

NINETY-FIFTH SESSION

Judgment No. 2260

The Administrative Tribunal,

Considering the complaint filed by Mr A. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 April 2002, the Agency's reply of 2 August, the complainant's rejoinder of 18 October 2002 and Eurocontrol's surrejoinder of 24 January 2003;

Considering Article II, paragraph 5, 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 complainant, a British national born in 1967, joined Eurocontrol in 1992. At the time of the relevant facts he held a grade C4 post in the Operations Division at the Maastricht Upper Area Control Centre.

In January 2001 the Director General submitted proposals to the Agency's executive bodies with a view to improving the conditions of employment of operational staff at the Control Centre. Following the acceptance of these proposals, two new allowances were created, with retroactive effect from 1 July 2000. Staff were informed of this by office notice 06/01 of 27 April 2001, entitled "Conditions of Employment for Operational Staff at the Maastricht Centre", to which the corresponding statutory amendments were appended. The relevant texts are cited below.

General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre:

"Article 69c

Established servants in the Operations Division holding an A, B or C category post and performing operational functions in the control room shall be paid, as from 1.7.00, an operational functions allowance ('ATC allowance') under the conditions laid down in a ruling of the Director General.

[...]

Article 69d

Established servants in the Operations Division holding an A, B or C category post and assigned to an operational support post shall be granted an operational support allowance as from 1.7.00 under the conditions laid down in a ruling of the Director General."

Rule No. 21a concerning function allowances paid to staff of the Operations Division at the Eurocontrol Maastricht Centre:

"Operational functions allowance ('ATC allowance')

Article 7

Recipients

1. A monthly operational functions allowance shall be paid to established category A, B and C servants of the Operations Division [...] performing operational functions in the control room.

2. The list of posts giving entitlement to the ATC allowance is fixed as follows:

[...]

C1 - Senior Flight Data Specialist, Flight Data Specialist Training Officer, Flight Data Specialist

C2 - Flight Data Specialist

C3 - Flight Data Specialist

3. However, this allowance is also paid to certain servants working in the Operations Division who cease performing operational functions and are assigned as from 1.7.00 to operational support functions provided they have performed previously operational functions in the control room for 7 years [...].

[...]

Operational support allowance

Article 9

1. A monthly allowance shall be paid to established category A, B and C servants of the Operations Division assigned to an operational support post as from 1.7.00. In order to qualify for the allowance, staff must have regularly worked shifts in the control room for at least seven years.

2. Notwithstanding the provisions of §1 above, the list of posts giving entitlement to the operational support allowance is fixed as follows:

[...]

C1 - Training Support Co-ordinator, Senior Operational Support Assistant

C2 - Operational Support Assistant

C3 - Junior Operational Support Assistant [Principal Simulator Pilot]

[C4 - Deputy Operational Support Assistant, Simulator Pilot]

3. Servants assigned to an operational support post prior to 1.7.00 may be paid this allowance as from 1.7.00 provided they fulfil the conditions set out in paragraph 1 above on their date of transfer, and if the post is included in the list mentioned above."

Operational staff posts were also reorganised. Category C staff were classified in two groups: flight data specialists and operational support assistants. The reclassification exercise began in May 2001.

By a memorandum of 19 June 2001 sent to the Director of Human Resources, the complainant asked to be granted the operational functions allowance (hereinafter "ATC allowance"). He stated that he was performing operational functions in the control room. By a decision of 11 July the Director of Human Resources, acting on behalf of the Director General, appointed the complainant to the post of Junior Operational Support Assistant and promoted him to grade C3 with retroactive effect from 1 July 2000. As a result of this, the complainant no longer satisfied the conditions for entitlement to the above-mentioned allowances. On 20 July 2001 he filed an internal complaint against the decision of 11 July and against office notice 06/01. In its opinion of 27 November 2001, the Joint Committee for Disputes took the view that it seemed "contrary to the spirit of the reform to restrict eligibility for the operational support allowance to staff who have worked for seven years in an operational control room". It considered that "the operational support allowance [was] intended as a bonus for functions associated with control" and that "all staff performing such functions [should] be placed in a similar situation". It concluded that a number of employees, including the complainant, "appear[ed] to be suffering discrimination as regards their financial

situation in relation to other staff performing similar functions", and unanimously recommended that "their situation should be reviewed in a manner that is consistent with the aim of the reform approved by the Permanent Commission". By a memorandum of 11 December 2001, which the complainant allegedly received only on 23 January 2002, the Director of Human Resources, acting on behalf of the Director General, rejected the internal complaint. That is the impugned decision.

