

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

T.

v.

Eurocontrol

128th Session

Judgment No. 4167

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs B. J. A. T. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 22 November 2016 and corrected on 7 December 2016, Eurocontrol's reply of 10 March 2017, the complainant's rejoinder of 27 April and Eurocontrol's surrejoinder of 27 July 2017;

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 Director General's decision to reject her complaint of psychological harassment and seeks compensation for the injury she considers she has suffered.

The complainant joined Eurocontrol on 1 February 2002. Assigned to the Internal Audit Service as of 1 July 2013, she was placed under the direct supervision of Ms F. from 1 February 2014 until May 2015, when she was reassigned at her own request.

On 20 July 2015 the complainant lodged a complaint of psychological harassment against Ms F. and requested the opening of an administrative inquiry. In particular, she alleged that Ms F. had gradually withdrawn her tasks and had cast doubt on her skills while

regularly making inappropriate comments about her. By letter of 1 September 2015 the Director General informed the complainant of his decision to initiate a preliminary investigation. The complainant was heard on 14 January 2016. On 15 March the Director General informed her that based on the facts established during the preliminary investigation, the situation could not be regarded as psychological harassment in the workplace, in particular because of Ms F.'s lack of intention, which was required by Article 12a of the Staff Regulations governing officials of the Eurocontrol Agency, and that no sanction would therefore be imposed on Ms F. The Director General further pointed out that both parties had "suffered from [their] difficult relations"* and offered to allow the complainant to remain in the post to which she had been reassigned in order to ensure the stability of her professional situation.

On 27 April 2016 the complainant lodged an internal complaint with the Director General seeking the setting aside of the decision taken on 15 March. She considered that the rejection of her harassment complaint was not properly substantiated, that the contested decision was vitiated by a manifest error of assessment and that she had not been afforded due process. On 25 May the complainant was informed that her internal complaint would be submitted to the Joint Committee for Disputes on 14 June 2016. It was brought to her attention that a complaint before the Tribunal could only be made "either against the decision of the Director General rejecting the internal complaint after the Joint Committee for Disputes ha[d] delivered its opinion, or after a period of four months from the date on which the internal complaint was filed, if no reply to the said complaint had been received"*.

The complainant considered that by 27 August 2016 an implicit rejection of her internal complaint had occurred within the meaning of Article 92, paragraph 2, of the Staff Regulations. On 22 November 2016 she filed a complaint with the Tribunal impugning the implied decision to reject her internal complaint. The complainant asks the Tribunal to set aside that decision as well as the decision of 15 March 2016. She seeks compensation for the moral and material injury suffered,

* Registry's translation.

amounting to 20,000 euros and 1 938,06 euros respectively, as well as costs.

In its reply, Eurocontrol informs the Tribunal that, on 12 October 2016, the Joint Committee for Disputes delivered its opinion. Its members considered that they were not in a position to provide an opinion on the merits of the case, because they had not had access to a summary of the facts, or to the documents and conclusions of the investigators, and they therefore requested that the case be reconsidered at a later session, once these items had been forwarded to them. By a memorandum dated 13 December 2016, to which the Committee's opinion was appended, the Director General informed the complainant that he did not share the Committee's opinion and rejected the complaint on the grounds that it was unfounded. Eurocontrol asks the Tribunal to reject all the complainant's claims as unfounded.

In her rejoinder, the complainant reiterates her claims. She also seeks the setting aside of the decision of 13 December 2016.

In its surrejoinder, Eurocontrol maintains its position.

CONSIDERATIONS

1. Although it was initially directed against an implied decision rejecting the complainant's internal complaint, the present complaint must now be seen as impugning the express decision of 13 December 2016 by which the Director General informed the complainant that he had decided to dismiss her internal complaint against the decision of 15 March 2016 rejecting her complaint of psychological harassment (see Judgments 4018, consideration 1, and 4081, consideration 3).

2. With regard to the decision of 13 December 2016, the complainant first alleges a breach of her right to due process in the proceedings before the internal appeals body on the grounds that the latter did not have access to the full investigation report into her harassment complaint.

3. In this respect, the Tribunal notes that the Director General submitted to the Joint Committee for Disputes only the page containing the final conclusions of that report and not the entire report.

In order to justify his refusal to disclose the remaining part of the report, the Director General invoked reasons of confidentiality.

According to Article 5 of Office Notice No. 06/11, “[t]he Joint Committee for Disputes shall carry out its activities with complete independence. It shall gather any information it requires to formulate an opinion. The members of the Committee shall be required to respect the confidential nature of information disclosed to them.”

The investigation report obviously contained information that the Committee needed to have access to in order to form an opinion on the merits of the complainant’s internal complaint. Since the members of the said committee are obliged to respect the requirement of confidentiality of the information disclosed to them, as expressly specified in the aforementioned Article 5, the Director General could not invoke this requirement to justify his refusal to disclose the entire report to the Committee.

