

NINETIETH SESSION

In re Thiele

Judgment No. 2027

The Administrative Tribunal,

Considering the complaint filed by Mr Christian Thiele against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 February 2000, the Agency's reply of 12 May, the complainant's rejoinder of 15 August and the Eurocontrol's surrejoinder of 23 October 2000;

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

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

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

A. The complainant, a French national born in 1946, joined Eurocontrol in 1974. At the material time he was Head of the New Technologies Section at grade A5, in Management Information Services (MIS) of the Finance Directorate.

In a memorandum of 27 November 1997 to the Director of Finance, the complainant's direct supervisor - the Head of MIS - proposed creating two posts of "customer planning and coordination manager". He recommended a grade B2 staff member for one of them and the complainant for the other as a means "of minimising the impact of his performance limitations".

The Head of MIS having described his behaviour as "irresponsible" in a memorandum of 26 November 1997, the complainant asked the Director General to take a stance on the dispute between them. The Director General replied on 7 January 1998 that it was a matter of intra-departmental relations and referred it to the Director of Finance. By a memorandum of 10 June 1998 the complainant again objected to his supervisor's treatment of him, accusing him of attempting to void his post as Head of Section of all substance. The Director of Finance replied on 11 June that he declined to take a stance on the accusations but inferred from them that the complainant's relations with his immediate supervisor had deteriorated to the point where it had become necessary to find him a post elsewhere than in MIS. By memoranda of 9 and 10 July, the complainant informed the Director of Human Resources and the Director of Finance that he had "never asked to leave [his] job in the Finance Directorate".

At the Director General's request the complainant sent him proposals for a new assignment in a letter of 20 October 1998. He said that he had no objection to a transfer provided that it was not against his interests. After several exchanges of views with his supervisors he was offered a reassignment to the post of "Customer Relationship Manager for Logistics and External Services" in MIS. He refused the offer by a memorandum of 26 January 1999; however, on 17 February 1999 the Director of Finance confirmed the transfer. By a memorandum of 23 April the complainant informed the Director of Finance that he would "execute the orders faithfully" but would appeal against the decision.

On 17 May 1999 the complainant filed an internal complaint with the Director General against that decision. After hearing him, the Joint Committee for Disputes unanimously concluded on 7 October that the complaint should be rejected as irreceivable because the decision did not affect him adversely. However, "speaking from a social rather than a legal standpoint", the Committee recommended "envisaging a transfer out of MIS very shortly". By a letter of 2 November 1999 the Director of Human Resources informed the complainant on the Director General's behalf that his internal complaint had been rejected and that the matter of his reassignment was being considered. That is

the impugned decision.

By a decision of 24 January 2000 the complainant was transferred as from 1 February to the post of "Projects and Services Coordinator" in the Central Route Charges Office. This post is not in the Finance Directorate. By a memorandum of 31 January he accepted that decision, albeit with a number of reservations.

B. The complainant submits that the dispute was prompted by the decision of 17 February 1999 to transfer him which affected him adversely because it implied a change of duties and assigned him to a post which did not match his grade. Consequently, it was not properly substantiated, as the case law requires. In his submission, the Agency should first have conducted an inquiry, since he and his immediate supervisor were at odds. He criticises the Director General and the Director of Finance for refusing to take a stance. He alleges abuse of process in that he was subjected to measures resembling disciplinary sanctions without the safeguards of due process.

He asserts that the post of Customer Relationship Manager for Logistics and External Service is a grade B one: the incumbent simply serves as a "relay" and needs no university qualifications. In fact, a staff member in a post similar to his holds grade B2. The only difference between the two is in the number of tasks not their nature, the complainant having more "customer services". This is an affront to his professional dignity. Moreover, the Agency failed in its "duties of assistance, care and sound administration" which required removing him from the authority of his supervisor. If the reason for the decision in question was poor performance, which he denies, then there was obvious misappraisal of the facts. He accuses the Head of MIS of abuse of authority and the Director of Finance and the Director General of failing in their duty of vigilance.

He asks the Tribunal to quash the decision of 17 February 1999 to transfer him and the decision of 2 November 1999 rejecting his internal complaint; to order the Agency to pay him compensation in an amount of 1 million Belgian francs plus interest at the rate of 8 per cent a year as from 17 May 1999, the date of his internal complaint; and to award him costs.

C. In its reply Eurocontrol submits that the decision of 17 February 1999 was a decision to reassign - not transfer - him, taken in the context of the general reorganisation of the service. It denies that the poor relations between the complainant and his immediate supervisor were the cause of the decision. The complaint is therefore irreceivable because it does not challenge a decision which was taken by the appointing authority and which affects him adversely. There has been no change in the nature, grade or remuneration of his employment. Furthermore, the complainant has no cause of action, since he has not challenged his subsequent transfer to another service.

In subsidiary argument the Agency rebuts the complainant's pleas. It maintains that the "measure" taken on 17 February 1999 cannot be dubbed a "decision adversely affecting" a staff member which needs to be substantiated. Besides, the complainant was amply informed of the reasons for the reassignment. Secondly, it was not a disciplinary sanction: an inquiry was therefore not necessary and there was no abuse of process.

Eurocontrol contends that the complainant's duties did match his grade. The comparison with a colleague holding a similar post is irrelevant: the nature of the duties may be the same, but there are far fewer of them. The complainant may not plead an affront to his dignity as he failed to avail himself of the special procedure for such grievances. The Agency asserts that it showed understanding towards the complainant but that he himself refused to be transferred out of the Directorate of Finance. It reiterates that his reassignment was not the consequence of his differences with the Head of MIS. It denies that there was an obvious misappraisal of the facts or abuse of authority. It asks the Tribunal to award all costs against the complainant.

D. The complainant rejoins that the decision in question is a decision to transfer him and has affected him adversely, and that he still has a cause of action because his reassignment outside the Directorate of Finance is temporary and there is no knowing what his administrative status will be when it ends. He adds that his complaint addresses "more generally ... the way his supervisor treated him", and is therefore receivable.

He maintains that the decision was inadequately reasoned and the reasons that the Agency gave in its reply were not the real ones. He points out that the Joint Committee on Appraisals, which heard an internal complaint he filed against an appraisal report written on 10 September 1999 by his immediate supervisor, recommended quashing the report in its entirety because it was unfair. According to the complainant when the Director General endorsed that recommendation on 12 July 2000, he confirmed that the Head of MIS was biased. The complainant submits that he was downgraded in a covert manner.

He presses his plea that the post of Customer Relationship Manager did not match his grade. He points out that the Agency concedes that the nature of his duties were the same as those pertaining to a post held by a grade B2 official. Eurocontrol's assertion that it was up to him to challenge the affront to his dignity is surprising: it was the Director General himself who asked him not to pursue the matter. The complainant quotes from the opinion of the Joint Committee on Appraisals in which the latter regrets that the Director of Finance took "no initiative to stop the deterioration in relations" with the Head of MIS. That, he says, is proof that the Agency failed in its duty towards him. He denies refusing a transfer away from the Directorate of Finance: he simply made the point that he had not asked for such a transfer and felt it to be unfair.

E. In its surrejoinder Eurocontrol maintains that the complaint is irreceivable: he has not challenged a decision by the Director General but an organisational measure decided within the department. The complainant fails to show a cause of action since the quashing of the impugned decision could not have the effect of returning him to his former duties, as they no longer exist. His claim to compensation for the injury he allegedly suffered at the hands of his supervisor is irreceivable because he failed to exhaust all internal remedies.

In Eurocontrol's submission, the complainant's contention that he did not know the reasons for the measure taken on 17 February 1999 shows bad faith. The facts subsequent to this measure are immaterial and must be discounted. However, although as a mark of goodwill the Agency quashed his appraisal report pursuant to the recommendation of the Joint Committee on Appraisals, that has no effect on the lawfulness of the transfer. It points out that heads of department have a broad measure of independence in organising their departments. Lastly, nothing prevented the complainant from resuming the proceedings to protect his dignity when he realised that its proposals were unsuitable.

Eurocontrol adds that an audit of functions being carried out at the Agency should result in the other post of Customer Relationship Manager being put up to grade A.

CONSIDERATIONS

1. The complainant joined Eurocontrol in 1974. At the material time he was Head of the New Technologies Section at grade A5 in Management Information Services (MIS) of the Finance Directorate.

2. The Director of Finance noted in a memorandum of 11 June 1998 that a new post should be sought for the complainant outside MIS, because relations between the complainant and the Head of MIS, his immediate supervisor, had begun to deteriorate following two incidents.

On 8 October 1998 the Director General asked the complainant to submit proposals for a new assignment.

Finally, after several exchanges of views, the complainant was offered a reassignment as part of the general reorganisation of MIS, as Customer Relationship Manager for Logistics and External Services. The complainant refused the offer but the Director of Finance sent him a memorandum on 17 February 1999 confirming his appointment to that post as from 1 March 1999.

3. The complainant lodged an internal complaint against that decision on 17 May 1999. In its opinion of 7 October the Joint Committee for Disputes recommended rejecting the complaint as irreceivable because the decision in question did not affect the complainant adversely, and also as devoid of merit, none of his pleas being sound. However, "from a social rather than a legal standpoint" the Committee suggested that the Director General transfer the complainant out of MIS as soon as possible. By a decision of 2 November 1999 the Director of Human Resources informed the complainant on the Director General's behalf that his internal complaint was rejected. He also told him that his transfer, recommended by the Committee, was being considered carefully and that he would be consulted as to any further action taken.

That is the decision now impugned.

4. Eurocontrol contends that the complaint is irreceivable because the "decision" to transfer him was not a real decision coming from an appointing authority, thus, he fails to show injury and has no cause of action.

The objections to receivability fail. Even a simple measure on a matter of internal reorganisation such as transfer

may sometimes impair the staff member's rights and legitimate interests (see Judgment 1078, *in re* Schaack, among others). Furthermore, the impugned decision has taken effect.