B. The complainant has two pleas: failure to provide sufficient reasons and breach of the principle of equal treatment.

The reason put forward for the impugned decision - insofar as it justifies the fact that eligibility for the operational support allowance is subject to the condition of seven years' control room experience on the grounds that staff having that type of experience must be able to leave the control room without suffering any financial loss - is clearly erroneous, because under Article 7(3) of Rule 21a, control room staff assigned to operational support functions remain entitled to the ATC allowance and can even claim both allowances.

Furthermore, by making eligibility for each of the two allowances subject to the condition of seven years' control room experience, Rule 21a leads to "completely arbitrary and unjustified" discrimination between staff performing similar functions and contravenes Article 69d of the General Conditions of Employment, which provides that the operational support allowance shall be granted to all established staff members without distinguishing on the basis of whether or not they have control room experience.

The complainant asks the Tribunal to set aside the decision of 11 July 2001 appointing him to the post of Junior Operational Support Assistant, "insofar as it entails a refusal to grant the complainant the ATC allowance [...] and the operational support allowance"; to declare that office notice 06/01 and Articles 7(3) and 9(1) of Rule 21a are illegal; to order Eurocontrol to pay him the ATC allowance and the operational support allowance with effect from 1 July 2000, with interest on arrears at an annual rate of 8 per cent; to set aside the impugned decision "to the extent that it is necessary to do so"; and to order the defendant to pay the costs, which he estimates at 2,500 euros.

C. In its reply the Agency submits that the reason put forward for the impugned decision, though succinct, complies with the Tribunal's case law, which allows that the reasons on which a decision is based may be provided at a later date. There was no need to reiterate the reasons which had led to the modifications in the conditions of employment of staff of the Operations Division since those reasons had already been amply explained previously, particularly in office notice 06/01. As for the alleged financial loss, this resulted not only from the loss of the ATC allowance, but also from the fact that the complainant had resumed fixed working hours.

Regarding the alleged breach of the principle of equal treatment, Eurocontrol argues that the two allowances serve different purposes. The ATC allowance is an additional salary component paid in respect of functions which are highly valued in all member States. The operational support allowance is designed to enable employees to move from control duties to support duties: it ensures, on the one hand, that staff trained by the Agency will not rapidly leave the control room in order to perform duties which, though involving fewer restrictions, are remunerated at a similar level by virtue of allowances, but on the other hand that staff will have the possibility of transferring without being exposed to a substantial loss. No discrimination has occurred because the complainant, who "has never been assigned to the control room", even though "he may have been there occasionally for brief spells", is in a different situation from his colleagues.

D. In his rejoinder the complainant states that he was never officially assigned to the Training Section but that he was in fact assigned to the Operations Division as a Flight Data Assistant. Contrary to the Agency's assertions, he has performed functions in the control room since May 1993, when he became a Flight Data Assistant, and continues to do so. Although those functions were performed in a discontinuous manner, on July 2000 he did satisfy the disputed condition of seven years' control room experience and he ought to have been granted the claimed allowances. He submits that he is the only category C employee "performing [Flight Data Assistant] duties" who was appointed as a Junior Operational Support Assistant following the reorganisation of operational staff posts, all others having been appointed as Flight Data Specialists.

The complainant rejects the argument that the impugned decision was sufficiently reasoned in the light of the case law, since no logical information enabling him to understand the decision and to determine whether an appeal would be appropriate was provided. He reiterates his pleas and argues that the allowances in question cannot be intended to compensate for financial losses associated with a return to fixed working hours, since it would be

"absurd to wish to compensate, by means of an allowance, for restrictions which no longer exist".

He asserts that the requirement of seven years' control room experience is "unjustified, discriminatory and contrary to the *ratio legis* of the legislator". He also accuses the defendant of disregarding its own rule, since some employees obtained the operational support allowance despite the fact that they did not have seven years' control room experience.

E. In its surrejoinder Eurocontrol maintains that the complainant was indeed assigned to the Training Section of the Operations Division, as witness his appraisal reports written by the Head of the Training Section and the organisation charts for that Division from 1994 to 2000. In fact, from 1 March 1994 until 30 June 2000, the complainant accumulated only 53 days' presence in the control room. Furthermore, a distinction should be drawn between the title of "Flight Data Assistant" and the post of "Flight Data Specialist". The fact that the complainant possesses the former does not prove that he was appointed to the latter.

According to the defendant, the complainant had sufficient information to determine whether an appeal was appropriate. It disputes his statements concerning breaches of the rule: all the staff members to whom he refers had at least seven years' control room experience. Lastly, it adds that the measures challenged by the complainant are the result of negotiations with the unions represented at Eurocontrol and were approved by the executive bodies of the Organisation. The Director General in no sense distorted the purpose or spirit of the measures in question by publishing office notice 06/01.

CONSIDERATIONS

1. Office notice 06/01 of 27 April 2001, entitled "Conditions of Employment for Operational Staff at the Maastricht Centre", was accompanied by an appendix containing a series of statutory and regulatory measures which, following their adoption by the Provisional Council and the implementation of the applicable consultation procedure, had been approved by the Permanent Commission of the Organisation.

These measures included the creation of two new allowances with effect from 1 July 2000: an operational functions allowance ("ATC allowance") for staff performing operational functions in the control room, provided for in Article 69c of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, and an operational support allowance, for staff assigned to operational support functions, provided for in Article 69d.

On 19 June 2001 the complainant asked the Director of Human Resources to grant him the ATC allowance.

By a decision of 11 July 2001 he was appointed to the post of Junior Operational Support Assistant with retroactive effect from 1 July 2000. According to him, this decision constituted a negative reply to his request. Firstly, the fact that he was no longer assigned to the control room, which is a condition for entitlement to the ATC allowance under Article 7(1) of Rule 21a of the General Conditions of Employment, deprived him of that allowance. Secondly, since he had not performed operational functions in the control room prior to the appointment decision, he did not satisfy the conditions stipulated in Article 7(3) of the above-mentioned Rule for entitlement to the ATC allowance, nor did he satisfy the conditions stipulated in Article 9(1) for entitlement to the operational support allowance. Consequently, on 20 July 2001 he filed an internal complaint under Article 91 of the General Conditions of Employment. In support of his internal complaint he referred to the discrimination he considered he had suffered as a result of the application of office notice 06/01.

In its opinion of 27 November 2001 the Joint Committee for Disputes unanimously concluded that the complainant, and other staff members concerned, appeared to have been discriminated against financially in relation to other staff performing similar functions. It recommended that their situation should be reviewed in a manner that was consistent with the purpose of the reform approved by the Permanent Commission.

By a memorandum of 11 December 2001 the Director of Human Resources, acting on behalf of the Director General, informed the complainant that he could not endorse the recommendations of the Joint Committee for Disputes and rejected his internal complaint. That is the impugned decision.

2. The two pleas that the complainant puts forward in support of his complaint - failure to provide sufficient reasons

and breach of the principle of equal treatment - are examined below.

Failure to provide sufficient reasons for the decision

3. The complainant contends that the Director General did not provide adequate reasons for his decision to reject his internal complaint, since his reasoning was patently erroneous. He points out that, in his decision, the Director General emphasises that the condition of seven years' control room experience, stipulated in Article 9 of Rule 21a for entitlement to the operational support allowance, is justified by the fact that staff who have acquired in-depth experience of the control room must be able to leave the control room in order to perform functions associated with control, such as training and planning, without suffering any financial loss. However, the complainant is of the view that Article 7(3) of Rule 21a allows control room staff assigned to operational support functions to retain their entitlement to the ATC allowance. He adds that staff who have in-depth experience of the control room therefore suffer no financial loss as a result of leaving it in order to perform operational support functions, and that under Rule 21a such staff can even claim the operational support allowance in addition to the ATC allowance.

4. The Tribunal reiterates that the requirement that reasons be given for any decision is designed to ensure that the person concerned is made aware of them so that he/she may - for one thing - challenge them on appeal (see Judgment 1590, under 7).

5. In this case the Director General indicated in his decision that it was because the complainant did not satisfy the condition stipulated in Article 9 of Rule 21a, concerning seven years' shift-work in the control room, that he was not entitled to the operational support allowance, and that it was for that reason that his internal complaint had been rejected.

