

L. A.

v.

Eurocontrol

130th Session

Judgment No. 4282

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. L. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 10 October 2018, Eurocontrol's reply of 17 January 2019, the complainant's rejoinder of 2 March and Eurocontrol's surrejoinder of 14 June 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to terminate his appointment at the end of his probationary period.

The complainant was recruited on 1 January 2017 as a contract staff member to fill the position of Service Delivery Assistant. His appointment was for a three-year term with a probationary period of nine months. The objectives subject to evaluation during the probationary period were set by his line manager on 1 March 2017, validated by the Directorate of Human Resources on 22 May and approved by the complainant on 29 May.

On 13 July 2017 a meeting took place between the complainant and his line manager where the latter suggested that the complainant's probationary period be extended due to his concerns regarding the

complainant's competencies. He emphasised, in particular, the need for the complainant to improve his communication and French language skills. The complainant objected to that proposal. By email of 19 July 2017, the complainant was informed that a probationary report had been drawn up by his line manager and that he was expected to comment on it before the report could be submitted to the Director General with a recommendation. On 31 July, following a few meetings held with his management, the complainant withdrew his objection to the extension of the probationary period.

On 9 August 2017 the complainant was informed that the proposal for extension of his probationary period was rejected by the Directorate of Human Resources as it was not compliant with Article 7 of the Conditions of Employment of Contract Staff at Eurocontrol. As a result, the complainant's line manager drafted a final report with a recommendation to the Director General to terminate the complainant's appointment at the end of his probationary period on 30 September 2017. By an internal memorandum of 30 August 2017, the Director General informed the complainant that he had decided to dismiss him at the end of his probationary period as his work and abilities had proven inadequate. The dismissal took effect on 30 September 2017.

On 23 November 2017 the complainant lodged an internal complaint seeking the setting aside of the dismissal decision and, on a subsidiary basis, that the contested decision be considered as an early termination of employment in accordance with Article 37(1)c) of the Conditions of Employment of Contract Staff, with the obligations and rights that this entailed. That internal complaint was transmitted on 20 December to the Joint Committee for Disputes, which issued its report on 5 April 2018. The Joint Committee unanimously recommended that the decision of the Director General to dismiss the complainant be maintained but that he be awarded moral damages due to the poor assessment procedure that was carried out. The members recommended that the Administration adopt a stricter approach and a proper follow-up of the probationary period and performance reports with objectives and reviews to be made regularly on a duly documented basis.

By a memorandum of 3 July 2018, the complainant was informed that the Director General had decided to maintain the dismissal decision as he considered that it had been taken in full compliance with the applicable provisions. That is the impugned decision.

The complainant asks the Tribunal to declare null and void the dismissal decision taken on 30 August 2017 and confirmed on 3 July 2018. He asks that these decisions be considered as an early termination of employment in accordance with Article 37(1)c) of the Conditions of Employment of Contract Staff, with the obligations and rights that this entails. The complainant further asks for cancellation and destruction of the appraisals and reports related to his case. He seeks moral damages of 40,000 euros as well as costs.

Eurocontrol asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant, who was employed as a Service Delivery Assistant by Eurocontrol on a three-year contract from 1 January 2017, challenges the Director General's decision of 3 July 2018, maintaining the initial decision of 30 August 2017 to dismiss him with effect from 30 September 2017 "as [his] work and abilities ha[d] proven inadequate in the Agency". This was at the end of his nine-month probationary period provided for in Article 7 of the Conditions of Employment of Contract Staff. The complainant seeks an order setting aside the impugned decision, consequential orders and costs.

2. It is useful to recall the general principles that govern setting aside a decision to dismiss a staff member of an international organization whose performance during a probationary period is considered inadequate. It was relevantly restated in consideration 4 of Judgment 4212 that the purpose of probation is to permit an organization to assess the probationer's suitability for a position, and, for that reason, the Tribunal has consistently recognized that a high degree of deference ought to be accorded to an organisation's exercise of its discretion regarding decisions concerning probationary matters. This includes the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements. Accordingly, it has been consistently stated that a discretionary decision of this nature will only be set aside "if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the

facts, or if there was abuse of authority”. In Judgment 4212, the Tribunal also reaffirmed that “where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation’s assessment with its own”.

3. It is also useful to reiterate an international organization’s obligations regarding a staff member’s probation period that are well settled in the case law. For example, in Judgment 4212, consideration 5, the Tribunal stated that such a period is to provide an organisation with an opportunity to assess an individual’s suitability for a position. In the course of making this assessment, an organisation must establish clear objectives against which performance will be assessed; provide the necessary guidance for the performance of the duties; identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken; and give a specific warning where continued employment is in jeopardy. It was also stated in Judgment 3678, consideration 1, that a probationer is “entitled to have objectives set in advance so that she or he will know the yardstick by which future performance will be assessed”.

4. The complainant contends, in his first ground, that his probationary evaluation and reports are null and void and, accordingly, the decision to dismiss him was taken in violation of the terms and conditions of his appointment. The Tribunal finds it unnecessary to consider this ground for reasons which will become evident in the following considerations.

5. In his second ground the complainant argues, on the basis of various pleas, that the decision to dismiss him was wrong and should be set aside because during his probationary period, his line manager did not comply with the relevant rules or procedures or with his obligations to properly manage his probation; did no follow-up assessment of his skills and competencies and even actively and passively hindered his successful integration into Eurocontrol. He therefore maintains that Eurocontrol violated its regulations and procedures and did not observe the terms of his appointment, thereby invalidating the final report for his probationary period. In response, Eurocontrol submits that the complainant’s appointment was terminated

in line with the applicable provisions and the requirements identified by the Tribunal.

6. In addition to the guiding principles established by the Tribunal, recalled in considerations 2 and 3 of this judgment, the applicable procedures for probationary evaluations are set out, in part, in Article 7 of the Conditions of Employment of Contract Staff and in Eurocontrol's Probationary Period Information and Procedure (the Procedure). Article 7, paragraph 3, requires a report to be made, not less than one month before the expiry of the probationary period, on the ability of a probationer to perform in the post, and on the latter's conduct and efficiency in the service. Article 7, paragraph 4, provides that a report may be made at any time during the probationary period if the probationer is proving to be obviously inadequate. It also states that the report is to be communicated to the probationer, who shall have the right to submit comments thereon in writing. Article 7, paragraph 4, also permits the Director General to dismiss a probationer even before the end of the probationary period by giving her or him one month's notice.

7. The Procedure provides a three-step process for the probationary period: the objective-setting, the progress monitoring, and the completion of the probationary period. The Procedure states that during the probationary period, individual performance based on objectives set at the beginning of the period should be monitored in an objective way to ensure that the probationer meets the requirements of the job. It further states that regular feedback should be given to the probationer to ensure that she or he is fully aware of how her or his performance compares with the required standard and also that she or he fits in with the team and the work environment. Under the Procedure, the manager, team leader or the probationer's supervisor is "the reporting manager". She or he is responsible for guiding, advising and helping the probationer during the period and for completing the probationary report. The reporting manager is also to set and review the objectives, draft the final probationary report by using intermediate reports and to sign it. The Directorate of Human Resources/People Development and Performance Management is made responsible for overseeing the probationary procedure and providing policy advice and guidance to the reporting managers and probationer as needed.

8. The complainant succeeds on a number of pleas under his second ground. First, his plea that his objectives were set too late, thereby reducing the time for him to fulfil them or to correct any unsatisfactory aspect of his performance, is well founded. The complainant and his line manager agreed on his objectives at a meeting on 1 March 2017, some two months after the date of his appointment. This did not fulfil the requirements of the Procedure, which provides that the objectives on which his performance was to be monitored should be set at the beginning of the probationary period.

9. As indicated earlier in consideration 3 of this judgment, assessing the complainant's suitability to remain in the subject post required his manager(s) to monitor his progress; provide necessary guidance and feedback for the performance of his duties; identify the unsatisfactory aspects of the performance in a timely fashion so that necessary remedial and developmental action could be taken, and give him a specific warning that his continued employment was in jeopardy.

10. The evidence shows that after the complainant and his line manager met and established his work objectives in early March 2017, they met again for a second formal meeting on 13 July 2017. This was the complainant's first meeting to assess his work performance and to provide him with feedback. Although the resulting report of 14 July 2017 was essentially an intermediate progress report, it came almost six and a half months after the complainant's appointment and about two and a half months before the end of his probationary period. This report states that the complainant did not meet Objective 1 (to improve his French language skills), which his line manager stated was mandatory for communication; that he met Objective 2 (Technology awareness) and Objective 3 (Architecture awareness). It further states that, in relation to Objective 4 (Business and service awareness), he had acquired enough awareness, and, in relation to Objective 5 (Service management), that he was sometimes going too deeply into technique, for example troubleshooting the data domain. In addition to his French language deficiency, his line manager concluded that the complainant was technically competent to do the job, but was deficient in the two corporate behaviours (readiness to change and teamwork), which he stated were critical aspects of his work.

11. The evidence further shows that following the report which the complainant was notified of on 19 July 2017, he met with the Head of his Directorate, on 28 July 2017. This was to discuss the possible extension of his probationary period to provide him with an opportunity to improve on the areas of deficient performance on the basis of a structured improvement plan. It was by then realized that Article 7 of the Conditions of Employment of Contract Staff precluded an extension of his probationary period. According to Eurocontrol, the complainant then met with his line manager for “another formal meeting on 9 August 2017, which led to the drafting of the final probationary period report and the [termination] recommendation”. The line manager had noted in his comments the areas of deficiency in the complainant’s work and had concluded that since his probationary period could not have been extended he was obliged to opt for the termination of his appointment. The complainant was given eight days to provide his comments. In effect, this was the complainant’s final probationary report, which the Director General signed on 30 August 2017 when the complainant was notified of his dismissal at the end of the period on 30 September 2017. It is further noteworthy that the only interview noted in the final report was that which was done on 1 March 2017 when the complainant’s objectives were set. The notations for steps 2 and 3 in that report signify that “no interview” was conducted.

Moreover, the complainant’s second plea, that there is no evidence that he was given a specific warning that his employment was in jeopardy if his performance did not improve to meet the required standard, is well founded. In the foregoing premises, Eurocontrol did not meet its obligations under the Tribunal’s case law, as recalled in consideration 5 of Judgment 3866.

12. The complainant’s plea that his French language proficiency objective was not monitored objectively is also well founded. This is because, in the first place, the French language proficiency objective was set to be met at the end of 2017. In the second place, the Tribunal accepts the complainant’s assertion that the comments in the report did not mention concrete facts or examples to support the line manager’s comment that he did not meet the objective. This was necessary, in the Tribunal’s view, as while his line manager commented that his objective of improving language skills was not met, his French teacher gave him positive reports.

13. The complainant's plea that his line manager did not evaluate the corporate behaviours in accordance with the Performance Management Appraisal Guidelines 2016-2017 is also well founded. Paragraph 7.1 of the Guidelines requires a line manager to assess a probationer's two corporate behaviours (readiness to change and teamwork) as a whole and to explain and substantiate the rating with examples. There is force in the complainant's argument that his line manager commented on particular aspects of this objective rather than on the whole set of the corporate behaviours balancing the positive and negative aspects. The Tribunal observes that the line manager's feedback on this objective focussed primarily on the complainant's alleged unwillingness to change. There is only passing reference to his ability to work in the team in the summary. In the intermediate report, the main example provided of the complainant's unwillingness to change is that he (the complainant) is "unwilling to see things in a different way". In the final report, an example given in the comments states that he "does not listen, does not change his mind to take into account the comments of others". However, these examples, which were ultimately provided to support the complainant's alleged inadequate performance, arose from his objection, at their meeting on 13 July 2017, to the proposal to extend his probationary period. As it transpired, the Administration later realized that an extension of the period would have breached Eurocontrol's rules.

14. In the foregoing premises, the decision to dismiss the complainant at the end of his probationary period was tainted with several irregularities and will be set aside, without there being any need to rule on the other pleas which the complainant raises.

15. The complainant has not requested reinstatement. Instead, he seeks compensation pursuant to Article 37(1)c) of Eurocontrol's Conditions of Employment of Contract Staff. Eurocontrol correctly argues that he is not entitled to compensation under the provisions of Article 37(1) because they are only applicable in cases of termination of limited-term contracts of staff members who have successfully completed their probationary period, which the complainant did not do. However, the decision to dismiss the complainant wrongfully denied him a valuable opportunity to have his appointment confirmed at the end of the probationary period and to receive in consequence the

remuneration specified in his letter of appointment for the remaining period of his contract (see, for example, Judgments 2732, consideration 19, and 4215, consideration 22). The loss of that opportunity warrants an award of material damages in the amount of 25,000 euros, from which any sums that he was paid under Article 7 of the Conditions of Employment of Contract Staff shall be deducted.

16. The Tribunal accepts the complainant's submission that the impugned decision also caused him moral injury, for which he will be awarded damages assessed in the amount of 20,000 euros.

17. Moreover, because of the flawed decision to dismiss the complainant in the circumstances in which he was dismissed, the Tribunal will make the order which he seeks for the appraisals and reports, whether electronic data or otherwise, generated by his line manager or created at the Directorate of Human Resources to be destroyed.

18. As the complainant succeeds in part, he is entitled to costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The impugned decision of 3 July 2018 is set aside, as is the Director General's earlier decision of 30 August 2017.
2. Eurocontrol shall pay the complainant material damages in the amount of 25,000 euros, deducting therefrom any sums that he was paid under Article 7 of the Conditions of Employment of Contract Staff.
3. Eurocontrol shall pay the complainant moral damages in the amount of 20,000 euros.
4. Eurocontrol shall destroy the appraisals and reports, whether electronic data or otherwise, generated by the complainant's line manager or created at the Directorate of Human Resources.
5. Eurocontrol shall pay the complainant 750 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 3 July 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