

**NINETY-SEVENTH SESSION**

**Judgment No. 2342**

The Administrative Tribunal,

Considering the complaint filed by Mr T. A. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 30 April 2003, the Agency's reply of 3 September, the complainant's rejoinder of 10 November 2003 and Eurocontrol's surrejoinder of 20 February 2004;

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, an Irish national born in 1956, was assigned at the material time to the Central Flow Management Unit (CFMU) in its CSO Section (CFMU Systems Operations) in Brussels, as a grade C2 network operator. He was also an elected member of the Bureau of FFPE-Eurocontrol, one of the Agency's trade union organisations.

On 24 October 2001 the President of FFPE-Eurocontrol sent the Director General a "register of grievances of CSO staff concerning observance of the provisions of Rule of Application No. 29"\*<sup>1</sup>, which was aimed at extending to CSO members the benefits enjoyed by staff members in other CFMU units. He asked for negotiations to be opened immediately and listed the measures the CSO team intended to take if no agreement was reached by 30 November. These measures included a refusal to perform stand-by duties. On 26 November the Director of Human Resources replied that the application of Rule No. 29 was under review and that most of the measures envisaged "would constitute punishable acts of blatant insubordination in breach of the Staff Regulations".

In an e-mail of 4 December 2001, the complainant refused, on the grounds of a union directive, to carry out various documentary updating tasks which he had been assigned on 20 November for completion by 14 December. He was on stand-by duty at home from 10 to 16 December. Any staff member on stand-by duty must be accessible at all times by means of a pager, especially in order to carry out emergency replacements. On 12 December 2001 the complainant refused to replace a sick colleague. In a memorandum of 22 March 2002, the Director of Human Resources sent the complainant a report listing the charges held against him and invited him to come to an interview on 19 April, which might be followed by a disciplinary measure. In a decision dated 16 June, handed to the complainant on 2 July, the Director General issued him a reprimand.

The complainant filed an internal complaint against that decision on 30 September 2002. In the opinion of the Joint Committee for Disputes dated 30 January 2003, three of the four members considered the complaint to be legally unfounded. Two of the four members recommended alleviating the disciplinary measure, suggesting that a written warning be issued instead of a reprimand. The other two members recommended withdrawing the measure altogether "in view of the confused nature of the information" held by the complainant. This opinion was appended to the defendant's decision to reject the internal complaint, which, although dated 10 April, was delivered only on 6 May 2003. The complainant had meanwhile filed the present complaint.

B. The complainant maintains that his refusal to perform stand-by duty constitutes strike action, which is in principle lawful. By basing the disciplinary measure on a failure to comply with statutory obligations concerning continuity of service, availability of staff and stand-by duties, the defendant infringed the right to strike, a right which is enjoyed by all staff members. By punishing an elected trade union official for an act arising from a trade union directive, it infringed freedom of association. He also accuses Eurocontrol of discrimination, on the grounds that similar strike action in the past did not give rise to any disciplinary proceedings. He believes he was punished

merely because he belonged to a trade union, which constitutes moral harassment. Furthermore, he states that on 13 January 2002 the Agency and the unions reached an agreement on conditions governing the right to strike, which fully cover the conduct with which he was charged. He maintains that the Director General, by punishing him – especially after that agreement had been signed – for conduct which had been recognised as lawful, was guilty of abuse of authority. He argues lastly that insufficient reasons were given for the impugned decision, insofar as the Director General did not explain in what respect exercising the right to strike was unlawful.

The complainant seeks the annulment of the decision of 16 June 2002 issuing the reprimand, and an award of costs, which he estimates at 4,000 euros.

C. In its reply Eurocontrol argues that the conduct with which the complainant was charged constitutes “blatant insubordination” and that he cannot exonerate himself by relying on an alleged union directive calling for strike action. In its register of grievances, FFPE-Eurocontrol had itself made it clear that the measures envisaged “in no way constituted strike action”, of which the complainant could not have been unaware. Moreover, many aspects of the conduct of the complainant and of just one of his colleagues (see Judgment 2343 also delivered this day), according to the Agency, constitute not so much strike action as “a lacking performance of normal duties”: firstly, the two staff members did not stop work at the same time; secondly, it was a surprise action which caught the administration unprepared; and thirdly, the measures announced in the register of grievances were aimed at disrupting the service – which is in breach of “the principle of continuity of the international public service” – and at damaging Eurocontrol’s reputation, so that the action concerned must be considered wrongful and “not in keeping with the spirit of a strike”.

It adds that the right of association does not automatically imply a right to strike and does not confer impunity on trade union officials in the event of blatant insubordination. It considers that it is wrong to speak of moral harassment in this case and explains that the strike actions to which the complainant appears to refer were actual collective work stoppages of limited duration, preceded by clear warnings. The allegation of abuse of authority, in its view, rests on the mistaken assumption that an agreement was reached between Eurocontrol and the trade unions, which is not the case. Be that as it may, such an agreement would not have had a retroactive effect. Lastly, it maintains that the documents supplied to the complainant during the disciplinary procedure show that sufficient reasons were given for the impugned decision.

D. In his rejoinder the complainant points out that he never received a copy of the letter written by the Director of Human Resources to the President of his trade union on 26 November 2001 and that he was therefore unaware of the possible consequences of his conduct. He argues that the right to strike is a fundamental right which is also applicable in the public services. The “cautious language” used by the President of FFPE-Eurocontrol in the register of grievances was aimed at avoiding the union’s actions being systematically penalised, but everyone knew that the measures envisaged were part of trade union action and were therefore an exercise of the right to strike. Furthermore, it can hardly be denied, in his view, that the incidents in question constituted collective action, undertaken at the initiative of a recognised trade union and aimed at serving work-related claims, and that “the work stoppage was complete, even though it affected only part of the work”. The two staff members did not stop work at the same time merely because they were not on stand-by duty on the same days. The complainant is surprised at the Agency’s statement that it was caught unprepared by their action, since they had given more than one month’s notice through the register of grievances. Lastly, the intention was never to cause harm, even though any strike action invariably causes employers some inconvenience. The complainant rejects the obsolete attitude to social relations reflected in Eurocontrol’s arguments. He contends that the Agency has not established why the principle of continuity of the service should take precedence over the right to strike, a fundamental right which may be restricted only in certain exceptional circumstances subject to prior negotiation between the social partners. He asserts that it was the defendant which refused, at the last moment, to sign the agreement with the unions, but that the content of the agreement nevertheless provides a “useful” framework for the exercise of strike action.

E. In its surrejoinder the Agency reiterates its pleas on the merits, arguing that the complainant’s refusal to carry out the tasks he was given and to replace a sick colleague while on stand-by duty at home constitutes an act of insubordination which cannot be considered as strike action. The fact that the complainant was not informed of the letter of 26 November is irrelevant. Lastly, the register of grievances cannot be deemed to constitute a clear, unambiguous notice of strike action for a specified period of time. Eurocontrol points out that the complainant was promoted to grade C1 on 1 July 2003, which proves that “the disciplinary measure caused him no injury”.

## CONSIDERATIONS

1. The complainant challenges the decision dated 10 April 2003 of the Director of Human Resources, acting on behalf of the Director General, to confirm the disciplinary measure applied to him on 16 June 2002, namely a reprimand, for refusing to carry out various documentary updating tasks to comply with the obligations of stand-by duty at home, on the grounds that he was following a call for strike action from his trade union.
2. The main issue raised by this case is that of whether the acts held against the complainant may be viewed as resulting from the exercise of the right to strike or of lawful trade union activity, or whether they amounted to blatant insubordination contravening the statutory obligations of international civil servants.
3. The trade union to which the complainant belongs – FFPE-Eurocontrol – had submitted a register of grievances, on 24 October 2001, which was aimed at extending to CSO staff the benefits enjoyed by staff members in other CFMU units, with a request for the immediate opening of negotiations. The President of that union had made it clear that, failing an agreement by 30 November 2001, CSO staff would undertake several forms of trade union action, starting 1 December 2001 and extending over an indefinite period, including “the refusal by all staff concerned to perform stand-by duties”. In the complainant’s view, he did no more than to implement, together with other colleagues, one of the forms of trade union action thus notified, by refusing to carry out stand-by duty.
4. The defendant maintains, on the contrary, that the complainant’s behaviour amounted to blatant insubordination, in breach of the provisions of Article 11 of the Staff Regulations, which stipulates that on accepting service with the Agency, an official “shall undertake, unconditionally, to refrain from any act which might jeopardise the safety of air navigation” and “shall be bound to ensure the continuity of the service and shall not cease to exercise his functions without previous authorisation”. It considers that the partial suspension of the complainant’s activities was not associated with a collective full work stoppage, especially in view of the fact that the union to whose Bureau the complainant belongs, had stated in its registry of grievances, where the union action had been announced, that the measures envisaged “in no way constituted strike action”. Furthermore, on 26 November 2001 the Director of Human Resources had warned the President of the union that most of the measures envisaged “would constitute punishable acts of blatant insubordination in breach of the Staff Regulations”. Apparently this letter was not made available to the complainant, which led the Joint Committee for Disputes to consider that it was preferable to show leniency, either by alleviating the disciplinary measure against him (as favoured by two members of the Committee) or even by withdrawing it altogether (as favoured by the other two members).
5. Regardless of whether or not the complainant had specifically been warned of the consequences of refusing to perform certain duties, in the circumstances described above, his behaviour nevertheless cannot be interpreted as strike action. Undoubtedly, as recalled in the case law (see, for instance, Judgment 566), as a matter of principle a strike is lawful, but this applies only in the case of a collective work stoppage, whereas in the case in hand only two staff members refused to perform certain duties on different days in December 2001, while they were at home. Even though the complainant may have believed, perhaps in good faith according to the Joint Committee, that he was following a trade union directive, his behaviour was not part of any collective action, especially since his trade union had made it clear to the Director General that the measures envisaged “in no way constituted strike action”. If a strike had really been decided, it should have been preceded by due notice, which would have allowed the Agency in good time to take whatever measures were necessary to safeguard air navigation. In the event, that was not the case. The Agency was therefore right in considering that the complainant’s initiative constituted insubordination rather than the simple exercise of a fundamental right.
6. The other pleas of the complaint must also fail. Firstly, the disputed disciplinary measure in no way affected the right of association of the staff member, who is naturally free to join whichever trade union he chooses, but he is not entitled to allow his union’s directives to take precedence over his statutory obligations.

Furthermore, the fact that particular strike action was not punished by Eurocontrol in the past is quite normal and cannot be used by the complainant to argue that he was discriminated against, since his situation is different from that of staff members against whom no disciplinary measures were taken, to which he refers in somewhat vague terms. Likewise, the conduct of negotiations between the trade unions and Eurocontrol regarding the conditions governing the right to strike in any case has no bearing on the correctness of the attitude adopted by the Agency towards the complainant. Furthermore, there is no evidence to support the allegations of “moral harassment” made by the complainant, who was in fact granted a promotion after the reprimand. Lastly, sufficient reasons were given

for the decision to issue a reprimand, in which it was stated that “the complainant refused to perform the professional duties assigned to him, especially when on stand-by duty at home, on the grounds that he was following a trade union directive” and that “the arguments he puts forward in his defence in the letter of 19 April 2002 cannot relieve him of his statutory obligations, in particular under Article 11 of the Staff Regulations”.

7. Since none of the complainant’s pleas succeeds, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, 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 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

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\*Rule No. 29 concerning the working conditions and allowances applicable to staff serving at the CFMU performing shift work, stand by duties, and overtime