Although the complainant considers that reasoning to be patently erroneous, which remains to be proved, the requirement that reasons be given, as defined by the Tribunal's case law, has been satisfied, since the complainant was made aware of the reasons on which the rejection of his internal complaint was based. Consequently, his plea concerning insufficient reasoning is unfounded.

Breach of the principle of equal treatment

6. The complainant criticises the defendant for having breached the principle of equal treatment. He states that by making entitlement to the new allowances subject to new conditions - such as the requirement of having worked in the control room and of having acquired seven years' experience there - which were not provided for in Article 69d granting the operational support allowance to all established staff members assigned to operational support functions, the defendant disregarded the *ratio legis* of the statutory amendments, thereby creating unacceptable discrimination against staff members who do not satisfy those conditions.

He observes that amongst the reasons put forward by the Director General with a view to obtaining the adoption by the Permanent Commission of the amendments to Rule 21a, it is stated that control support staff perform tasks which are of fundamental importance and that it had seemed necessary to reassess the conditions of employment of operational support staff. In spite of this, Rule 21a, as amended by office notice 06/01 of 27 April 2001, provides that in order to be entitled to the ATC allowance, staff transferred from the control room to operational support functions had to have performed operational functions in the control room for seven years, and that the operational support allowance is granted to staff assigned to operational support functions only on condition that they have worked shifts in the control room for at least seven years.

The complainant submits that, as far as the ATC allowance is concerned, there is no justification for the requirement that staff transferred from the control room to operational support functions should have performed operational functions in the control room for seven years in order to be eligible for the allowance, and that by imposing that condition the legislator created discrimination amongst operational staff transferred from the control room to support functions.

He asserts that he did perform operational functions in the control room but acknowledges that he had not acquired seven years' experience there. In his view, there is no justification for denying him the ATC allowance granted to staff who have seven years' control room experience and who are transferred to operational support functions.

With regard to the operational support allowance, he contends that the *ratio legis* of Article 9(1) of Rule 21a "clearly explains that control support staff perform functions that are of fundamental importance and that their

conditions of employment should be reassessed". Consequently, to confine that reassessment to staff who are coming from the control room and who, in addition, have acquired seven years' experience there, is totally contrary to the *ratio legis* of Article 9(1) and amounts to arbitrary and unjustified discrimination against staff members who do not fulfil those conditions but who perform tasks similar to those of staff who have seven years' control room experience.

He therefore asks the Tribunal to declare that Articles 7(3) and 9(1) of Rule 21a are illegal, in that they make entitlement to the ATC allowance and to the operational support allowance subject to the requirement of seven years' control room experience.

In his rejoinder the complainant adds that the defendant appears to have disregarded its own rule. He states that some of his colleagues, whom he names, obtained the operational support allowance despite the fact that they did not have seven years' control room experience. Going back on his earlier affirmations, he asserts that he had acquired seven years and two months' control room experience, albeit discontinuously, since the time when he was given the title of Flight Data Assistant in May 1993, not counting the training period. That, he believes, justifies the granting of both the ATC allowance and the operational support allowance. He adds that since the decision of 11 July 2001, by which he was appointed to the post of Junior Operational Support Assistant, he has continued to perform operational functions in the control room.

7. In its reply the Agency argues that the accusation of discrimination is unfounded, because the "complainant is in a different situation to [that of] his colleagues, who had previously worked in control rooms or who had also been required to work special shifts [...] and for whom it was necessary to provide a mechanism to protect them from any financial loss". On this issue it refers to the Tribunal's case law, which establishes that different treatment of staff members who are in different positions does not constitute discrimination (see Judgment 2149, under 6).

The defendant submits that the *ratio legis* of the statutory and regulatory amendments negotiated with the unions and approved by the Permanent Commission appears in the appendices to the letter of 25 January 2001 from the Director General to the members of the Provisional Council. These documents show that the ATC allowance and the operational support allowance were established for different purposes. The ATC allowance is connected with the performance of control tasks and constitutes an additional salary component paid in respect of functions that are highly valued in all member States, whereas the operational support allowance serves a different purpose and is granted only to staff who have previously performed control functions whilst working in shifts, but who leave the control room in order to perform support functions. It was therefore necessary to facilitate the transition of those staff members from control functions to support functions by avoiding two pitfalls: firstly, staff whose training had been provided primarily by the Agency had to be prevented from rapidly leaving the control room in order to perform tasks which, though involving fewer restrictions, were similarly remunerated by virtue of allowances, and secondly, staff had to be given the opportunity to transfer after a certain period of time, without facing substantial financial losses.

According to the defendant, that is why the condition of seven years' control room experience was imposed not only for continued entitlement to the ATC allowance, but also for entitlement to the operational support allowance paid to staff who had worked in the control room on a regular basis in order to maintain a permanent service.

It adds that since the complainant in any case never worked in a control room, he could not be entitled to the ATC allowance even if the requirement of seven years' experience were waived.

Regarding the operational support allowance, which is intended to facilitate the transfer, after a period of at least seven years, of staff who have performed control room functions in shifts, by ensuring that their remuneration remains stable, the Agency submits that this cannot concern the complainant.

8. The reasons underpinning the statutory and regulatory amendments are set out in the appendices to the Director General's letter of 25 January 2001 to the members of the Provisional Council.

In those appendices, the ATC allowance is described as an additional salary component aimed at "rewarding the performance of a function that is highly valued on the employment market, in view of the chronic shortage of ATC controllers".

As for the measures applicable to operational support staff, the appendices state, in particular, that:

"many staff members come [...] from the operational control room, and the qualifications and experience they have acquired there are of prime importance in their new functions. The optimal concept would be to manage a pool of experienced operational staff who could, as needs dictated, work in the control room or perform support functions. Practical measures will be taken to enable controllers transferred from the control room validly to preserve their licence.

However, one of the major obstacles to the implementation of that idea is the chronic shortage of controllers in the operational room and the loss of certain financial benefits attached exclusively to control functions. Furthermore, the creation of an ATC allowance for control staff merely widens the gap as regards career conditions.

It is therefore proposed that the transfer of controllers to support functions should be facilitated by the granting of certain financial benefits. These benefits are cumulative and are granted to staff leaving operational functions on or after 1.7.2000, subject to certain conditions."

Those conditions, as mentioned in Articles 69c and 69d of the General Conditions of Employment, were specified in the amendments to Rule 21a.

9. It is clear from the evidence examined above that experience acquired in a control room is an important element to be taken into account in granting the operational support allowance and in maintaining the ATC allowance in the cases provided for in Article 7(3) of Rule 21a.

The reasons underpinning Articles 69c and 69d were conveyed to the competent bodies which adopted those articles. At that time, they were also asked to take note of the amendments to the provisions of Rule 21a which had been approved in the context of the consultation procedure. Thus, it was in full compliance with the statutory provisions adopted by the competent body that the conditions of application for the said provisions were established in Rule 21a, and particularly those requiring seven years' control room experience as a condition for entitlement to the operational support allowance and for maintaining the ATC allowance.

Consequently, the complainant's pleas aimed at obtaining a declaration to the effect that Articles 7(3) and 9(1) of Rule 21a are illegal are unfounded.

10. A question remains as to whether, in the application of the relevant texts, the complainant was the victim of a breach of the principle of equal treatment by the Organisation.

The Tribunal considers that the right to equal treatment is breached only where staff members in an identical or comparable position in fact and in law receive different treatment from the organisation (see in particular Judgment 2066, under 8).

In the present case, the complainant is not entitled to the ATC allowance. Indeed, the evidence on file, and particularly a letter that he sent to the Director General of the Agency on 21 June 1997, his appraisal reports and the organisation charts for the Operations Division from 1994 to 2000, show that he did not perform operational functions in the control room within the meaning of Article 69c of the General Conditions of Employment and Article 7(1) of Rule 21a, and that he was not assigned, as from 1 July 2000, to operational support functions after having performed operational functions in the control room for seven years, within the meaning of Article 7(3) of Rule 21a.

Nor is he entitled to the operational support allowance provided for in Article 69d of the General Conditions of Employment and Article 9 of Rule 21a, because, as stated above, he did not satisfy the requirement of seven years' shift-work in the control room.

The staff members named by the complainant, who allegedly obtained the operational support allowance despite the fact that, according to him, they did not have seven years' control room experience (which would prove that the defendant had disregarded its own rule), satisfied the applicable conditions, as is confirmed by the document concerning the individual situations of those staff members with regard to the ATC and operational support allowances, submitted by the defendant as an annex to its surrejoinder.

11. In view of the foregoing considerations, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2003, 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 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet