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

100th Session **Judgment No. 2493**

The Administrative Tribunal,

Considering the complaint filed by Mr G.J. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 October 2003, the Agency's reply of 16 January 2004, the complainant's rejoinder of 25 March, Eurocontrol's surrejoinder of 25 June 2004, the additional submissions filed by the complainant on 3 February 2005 and the Agency's comments thereon of 29 April 2005;

Considering also the complaints filed against Eurocontrol by Mr P.B., Mr J.B. (his second), Mr G.L., Mr P.T., Mr M.T. and Mr R.V. (his fourth) on 25 February 2004, Mr P.L., Mr H.P., Mr R.R., Ms S.T. and Mr M.V. on 26 February, Mr F.C., Ms M.D., Mr P.G., Ms D.K., Mr A.L. (his second), Mr M. M. (his second), Mr D. P.-C. (his second), Mr P.T. (his second) and Mr C.T. on 27 February and Ms C.M. on 30 April 2004, the Agency's single reply of 15 April 2005, the complainants' rejoinder of 30 June and Eurocontrol's surrejoinder of 22 September 2005;

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

Having examined the written submissions and disallowed the complainants' application for hearings;

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

A. At the material time the complainants were employed as Clerical Assistants 1st or 2nd class (at grades C2 or C3 respectively) in one of the two Integrated Initial Flight Plan Processing System Units (IFPUs) within the Central Flow Management Unit (CFMU). Facts relevant to this case are given under A in Judgment 2387, delivered on 2 February 2005, and in Judgments 2494 and 2495, also adopted this day. The complainants took part in the strike action referred to in those judgments, which the Eurocontrol section of the European Civil Service Federation (hereinafter referred to as "FFPE-Eurocontrol") had called for the period 10-14 March 2003 and as a result of which the complainants did not report for duty.

In March 2003 the Director of Human Resources sent a memorandum to each of the twenty-two complainants inviting them to attend a hearing in the context of "possible disciplinary action". A report listing the charges against them was attached to the memorandum. All the complainants, except one, asked the Director General to communicate to each of them the precise grievances held against them individually, to have the relevant documents translated into French so that their lawyer could answer the case against them, and to fix a later date for the hearing. The Director of Human Resources rejected their requests but gave them until 24 March to ask for a later hearing date, failing which they would be presumed to have waived their right to be heard. Eight of the complainants took no action. The 14 others were heard between 24 March and 17 April 2003. On 23 May the Director General issued a written warning to each complainant as a disciplinary measure for having participated in an unlawful industrial action.

On dates ranging between 22 July and 22 August, the twenty-two complainants, as well as their ten colleagues whose cases are dealt with in Judgment 2494, each filed internal complaints based on a standard text against those decisions. On 22 October 2003 the Joint Committee for Disputes issued an opinion concerning the complaints of all these thirty-two officials who worked in one or the other of the two IFPUs. It concluded that the pleas put forward by the complainants were unfounded but, emphasising the "social impact" of imposing disciplinary measures following industrial action, it recommended rescinding these measures and removing all reference to them in the officials' personnel files "as a gesture of goodwill". It also noted "the absence of a clear legal basis for the right to strike at Eurocontrol". On 19 November 2003 the Director of Human Resources, acting on behalf of the Director General, forwarded this opinion to the complainants. He rejected their internal complaints and refused to withdraw the disciplinary measures.

B. The complainants contend that the Director General has no authority to decide whether a strike is lawful or

not and accuse him of abusing his authority by bringing pressure to bear on the staff. They submit that strike action is a fundamental right which cannot be unilaterally restricted by the executive, and point out that the exercise of that right at Eurocontrol was not governed by any general agreement or rule when the strike began. They deny contravening Article 11 of the Staff Regulations governing officials of the Agency, since the obligation to ensure the continuity of the service is suspended in the event of a strike. They also allege unequal treatment, on the grounds that some of those who took part in the strike were not penalised. They complain of procedural flaws insofar as they were given no precise indication of the charges levelled at them individually, since the document of March 2003 enclosed with the memorandums from the Director of Human Resources was a report containing general accusations sent out to most of the strikers across the board. They submit that to initiate disciplinary proceedings solely on the basis of such a document would constitute a breach of defence rights. Although some of the complainants were heard, they deplore the fact that the hearings did not take place before the disciplinary measures were imposed. Lastly, they argue that the decisions of 23 May 2003 subjecting them to disciplinary measures were not properly substantiated since they refer to the report attached to the summons to a hearing which, as already pointed out, contained only general and collective charges.

Each complainant asks the Tribunal to set aside the decisions of 23 May and 19 November 2003 concerning him or her*, and to order Eurocontrol to pay him or her 4,000 euros for moral injury (concern for their freedom of association, their freedom to strike and the future of their careers**) and 4,000 euros in costs.

C. In its replies the Agency contends that the Director General had both the authority and the duty to warn CFMU officials that, by following FFPE-Eurocontrol's call to industrial action, they were participating in an unlawful strike leaving them liable to disciplinary measures, which he did in a memorandum dated 10 March 2003. The industrial action concerned was in fact a call to disobedience and constituted "unacceptable interference" in the smooth running of an operational service. The Director General therefore neither abused nor exceeded his authority. The Agency explains that, while it recognises the principle of the right to strike, this right must be compatible with the operational environment in some of its services and with the need to ensure the safety of air navigation. It maintains that each official who was proved to have taken part in the industrial action was penalised. It rejects the complainants' allegation that they were not notified of the precise charges against each of them individually. The report preceding the hearing was sufficiently precise and there was nothing unusual in the fact that an identical text was sent to all participants, since the action was collective. It denies having breached defence rights and considers that the eight complainants who did not act upon the invitation of the Director of Human Resources to request a later date for a hearing cannot complain that they were not heard. It argues that the impugned decisions are sufficiently substantiated since they refer explicitly to the reasons given in the aforementioned report, which itself referred to those circulated on 10 March 2003 to all CFMU staff. Lastly, it rejects the allegation of moral injury arising from concern for the future of their careers, noting that some of the complainants have since been promoted.

Moreover, in its reply to Mr M.'s complaint Eurocontrol points out that under Article 92(2) of the Staff Regulations, the Director General is allowed four months to reply to internal complaints. Instead of waiting until that period had expired, the complainant opted to file a complaint under Article VII, paragraph 3, of the Statute of the Tribunal, which, according to the Agency, "sets a deadline" at 60 days. It accepts that he is entitled to do so but points out that he cannot then complain about the consequences of his choice.

In its reply to the other complaints, the defendant contends that one of them is time-barred and hence irreceivable, since the complainant filed it on 30 April 2004, that is, more than two months after the three-month period allowed by the Staff Regulations for appealing to the Tribunal against a decision.

D. In their rejoinders the complainants accuse Eurocontrol of considering any inconvenient strike unlawful and of recognising the principle of strike action only where such action has been duly authorised. They submit that this is unacceptable. They point out that the Director General did not "warn" officials that the strike was unlawful but simply "declared" it to be so on the basis of criteria decreed for the occasion. Moreover, they argue that, although the Director General notified CFMU staff on 10 March that the continuation of the strike was to be seen as the resumption of an unlawful industrial action and that disciplinary measures would be taken against those striking, he did so only at around 5.40 p.m., in other words, after the strike had started. Those on strike became aware of the Director General's position only after they had returned to work. They refer (in the case of Mr M., in his additional submissions) to a statement in a related case, given to the Disciplinary Board by the Director of CFMU during a videoconference which took place on 12 March 2003. In this statement, the Director did not challenge the lawfulness of the strike and declared that no disciplinary measures would be taken against the strikers. With regard

to the reasons stated in the decisions of 23 May 2003, they point out that the report attached to the memorandums sent out in March – referred to by the Agency – is contested precisely because it did not indicate the specific charges against them individually, and that the memorandum of 10 March was addressed to "all CFMU staff". Although strike action is inherently collective, a disciplinary measure must be individual. The complainants submit that it is hardly surprising that the industrial action consisted in acts of disobedience, since that is "the case in most if not all strikes". They maintain their allegation that several officials who took part in the strike, one of whom they name, were not penalised. With regard to the eight officials who were not heard, the complainants consider that the Director of Human Resources was mistaken in assuming that they did not want a hearing, since they had clearly indicated that they wished it to be held at a later date. As far as moral injury is concerned, the complainants contend that this cannot seriously be denied.

They refer to opinions delivered on 30 April and 17 May 2004 by two Disciplinary Boards in the cases of two supervisors/colleagues who took part in the strike action. They remark that those Boards described the actions concerned as strikes and considered that the officials had been unable to obtain any information as to whether the strike was unlawful until it was all over.

As for the complaint which the Agency deemed irreceivable, the complainants point out that the complaint challenges a decision dated 19 November 2003 that was notified to the complainant concerned only on 4 February 2004. They submit that the defendant cannot deny this unless it produces a receipt showing otherwise.

E. In its surrejoinders the Agency considers that it is "entitled to ensure that the exercise of the right to strike remains compatible with the very special nature of the duties carried out by Eurocontrol, particularly with regard to the safety of air navigation". In this case, however, it is adamant that the action conducted by FFPE-Eurocontrol was not a strike but an unlawful industrial action. It emphasises that Disciplinary Boards only offer opinions to the Director General and that their appraisal of the facts, such as their view that the industrial actions in question constituted a "strike", is theirs and theirs alone. It points out that the complainants "could and should have known earlier the content of the message" sent out on 10 March by the Director General. Furthermore, they did receive a substantiated reply to their internal complaints, together with a copy of the opinion of the Joint Committee for Disputes. The Agency explains that if it had not penalised some officials, this was because it had been unable to establish with certainty that they had taken part in the industrial action concerned. Lastly, it submits that should the Tribunal see fit to set aside the impugned decisions, that in itself would provide sufficient compensation for the alleged moral injury, bearing in mind that the disciplinary measure imposed was the least severe of those contained in the Regulations.

The defendant maintains its objection to the receivability of one of the complaints. It argues that it is hardly believable that the complainant concerned received the decision of 19 November 2003 only on 4 February 2004 and notes that the complainant herself does not offer any explanation. In its view, moreover, the Disciplinary Boards' opinions in the cases of the two supervisors/colleagues are not relevant to the present case.

CONSIDERATIONS

1. On 23 May 2003, twenty-two Eurocontrol officials working in CFMU were issued a written warning – the disciplinary measure provided for in Article 88(2)(a) of the Staff Regulations – on the grounds that they had participated in an industrial action which management considered to be unlawful. They all challenge before the Tribunal the decisions taken by the Director of Human Resources on behalf of the Director General on 19 November 2003 to reject the internal complaints they had filed against those disciplinary measures.

2. These twenty-two complaints, which are similarly drafted and based on the same pleas, seek the same redress. They are, therefore, joined to form the subject of a single judgment.

3. The circumstances surrounding the collective actions in which the officials subjected to disciplinary measures participated between 10 and 14 March 2003 are the following. On 29 December 2002 FFPE-Eurocontrol, a trade union recognised by the Agency, issued a strike notice concerning CFMU staff, who were called upon to participate simultaneously in two types of industrial action that would begin on 4 January 2003, namely, "a work to rule whereby staff should reduce activity to the minimum provided for in the […] rules and provisions in force on 10 December 2002" and "further action consisting in a 'refusal of responsibility'". The details of this industrial action were given in an annex, which contained "instructions" urging officials not to apply their normal working

rules. On 3 January 2003 the FFPE-Eurocontrol also published a note telling staff how they should answer telephone calls during the industrial action. On 2 and 3 January 2003 the management reacted by appealing to staff to continue performing their duties "correctly and professionally" and warning them that "the relevant provisions of the staff regulations" would be applied to any staff members who obeyed the trade union's instructions, rendering them liable to disciplinary measures. The President of FFPE-Eurocontrol met with the Director General, after which the trade union decided to suspend unconditionally all current industrial actions for eight weeks starting 6 January.

4. On 7 March 2003 the President of FFPE-Eurocontrol informed the Director General that, following discussion of the latter's latest proposals, it had been decided to resume the industrial action suspended on 6 January. The President wrote as follows:

"Strike action will be resumed […] starting Monday 10 March 2003 for an indefinite period, in the form of temporary work stoppages involving all categories of CFMU operational staff. In the meantime, working staff will refuse either to make up the delay caused by the work stoppages or to perform the tasks of staff who have stopped working.

[…]

Considering the bad faith shown by the Administration when work was suspended on 4 January last and in view of the fact that, according to the Human Resources Directorate, the trade unions represent only a small minority of the staff, we shall issue no instructions on how to proceed as these have been deemed to constitute illegal orders issued by the trade union."

5. In a memorandum of 10 March 2003 the Director General reminded staff that, in his view, the action started in January was illicit because the "instructions" given to staff by the trade union constituted external interference in Eurocontrol's prevailing working procedure. He added that the continuation of the action, after the suspension decided in January, would be seen as the resumption of an illegal action, since it contravened the provisions of Article 11(2) of the Staff Regulations, and that any official who left his post without authorisation would be liable to disciplinary action.

The industrial action began despite that warning and it is not disputed that the complainants ceased work on various dates between 10 and 14 March 2003. In Office Notice 15/03 dated 13 March, the Director General published the "General provisions applicable in the event of a strike at Eurocontrol". He stated that the agreement on that subject that had been negotiated with the trade unions was not in force as it had not been signed by the parties, and that in the circumstances he considered it his duty to clarify "the conditions under which a strike would be considered as lawful". He added that the provisions of the Notice took effect immediately.

6. In March 2003 the Director of Human Resources invited the members of staff concerned individually to a hearing to discuss the charges made against them in connection with their participation in an "illicit strike" and their breach of Article 11(2) of the Staff Regulations, under which they were bound to ensure the continuity of the service and not to cease to exercise their functions without prior authorisation. Practically all the complainants requested that all documents be translated into French, that they be informed of the precise charges against them personally, and that they be offered a later date for a hearing to enable them to prepare their defence. Those requests were in the main rejected. Fourteen of the twenty-two complainants were eventually heard. They were then all issued a written warning on the grounds that they had participated in an unlawful industrial action causing them to be absent from duty without authorisation and that they had therefore failed to meet their professional and legal obligations. Having examined the internal complaints filed by the complainants, the Joint Committee for Disputes concluded that the pleas they put forward were unfounded but suggested that, as a gesture of goodwill, the Administration might withdraw the disciplinary measures concerned. These internal complaints were rejected by decisions of 19 November 2003.

7. The complaints before the Tribunal are receivable. In its reply to Mr M.'s complaint Eurocontrol does point out that the complainant filed on 10 October 2003, that is, before the Joint Committee for Disputes had issued an opinion on his internal complaint and before the express decision of 19 November 2003 rejecting that complaint. It adds, however, that it does not challenge the receivability of the complaint thus filed. In this case, any other approach would indeed have been overly formalistic. Moreover, although it objects to the receivability of Ms M.'s complaint because she filed it only on 30 April 2004 – that is, more than three months after 19 November 2003, the

date of the impugned decision – it has not discharged the burden of proving that she was duly notified of that decision. Although in Eurocontrol's view it is "hardly believable" that, as the complainant maintains, she was not notified of the decision until 4 February 2004, it puts forward no evidence to contradict her assertions. Her complaint cannot therefore be deemed to be time-barred.

8. Some of the accusations put forward by the complainants cannot stand: the adversarial procedure was duly applied and, while some of them were not heard before disciplinary measures were imposed, they were properly summoned and only have themselves to blame if they failed to appear or to propose alternative dates for the hearing. They were not entitled to have the documents used in the proceedings drafted in French, considering that the Agency's two working languages are English and French, and that none of the complainants alleges an inability to understand documents drafted in English. The charges brought against them were suitably set out in the report preceding the hearings, and the charges on which the disciplinary measures were based refer to the report and to the participation of the officials concerned in "unlawful" industrial action, so that the plea that the impugned decisions were unsubstantiated or insufficiently substantiated must be dismissed. On the merits, the allegations that some officials who took part in the disputed industrial actions were not penalised are not supported by the evidence on file, which reveals no discrimination against the complainants on the part of the Agency.

9. There is greater force in the plea that the Director General had no authority to decide whether the collective action was illegal. However, the Agency rightly points out that, according to Article 3(1) of the Statute of the Agency, the Director General "shall enjoy wide management independence with regard to the implementation, utilisation and efficient operation of the technical, financial and personnel resources placed at his disposal" and "[t]o this end […] shall take the measures which he […] deems necessary in order to fulfil his […] obligations". There is no doubt that in the absence of any statutory provisions or collective agreement between the Agency and the staff representatives, it is up to the Director General to take whatever measures are necessary to prevent actions which he deems unlawful, to warn members of staff against participating in such actions and, if necessary, to lay down guidelines for the exercise of the collective rights of staff in accordance with the general principles of international civil service law. From this point of view, one cannot object to the Director General's legitimate right to take action when he, "in the absence of an agreement with the unions", issued on 13 March 2003 – in other words, three days after the start of the industrial action – an Office Notice setting out "General provisions applicable in the event of a strike at Eurocontrol". Nevertheless, the general measures taken by the administration and the individual decisions taken to implement those measures must not have the effect of restricting the exercise of the collective rights of members of staff in such a way as to deprive them of all substance. In the present case, Eurocontrol seeks justification in Article 11 of the Staff Regulations whereby an official "shall be bound to ensure the continuity of the service and shall not cease to exercise his functions without previous authorisation", from which it deduces in its reply that, while it recognises "the principle of the right to strike", the complainants were not entitled to cease to exercise their functions without previous authorisation. At the same time, however, it considers that the action initiated by FFPE-Eurocontrol did not constitute a strike, since it was merely a resumption of the action launched and then suspended in January 2003, which involved industrial action going far beyond that which is implied by a collective work stoppage.

10. This reasoning, which in many respects is contradictory, must be rejected; firstly, the report explaining the charges which the officials concerned were liable to face, and to which the impugned disciplinary measures refer, mentions "[p]articipation in an illicit strike" and failure to meet the obligations set out in Article 11(2) of the Staff Regulations. It is hard to see, then, how the Agency in the context of the appeal procedure can deny that the collective action in question constituted a strike. Secondly, while it is true that the trade union's calls to action issued in December 2002 and January 2003 called not only for a work stoppage but also for staff to disregard the rules in force and to replace them with the trade union's "instructions", the President of FFPE-Eurocontrol had taken the precaution of specifying, in the letter of 7 March 2003 by which he announced the resumption of the action suspended in January, that he would issue no instructions on how to proceed with the work stoppage, as these had been "deemed to constitute illegal orders issued by the trade union". It appears quite clearly, therefore, that the trade union was not repeating the instructions which, had they been maintained, would undoubtedly have rendered the industrial action unlawful.

11. In the circumstances, if it were a work stoppage not involving unlawful actions, the question arises as to whether the Agency could, in view of the provisions of Article 11 of the Staff Regulations whereby an official is bound to ensure the continuity of the service and must not cease to exercise his functions without previous authorisation, deem participation in the collective action by the officials in question to be unlawful. Without overlooking the fact that a strike will necessarily affect continuity of service, the Tribunal considers that, if the

answer to that question were yes, it would in practice deprive of all substance the exercise of a right, the existence of which the Agency does not deny and which, according to case law, is lawful in principle (see, for instance, Judgments 615 and 2342 of the Tribunal). To make the exercise of that right conditional on obtaining leave of absence would clearly be incompatible with the principle itself, the necessary corollary of which is the freedom of officials to follow or not to follow a call to strike duly issued by their representative organisations. In this case, the call to a work stoppage was not in itself unlawful, even though it is true that the management was sent a strike notice only three days before the industrial action began. In the absence of specific rules in that respect, however, the short notice and the indefinite duration of the strike were not sufficient to render the collective action in which the complainants took part unlawful.

12. The complainants are therefore justified in pleading that the Director General was wrong to take disciplinary measures against them on the grounds that their participation in the strike action of March 2003 was unlawful. The impugned decisions must therefore be set aside.

13. The complainants seek redress for moral injury. It must be considered that such injury is largely compensated by the fact that the impugned decisions are set aside by this judgment. The disciplinary procedure initiated against them on the grounds of their strike action, however, is liable to have caused them moral injury, which shall be fairly compensated by awarding each of them the sum of 1,000 euros.

14. The complainants are entitled to costs, which the Tribunal sets at 500 euros each.

DECISION

For the above reasons,

1. The decisions issuing the complainants a written warning and those rejecting their internal complaints are set aside.

2. Eurocontrol shall pay each complainant moral damages in the sum of 1,000 euros.

3. It shall also pay each complainant 500 euros in costs.

In witness of this judgment, adopted on 9 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

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* Mr M., having filed his complaint on 10 October 2003, asks for the quashing of the implicit decision to reject his internal complaint and of the decision of 23 May 2003.

** Mr M. mentions only concern for his career.