

FORTY-SEVENTH ORDINARY SESSION

***In re* JADOUL**

Judgment No. 468

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. François Joseph Ghislain Jadoul on 20 August 1980, the Agency's reply of 8 December, the complainant's rejoinder of 1 February 1981 and the Agency's surrejoinder of 14 May 1981;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Articles 25, 43 and 92 of the Staff Regulations governing officials of the Eurocontrol Agency, and Rule No. 3 concerning the drawing up of the periodical efficiency report provided for in Article 43 of the Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. In 1967 the complainant, who is a citizen of Belgium, was appointed to the staff of the Eurocontrol Agency as a grade A6 expert with retroactive effect from 17 October 1966. The two-yearly reports on his performance related at the time to his mathematical research work, but in 1971 he became acting head of a section for operational research and was put in charge of a team of some eight Agency officials, and in 1972 he was promoted to grade A5 and given increased responsibilities. The reports have since related to such matters as work on long-term forecasts of air traffic trends and his duties as head of the research section. On 6 November 1979 the complainant was given for signature a performance report for the period from 1 July 1977 to 30 June 1979 which contained criticisms of his ability, efficiency and conduct in the service. In three letters dated 14 December 1979 he submitted a "complaint" to the Director-General under Article 92 of the Staff Regulations alleging failure to apply Article 25, which reads: "Any decision embodying a complaint against an official shall state the reasons on which it is based". He also asked to have the original report transmitted to the Joint Committee on Efficiency Reports and alleged that the report was time-barred because it had not been prepared by the prescribed deadline. In his reply dated 21 May 1980 the Director-General observed that, according to Article 7 of Rule No. 3 on the drafting of the efficiency reports provided for in Article 43 of the Staff Regulations, a staff member was required to appeal within fifteen days to the "appeal assessor" - for category A officials the Director-General himself - and that the appeal was therefore time-barred and irreceivable. It was also irreceivable since under Article 8 of Rule No. 3 the report was treated as final only after the appeal procedure set out in the Rule had been followed, and the report which the complainant had challenged was therefore not final. The delay in preparing the report did not constitute any flaw: in any case it occurred because the assessor had to discuss their performance with all officials concerned, and the complainant was not available at the time. The requirement in Article 25 of the Staff Regulations did not apply to performance reports, which were governed by Article 43 and the special rules. The Director-General nevertheless offered to review the report. On 14 July, in a further "complaint", the complainant declined that offer. On 3 October the decision of 21 May was confirmed, but meanwhile, on 20 August, the complainant had appealed to the Tribunal.

B. The complainant asks the Tribunal to order the Director-General to state the reasons for the performance report to which he objects. He observes that this is not the first time he has challenged such a report: in 1976 he appealed to the Joint Committee against the report for 1973-75, and the Committee gave a recommendation in his favour. Yet no change was made in the report, and he was never given the reasons for the criticisms in it. That is why in bringing his appeal on 14 December 1979 he called for application of Article 25 of the Staff Regulations. He objects to the grounds on which that appeal was dismissed: the original report is not removed from the personnel file even when the final report is different. To state the reasons for the report is essential to the proper functioning of the appeal procedure. Article 25 of the Staff Regulations is not restricted in scope and therefore does apply to performance reports. Reasons should be stated for the criticisms in the performance report for the period from 1 July 1977 to 30 June 1979.

C. In its reply the Agency observes that the first reports on the complainant's performance acknowledged his competence, but that the report for the period 1971-73 revealed difficulties. The report for 1973-75 contained criticisms of his management of his unit and failure to respect instructions and showed a decline in his performance under several headings; in two out of twelve points he was assessed as "below average". The Joint Reports Committee having made its recommendations on his appeal against that report, the text was amended so as to improve the general assessment to "satisfactory on the whole", and on 1 December 1977 the complainant signed that final report without raising any fundamental objections. The next report, dated 14 February 1978, was similar: it recognised his professional competence but found fault with his ability to supervise and co-ordinate. He made no substantive comment. The report dated 6 November 1979, which forms the subject of the present dispute and which was drafted by the Director of Operations, is similar to the one for 1973-75: it assesses him as below average on only two out of twelve points and in general puts him in the category of "normal" officials within the meaning of Service Note No. 25/79, i.e. those whose performance is usually satisfactory.

(1) The Agency contends that the complaint is irreceivable. First, the report cannot be challenged before the Tribunal because it is not an administrative decision having a direct and final effect on the complainant's career. It causes the complainant no wrong: it is merely a preliminary to an administrative decision. Secondly, it is not a final decision: the rules require that, at the official's request, the report must be referred by the assessor - in this case the Director of Operations - to the appeal assessor - the Director-General - and then to the joint reports committee with a view to drawing up a final report. This procedure has not been properly followed. Thirdly, the complainant has not exhausted the internal means of redress, the internal appeal having been time-barred.

(2) Subsidiarily, the Agency argues on the merits. It contends that there is no obligation to state the reasons for the report. The report provided for in Article 43 of the Staff Regulations does not constitute a "decision" within the meaning of Article 25. It draws an analogy with withholding of promotion, for which, likewise, no reasons need be stated. The rules on performance reports do not require any statement of reasons. It would indeed be to the staff member's detriment that there should be any when the report is adverse since they would remain in his personnel file. It is in the interests of general administration that the Tribunal's power of review of performance reports should be limited. The staff member's rights are safeguarded by the procedure for consultation between him and his assessor, although the final decision lies with the administration. In any case the assessment of the complainant's performance is borne out by the written evidence. Though "capable as a specialist on his own" - to quote the report - he has not acquired the qualities of a head of unit; on the contrary, he has shown grave shortcomings as such and also lacks team spirit and discipline.

D. In his rejoinder the complainant rejects the defendant's contention that the complaint is irreceivable. He fully respected the prescribed internal procedure and, by failing to give the explanation he asked for, the Agency itself hampered the appeal procedure. Even if it is later altered, the report remains on file and therefore in itself constitutes a final decision which is challengeable. Since it constitutes a wrong, is preliminary to an administrative decision and forms part of the personnel file, the reasons for it should be stated so that they may be duly challenged, first under the internal procedure and then before the Tribunal. If Article 25 did not apply to performance reports, the restriction would be expressly stated. As to the merits, the complainant observes again that the report was not drafted in due time and that, even if in normal cases reasons may not be required, such a striking decline in the assessment of his performance, and its inconsistency, call for a full explanation. The evidence cited in the Organisation's reply is quite insufficient to justify the assessment, and the complainant believes that there may be a hidden reason for it or that it constitutes a concealed sanction for incidents which occurred during earlier report periods. He accordingly presses his claim for relief.

E. In its surrejoinder the Agency denies that it hampered the appeal procedure. In his letter of 21 May the Director-General offered to review the report, and the complainant expressly declined the offer by his letter of 14 July 1980. The internal appeal procedure enables staff members, in the course of conversations with their supervisors, to obtain any further information they may want on the assessment in the original report, as indeed the complainant well knew, having already followed the procedure in 1976. As to the merits, the complainant raises two points: the statement of reasons for the assessment in the original report, and the explanation for the more critical assessment. Article 25 of the Staff Regulations applies only to individual decisions, and requires that only those "embodying a complaint" shall state the reasons: reasons do not have to be stated for other administrative acts, a performance report does not constitute such a decision, and there is therefore no need for it to be expressly excluded from the scope of the article. There are indeed other decisions for which reasons do have to be stated, but in all cases there is an express requirement. The performance report does not "embody a complaint" in itself: it may merely be used in

taking an individual decision which does so. As for the reasons for the more critical assessment., they are set out in the Organisation's reply to the complaint and elaborated in the surrejoinder, and the complainant is mistaken in alleging the existence of some "hidden reason". He is quite aware of his professional shortcomings, which have been identified by two successive assessors, but he has done nothing to correct them. The Agency accordingly invites the Tribunal to declare the complaint irreceivable in its entirety, and at least in so far as it relates to his earlier performance reports; and, subsidiarily, to dismiss it as unfounded.

CONSIDERATIONS:

Article VII, paragraph 1, of the Statute of the Tribunal reads: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". Article VII, paragraph 2, reads: "To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned...".

Rule No. 3 relates to the drawing up of the periodical staff reports provided for in Article 43 of the Eurocontrol Staff Regulations. Articles 3 to 8 of the rule set out the procedure to be followed when a staff member challenges such a report. It has three stages: the preparation of the performance report, the opinion of an "appeal assessor", and the opinion of a Joint Committee on Efficiency Reports. The opinion of the Joint Committee shall be communicated to the final assessor, who, according to the last paragraph of Article 8, "shall draw up another report and shall communicate [it] to the official. This report shall be considered final."

Thus an appeal will lie against an efficiency report only when the report is final and all the formalities prescribed by the rules have been completed.

On 6 November 1979 the complainant received an efficiency report for the period from 1 July 1977 to 30 June 1979. On 14 December 1979, i.e. after the expiry of the time limit of 15 days set in Article 7 of the rule for challenging the original report, he wrote three letters to the Director-General asking, first, for transmission of the report to the Joint Committee; secondly, for recognition of the fact that it had not been made in time; and, thirdly, for a statement of the reasons for the appraisal. The Director-General rejected the three claims by a letter dated 21 May 1980.

In his complaint, which he filed within the time limit, the complainant merely contends that to comply with Article 25 of the Staff Regulations the reasons for the appraisal ought to have been stated.

He is asking the Tribunal to annul something which is only one step in a complex procedure and of which only the final outcome is subject to appeal. He may appeal to the Tribunal only against the final decision taken after consultation of the Joint Committee, and his complaint is therefore premature.

It is true that he asked that the matter of his report should be referred to the Joint Committee. But the Director-General was correct in replying that that could be done only after the appeal assessor had himself dismissed the claim.

The complainant's appeal was therefore premature and directed against a decision which cannot be impugned.

In any event the Tribunal will not consider his further claims for relief in his rejoinder since the rejoinder was filed after the expiry of the time limit for lodging a complaint.

The Agency is therefore right in contending that the complaint is irreceivable on the grounds of failure to exhaust the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as

myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.