5. The complainant has a number of pleas which he describes as formal and procedural: the Agency failed to state its reasons in breach of Article 25(2) of the Staff Regulations governing officials of the Eurocontrol Agency; it failed to carry out an objective and impartial inquiry prior to the decision to transfer him, and there was abuse of process in breach of Articles 51 and 88 to 90 of the Staff Regulations. The Tribunal will consider these pleas together with the substantive pleas since, in order to rule on them, it needs to ascertain the nature of the decision in question and whether it was indeed a hidden sanction imposed for disciplinary reasons or on grounds of inadequate performance, in the form of a transfer to a post in a lower category, which amounts to downgrading.

6. The evidence shows that the complainant was to be found a new post because relations with his first-level supervisor had become increasingly strained since 1997. However, when he was offered the post of Customer Relationship Manager for Logistics and External Services, he said that he did not want it because it comprised no supervisory duties and did not match his grade. The Director of Finance nonetheless confirmed the new assignment in a memorandum of 17 February 1999. The complainant construed that decision as proof that the Agency shared his immediate supervisor's views about his abilities and had imposed a hidden sanction on him for which there was only one explanation: malice on the part of the Head of MIS.

7. The argument is unsound. Since the complainant offers no objective evidence to bear out his allegations, the Tribunal sees no reason to disbelieve the Agency's assertion that it transferred the complainant as a result of a general reorganisation of MIS which involved almost all staff in the department.

Consequently, the pleas - that the Agency failed to substantiate its decision and conduct an inquiry, committed a breach of procedure, drew obviously wrong conclusions from the evidence and abused its authority - cannot succeed. The complainant has failed to provide objective evidence that the impugned decision is a transfer which should be treated as a hidden sanction, imposed because he did not get on with his supervisor and the latter had given him an adverse performance appraisal.

8. Having ascertained that the decision is not a hidden sanction, the Tribunal must also determine whether it respects the complainant's dignity and good name and does not cause him unnecessary hardship.

9. The complainant takes the view that the duties of the post in question did not match his grade in breach of the first paragraph of Article 7 of the Staff Regulations, and that his professional reputation was damaged. That paragraph says:

"The Director General shall, acting solely in the interests of the service, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade."

The second paragraph of Article 5(1) states:

"Category A shall comprise eight grades, involving administrative and advisory duties which require university education or equivalent professional experience ..."

10. The complainant contends that the post he was assigned to is a grade B one, the incumbent serving simply as a "relay" or "letter box", which obviously does not require a university education. In support of that assertion he argues that another post of Customer Relationship Manager with duties defined in a manner similar to his own was given to a grade B2 staff member, whereas he holds grade A5; and the only difference between the two posts is the number of "customer services" for which he provides liaison with MIS.

11. The Agency contends that, according to the job description, the duties of the post of Customer Relationship Manager do meet the criteria set in the second paragraph of Article 5(1) of the Staff Regulations, since the functions include planning, negotiation, coordination and an analysis of customer needs.

Moreover, the fact that these functions may be different from his duties in MIS does not mean that they are inferior, as the post involves responsibility and requires extensive knowledge of information technology and, above all, communication and negotiating skills.

As to the grade B official in a post similar to his, whom he cites for the purposes of comparison, the Agency does

not deny that the nature of his duties are similar to the complainant's, but asserts that they are far less extensive as he is responsible for far fewer "customer services". Consequently, says the Agency, the difference in grade between the two is warranted by the differences in their tasks and is not at odds with the criteria set in Article 5(1).

12. The defendant's arguments are unsound. A quantitative difference in duties rather than a difference in their nature or intrinsic importance is not a decisive criterion on which to base a difference in grade between two officials who perform exactly the same duties.

The Agency's explanation in its surrejoinder that an audit of functions being carried out at Eurocontrol should result in the grade B official's post being put up to grade A merely bears out the complainant's assertion that at the time of his reassignment the duties of Customer Relationship Manager did not correspond to grade A because they conferred no power of decision and relegated the incumbent to information and documentation duties, which require no university qualifications.

13. The complainant is therefore right in his assertion that the grade did not match the job in breach of the first paragraph of Article 7 of the Staff Regulations. The impugned decision, based on an unlawful measure must therefore be set aside.

14. The Tribunal holds that even though the Agency subsequently followed the recommendation of the Joint Committee for Disputes and offered the complainant another assignment which he accepted - this unlawful measure did cause him moral injury by impairing his professional dignity, and he is entitled to redress.

15. The complainant claims one million Belgian francs plus interest at the rate of 8 per cent a year as from 17 May 1999 in compensation for the injury caused by the decision of 17 February 1999 and the conduct of the Head of MIS. In view of the circumstances of the case, the Tribunal considers that an award of 2,000 euros is fair redress but only for the unlawfulness of the decision of 17 February 1999. The complainant having failed to show injury stemming from the conduct of the Head of MIS, his claim on that count must fail.

16. The complainant is entitled to an award of 2,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay the complainant the sum of 2,000 euros to include all interest at the date of the delivery of the judgment.
3. It shall pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