The Tribunal also notes that this refusal to disclose resulted in the Committee being unable to give a proper opinion on the merits of the internal complaint. The Director General thus rendered his final decision without the benefit of such an opinion, thereby disregarding an essential safeguard inherent in the right of appeal, which is the requirement that his final decision be informed by the opinion of the Committee. The decision is thus tainted with another irregularity.

4. The complainant also invokes a failure to state the reasons for that decision.

The Tribunal recalls that, in accordance with its case law, an executive head of an international organisation who departs from a recommendation of an internal appeal body must state the reasons for disregarding it and must motivate the decision actually reached (see Judgments 3908, consideration 3, and 3863, consideration 8). In the present case, the Tribunal finds that the Director General departed, without explanation, from the Committee’s proposal to postpone the

examination of the complainant's internal complaint to a later session, pending the submission of the missing documents, in order to enable it to provide an opinion on the merits.

5. It follows from the foregoing that the Director General's decision of 13 December 2016 must be set aside.

At this stage of its findings, the Tribunal should, in principle, remit the case to the Organisation for a fresh examination of the internal complaint of 27 April 2016. However, in the present case, taking into account the elements of the file, and in particular the time that has elapsed since the facts, the Tribunal considers it appropriate not to remit the case to Eurocontrol and to examine itself the lawfulness of the decision of 15 March 2016.

6. In seeking the setting aside of this decision, the complainant submits, *inter alia*, that the Director General erred in law by rejecting her complaint of harassment on the grounds that Article 12a(3) of the Staff Regulations must be interpreted as meaning that the intention to harass is a necessary condition for establishing harassment.

7. At the material time, paragraph 3 of the aforementioned Article 12a read as follows:

“‘Psychological harassment’ means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.”

The complainant relies on the case law of the courts of the European Union, in particular the judgment of the European Union Civil Service Tribunal of 9 March 2010 in Case F-26/09, which applied an article of the Staff Regulations of Officials of the European Union drafted in exactly the same way. According to that judgment:

“Article 12a(3) of the Staff Regulations defines psychological harassment as ‘improper conduct’ which requires, in order to be established, that two cumulative conditions be satisfied. The first condition relates to the existence of physical behaviour, spoken or written language, gestures or other acts which take place ‘over a period’, and are ‘repetitive or systematic’,

which suggests that psychological harassment must be a process that occurs over time and presumes the existence of repetitive or continual conduct, which is 'intentional'. The second cumulative condition, which is joined to the first by the conjunction 'and', requires that such physical behaviour, spoken or written language, gestures or other acts have the effect of undermining the personality, dignity or physical or psychological integrity of any person. By virtue of the fact that the adjective 'intentional' applies to the first condition, and not to the second, it is possible to draw a twofold conclusion. First, the physical behaviour, spoken or written language, gestures or other acts referred to by Article 12a(3) of the Staff Regulations must be intentional in character, which excludes from the scope of that provision improper conduct which arises accidentally. Secondly, it is not, on the other hand, a requirement to prove that such physical behaviour, spoken or written language, gestures or other acts were committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person. In other words, there can be psychological harassment within the meaning of Article 12a(3) of the Staff Regulations without the need to demonstrate that there has been any intention on the part of the harasser, by his conduct, to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such improper conduct, provided that it was committed intentionally, led objectively to such consequences. [...]"

This Tribunal is obviously not bound by the case law of the courts of the European Union. However, in the present case, it interprets Article 12a(3) of the Staff Regulations in the same way, bearing in mind that this interpretation is in line with its general case law on the subject, according to which harassment and mobbing do not require any malicious intent (see Judgments 2524, consideration 25, 3400, consideration 7, and 4085, consideration 15).

Consequently, by dismissing the complainant's allegations of harassment on the grounds that the established facts could not constitute psychological harassment in the absence of intention, the Director General erred in law.

It follows that the decision of 15 March 2016 must be set aside.

8. In such a case, the Tribunal should in principle remit the case to the Organisation for a new decision to be taken on the basis of the correct interpretation of the applicable provisions. However, for the same reasons as those already indicated in consideration 5 above, the Tribunal will not do so in this case and will instead award the

complainant compensation for the injury caused by the decision of 15 March 2016.

9. It may be inferred from the foregoing considerations that the complainant was denied the right to have both her complaint of harassment and her internal complaint before the internal appeals body properly examined, which caused her serious moral injury. The Tribunal considers that this injury will be fairly compensated by awarding the complainant the sum of 20,000 euros, as claimed.

10. The complainant seeks the reimbursement of medical expenses resulting, according to her, from the harassment she allegedly suffered.

However, the documents on file do not establish a causal link between these expenses and the alleged harassment. This claim will therefore be rejected.

11. As she succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decisions of the Director General of Eurocontrol of 15 March 2016 and 13 December 2016 are set aside.
2. Eurocontrol shall pay the complainant 20,000 euros in moral damages.
3. It shall also pay her 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