

113th Session

Judgment No. 3116

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N.J. G. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 18 May 2010 and corrected on 9 July, Eurocontrol's reply of 5 November, the complainant's rejoinder of 22 November 2010 and the Agency's surrejoinder of 3 March 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 6 of its Rules;

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 complainant, a Portuguese national born in 1986, joined Eurocontrol as a student air traffic controller in October 2008. His appointment to a post of air traffic controller at the Eurocontrol Centre at Maastricht was subject to the satisfactory completion of a three-year training programme at the Institute of Air Navigation Services in Luxembourg. The first phase of the training took place in Switzerland, at Skyguide, the Swiss air navigation services provider. A daily subsistence allowance was paid to him until January 2009, when he was informed by the Agency that this had been done by mistake and

that the overpayment would be deducted from his future entitlements. The complainant replied that there was no legal basis for recovering the overpayment and that, without the daily subsistence allowance, he might not be able to “assure performance of duties” and pursue his employment with the Agency.

On 19 November 2008 Skyguide’s Head of Initial Training, Mr K., sent a “student report” to Eurocontrol’s Head of the Training and Proficiency Section, Mr S., which contained the following remarks about the complainant: “extrovert to the extent that occasionally is disruptive in [...] class”, “has to be center of attention”, “a little overassertive with his peers”, “with maturity shows good potential”, “always late in class”. Mr S. informed the complainant later that month that his behaviour was problematic. In December the complainant failed to attend two classes. As a result, on 15 December 2008 Mr K. and Mr S. issued him with a formal written warning, on the grounds that he had not provided an acceptable explanation for his absences, in spite of having been informed by his instructors that his behaviour was raising concerns. It was also stated that the complainant was expected to demonstrate “a mature and committed attitude to the training and objectives” and that failure to do so by 16 January 2009 would result in a recommendation to terminate his training.

In a letter of 19 January Mr K. recommended to Mr S. that the complainant’s training be terminated. Mr S. replied on 21 January that he accepted this recommendation and that the termination procedure would start. The complainant was so informed at a meeting on 23 January, and was told that a Review Board would soon be convened to examine the case. He was also informed that the Review Board was to meet in Luxembourg on 11 March 2009 in the morning and that the travel arrangements for his journey were taken care of by the Agency. However, in view of the arrival time of the complainant’s flight, the Board decided to postpone its meeting to the following day. It notified the complainant accordingly by an e-mail of 11 March, and the security officer and receptionist at Eurocontrol’s premises in

Luxembourg were also asked to inform him, upon his arrival, that the Review Board would meet the next morning.

The Review Board met on 12 March but the complainant did not attend the meeting. The Board supported the recommendation to terminate his training, noting that he had been treated in a way that offered him a fair opportunity to reach the required standard of performance, but had failed to improve his attitude and behaviour. On 13 March the complainant replied to the e-mail of 11 March indicating that he had received confusing and unclear information about the Board's meeting.

By a letter dated 20 March 2009 the Head of Administration Services informed the complainant that the Director General had decided to terminate his appointment with the Agency with effect from 30 April 2009. The complainant requested a review of that decision. In July the Joint Committee for Disputes, to which the matter had been referred, unanimously recommended that his appeal be rejected as legally unfounded. By a letter dated 1 October 2009 the complainant was informed that the Director General had decided to endorse that recommendation. That is the decision he impugns in the complaint he filed on 18 May 2010 with the Tribunal.

On 10 February 2010 the complainant wrote to the Agency enquiring about his appeal and stating that he had not received any reply to it. A copy of the decision of 1 October 2009 was sent to him by e-mail on 11 February 2010, and he acknowledged receipt of it that same day. In a letter of 25 April he requested a review of the Director General's final decision on the basis of alleged new evidence, which he attached to his letter. By an e-mail dated 7 May he was informed that he would shortly receive a letter confirming the decision of 1 October 2009 and that he had until 12 May to submit a complaint to the Tribunal, as the time limit for challenging that decision would expire on that day. He was subsequently advised in an e-mail dated 10 May that his letter of 25 April did not contain any new evidence that could lead to a review of the decision to terminate his appointment and, therefore, that the decision of the Director General

to reject his appeal was maintained. This decision was confirmed in a letter to the complainant dated 14 June 2010.

B. The complainant contends that his training was wrongfully terminated, not because of his unsatisfactory performance but rather as a retaliatory measure, following his refusal to reimburse the overpaid daily subsistence allowance. According to the complainant, after he had made it clear that he would not be able to reimburse the overpayment, the Agency tried to intimidate him. He considers that the decision to terminate his appointment therefore constitutes an abuse of authority.

He submits that he was not provided with the reasons for the termination of his appointment. He asserts that he was not properly informed of the final venue of the Review Board and could not attend it. In his view, it was unreasonable for Eurocontrol to expect him to see the e-mail of 11 March in time. Moreover, when he arrived at Eurocontrol's premises on 11 March the receptionist told him that "everyone had left", and he assumed that the Board had gone ahead with its meeting without him. As a result, he was deprived of an opportunity to defend himself and to present his arguments.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement as a student air traffic controller or the payment of five years' remuneration as an air traffic controller for loss of the opportunity to be appointed. He also seeks the payment of all the remuneration he would have received had he been kept on duty until reinstatement, as well as moral damages and costs.

C. In its reply Eurocontrol submits that the complaint is time-barred and hence irreceivable. The complainant was notified of the impugned decision on 11 February 2010, and the time limit for filing his complaint therefore expired on 12 May 2010. He was fully aware of that deadline, as his attention had been drawn to it in the Agency's letter dated 7 May, yet he did not file his complaint until 18 May.

On the merits, the Agency argues subsidiarily that the decision to dismiss the complainant is legally founded. The decision of 20 March 2009 was based on the fact that he had failed to give satisfaction during his period of instruction, and it was taken following the Review Board's recommendation that his appointment be terminated, in accordance with the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre.

Eurocontrol denies that the complainant was not provided with the reasons for the termination, or that he was unaware of his unsatisfactory performance or of his inappropriate behaviour. In its view, the evidence clearly shows that he was informed on several occasions about his shortcomings. The complainant himself admits as much in his complaint. Further, the written warning that he received clearly states the reasons for which it was issued, namely unacceptable absence from classes and concerns voiced by instructors and fellow students regarding his behaviour and attitude both in the classroom and during simulation exercises. In that document, the complainant was also duly informed of the possible consequences of this measure.

Regarding the complainant's allegation that he was not given the opportunity to defend himself, the Agency submits that it took all the necessary measures to enable him to defend himself and to attend the Review Board meeting. Contrary to the complainant's allegations, he was duly informed of the change in schedule of the meeting. Further, Eurocontrol underlines that neither the General Conditions of Employment, nor the relevant rules of application, require the Review Board to hear the student, and that he has only himself to blame for the lost opportunity to be heard by the Board.

Lastly, it rejects as unsubstantiated the allegation of intimidation stressing that the termination of the complainant's appointment does not have any causal link with the daily subsistence allowance conflict that existed before. It points out that Mr K., who recommended the termination, was not involved in the discussions about the overpayment.

D. In his rejoinder the complainant presses his pleas. He argues that his complaint is receivable, explaining that, as he was abroad at the time, he was advised by the Registrar of the Tribunal that he could submit the complaint by e-mail, provided that the originals were later posted to the Tribunal. He points out that he sent an incomplete complaint form by e-mail on 11 May, but on 18 May he sent both the original and the amended complaint forms together by post. Alternatively, he submits that he never received the “formal decision”, and never signed it, and that his complaint should therefore be considered as being directed against an implicit decision which he was entitled to challenge within “12 months”.

