

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

111th Session

Judgment No. 3029

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs J. A. (his third), O. A., S. A. (his fourth), A. B., Ms S. B. (her second) M. P. B. (his second), F. B. (his third), J. B. (his fifth), P. C. (his third), F. C. (his third), C. C., J.-B. C. (his second), R. C., H.D.G., F.d.J. (his fourth), R.D.K. (his second), D.D.S. (his second), O. D., Ms K. D., Messrs I.D'H. (his second), D. D. (his third), A. E., P. F., D. F., F. F., M. F. (his second), M. F. (his second), P. G. (his third), A. G. (his second), Ms D. G., Messrs S. G. (his second), J. G. (his fourth), R. H. (his third), G. H. (his second), B. H. (his second), M. H. (his second), A. H., Ms D. H.-B. (her second), Ms C. I. (her second), Messrs J. I.A. (his fifth), J. J. (his second), Ms S. K., Messrs U. K., P. K., Ms E. K. (her second), Messrs A. L. (his third), G. L. (his third), A. L., C.L.R. (his second), T. L., S. L. (his fourth), A. L. (his fourth), M. M. (his fifth), M. M.-K., T. M. (his third), M. M. (his fourth), P. McG. (his second), J. McK., P. N., A. O. (his fourth), Ms C. P. (her second), Messrs D. P.-C. (his fourth), S. R. (his fourth), C. R. (his second), G. R., G. R., R. R. (his third), W. R. (his second), T. S. (his second), Ms P. S., Ms S. S., Messrs S. S. B. (his third), P. T. (his fourth), P.G. T. (his fourth), Ms K. T. (her second), Ms B. V.A. (her third), Messrs E.P.V.d.W. (his second), A.V.d.S. (his second), E.v.I. (his second), M. V. (his third), F. V. (his third), R. V. (his fifth),

P. W., C. Y. (his second) and R.-M. Y. (his second) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 February 2009, the Agency's single reply of 19 June, the complainants' rejoinder of 7 September and Eurocontrol's surrejoinder of 16 December 2009;

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 none of the parties has applied;

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

A. The complainants are members of the operational staff of the Central Flow Management Unit (CFMU) who work in shifts varying in length from 7 hours 30 minutes to 10 hours. The length of a working week is 37 hours 30 minutes for these officials and those subject to normal office hours. For the latter category of staff one day's leave is of the same length as a working day, namely 7 hours 30 minutes. Under Article 57 of the Staff Regulations governing officials of the Eurocontrol Agency and Article 1 of Rule of Application No. 6 of the Staff Regulations, officials are entitled to annual leave of not less than 24 working days nor more than 30 working days per calendar year.

By Note to all CMFU Staff No. 25 of 8 March 1993, the Director of the Unit announced that he had decided that leave accounting for shift staff would be calculated in hours. Between 25 March and 27 April 2008 each complainant sent the Director General an internal complaint challenging this accounting system, mainly on the grounds that it was not based on any provision of the Staff Regulations or Rules of Application thereof. They asked to have their leave calculated in days as from 1 January 2008 and to have their rights restored by the granting of "days to make up for leave improperly calculated in hours" during the period from 1 January 2003 to 30 June 2007. On 2 October the Joint Committee for Disputes issued a divided opinion, where two of its members held that the internal

complaints were well founded, while the other two recommended that they be dismissed as irreceivable in part and unfounded in their entirety. In a memorandum of 15 October 2008, which constitutes the impugned decision for each complainant, the Director General informed each of them that he had decided to follow the latter two members' recommendation.

B. The complainants submit that the Note of 8 March 1993 is unlawful in that it breaches the provisions of Article 57 of the Staff Regulations and Article 1 of Rule of Application No. 6, which stipulate that a staff member is entitled to a certain number of days – not hours – of leave. They explain that, every year, they are allocated a number of hours of leave equivalent to the number of days of leave granted to them under the two above-mentioned articles, multiplied by the length of a normal working day, in other words 7 hours 30 minutes. However, for each day of leave taken, a number of hours varying according to the length of the shift during which they are absent, which is generally higher than the number of hours corresponding to a normal day's leave, is deducted. Thus, in 2008, one of the complainants was able to take only 48 days' leave, whereas pursuant to the two above-mentioned articles, he should have been entitled to 55 or 56 days.

