

**107th Session**

**Judgment No. 2822**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. N. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 December 2007 and corrected on 18 January 2008, Eurocontrol's reply of 29 April, the complainant's rejoinder of 12 August and the Agency's surrejoinder of 28 November 2008;

Considering Articles II, paragraph 5, and VII 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 citizen, was born in 1962. He joined Eurocontrol in 1993 as a clerical assistant at grade C4 and was assigned to the Flight Data Operations Division in the Central Flow Management Unit (CFMU). He was promoted to grade C3, then to grade C2. With effect from 1 June 2006 Eurocontrol's Permanent Commission approved a revision of the conditions of employment of operational staff in the CFMU. As a result, several Staff Regulations governing officials of the Agency were amended. The new conditions

of employment were published together with the relevant amendments of the Staff Regulations and Rules of Application in Office Notice No. 17/06 issued on 18 October 2006. They involved the creation of two groups of operational posts – E1 and E2 – covering, among other fields, air traffic flow and capacity management (ATFCM) and the processing of flight data, the redefinition of functions and grades corresponding to those posts, the introduction of physical fitness criteria for the exercise of functions in group E1 and the payment of a new ATFCM allowance. On 6 November 2006 the Director of CFMU published Note No. 07/06, entitled “Practical modalities concerning the implementation of the new conditions of employment of CFMU operational staff”, which indicated, inter alia, that the new posts in group E1 and E2 would be filled either by direct appointment or following an internal competition.

On 25 November 2006 the complainant enquired whether the new conditions set out in Office Notice No. 17/06 were applicable to him; if so, he wished to know his new group and grade as well as the amount of the ATFCM allowance he would receive. The Director of CFMU replied on 1 December, stating that Note No. 07/06 provided detailed information concerning the implementation of the new conditions.

On 12 December 2006 the complainant submitted his application for a post of assistant ATFCM. On the application form he indicated that he was “applying for a post of B3 [...] as required under the new conditions for CFMU operational staff” set out in Office Notice No. 17/06. He also indicated that he considered that these conditions had been “implemented in [a] non transparent way and unusual manner and contrary to Article 21 of the Staff Regulations”. On 16 January 2007 he wrote to the Director General, explaining that he had applied for a post whose grade, step and corresponding ATFCM allowance he did not know. He expressed concern that he might be given a lower grade if he failed to meet the new physical fitness criteria. He also contended that Office Notice No. 17/06 was unlawful since the Staff Committee had not been consulted prior to issuing it and the requirements it set out had not yet been published. He requested that Office Notice No. 17/06 as well as subsequent relevant

Office Notices be cancelled and that the new conditions of employment be renegotiated.

In early 2007 he sought clarification as to his new group and grade. He was informed on 8 February 2007 that he had been selected for the post of assistant ATFCM. Shortly thereafter, he was advised that he would be placed in group E1 and assigned to grade B5 step 4 with retroactive effect from 1 September 2005 and promoted to grade B4 step 5 with effect from 1 January 2006. This was confirmed by a decision of the Director General of 26 March 2007. By another decision of the same day the ATFCM allowance payable to the complainant was set at the rate of 100 per cent as from 1 September 2005.

On 5 April 2007 the Acting Director of Human Resources responded to the complainant's letter of 16 January 2007. She stated that the new conditions of employment had been implemented and that his request had thus been superseded. On 27 June 2007 the complainant lodged an internal complaint with the Director General challenging the decision of 5 April, affirming his view that the implementation of the new conditions of employment was illegal and pressing for their renegotiation. Having received no response, he filed a complaint with the Tribunal on 10 December against the implied rejection of his request. He was informed by a memorandum of 21 December 2007 that, following the unanimous recommendation of the Joint Committee for Disputes, his internal complaint had been rejected as inadmissible and unfounded.

B. The complainant submits that Office Notice No. 17/06 is unlawful. In his view, the Agency revised the conditions of employment of operational staff in the CFMU partially as a result of Judgment 2546, delivered on 12 July 2006 on his second complaint, and "implemented [the new conditions] quickly and unlawfully in order to prevent a further increase in salaries" and in breach of good faith. He contends that Office Notice No. 17/06 did not comply with the formal requirements provided for in the Staff Regulations, the Social Dialogue Policy and the Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions. He

asserts that the physical fitness criteria set out in Office Notice No. 17/06 contravened the Agency's Policy on Protecting the Dignity of Staff at EUROCONTROL in that officials who failed to meet these criteria could be assigned to a lower grade. He notes that he did not undergo any medical examination or interview in the course of the selection process, and that he has not recently received an appraisal report. He adds that the Agency further showed disrespect for CFMU staff by using "delaying tactics", as shown through his own exchanges with the Administration.

The complainant also submits that the Administration erred in calculating his new salary and that he should have been given at least grade B3 step 2, in view of his length of service. He claims that the letter of 8 February 2007 did not comply with the Staff Regulations since it did not mention his grade, salary, or the amount of the ATFCM and fixed typing allowances he would receive.

By way of relief, the complainant requests that the conditions of employment of CFMU operational staff be renegotiated in a manner that respects the dignity of its staff and the Agency's policies and regulations. In addition, he asks that officials assigned to grade B5 be given grade B4 until the implementation of new conditions of employment and that they be given at least grade B4 thereafter. The complainant also asks to be assigned to grade B3, at an "appropriate step", and to be awarded "any associated back pay plus interest from 1 [September 2005]", as well as the fixed typing allowance. He claims costs in the amount of 500 euros.

C. In its reply Eurocontrol submits that the complaint is irreceivable. It argues that the claim for renegotiation of the conditions of employment is irreceivable as the complainant may not act on behalf of his colleagues. As to the claim for promotion to grade B3 with retroactive effect and the award of the fixed typing allowance, they were not raised during the internal proceedings. It produces the opinion of the Joint Committee for Disputes and the letter of 21 December 2007.

On the merits the Agency contends that the complainant has failed to indicate in what way the terms of his appointment or the Staff Regulations were disregarded or to show how he was adversely affected by any measure. It rejects as absurd the contention that the revision of the conditions of employment of operational staff in the CFMU was prompted by Judgment 2546, and asserts that, according to Article 59(4) of the Staff Regulations, it was free to require officials to undergo a medical examination. It adds that Articles 35(a), 92 and 93 of the Staff Regulations and Rule of Application No. 26(a) set out a procedure for reviewing the assignment to a lower grade resulting from unfitness and that, if the complainant wished to receive an appraisal report, he could simply request one.

Eurocontrol states that the complainant was duly informed about his grade, step, seniority and ATFCM allowance by the decisions of 26 March 2007 and that he subsequently received payslips which detailed his back pay. However, he did not challenge the grade to which he was assigned in category B at that time. The Agency asserts that he did not receive the fixed typing allowance because he was promoted from category C to category B, and the allowance is paid only to category C staff. It submits that the complaint is abusive and asks the Tribunal to order the complainant to pay at least part of the costs of the proceedings.

D. In his rejoinder the complainant presses his pleas. He submits that the opinion of the Joint Committee for Disputes is “irreceivable” as it was received after the implied rejection of his request of 27 June 2007, and he questions the independence of its members. According to him, the Agency’s reply is aggressive and contravenes the Dignity Policy. The complainant adds that, contrary to his expectations, he was not given an opportunity to raise questions as to the modalities and possible consequences of his promotion from category C to category B prior to submitting his application for the post of assistant ATFCM and he asserts that the fact that he was not interviewed in the course of the selection process amounts to discriminatory treatment. He reaffirms that he was not informed about his grade and salary before he received his new salary and back pay.

E. In its surrejoinder Eurocontrol maintains its position. It rejects the assertion that the reply is aggressive and contends that in any event, it is covered by the immunity that applies to statements made in legal proceedings.

## CONSIDERATIONS

1. On 16 January 2007 the complainant wrote to the Director General complaining of lack of clarity in the revised conditions of employment of operational staff in the CFMU, the consultation process that had taken place with respect to those conditions, the lack of feedback and the need for Flight Data Operators to apply for their posts in accordance with Office Notice No. 17/06. He asked for cancellation of the Office Notice and any relevant subsequent Office Notices notifying the new conditions, and renegotiation of the conditions as they affected Flight Data Operators. He also asked that, pending further negotiations, all Flight Data Operators be awarded temporary B4 grades as an indication of good faith on the part of the Agency. The complainant was subsequently informed that his application had been successful and, by a decision of 26 March 2007, he was assigned to grade B5 step 4 with effect from 1 September 2005 and promoted to grade B4 step 5 with effect from 1 January 2006. It was stated in the same decision that, as from 1 April 2007, he would no longer benefit from the “fixed allowance”, the latter, presumably, being a reference to a fixed typing allowance.

2. The Acting Director of Human Resources replied on 5 April 2007 to the complainant’s letter of 16 January. She pointed out that the new conditions had been implemented and said that she considered that his request had, thus, been superseded. In an internal complaint which he lodged on 27 June 2007, the complainant protested that the letter of 16 January had not been upheld and complained that the “fixed allowance” had disappeared, that he had merely been allocated grade B4 step 5 and that not all new conditions had been published. He concluded his letter by requesting “a fully transparent, re-negotiated agreement [...] as quickly as possible”. That

letter was treated as an internal complaint and referred to the Joint Committee for Disputes. By a memorandum of 21 December 2007 the complainant was informed that his internal complaint had been rejected as inadmissible and unfounded in accordance with the recommendation of the Joint Committee. In the meantime, the complainant filed a complaint with the Tribunal on 10 December 2007 directed to an implied decision to reject his claim of 27 June. It is convenient to treat the complaint as directed to the express decision conveyed to the complainant on 21 December 2007.

3. The complainant seeks renegotiated employment conditions, the award of temporary B4 grades to all Flight Data Operators pending further negotiations with a guarantee that the grades given following those negotiations are not lower than B4, and the reintroduction of a fixed typing allowance. Additionally, he asks that he be graded at B3 with the appropriate step with effect from 1 September 2005 together with back pay and interest, as well as costs.

4. Eurocontrol contends that the complaint is irreceivable. Its argument is correct. So far as concerns the complainant's claim to be graded at B3 with effect from 1 September 2005 together with back pay and interest, that precise claim is made for the first time in the complaint. Accordingly, it has not been the subject of a decision and internal remedies have not been exhausted. Further, if, as the complainant contends, his seniority entitled him to be graded at B3, rather than B5 or B4 as communicated in the decisions of 26 March 2007, his proper course was to challenge those decisions. On this basis, also, internal remedies have not been exhausted. It follows that, in accordance with Article VII, paragraph 1, of the Tribunal's Statute, the claim to be graded B3 together with back pay and interest is irreceivable.

5. So far as concerns the claim for a fixed typing allowance, the complainant does not contend that he has any present entitlement to that allowance. Rather, he claims that it should be reintroduced. Article II, paragraph 1, of the Tribunal's Statute confines its jurisdiction to "complaints alleging non-observance, in substance or in form, of the

terms of appointment of [a complainant] and of such provisions of the Staff Regulations as are applicable to the case”. Thus, this claim is also irreceivable. The same consideration applies to the claim for renegotiation of employment conditions.

6. Further, the Tribunal cannot entertain the complainant’s claim that all Flight Data Operators should be granted B4 grades, whether pending renegotiation of their conditions of appointment or otherwise. Again, the complainant alleges no breach of his employment conditions or of the applicable Staff Rules or Regulations. And as pointed out in Judgment 1852, “a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him”. To the extent, if any, that the new conditions of employment were applied adversely to the complainant, they were applied by the decisions of 26 March 2007, which decisions were not challenged.

7. The complaint is wholly irreceivable. Eurocontrol asks that the complainant be ordered to pay its costs and that it be authorised to deduct them from future remuneration. In the absence of evidence that the complainant filed his complaint in bad faith or that he knew or should have known that it was wholly irreceivable, no such order will be made.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet