

The Administrative Tribunal,

Considering the complaint filed by Ms C. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 19 September 2003 and corrected on 16 January 2004, the Agency's reply of 30 April, the complainant's rejoinder of 6 August, Eurocontrol's surrejoinder of 8 October, the complainant's further submissions of 20 October and the Agency's comments thereon of 2 November 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant was born in 1950 and has Polish and French nationality. She joined the Agency on 1 August 2001 as a Welfare Officer at the Eurocontrol Experimental Centre (EEC) at Brétigny-sur-Orge (France). Her five-year limited-term appointment was subject to a nine-month probationary period.

On 17 October 2001 the complainant was interviewed for the first time in connection with her probationary period by her first and second-level supervisors. The probationary period report summarising the interview contained no assessment of the complainant's work but listed the objectives to be attained by her. A second probation interview was conducted by the same supervisors on 22 January 2002. The report written on this occasion stated that the complainant's objectives had been reviewed but likewise contained no comments on her performance. On 28 February 2002 she attended an interim interview with her first-level supervisor, who told her that she exhibited high levels of stress and that this had a negative effect on her performance. Her third probationary period report, drafted after a further interview on 29 March 2002, indicated that although the complainant had made progress on all her objectives, she needed to make further progress in the area of interpersonal communication. Her supervisors decided that her probationary period should be extended for a period of three months to enable her to address the concerns raised during that interview and the previous one, and that her progress should be monitored by means of regular meetings. In April 2002, at the request of the EEC's Head of Human Resources Management, the complainant sat tests organised by an external firm aimed at determining her strengths and weaknesses.

On 25 June 2002 she was given a draft copy of her final probationary period report by her first-level supervisor. Her performance was rated "unsatisfactory" in all areas. The report also stated that the concerns mentioned during the interim and third probation interviews remained unresolved, that there were doubts as to her efficiency in daily social work, that she had shown no improvement in interpersonal communication, that clients and staff had complained of her lack of attentive listening – a weakness confirmed by the results of the external tests – and that colleagues had noted a reluctance to help staff members, pensioners and spouses who were experiencing difficult circumstances. The conclusion reached by her supervisor was that she had not proved herself to be adequate for the post of Welfare Officer. In the final version of this report, dated 10 July 2002, two of the performance ratings were changed from "unsatisfactory" to "satisfactory" and the reference to a reluctance to help people experiencing difficult circumstances was deleted, but the conclusion remained the same and the Director of the EEC recommended that the complainant's appointment be terminated. On 17 July 2002 the complainant lodged an appeal with the Reports Committee. That same day she was relieved of her duties by the Director of Human Resources pending a final decision by the Director General on her probationary period. She continued to receive her full salary but no longer had access to the Agency's buildings.

Having interviewed the complainant as well as her immediate supervisor and three other officials, the Reports Committee recommended on 29 July 2002 that her probationary period be extended for a further four months. The Committee drew attention to the following considerations: the complainant had taken up her duties under very difficult circumstances, particularly because many staff members had made it clear, by signing a petition, that they hoped that the previous Welfare Officer would win the competition for the post; she had attained almost all the objectives set for her during her first probation interview; she did not appear to the members of the Committee to display high levels of stress or communication difficulties; the closer monitoring of her performance which was

meant to have been introduced following the initial extension of her probationary period had not really materialised; the results of the tests she had sat externally had not been communicated to her in full, despite the fact that they concerned areas of her performance on which she had been asked to improve; and the decision to recommend terminating her appointment appeared to be insufficiently substantiated, particularly with regard to the reported weakness in interpersonal communication. The Committee also recommended that during this second extension, in the interests of impartiality, the person appointed to replace the complainant's second-level supervisor, who had recently left the service, should be her reporting manager. The Committee's recommendations were accepted by the Director of Human Resources on behalf of the Director General on 31 July 2002.

At the beginning of August 2002 the complainant's reporting manager defined 11 new objectives for the complainant and instructed her to submit weekly reports to him detailing her activities. In September 2002 he noted in an interim report that despite repeated requests she had not supplied sufficient information on her activities to enable him to assess her performance. He also indicated that he had received written complaints from two of her colleagues raising doubts as to her behaviour in the service, that she had devoted a great deal of time to organising a conference which was neither a priority for the EEC nor an objective for her probationary period, that the assistance she had provided following two deaths in August 2002 had not been entirely satisfactory and that her knowledge of the Staff Regulations governing officials of the Agency was far from adequate. In conclusion he stated that her chances of being established in her post seemed very much compromised and that in view of "the problems encountered and her very slight intellectual capacities" he entertained little hope of any improvement in her performance.

The final probationary period report signed on 30 October 2002 at the end of the complainant's second extension showed unsatisfactory ratings in all areas. Her reporting manager recommended that her appointment be terminated. At the request of the Human Resources Directorate the matter was again submitted to the Reports Committee, which interviewed both the complainant and her reporting manager. In a report dated 25 November 2002 the Committee concluded that the complainant had not demonstrated the skills necessary for the performance of her duties and likewise recommended termination. This recommendation was endorsed by the Director General, who, by a decision of 27 November 2002, terminated her appointment with effect from 1 December 2002.

On 20 February 2003 the complainant lodged an appeal against that decision with the Joint Committee for Disputes, which heard her on 7 July. On 19 September, having received neither the Opinion of the Joint Committee nor any express decision by the Director General within the time limits stipulated in the Staff Regulations, the complainant filed the present complaint with the Tribunal, challenging the implicit rejection of her appeal. Shortly afterwards, however, she received an express decision: by a letter of 25 September 2003 the Director of Human Resources informed her that he had decided on behalf of the Director General to dismiss her appeal in accordance with the recommendation of the Joint Committee for Disputes. He enclosed a copy of the Committee's Opinion, dated 20 August. The Committee was unwilling to substitute its assessment of the complainant's performance for that of the management or of the Reports Committee. Having established that the applicable procedure had been complied with throughout the complainant's probationary period, it recommended that the appeal be dismissed as unfounded.

B. The complainant contends that the Agency breached its Guidelines for Reporting Managers as well as rules of due process. Her first probation interview ought to have taken place during the first week of her appointment, not after two and a half months. She was not given sufficient warning of the criticisms on which the first decision to extend her probationary period and the successive recommendations that her appointment be terminated were based. In particular, her first-level supervisor produced no evidence of the stress, interpersonal communication difficulties and complaints on which he based his opinion, and contrary to Article 26 of the Staff Regulations there is no evidence in her personal file to support the accusations levelled at her.

She also considers that she has been denied the right to a defence. The issue of interpersonal communication was raised only shortly before the initial decision to extend her probationary period was taken; at the time when she was given the draft of her final probationary period report, on 25 June 2002, more than two months had elapsed since her last meeting with her supervisors; and the latter's decisions were based on "vague allegations" and "unsubstantiated complaints".

According to the complainant, the decision to terminate her appointment is tainted with errors of fact and erroneous conclusions. For example, her reporting manager's opinion of her intellectual capacities was based on test results which he had clearly misread, yet the Reports Committee appears to have accepted his assessment. That same

Committee noted in its report of 25 November 2002 that she had failed to produce minutes for certain meetings, but its conclusion that this revealed “a weakness in [her] drafting skills and ability to summarise” was clearly erroneous given that the meetings in question never took place.

She also criticises the Agency for breaching the procedural rules governing appeals to the Joint Committee for Disputes by scheduling the Committee’s hearing at a date more than four months after the appeal was lodged. As a result she was obliged, in view of the applicable time limits, to file a complaint with the Tribunal before the Committee had issued its opinion and before the Director General had taken a decision on her appeal.

The complainant asks the Tribunal to set aside the decision terminating her appointment, to establish her in the post of Welfare Officer with effect from 1 December 2002 and to convert her five-year appointment into an indefinite appointment. She claims the equivalent of two years’ salary in damages for moral and financial injury and for damage to her career and health; an additional five years’ salary in the event that she cannot be reinstated; and 10,000 euros in costs.

C. In its reply the Agency submits that the Guidelines for Reporting Managers are intended only as a non-binding guide. Rejecting the allegation that she was given insufficient warning of her unsatisfactory performance, it points out that the complainant herself refers to the criticism she received from her supervisors and must therefore have realised that her establishment in the post was seriously in doubt. It adds that the personal file provided for in Article 26 of the Staff Regulations is not a compilation of all documents relating to the official together with comments by line managers, and that the complainant’s file contained all the documents relevant to her probationary period.

Concerning the complainant’s right to a defence, the Agency recalls that she had regular meetings with her successive reporting managers and received several warnings before being granted the initial extension to her probationary period. During that extension she was informed by the reporting manager that her performance was unsatisfactory. The unfavourable report she received in July 2002 therefore cannot have come as a surprise to her. She submitted her comments on that report and was subsequently heard by the Reports Committee. During her second extension she had the opportunity to justify her actions to her reporting manager in weekly reports. She also took the opportunity to reply to the unfavourable interim report issued in September 2002, and when she received the final probationary period report in October 2002 she submitted her observations. She was then heard again by the Reports Committee and subsequently by the Joint Committee for Disputes. The allegation that her right to a defence was disregarded is, therefore, devoid of substance.

In comments appended to the Agency’s reply, the complainant’s reporting manager denies that he misread her test results. More generally, the Agency submits that even if some aspect of the criticism levelled at the complainant were exaggerated or unfounded, the overall unsatisfactory assessment, based on 16 months’ work, could not be called into question.

The defendant notes that the complainant did not provide the Tribunal with copies of the Director General’s decision of 25 September 2003 and of the Opinion of the Joint Committee for Disputes, and it produces these documents as an appendix to its reply. It acknowledges that it was “a little late in sending the explicit reply” to her appeal but considers that this delay had no detrimental consequences for her, insofar as she was able to challenge the implicit rejection of her appeal and had ample time to take into account in her submissions to the Tribunal the content of the express rejection she received subsequently.

D. In her rejoinder the complainant reviews the facts of the case in detail and presses her pleas.

E. In its surrejoinder the Agency reiterates its position.

F. In her further submissions the complainant objects to the fact that Eurocontrol submitted, as appendices to its surrejoinder, a number of documents which were “deliberately withheld until the last moment and [...] produced after the facts”. She rebuts the content of the documents in question and asserts that most of them were produced solely for the purpose of the present proceedings; they played no part in her dismissal.

G. In its final comments the Agency agrees that the new documents played no role in her dismissal. It explains that these documents were simply provided as additional evidence, to show that the complainant’s work was criticised not only by management, but also by other staff members.

## CONSIDERATIONS

1. The complainant challenges a final decision to terminate her limited-term appointment as a Welfare Officer with the Eurocontrol Agency on the grounds that it involved a denial of due process, a failure to observe the relevant Staff Regulations, errors of fact and mistaken conclusions.
2. It is clear that the Organisation gave the complainant ample opportunity to prove herself to her supervisors and that none of them was satisfied on any of the three occasions when her work was evaluated. In each case they provided her with details of her unsatisfactory performance. The complainant argues that she was denied due process because the allegations and complaints against her were “vague”, “unsubstantiated” and “based on hearsay”. Given the nature of the complainant’s work as a welfare officer the mere fact that there were complaints about her work from those she was required to assist is, in itself, an indication that her work was unsatisfactory. The fact that these complaints may not have been specific does not alter the fact that she was made aware of her shortcomings and given ample opportunity to rectify them during her extended probationary period. The argument as to due process is therefore not substantiated.
3. Although it is alleged that the Staff Regulations were not strictly observed, the evidence submitted does not establish that such non-observance caused the complainant any injury. In fact, the relevant provisions were applied in a flexible manner in order to ensure that she had every possible opportunity to prove her suitability for the position of Welfare Officer.
4. It is contended that the decision to terminate the complainant’s appointment involved errors of fact and mistaken conclusions as a result of “vague allegations” and “unsubstantiated complaints”. However, the only specific matter which might constitute an error of fact relates to the results of a test apparently designed to evaluate the complainant’s aptitude and suitability for the position in question. These results do not feature in the final probationary period report to which the contested decision refers. It must be concluded that the decision was based solely on an evaluation of the complainant’s work and aptitude, as demonstrated throughout her extended probationary period, and not on the test results. Certainly, the evidence contained in the file does not demonstrate otherwise.
5. Nor has it been established that there was any mistake in the conclusion that the complainant’s performance indicated that she was not suitable for the position in question. There is ample evidence of the uniformly negative evaluation of her work, notwithstanding several opportunities that were given to her to prove her competence and suitability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