The complainants further rely on a breach of the principle of equal treatment. They point out that, although the Director General stated in an Office Notice of 17 December 1992 that "all Agency staff should work the same number of hours and enjoy the same amount of leave regardless of whether or not they are shift workers", the operational staff of the CFMU who work in shifts do not receive the same number of days of leave as the rest of the Agency's staff, because up to 10 hours of leave can be deducted for each day of leave taken, despite the fact that the length of the working week is identical for both categories of staff. According to the complainants, the unlawfulness of this situation has been implicitly recognised by the Director of the CFMU since, by Note No. 03/07 of 26 July 2007, he granted these staff members four additional days' leave for one half of 2007. The complainants also contend that the comparison which

two members of the Joint Committee for Disputes drew between their situation and that of part-time officials, whose leave account is also kept in hours, is inappropriate. Lastly, they point out that, under Article 1 of the Implementing Provisions for Rule of Application No. 6, “a day of leave is a working day [...] which is not worked”.

Each complainant asks the Tribunal to set aside the impugned decision and to award him/her costs in the amount of 4,000 euros.

C. In its reply the Agency submits that, like the internal complaints, the 85 complaints – whose joinder it requests – are irreceivable in part because they are time-barred “insofar as they concern situations prior to 2008”.

On the merits, the defendant recalls the “principle” that a day of leave must be of the same length as the working day which should have been accomplished on that date. It states that leave accounting in hours is consistent with the provisions of the Staff Regulations and the Rules of Application thereof, which must be interpreted without undue pedanticism in order to avoid “patent and unjustified discrimination”, and that the terms of the Note of 8 March 1993, which it adopted in the exercise of its discretionary authority, reflect “long-standing practice in applying” Article 57 of the Staff Regulations. It explains that, if a part-time official were to have one normal day’s leave – i.e. 7 hours 30 minutes – deducted for every day of leave taken, he/she would be penalised and that, by the same token, members of the CFMU staff working shifts longer than 7 hours 30 minutes a day would be treated more favourably than officials subject to normal office hours if their leave were not calculated in hours. In the opinion of Eurocontrol, leave accounting in hours is therefore necessary in order to ensure that the various categories of staff have equal working hours and leave entitlements.

The Agency further states that, because the decision of the Director of the CFMU of 26 July 2007 constituted an “exceptional, temporary measure to relieve exceptional pressures”, it did not call into question the above-mentioned practice. It adds that the reference to Article 1 of the Implementing Provisions for Rule of Application No. 6

is irrelevant because this article applies to staff subject to normal office hours. As it considers that the complaints are not only irreceivable in part but also devoid of merit, it is of the opinion that it should not be ordered to pay costs, and in this connection it comments that the amount claimed under this heading is “exorbitant”.

D. In their rejoinder the complainants endeavour to show that their internal complaints were receivable, insofar as they were directed against the calculation of their leave in hours for 2007 and 2008. On the other hand, they recognise that their claims in respect of the period prior to 1 January 2007 are time-barred.

On the merits, the complainants expand on their arguments. They point out that leave is computed in days for members of the operational staff of the Maastricht Upper Area Control Centre (MUAC) who likewise work shifts. In their view, the Agency is committing an error of law in wishing to apply the same leave-accounting system to officials working shifts and to those employed part-time, for the latter are subject to separate rules (Article 7 of the Implementing Provisions for Rule of Application No. 6).

The complainants, who do not object to the joinder of their complaints, partly modify their claims in that they ask the Tribunal to award each of them costs in the amount of 500 euros.

E. In its surrejoinder the Agency reiterates its position. In its opinion, the situation of MUAC staff differs in fact and in law from that of the complainants and no comparison is therefore possible. It explains that the average length of a shift is 8.2 hours and that, when an official who works shifts takes a day’s leave, 8.2 hours of leave are deducted from his/her leave account.

CONSIDERATIONS

1. The complainants are Eurocontrol Agency officials who belong to the operational staff of the CFMU. Like all other Agency officials, they are conditioned to a working week of 37 hours

30 minutes. However they work shifts varying in length from 7 hours 30 minutes to 10 hours. Unlike officials subject to normal office hours, i.e. 7 hours 30 minutes per day, who usually work 21 or 22 days a month, their working arrangements generally take the form of 17 or 18 shifts making up a working month of equivalent length.

2. The first paragraph of Article 57 of the Staff Regulations governing officials of the Eurocontrol Agency stipulates that “[o]fficials shall be entitled to annual leave of not less than twenty-four working days nor more than thirty working days per calendar year”. The conditions for granting this leave are specified in Rule of Application No. 6 of the Staff Regulations, Article 1 of which repeats the wording of this provision, while Article 2 sets out officials’ age-related additional leave entitlement over and above the minimum 24 days.

3. For officials subject to normal office hours the length of a day’s leave, within the meaning of these provisions, obviously corresponds to one working day, i.e. 7 hours 30 minutes.

4. The leave-accounting method is, however, different for CFMU officials who work shifts. In accordance with a note from the Director of the Unit of 8 March 1993, their annual leave is calculated in hours, rather than in actual days, in order to take account of their special working hours. Thus, the number of days’ leave which each of them may claim under the above-mentioned provisions of Article 57 of the Staff Regulations and Rule of Application No. 6 is first converted into hours, on the basis of 7 hours 30 minutes per day, in order to determine an annual leave entitlement in hours. Then each day of authorised absence gives rise to the deduction from this leave entitlement of a number of hours corresponding to the length of the shift not worked.

5. This method of leave accounting for shift workers was adopted following the decision of 1 January 1993 to shorten the working week of Eurocontrol staff. Its purpose, in the minds of the Agency’s senior management, was to ensure the equitable treatment of

all categories of officials and to implement the principle laid down in an Office Notice issued by the Director General on 17 December 1992 that “all Agency staff should work the same number of hours and enjoy the same amount of leave regardless of whether or not they are shift workers”.

6. Although this method of calculating annual leave in hours was approved by the Staff Committee at the time of its adoption, it was challenged by numerous members of the CFMU operational staff in 2008. As they considered that they were entitled to receive a number of days – not hours – of leave equal to that allocated to officials subject to normal office hours, they lodged internal complaints seeking the retroactive revision of their leave entitlements as from 1 January 2003.

7. After the Joint Committee for Disputes had issued a divided opinion on this case, by decisions of 15 October 2008 the Director General dismissed all these internal complaints for the same reasons as those given by the two committee members who had advocated this course of action.

8. It is these decisions which 85 of the officials concerned are now impugning before the Tribunal. They request that these decisions be set aside and they seek an award of costs.

9. The joinder of all the complaints, which is requested by the Agency, has not given rise to any objections on the part of the complainants. These complaints seek the same redress and are based on identical submissions. They shall therefore be joined to form the subject of a single ruling.

10. In support of their claims, the complainants first submit that the calculation of shift workers’ leave in hours, as provided for in the above-mentioned Note of 8 March 1993, constitutes a breach of the relevant Staff Regulations and Rules of Application thereof.

11. It is true that Article 57 of the Staff Regulations and Article 1 of Rule of Application No. 6 refer to annual leave defined as a number of “working days” and not as a number of hours of authorised leave. While the notion of a “working day”, to which these texts refer, is not difficult to apply when determining the leave entitlement of officials subject to normal office hours, it plainly requires some interpretation when it has to be applied to officials with special working hours. Such is the case, for example, of part-time staff and particularly of officials working shifts like the complainants. The Tribunal therefore considers that the reference to “working days” contained in the above-mentioned provisions must be deemed to allow the allocation to the officials concerned of leave of a length equivalent to that specified in these provisions, even though it is calculated in hours, and not days, of leave. The opposite conclusion, which would require leave to be set in days for the sake of consistency with the literal wording of the texts, would indeed be an unduly pedantic approach. Moreover, as stated earlier, the complainants’ annual leave entitlement, albeit set in hours, is in fact determined by converting the number of days of leave which the complainants can claim under Article 57 of the Staff Regulations and Rule of Application No. 6.

12. It goes without saying that this leave accounting in hours would not be acceptable if the method of calculation that it entails were to penalise the complainants in the determination of their overall leave entitlement. In this respect, the crucial question is whether the number of hours deducted for each day of leave taken by an official working shifts should correspond to the working day of an official subject to normal office hours, i.e. 7 hours 30 minutes, or the shift of the person concerned, which may be as long as 10 hours. But since the above-mentioned provisions of Article 57 of the Staff Regulations and of Rule of Application No. 6 do not give any indication of how to determine the number of hours making up a day’s leave in such a case, the complainants have no grounds to contend that these provisions have been breached. As they are couched in very general terms, they allowed the Agency freely to define the method for determining this period of time, the sole proviso being, of course, that the choice made

in this regard must respect the principle of equal treatment among officials.

13. The complainants specifically rely on a breach of this principle in arguing that they are discriminated against insofar as they are allocated fewer whole days of leave than officials working normal office hours.

14. The Tribunal has consistently held that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations must be governed by different rules defined so as to take account of this dissimilarity (see, for example Judgments 1990, under 7, 2194 under 6(a), or 2313, under 5).

15. In the instant case, compliance with the first of these requirements meant that all Eurocontrol officials, who must normally work an identical number of hours, in other words 37 hours 30 minutes a week, therefore also had to be granted an identical number of hours of leave. But as some of these officials have special working conditions, i.e. shifts, compliance with the second of these requirements meant that their leave had to be calculated using a method different to that applied to their colleagues who are subject to normal office hours, precisely in order to ensure an equal number of hours.

16. As the figures contained in the submissions clearly show, the leave-accounting method applied by Eurocontrol to shift workers does satisfy these requirements. In fact, by calculating these officials' leave entitlement in hours and by deducting from it, for each day of leave, a period of time equivalent to the length of the shift not worked by that person, rather than an average period of 7 hours 30 minutes, the Agency merely ensures the arithmetic equality of the length of these officials' leave with that applicable to staff members who must keep normal office hours, and indeed with that applicable to staff members working shifts of different lengths.

17. This leave-accounting method undoubtedly results in the complainants receiving fewer days of authorised leave than their colleagues working normal office hours. But if, as they request, they were allocated at least 24 days' leave calculated on the basis of 7 hours 30 minutes per day, their working year would be substantially shorter than that of other officials, as the Agency once again demonstrates by means of a relevant quantified example in the file. It must also be emphasised that, in addition to leave days, the shift system includes recuperation days, defined according to the shifts worked, which in practice mitigate the effects of the method of calculating the number of days of leave.

18. In addition to the general submissions which have already been answered above, the complainants rely on several more specific legal or factual arguments which, in their opinion, substantiate their claim.

19. Firstly, they contend that the method of calculating their days of leave is not consistent with Article 1 of the Implementing Provisions for Rule of Application No. 6, which entered into force on 1 July 2008 and which states that, “[f]or staff not subject to duty rosters or special working hours, a day of leave is a working day [...] which is not worked”. However, as can be seen from its wording, this article does not apply to staff members who, like the complainants, are subject to duty rosters. This argument is therefore completely unfounded.

20. Secondly, the complainants take issue with the Agency for referring in its defence submissions to the leave rules applied to part-time officials, according to which, as Article 7 of the Implementing Provisions for Rule of Application No. 6 makes clear, authorised leave is also computed on an hourly basis. They point out that full-time officials who, like they, work shifts are in a different situation to part-time staff members. While this statement is obviously correct, the purpose of the Agency's comparison of the leave rules applicable to these two categories of officials is solely to highlight the need to

calculate leave days for all officials with special working hours by reference to the length of their working days. To that extent, this comparison, which is only one element of the Agency's submissions and not the essential basis of the impugned decisions, cannot be regarded as irrelevant.

21. Thirdly, the complainants, referring in turn to the comparison of their situation with that of part-time officials, submit that, since their own leave system is not covered by the above-mentioned Article 7 of the Implementing Provisions for Rule of Application No. 6, they could not be subjected to leave accounting on an hourly basis. But this *a contrario* reasoning cannot be followed here. While it might well have been advisable for the Agency to use the issuing of these implementing provisions in 2008 as an opportunity to clarify the rules applying to shift workers' leave as well, the fact that it omitted to do so does not in any way prevent the complainants' authorised leave from still being computed on an hourly basis in accordance with the Note of 8 March 1993, especially because, as stated earlier, if this method of calculation were called into question the result would be that these officials would be given a more favourable set of rules governing leave than their colleagues working normal office hours, which would breach the principle of equal treatment among officials.

22. Fourthly, the complainants contend that the Director of the CFMU implicitly recognised the unlawful nature of the rules governing their leave, since by a memorandum of 26 June 2007 he had agreed to debit the leave of the unit's operational staff in days for the second half of 2007 and had thus granted the officials in question four additional days' leave. However, in addition to the fact that the lawfulness of a measure must be assessed objectively and is in any case unaffected by any "acknowledgement of unlawfulness" on the part of an administrative authority, the above-mentioned memorandum did not have the scope ascribed to it by the complainants. By a Note to shift workers of 26 July 2007, the Director of the CFMU had taken care to explain that the advantageous treatment

of these officials was “a temporary and exceptional measure for 2007” and that “[t]his measure [did] not change the leave entitlement of staff but only the way in which leave to be taken [would] be debited [that] year”. At the same time, he emphasised that the calculation of leave in hours would remain the “normal rule applied”. The complainants are therefore clearly wrong in believing that they have reason to assert that, at that juncture, the Agency had acknowledged the unlawfulness of the rules governing their leave.

23. Lastly, the complainants hold that they have suffered unequal treatment vis-à-vis the operational staff of the MUAC. They contend that the Centre’s staff members, who also work shifts, have their leave calculated in days. But MUAC staff members are covered not by the Staff Regulations governing officials of the Eurocontrol Agency but by the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, and these officials’ shift arrangements are different to those obtaining in the CFMU. As the Agency rightly submits, these two categories of officials are not therefore in the same situation and, for this reason, the allegation that the principle of equal treatment has been violated must be rejected.

24. It may be concluded from the above that the impugned decisions are not in any way unlawful. Consequently, the complaints must be dismissed in their entirety, without there being any need for the Tribunal to rule on the Agency’s plea that they are irreceivable insofar as they concern leave accounts for years prior to 2008.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 6 May 2011, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet