurocontrol Agency. He adds that the argument concerning the shortage of resources is not relevant to Article 12b, as it would have been possible for him to engage in an activity outside the Organisation by taking annual leave. He points out in this regard that the application form for engaging in an activity outside the Organisation provides for the possibility of carrying out such an activity during annual leave.

Eurocontrol considers that the Director General's refusal to grant the complainant permission to carry out an assignment outside the Organisation is justified under Article 12b, given the important position held by the complainant and the fact that his absences would be incompatible with the interests of the Organisation.

7. According to Article 12b of the Staff Regulations, “an official wishing to engage in an outside activity, whether paid or unpaid, or to carry out any assignment outside [the Organisation], shall first obtain the permission of the Director General. Permission shall be refused only if the activity or assignment in question is such as to interfere with the performance of the official’s duties or is incompatible with the interests of [the Organisation].”

8. According to the Tribunal’s case law, the decision of the executive head of an international organisation to allow or not to allow a staff member to carry out an assignment outside the organisation is a discretionary decision. Such a decision is subject to only limited review and thus will be set aside only if it has been taken without authority, if there is a formal or procedural flaw, a mistake of law or of fact, or if some essential fact has been overlooked or a clearly mistaken conclusion drawn from the evidence, or if there is misuse of authority (see Judgments 2377, consideration 5, and 3858, consideration 12).

9. The Tribunal notes that the Organisation’s shortage of resources is indeed a reason that could be lawfully invoked by the Director General under Article 12b of the Staff Regulations to refuse an official permission to carry out an assignment outside the Organisation, because such a reason is germane to incompatibility with the interests of the [Organisation] within the meaning of that article. Furthermore, in the present case this shortage of resources is corroborated by the written submissions. Extracts of the Business Plan 2013-2017 produced in annex to the reply show that the Central Route Charges Office, to which the complainant’s unit was attached, had significantly reduced its staff at the end of 2011 and would continue to have problems in this respect in the coming years.

It is clear from these findings that the Director General did not exceed his discretionary power by holding that the complainant’s assignment would be incompatible with the interests of the Organisation.

10. The Tribunal recognises, having regard to the Organisation's application form to engage in an outside activity – which the complainant never actually filled in – that it is not expressly prohibited to take annual leave in order to engage in such an activity. Nonetheless, the Tribunal recalls that although annual leave is usually granted to officials upon submission of a request approved by the administration, such approval is subject to the requirements of the service. Given the frequency of the meetings of the Governing Board of the CERN Pension Fund (six times per year) and, moreover, the fact that the dates of such meetings would not have been set according to Eurocontrol's requirements, the complainant could not say in advance that his absences would be compatible with the efficient running of the service.

11. The complainant contends that Eurocontrol has deprived him of a beneficial experience and acted in contradiction with its staff training policy. However, the Tribunal considers that, whilst this argument is not, in itself, completely devoid of merit, in the present case the Director General did not misuse his discretionary power by holding that the request to carry out the assignment should be refused, in view of the Organisation's shortage of resources, as mentioned above. This plea must therefore be dismissed.

12. Furthermore, the complainant argues that his supervisor was the person best placed to assess the merits of his request.

It is true that, according to the application procedure for engaging in an outside activity the supervisor of the staff member concerned must be consulted in order to assess the merits of the request, and, in the present case, the complainant's supervisor indicated that he had no objection to the request being considered favourably. Nevertheless, in accordance with Article 12b of the Staff Regulations, the decision rests with the Director General, who is not bound by the supervisor's opinion and who, in this case, did not misuse his discretionary power by discounting that opinion. This plea therefore fails.

13. The complainant then raises several objections concerning the letter of 1 August 2014, in which the Director General informed the Chairman of the Governing Board of the CERN Pension Fund that he would prefer the complainant to concentrate on his duties as head of unit and that he considered that participation in the Governing Board would not be beneficial for Eurocontrol.

14. Firstly, the complainant criticises the Director General for having directly informed the Chairman of the Governing Board that he was not authorised to carry out the assignment in question and of having thus “closed all possibility of discussion”.

Eurocontrol explains that since the complainant’s request was submitted late, the Director General had been “pressed for time” and, out of respect, wished to notify CERN directly.

The Tribunal notes that by submitting his request on 14 July 2014, in other words after the date on which his mandate was due to commence (1 July), the complainant failed to comply with Article 12b of the Staff Regulations, which required that the request be submitted first to the Director General; the Organisation was thus presented with a *fait accompli*, as a result of which it did not have sufficient time to enter into discussions with the complainant. This plea must therefore be dismissed.

15. In addition, the complainant asserts that it was his responsibility and not that of the Director General to notify the Governing Board of the CERN Pension Fund that he was not available for the assignment. The complainant fails to show how the fact that the Director General was first to contact the Chairman of the Governing Board caused him any injury or was intended to harm him. This plea must therefore be rejected.

16. The complainant also alleges that some of the “considerations” contained in the letter of 1 August 2014 are “inapposite”. According to him, the Director General stated that he was willing to offer the services of another staff member to replace the complainant.

The Tribunal notes that, contrary to the complainant’s allegations, in his letter of 1 August 2014 the Director General merely stated that he would greatly appreciate another person being nominated in place of

the complainant and that he was not in a position to offer the services of Eurocontrol's "current Pension Fund Executive Officer", which, in any event, could not be construed as a proposal to nominate another staff member of Eurocontrol. The plea must therefore be dismissed.

17. The complainant argues that the reasons set forth in the letter of 1 August 2014 are not consistent with the reason given in the decision of 4 August 2014. The Tribunal considers that there is no inconsistency between the Director General's reference in the e-mail of 4 August 2014 to the Organisation's shortage of resources as grounds for his decision not to allow the complainant to carry out the assignment and the wish expressed in his letter of 1 August 2014 that the complainant should concentrate on his duties as head of unit.

18. Lastly, the complainant submits that the content of the letter of 1 August 2014 suggests that there are reasons extraneous to the scope of Article 12b underlying the disputed decision. In his view, the letter involved misuse of authority.

19. The Tribunal recalls its case law according to which "[t]here will indeed be misuse of authority where an administration acts for reasons that are extraneous to the organisation's best interests and seeks some objective other than those which the authority vested in it is intended to serve" (see Judgment 1129, consideration 8). Moreover, "misuse of authority may not be presumed and the burden of proof is on the party that pleads it" (see Judgment 3939, consideration 10).

In the present case, the complainant fails to prove that the Director General's refusal to allow him to carry out an external assignment was intended to protect interests extraneous to those of the Organisation. This plea is therefore groundless.

20. The complainant points out that, on 5 February 2015, he was told that the original copy of his internal complaint had been mislaid. From his perspective, the fact that his complaint was mislaid and that it went unanswered shows the Organisation's cavalier attitude towards him.

The Tribunal considers that, regrettable though it may be, the fact that the original of the internal complaint was mislaid had no bearing on the conduct of the proceedings in the present case, since an electronic copy had been saved and the complaint was in fact examined. This plea is thus unfounded.

21. The complainant considers that it would have been appropriate for the Director General to send a personal response to his request of 14 July 2014.

The Tribunal notes that on 4 August 2014 the Director General asked the supervisor of the complainant to inform him – which he did the following day – of his decision not to grant his request. Even though he was not directly informed by the Director General, the complainant nonetheless had knowledge of this decision on 5 August 2014 and there is nothing unlawful about this procedure. The plea must therefore be dismissed.

22. It follows from the foregoing that the impugned decision is not unlawful in any way. The complaint must therefore be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered in public in Geneva on 6 February 2019.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