E. In its surrejoinder Eurocontrol maintains its position in full. It points out that the complainant contradicts himself when he claims that he never received valid notification of the final decision, given that he acknowledged receipt of the e-mail sent on 11 February 2010. Moreover, even if the decision was considered to be implied, that would mean his time limit for the submission of his complaint expired much earlier, i.e. on 10 December 2009.

CONSIDERATIONS

1. The complainant joined the Agency as a student air traffic controller in October 2008. His appointment was subject to the successful completion of a three-year training period.

2. During the first phase of the training programme at Skyguide, the Head of Initial Training, Mr K., met with the complainant to explain what was expected of him as there had been reports that his behaviour was problematic. In December 2008 Mr K. issued a formal written warning to the complainant, referred to as a “Conditional Go Status” in which it was stated that failure to show a more mature and committed attitude to the training would result in a recommendation for termination of the complainant’s training. On 21 January 2009 the Agency’s Head of the Training and Proficiency Section, Mr S., informed Mr K. that he had accepted his

recommendation of 19 January to terminate the complainant's training and that the termination procedure would commence. The complainant was notified of this decision on 23 January and he was advised that a Review Board would meet to examine his case. The Board met on 12 March 2009 and issued a report in which it recommended terminating the complainant's training.

3. The Head of Administration Services informed the complainant of the decision to terminate his appointment as a student controller in March 2009. The complainant requested a review of that decision and the Joint Committee for Disputes, in its report of July 2009, unanimously recommended that his appeal be rejected as unfounded. The Director General accepted that recommendation, and the complainant was so informed by a letter dated 1 October 2009. The complainant wrote to the Agency on 10 February 2010, seeking information about the status of his appeal since he had not yet received a decision in that respect. A copy of the decision was sent to him by e-mail on 11 February 2010 and he acknowledged receipt of it that same date. In April the complainant requested a review of the Director General's final decision. The Agency replied on 7 May that if he wished to contest the decision, he had to submit a complaint to the Tribunal by 12 May 2010. In his complaint the complainant impugns the Director General's decision of 1 October 2009, accepting the Joint Committee for Disputes' recommendation to reject his appeal.

4. The complainant submitted his complaint by sending a scanned complaint form to the Tribunal via an e-mail of 11 May 2010, with only sections 1, 2, 3 and 5 filled in. One of the essential sections, section 4, had been left blank. He submitted a completed version of the form on 18 May 2010. The complainant was notified, however, by the Registrar of the Tribunal on 9 June that, since his initial complaint form was not properly filled in, the complaint could not be considered as being filed on 11 May 2010.

5. The Agency contests the receivability of the complaint as it was filed six days beyond the ninety-day time limit provided for by

the Statute of the Tribunal. Subsidiarily, it submits that the complaint is unfounded on the merits.

6. It should be recalled that Article 6(1)(a) of the Rules of the Tribunal sets out the requirements of form for filing a complaint: the complainant should fill in and sign the complaint form prescribed in the Schedule of those Rules. The complainant's requests to the Tribunal that he be allowed to correct retroactively the incomplete initial complaint form, sent on 11 May 2010, and consequently that the completed revision of it, sent on 18 May, be accepted as having been filed on 11 May, are denied. Indeed, the entries in the initial complaint form did not suffice to identify the relief the complainant was claiming. Therefore, one of the essential requirements of form set out in Article 6(1) was not met and the complaint could not be registered as filed on 11 May 2010. Moreover, this case does not fall within the purview of the thirty-day time limit prescribed by Article 6(2) of the Rules for correction of complaints. The Registrar notified the complainant of this, specifying that the document sent on 11 May could not be considered sufficient as submitted and she rightly further specified, following the submissions on 18 May, that the date of filing could not be registered as 11 May 2010. Consequently, the document filed on that date cannot be considered a complaint, as it did not contain the claims which are essential elements of a complaint. The complaint form, properly filled in, was filed on 18 May 2010, i.e. six days after the expiration of the ninety-day time limit. Therefore, the complaint must be considered irreceivable. In the circumstances, the Tribunal shall not deal with the merits of the case.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet