Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A. (No. 6)

v.

Eurocontrol

136th Session **Judgment No. 4697**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr G. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 17 December 2020 and corrected on 11 and 18 February 2021, Eurocontrol's reply of 28 May 2021, the complainant's rejoinder of 19 July 2021, Eurocontrol's surrejoinder of 18 October 2021, the complainant's further submissions of 5 January 2022 and Eurocontrol's final comments thereon of 7 February 2022;

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

Having examined the written submissions;

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

The complainant challenges the Director General's decision to impose on him the disciplinary sanction of downgrading.

Some of the facts relevant to this case are to be found in Judgments 4694 and 4695, also delivered in public this day, on the complainant's third and fourth complaints. Suffice it to recall that, on 30 March 2016, after the complainant had taken numerous days' sick leave between 2013 and 2016, the Administration set up a procedure to determine the extent of his invalidity. Following an opinion from the Invalidity Committee on 9 February 2017 which declared the complainant fit for work and several medical examinations he underwent between 2017

and 2019 which concluded that he was fit for work, the Administration decided that it would no longer accept medical certificates submitted by the complainant. By letter of 27 February 2019, the Head of the Human Resources and Services Unit of the Eurocontrol Agency, the secretariat of the Organisation, informed the complainant that no medical certificate submitted thereafter would be accepted and that any further absence would be considered as unjustified, leading to a deduction from his annual leave entitlement and then from his salary. By a subsequent letter of 5 July 2019 in which she asked the complainant to resume work without further delay, she indicated that she was going to inform the Director General of the situation and that he would decide whether or not to initiate disciplinary proceedings.

On 30 July 2019, the complainant asked to take early retirement and to draw his retirement pension. By decision of 31 July 2019, the Director General approved this request and informed the complainant that his retirement would take effect on 31 July 2019 and that he would receive his retirement pension as from 1 August 2019.

On 31 July 2019, the Director General mandated the Head of the Human Resources and Services Unit to institute disciplinary proceedings against the complainant. By internal memorandum of 2 August 2019, the Head of the Human Resources and Services Unit asked the complainant's counsel, in view of the fact that the complainant's application for retirement had been approved by the Director General who had reserved the right, as anticipated, to initiate disciplinary proceedings against him, to propose to the complainant that he withdraw the harassment claim he had lodged on 2 April 2019 against the "Agency's Medical Advisers". The complainant did so on 7 August.

By letter of 26 November 2019, the complainant was informed that, taking into account his early retirement, his unjustified absences and the fact that he had exhausted his annual leave entitlement, he was required to reimburse the sum of 24,687.56 euros which he had unduly received between 20 May and 31 July 2019.

By internal memorandum of 30 January 2020, the complainant was sent a copy of the report which had formed the basis for the Director General's decision to initiate disciplinary proceedings and was informed

of the composition of the Disciplinary Board. On 21 February 2020, the complainant was heard by the Board. In its opinion of 28 February 2020, the Board held unanimously that the facts complained of had not been established and did not call for disciplinary sanctions.

Prior to the Director General taking a decision following this opinion, the complainant was heard by the Administration on 20 March 2020. By letter of 27 March 2020, the Director General decided to depart from the Disciplinary Board's opinion and to impose on the complainant the disciplinary sanction of downgrading by two grades with effect from 1 April 2020. In addition, the complainant was to reimburse the Agency for all payments received between 20 May and 1 August 2019 on account of his unjustified absences. By letter of 6 April 2020, he was informed of the new amount of his net pension which had been revised downwards in line with his new grade.

On 29 May 2020, the complainant lodged an internal complaint challenging the decision of 27 March. On 11 June 2020, the Administration acknowledged receipt of the internal complaint and conveyed it to the Joint Committee for Disputes, specifying that it was a "decision upon the claim" – within the meaning of the Tribunal's case law – the effect of which was to interrupt the 60-day period on the expiry of which an implied rejection decision may arise under Article VII, paragraph 3, of the Statute of the Tribunal. It also warned the complainant that there could be delays in dealing with his internal complaint as a result of the COVID-19 pandemic.

On 17 December 2020, the complainant filed a complaint with the Tribunal challenging an implied decision to reject his internal complaint of 29 May.

In its opinion of 6 October 2021, which followed a meeting held on 16 December 2020, the Joint Committee for Disputes unanimously considered that the internal complaint was well founded. In a letter of 12 October 2021, the Director General informed the complainant that he considered that the Committee had erred in its analysis and that he had decided to reject the internal complaint as unfounded.

The complainant asks the Tribunal to set aside the decision of 27 March 2020 to impose a sanction and the implied decision rejecting his internal complaint of 29 May 2020. In his further submissions, he seeks the setting aside of the express decision of 12 October 2021 which was taken while proceedings before the Tribunal were ongoing. The complainant asks that the Organisation be ordered to reimburse him for all amounts withheld from his pension pursuant to those decisions. He further seeks compensation of 50,000 euros for the moral injury he considers he has suffered, and an award of costs.

Eurocontrol asks the Tribunal to reject some of the complainant's claims as irreceivable and to dismiss the complaint in its entirety as unfounded.

CONSIDERATIONS

1. In his sixth complaint, the complainant seeks the setting aside of the implied decision rejecting his internal complaint of 29 May 2020 by which he challenged the decision of the Director General of Eurocontrol of 27 March 2020 imposing on him the disciplinary sanction of downgrading by two grades with effect from 1 April 2020.

The Tribunal notes that, pursuant to the last sentence of Article 92(2) of the Staff Regulations, an implied decision rejecting the complainant's internal complaint, challengeable before the Tribunal, arose on the expiry of four months from the date on which that internal complaint was lodged, namely on 29 September 2020. Therefore, on 17 December 2020, the date on which the complainant filed his complaint with the Tribunal, the internal means of redress available to him had been exhausted.

The complaint is therefore receivable.

2. In view of the fact that, subsequent to the complainant filing his complaint and his rejoinder, the Joint Committee for Disputes delivered its opinion on 6 October 2021 on his internal complaint of 29 May 2020 and the Director General made an express decision on

12 October 2021 rejecting that internal complaint, the complainant also impugns that decision in his further submissions.

Since the parties have had ample opportunity to comment in their submissions on that express decision rejecting the complainant's internal complaint of 29 May 2020, the Tribunal considers it appropriate to treat the complaint as being directed against that decision.

3. The complainant requests an oral hearing. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and the relevant evidence. The request for an oral hearing is therefore dismissed.

4. The complainant also asks that this complaint be joined to his fourth complaint in which he seeks the setting aside of the decision concluding that some of his absences were unjustified, since he considers that the two complaints rest on the same facts. The Organisation opposes this. Given that the two complaints involve different impugned decisions, different opinions of the Joint Committee for Disputes, and provisions of the Staff Regulations governing officials of the Eurocontrol Agency which are not entirely the same, the Tribunal considers it appropriate to deal with the two cases separately and to render a separate judgment for each of them. Accordingly, the complaints will not be joined.

5. The contested decision of 27 March 2020 and the impugned decision of the Director General of 12 October 2021 have in common the fact that they both departed from a unanimous opinion, of the five members of the Disciplinary Board for the first and of the four members of the Joint Committee for Disputes for the second. In this regard, in its Judgment 3969, considerations 10 and 11, the Tribunal stated the following:

> "10. The overarching legal principles in a case such as the present have recently been discussed by the Tribunal in Judgment 3862, consideration 20. The Tribunal observed:

> ‘The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached. In addition, according to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It is equally well settled that the “Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact” (see Judgment 2699, consideration 9).’
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> These observations, as they relate to reports and conclusions of internal appeal bodies, are equally applicable to reports and opinions of a Disciplinary Committee.
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> 11. The Disciplinary Committee’s opinion in the present matter is a balanced and thoughtful analysis of the issues raised in the disciplinary proceedings and, on its analysis, the conclusions and recommendations were justified and rational. It is an opinion of a character which engages the principle recently discussed by the Tribunal in Judgment 3608, consideration 7, that the report warrants ‘considerable deference’ (see also, for example, Judgments 2295, consideration 10, and 3400, consideration 6).”

In the context of the present case, the Tribunal considers that the Director General of the Organisation could only depart from the unanimous opinions of the Disciplinary Board and the Joint Committee for Disputes for clear and cogent reasons (see Judgment 4504, consideration 10). It is therefore necessary to begin by assessing the content of the reasons stated by the Director General in the two decisions at issue.

6. In his first decision, dated 27 March 2020, the Director General decided to depart from the unanimous opinion of the Disciplinary Board because he considered that the Board had incorrectly evaluated the seriousness of the complainant’s conduct.

In the first place, with regard to what he described as a “breach of the provisions concerning the binding nature of the Invalidity Committee’s findings” (in other words, in relation to Article 59(5) of

the Staff Regulations), the Director General emphasised the following in paragraphs 2.1.1, 2.1.6, 2.1.10, 2.1.11 and 2.1.16:

> "2.1.1
>
> I disagree with the opinion delivered by the Disciplinary Board, which considers that the provisions concerning the binding nature of the Invalidity Committee's findings were not breached. I consider that the Disciplinary Board was wrong to conclude that the Agency should have relied on Article 59(1) of the Staff Regulations in relation to a medical examination (medical control) to verify the validity of the numerous medical certificates you submitted even though the Invalidity Committee had declared you fit to carry out your duties, which it did unanimously and in the presence of your treating physician.
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> [...]
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> 2.1.6
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> In addition, the medical examination procedure is carried out by health professionals with no experience or expertise of the field to which your supposed medical condition belongs, namely forensic psychiatry. They are general medical practitioners who are therefore not specialists in that field. Given that your supposed condition is primarily psychiatric in nature, as you yourself stated – the medical examiners would not have been able to make the relevant medical findings.
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> [...]
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> 2.1.10
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> Since not all medical conditions are the same and must therefore be considered on a case-by-case basis, the Agency sought to use the most effective and appropriate administrative/medical resources available in the circumstances.
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> 2.1.11
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> That is indeed what the Agency did. Faced with a highly unusual situation where an official who has been unanimously declared fit for work by an Invalidity Committee nonetheless refuses to resume his job and instead submits numerous medical certificates, the Agency extended its duty of diligence by seeking to determine whether the medical certificates related to a medical condition (a new condition or a worsening of the existing condition) which could have justified convening a new Invalidity Committee.
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> [...]

2.1.16

Your refusal to comply with the Administration's instruction to return to work demonstrates that you did not abide by the binding findings of the Invalidity Committee, which constitutes a flagrant violation of the applicable provisions and a manifest abuse of Agency procedure."*

In the second place, with regard to what he described as a "breach of the provisions concerning absence due to sickness/accident" (in other words, in relation to Article 59(1) of the Staff Regulations), the Director General underlined the following, in particular, in paragraphs 2.2.6, 2.2.8 and 2.2.10:

"2.2.6

Once it had been established that [...] the findings of the Invalidity Committee were still valid, the medical certificates could no longer be accepted. As a result, any absence connected with those medical certificates would be considered as unjustified pursuant to the provisions of Article 59 of the Staff Regulations.

[...]

2.2.8

Furthermore, the Administration only considered your absences as unjustified from the date of the last medical report, that is, [Professor D.]'s report dated May 2019.

[...]

2.2.10

Any medical certificates received from May 2019 onwards will continue to be regarded as unjustified since they relate to the medical condition in respect of which the Invalidity Committee declared you fit to carry out your duties and whose findings were corroborated on four occasions by experienced and specialised health professionals."*

In the third place, with regard to what he identified as a "breach of the provisions concerning the obligations imposed on officials by the Staff Regulations" (in other words, Articles 11 and 12 of the Staff Regulations), the Director General made, inter alia, the following observations in paragraphs 2.3.1 to 2.3.3:

* Registry's translation.

"2.3.1

I am sorry to note that the Disciplinary Board did not consider there to be sufficient evidence of a breach of the provisions concerning the obligations imposed on you by the Staff Regulations.

2.3.2

I consider that the evidence on file is not only sufficient but that it constitutes irrefutable proof of the flagrant disregard you have shown for your obligations in terms of integrity, loyalty and honesty.

2.3.3

As the Agency's Medical Adviser testified at the hearing before the Disciplinary Board, and as also mentioned in the file, you admitted, during the many consultations you had with him, that the sole reason that drove you to commence this long and arduous process was that you were unhappy about your career prospects when you were not given a promotion.

[...]"*

Lastly, in his conclusion, by way of explanation for the disciplinary measure of downgrading by two grades he had chosen to impose on the complainant, the Director General stated the following in paragraphs 3.2 and 3.4:

"3.2

I have decided to impose a disciplinary measure commensurate with the seriousness of the facts, taking account of the nature of the misconduct and the circumstances in which it occurred. As demonstrated above, I consider your misconduct to be flagrant and to have occurred repeatedly over a prolonged period. Despite numerous warnings, you failed to comply with the Agency's instructions and stipulations.

[...]

3.4

Your actions were clearly intentional since you admitted to the Agency's Medical Adviser that you began this process due to your frustration about not being promoted. Therefore, your motive was not of a medical nature, but a socio-administrative nature, and should therefore not have led to a process specifically reserved for situations where a member of staff is genuinely suffering from a medical condition."*

* Registry's translation.

It must be noted that, in its unanimous opinion of 28 February 2020, the Disciplinary Board had written the following in respect of each of the three categories of breach to which the Director General referred in his decision of 27 March 2020:

> "The Disciplinary Board noted that the Administration confused two different procedures – the procedure leading to invalidity and the procedure for absences due to sickness/accident –and, as a consequence:
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> 1. With regard to the alleged breach of the provisions concerning the binding nature of the Invalidity Committee's findings as described in the Director General's report: the Disciplinary Board is of the unanimous opinion that there was no such breach, the Board having found no evidence that [the complainant] ever disputed or failed to abide by the findings of the Invalidity Committee. The medical certificates submitted after the Invalidity Committee had made its findings were for absences due to sickness/accident (for which a different process exists) and were never contested by the Administration as described in Article 59(1) of the Staff Regulations (at no time was a doctor called to perform a monitoring examination, which could have established that the absences were unjustified);
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> 2. With regard to the alleged breach of the provisions concerning absence due to sickness/accident as described in the Director General's report: the Disciplinary Board is of the unanimous opinion that there was no such breach, the Board having found no evidence that [the complainant] did anything that was not compliant with the provisions of Article 59 of the Staff Regulations concerning absences due to sickness/accident or with Office Notice No. 29/12. All his certificates were submitted to the Agency within the time limits. The medical examinations that confirmed that he was fit for work were organised in the invalidity context by professionals (doctor/expert) involved in the invalidity procedure and not by monitoring doctors; he did not dispute the findings made in the invalidity context;
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> 3. With regard to the alleged breach of the provisions concerning the obligations on officials, i.e. loyalty, integrity and honesty as described in the Director General's report: the Disciplinary Board's discussions did not reach any conclusion on this specific point despite some doubts (serious doubts on the part of certain members) about [the complainant]'s conduct which could not, however, be substantiated by the evidence.
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> The Disciplinary Board is of the unanimous opinion that the facts complained of in the present case have not been established and do not call for any disciplinary measure.

> Other observations:
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> As previously indicated, the Disciplinary Board noted that the Administration mixed up two different procedures (invalidity and absence due to sickness/accident) and, as a result, failed to comply with the provisions and procedure laid down in Article 59(1) of the Staff Regulations and Office Notice No. 29/12 in relation to the monitoring of absences due to sickness/accident. Compliance with those provisions would have led to confirmation that the absences were (or were not) justified and would have clarified the situation.
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> [...]"*

7. In his second decision dated 12 October 2021, in which the Director General departed, this time, from the unanimous opinion of the Joint Committee for Disputes of 6 October 2021 and rejected the complainant's internal complaint of 29 May 2020, the Director General stated that, in his view and as he had expressed in his first decision of 27 March 2020, the procedure under Article 59(1) of the Staff Regulations was not relevant to the complainant's case. As a result, the opinions of the Disciplinary Board and of the Joint Committee for Disputes, according to which Organisation had mixed up two procedures, were, in his view, erroneous. As he had previously stated, the only procedure which he believed had been applied in the complainant's case was that provided for in Article 59(5).

The Director General reaffirmed that, in the complainant's case, the Administration had decided to follow the invalidity procedure and that, in view of the disregard for what the Director General called the "decisions" of the Invalidity Committee, the Administration had concluded that the complainant had failed to comply with section 3 of the Agency's Policy for the management of absences due to sickness/accident.

The Director General also stated that, in his view, there had been no breach of due process given that the complainant had been heard on 20 March 2020. The Director General also pointed out that he considered the Joint Committee for Disputes to have erred in its conclusion that there was a lack of evidence in the complainant's case, as it had been shown beyond reasonable doubt that the complainant had breached his

* Registry's translation.

obligations under the Staff Regulations and the Organisation's rules, as was visible in the abundance of evidence, spanning more than six years, of a premeditated, grave and unprecedented abuse of the applicable rules.

The Director General concluded that, in his view, there had been a gross violation of the complainant's obligation to conduct himself with honesty and integrity. In its unanimous opinion, the Joint Committee for Disputes had, however, concluded that, even though some of its members harboured doubts about the complainant's conduct, the facts had not been proven beyond reasonable doubt, as is required in disciplinary matters.

8. Among the various pleas entered by the complainant in his submissions, the Tribunal considers that there are three that are decisive for the outcome of this dispute. The first is that the rights of the defence were not observed. The second concerns what the complainant calls a "lack of reasons" for the disciplinary sanction imposed and for the impugned decision but which in fact, in view of the content of his submissions, is a criticism of the reasons for those decisions. The third is that the sanction imposed was unlawful and disproportionate.

9. With regard to the first plea, the complainant relies on the fact that, before taking his decision of 27 March 2020 which departed from the unanimous opinion of the Disciplinary Board and which, notwithstanding that opinion, imposed a disciplinary measure on him, the Director General neither warned the complainant of his intention to downgrade him by two grades, nor gave him the opportunity to be heard on this aspect of the disciplinary proceedings.

10. Regarding disciplinary measures, Articles 4 and 5 of Annex XIV to the Staff Regulations, which concerns disciplinary proceedings, provide as follows:

"DISCIPLINARY MEASURES

Article 4

1. The Director General may impose one of the following penalties:

a) a written warning;

b) a reprimand;

c) deferment of advancement to a higher step for a period of between one and 23 months;

d) relegation in step;

e) temporary downgrading for a period of between 15 days and one year;

f) downgrading in the same function group;

g) classification in a lower function group, with or without downgrading;

h) removal from post and, where appropriate, reduction pro tempore of a pension or withholding, for a fixed period, of an amount from an invalidity allowance; the effects of this measure shall not extend to the official's dependants. In case of such reduction, the official's income may not, however, be less than the minimum subsistence figure laid down in Article 6 of Annex IV to these Staff Regulations, with the addition of any family allowances payable.

2. Where the official is in receipt of a retirement pension or an invalidity allowance, the Director General may decide to withhold an amount from the pension or the invalidity allowance for a given period; the effects of this measure shall not extend to the official's dependants. The official's income may not, however, be less than the minimum subsistence figure laid down in Article 6 of Annex IV to these Staff Regulations, with the addition of any family allowances payable.

3. A single case of misconduct shall not give rise to more than one disciplinary penalty.

Article 5

The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account shall be in particular of:

a) the nature of the misconduct and the circumstances in which it occurred;

b) the extent to which the misconduct adversely affects the integrity, reputation or interests of the Agency;

c) the extent to which the misconduct involves intentional actions or negligence;

d) the motives for the official's misconduct;

e) the official's grade and seniority;

f) the degree of the official's personal responsibility;

g) the level of the official's duties and responsibilities;

h) whether the misconduct involves repeated action or behaviour;

i) the conduct of the official throughout the course of his career."

It is clear from these articles that when imposing a penalty as a result of disciplinary proceedings, the Director General may choose from a range of measures, the scope and impact of which vary greatly but key to which is the principle that the penalty selected must be commensurate with the misconduct involved.

11. Established precedent of the Tribunal has it that before adopting a disciplinary measure, an international organisation must give the staff member concerned the opportunity to defend herself or himself in adversarial proceedings (see, for example, Judgment 3875, consideration 3). This is to ensure that the staff member is afforded the opportunity to fully express her or his point of view, with the aim of being properly heard. In Judgment 4408, consideration 4, the Tribunal reiterated the importance of these principles as follows:

> "4. The Tribunal points out that respect for the adversarial principle and the right to be heard in the internal appeal procedure requires that the official concerned be afforded the opportunity to comment on all relevant issues relating to the contested decision and, in particular, on all the organisation's arguments (see Judgment 2598, consideration 6)."

12. The Tribunal's case law also establishes that, in disciplinary matters, the official's right to due process means that an organisation has an obligation to prove the misconduct complained of beyond reasonable doubt. This serves a purpose peculiar to the law of the international civil service and involves the recognition that often disciplinary proceedings can have severe consequences for the official concerned (see, for example, Judgments 4478, consideration 10, 4362, considerations 7, 8 and 10, and 4360, consideration 10).

13. Regarding disciplinary proceedings, the Organisation's regulatory provisions contained in Annex XIV to the Staff Regulations establish that the Director General's report on the facts complained of must first be communicated to the official concerned (paragraph 2 of Article 7). Then, where an official, who has been previously informed of the possible consequences of acknowledging his misconduct, acknowledges that misconduct and accepts the report without reservation, the Director General may withdraw the matter from the consideration

of the Disciplinary Board, "in accordance with the principle that the severity of the penalty envisaged must be commensurate with the misconduct committed"; in that event, the chairman of the Disciplinary Board shall, however, give his views on the penalty envisaged (Article 9).

Where disciplinary proceedings come before the Disciplinary Board, the Board must not deliver its opinion without first having heard the official (Article 11). Its opinion, which must deal with whether the facts complained of are established and what, if any, penalty those facts should, in the Board's view, give rise to, must be transmitted to the Director General and to the official concerned (second paragraph of Article 13). Lastly, once the Board's opinion has been received, Article 17 expressly provides that the official must be heard before the Director General takes a decision "as provided for in Articles 4 and 5", referred to above, in other words, the provisions dealing with the penalties that may be envisaged.

14. The Tribunal considers that it is clear from these provisions, which are peculiar to Eurocontrol's Staff Regulations, that officials of the Organisation are entitled to a due process which affords them the opportunity to be fully heard in connection with the misconduct of which they are accused and to a genuine opportunity to express themselves on the "penalty envisaged" in terms both of its content and of its proportionality to the facts complained of.

In the present case, bearing in mind that the Director General had the ability to apply a large range of disciplinary measures which had to be commensurate with the facts complained of and which had potentially significant consequences for the complainant depending on the severity of the penalty decided upon, the Tribunal considers that the provisions required the complainant to be given the opportunity to make observations on the penalty envisaged by the Director General before that penalty was imposed.

15. It is evident from the file that no reference whatsoever to the content of the disciplinary measure envisaged by the Director General was made in the report of 30 January 2020 informing the complainant of the Director General's intention to initiate disciplinary proceedings against him, in the unanimous opinion of the Disciplinary Board of 28 February 2020, in the invitation of 18 March 2020 to the hearing scheduled to be held after the Board delivered its opinion but before the Director General took a decision, or in the summary of discussions that took place at that hearing of 20 March 2020, bearing in mind also that the Board had concluded that no sanction was warranted in this case.

The Tribunal considers that the Organisation therefore breached its own disciplinary rules and substantially undermined the complainant's right to be heard under the Staff Regulations in order to put forward his comments on the penalty envisaged against him. This breach of the rules was all the more serious that the penalty in question was significant and had severe consequences for the complainant, as downgrading by two grades brought with it an immediate and permanent reduction by almost 20 per cent of the amount of his pension.

This first plea is therefore well founded, which is sufficient to vitiate both the decision of the Director General of 27 March 2020 and, consequently, that of 12 October 2021 which refers to and confirms it.

16. With regard to the complainant's second plea, concerning the "lack of reasons" for the decision to impose a sanction and the impugned decision, the complainant submits, in the first place, that the Director General erred in law when he concluded, contrary to the unanimous opinions of the Disciplinary Board and the Joint Committee for Disputes, that there had been a breach of the provisions of the Staff Regulations relating to invalidity and absence due to sickness.

The relevant provisions in this regard are to be found in paragraphs 1 and 5 of Article 59 of the Staff Regulations, which provide as follows:

> "1. An official who provides evidence of incapacity to perform his duties because of sickness or accident shall automatically be entitled to sick leave.

The official concerned shall notify the Agency of his incapacity, as soon as possible and at the same time state his present address. He shall produce a medical certificate if he is absent for more than three days. This certificate must be sent on the fifth day of absence at the latest, as evidenced by the date as postmarked. Failing this, and unless failure to send the certificate is due to reasons beyond his control, the official's absence shall be considered as unauthorised.

An official on sick leave may at any time be required to undergo a medical examination arranged by the Agency. If the examination cannot take place for reasons attributable to the official, his absence shall be considered as unauthorised as from the date that the examination is due to take place.

If the finding made in the examination is that the official is able to carry out his duties, his absence shall, subject to the following subparagraph, be regarded as unjustified from the date of the examination.

If the official considers the conclusions of the medical examination arranged by the Agency to be unjustified on medical grounds he may, within two working days of receipt of the decision declaring his absence unauthorised, submit to the Director General a request that the matter be referred to an independent doctor for an opinion.

The Director General shall immediately transmit the request to another doctor agreed upon by the official's doctor and the Agency's medical officer. Failing such agreement within five days of the request, the Director General shall select a person from a list of independent doctors to be established for this purpose each year by common consent of the Director General and the Staff Committee. The official may, within two working days, object to the Director General's choice, whereupon he may choose another person from the list, which choice shall be final.

The independent doctor's opinion given after consultation of the official's doctor and the Agency's medical officer shall be binding.

Where the independent doctor's opinion confirms the conclusion of the examination arranged by the Agency, the absence shall be treated as unjustified from the date of that examination. Where the independent doctor's opinion does not confirm the conclusion of that examination, the absence shall be treated for all purposes as having been justified.

[...]

5. The Director General may refer to the Invalidity Committee the case of any official whose sick leave totals more than twelve months in any period of three years to consider total permanent invalidity subject to the conditions of Article 78. Such referral shall only be optional and shall not constitute a right for the official."

17. With regard first to the Invalidity Committee, paragraph 5 provides that the Director General may refer a case to the Committee to examine whether an official should be declared as suffering from total permanent invalidity. The objective is therefore to evaluate whether or not the official is affected by invalidity at the time when the Committee delivers its opinion. As the complainant rightly points out in his submissions, the Committee looks at the official's medical history and does not try to predict how his state of health might change in future. The Tribunal also notes that this paragraph does not make any provision for the Invalidity Committee to re-evaluate the official's situation or set out any procedure concerning the findings it may make in such a situation.

Next, with regard to Article 59(1) concerning absence due to sickness, this paragraph establishes the rule that an official is automatically entitled to sick leave. The requirements are to notify the Agency as soon as possible and to produce a medical certificate on the fifth day of absence at the latest. If the official satisfies these requirements, the paragraph provides for a procedure by which the Administration may challenge the absences and ultimately come to regard them as unjustified. To this end, the Administration may require the official to undergo a medical examination, but when or how that medical examination is to be carried out is not stipulated. In a situation where the medical examination reveals that the official is able to carry out her/his duties, her/his absence may then be regarded as unjustified, but she/he may request that the matter be referred to an independent doctor if she/he considers the conclusions of the medical examination to be unjustified on medical grounds. In that eventuality, it is not until the independent doctor confirms the conclusions of the medical examination that the absence of the official can be treated as unjustified. As the provision states, the independent doctor's opinion is then binding.

18. The Tribunal considers that, in concluding that Article 59(5) was the applicable provision in a case such as that of the complainant, the Director General misread that provision. Firstly, that is not what paragraph 5 prescribes. Secondly, the file shows that at no time did the complainant challenge the Invalidity Committee's findings, either when

it delivered its opinion on 9 February 2017 or subsequently. Lastly, the Director General was wrong to assert that the complainant did not comply with the procedure set out in paragraph 5, since that provision does not set out any procedure once the Committee has delivered its opinion.

In its opinion of 28 February 2020, the Disciplinary Board noted that there was no evidence that the complainant had challenged or failed to abide by the Invalidity Committee's findings. It noted that, in this case, the Administration confused two different procedures: the procedure under Article 59(5) relating to invalidity and the procedure under Article 59(1) relating to absence due to sickness and accident. The same incongruities were noted by the members of the Joint Committee in relation to the procedure under Article 59(5).

The argument put forward by the Director General is all the more astonishing that the Organisation was perfectly aware at the time of the shortcomings in its regulations in terms of the mechanism under Article 59(5) and the appeals that might be filed as a result. In a revealing exchange of emails on 9 and 10 October 2017, three of Eurocontrol's senior managers – the Organisation's Medical Adviser (Dr V.), the Head of the Human Resources and Services Unit and the Head of Compensation and Benefits – effectively acknowledged that, in the absence of a specific rule on the matter, it could be difficult to justify the policy followed by the Administration, that there were no rules applicable to the situation where an official refuses to return to work after an Invalidity Committee has issued an opinion concluding that he is able to resume his duties and that, in effect, it would require the adoption of a rule which did not currently exist.

Furthermore, although, following the complainant's retirement on 31 July 2019, the Head of the Human Resources and Services Unit expressly requested the Medical Adviser, Dr V., to confirm that the Organisation could not accept medical certificates once the Invalidity Committee had declared a person fit for work, no such confirmation appears to have been provided. In any event, there is none in the file before the Tribunal.

19. In its submissions, the Organisation maintains that it was in an unprecedented and complex situation, in the face of which it considered that the examination procedure provided for by Article 59(1) of the Staff Regulations was not an effective administrative solution in the circumstances. It explains that it therefore sought to use the most effective and appropriate administrative and medical solution in a case where it considered that Article 59(1) was not suited to the unusual circumstances surrounding the complainant's situation.

However, in view of the fact the Organisation has the power to adopt clear rules, procedures and policies on the matter but, despite being aware of the problem since at least October 2017, chose not to do so, it cannot cite the supposed ineffectiveness of the applicable provisions of the Staff Regulations as an excuse to ignore their substance.

At several junctures in its submissions, the Organisation argues that it never sought to follow the provisions of Article 59(1) in the complainant's case and that at no time did it require the complainant to undergo a medical examination within the meaning of that paragraph. Firstly, this confirms that the Director General's assertion that the complainant breached that provision was incorrect. Secondly, since the complainant had submitted medical certificates covering the whole of the periods concerned, the Organisation had no option but to proceed in accordance with that provision, which it nonetheless asserts that it never sought to do. Moreover, given that, in the decision of 27 March 2020 to impose a sanction, the Director General admitted that the Administration had never regarded the complainant's absences as unjustified prior to the date of Professor D.'s last medical report of 20 May 2019, the Organisation has ultimately failed to establish any breach by the complainant of Article 59(1).

The Tribunal considers that the Director General therefore erred in law when he concluded in the impugned decisions that the complainant had breached Article 59, whether it be in relation to paragraph 1 or to paragraph 5 thereof.

20. In the second place, still in connection with the second plea alleging a "lack of reasons" for the disciplinary sanction but this time in relation to the alleged breach of the Staff Regulations concerning the obligations on members of staff in terms of loyalty, integrity and honesty, the provisions on which the Director General stated he was relying are Articles 11 and 12, which state as follows:

> Article 11:
>
> "An official shall carry out his duties and conduct himself solely with the interests of the Agency in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside the Agency. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Agency.
>
> On accepting service with the Agency, an official shall undertake, unconditionally, to refrain from any act which might jeopardise the safety of air navigation; he shall be bound to ensure the continuity of the service and shall not cease to exercise his functions without previous authorisation.
>
> An official shall not without the permission of the Director General accept from any government or from any source outside the Agency any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.
>
> Before recruiting an official, the Director General shall examine whether the candidate has any personal interest such as to impair his independence or any other conflict of interest. To that end, the candidate, using a specific form, shall inform the Director General of any actual or potential conflict of interest. In such cases, the Director General shall take this into account in a duly reasoned opinion. If necessary, the Director General shall take the measures referred to in Article 11a(2).
>
> This Article shall apply by analogy to officials returning from leave on personal grounds."
>
> Article 12:
>
> "An official shall refrain from any action or behaviour which might reflect adversely upon his position."

21. On this point, in its submissions and in the impugned decisions, the Organisation accuses the complainant of making virulent remarks, the main and decisive foundation for which is the testimony of the Agency's Medical Adviser at the hearing before the Disciplinary

Board, according to which the complainant purportedly told him, at several consultations, "that the sole reason that drove him to commence this long and arduous process was that he was unhappy about his career prospects, having failed to receive a promotion". The Organisation regards this as a "socio-administrative" grievance which was "deliberately transformed" by the complainant into a "socio-medical" situation which lasted six years and which was motivated by "clearly intentional" actions on the part of the complainant for which he is personally liable.

However, since, according to the settled case law of the Tribunal, the level of proof to which the Organisation is subject in disciplinary matters is proof beyond reasonable doubt (see, for example, Judgments 4478, consideration 10, and 4247, considerations 11 and 12), it must be noted that the remarks attributed by the Organisation to the complainant cannot be regarded as having been established.

Firstly, such an assertion does not appear in the summary of Dr V.'s testimony before the Disciplinary Board and is also expressly denied by the complainant in his submissions. Secondly, there is no evidence on file deriving from Dr V., whether contemporaneous or not, to substantiate the claim that the complainant told him that he was motivated by his dissatisfaction with his career prospects and lack of promotion.

22. In Judgment 4491, consideration 19, the Tribunal recalled that "[a] staff member accused of wrongdoing is presumed to be innocent and is to be given the benefit of the doubt". Similarly, in Judgment 3969, consideration 16, the Tribunal reiterated that, when the executive head of an organisation seeks to motivate his conclusions and decision for departing from the conclusions of a Disciplinary Committee, she or he must establish beyond a reasonable doubt the conduct or behaviour of which a complainant is accused. Lastly, in Judgment 4047, consideration 6, the Tribunal recalled that it is equally well settled that the "Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact".

In the present case, the Tribunal considers it entirely apparent, as was also noted in the unanimous opinions of the Disciplinary Board and the Joint Committee for Disputes, that the Administration could not have found the complainant to be guilty beyond reasonable doubt of the alleged breaches of the provisions of the Staff Regulations relied on. This is all the more evident in view of the various factors, listed below, which were clearly such as to raise reasonable doubts, of which the complainant should be given the benefit:

– the lack of any documentation to substantiate what Dr V. allegedly asserted;
– the complainant's denial of Dr V.'s assertion;
– the complainant's sickness absence record drawn up by the Organisation for the period from July 2013 to July 2019, which showed that, apart from five entries recorded under the code MALN (denoting a non-certified sickness absence), all the others were given code MALO, denoting absences justified by a medical certificate, except for two periods for which evidence needed to be supplied, that is the period from 12 January 2019 to 31 May 2019 and the period from 1 June 2019 to 31 July 2019;
– the many medical certificates, reports and diagnoses submitted by the complainant over the years which were issued by no fewer than ten different doctors;
– the fact that the Organisation had considered the complainant's absences to be unjustified only from the date of Professor D.'s last medical report of 20 May 2019;
– lastly, the fact that the Organisation had itself acknowledged that it had accepted the complainant's absences as justified until 20 May 2019.

23. In light of these factors, the Tribunal considers that it was not possible for the Director General to depart from the unanimous opinions of the Disciplinary Board and the Joint Committee for Disputes in the way he did. The grounds he gave in the contested decisions do not meet the standard of a clear and cogent demonstration of the Organisation's

ability to conclude beyond reasonable doubt that the complainant was guilty.

This second plea is therefore also well founded.

24. Lastly, with regard to the complainant's third plea, that the sanction imposed was unlawful and disproportionate, the Tribunal recalled, in its Judgment 4504, consideration 11, that "[l]ack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature. In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account (see Judgment 4478, consideration 11, and the case law cited therein)."

This requirement for proportionality is also expressly set out in the aforementioned Article 5 of Annex XIV to the Staff Regulations.

In the present case, the Tribunal considers that even if the acts of which the Organisation accused the complainant had been established, the Director General could not, without breaching the principle of proportionality, impose on him the sanction of downgrading by two grades, assuming that a sanction of that type could even be lawfully imposed on a former official. The sanction seems in the present case all the more disproportionate that it led to a substantial and permanent reduction in the amount of pension received by the complainant, which fell from 5,212.35 euros to 4,210.68 euros, a decrease of almost 20 per cent.

This third plea is, therefore, also well founded.

25. It follows from the foregoing that the Director General's decision of 12 October 2021 and his earlier decision of 27 March 2020 are both unlawful and must be set aside, without there being any need to rule on the other pleas raised in the complaint.

Accordingly, the Organisation must be ordered to reimburse the complainant for all the sums withheld from his pension from 1 April 2020 onwards pursuant to the decision of 27 March 2020 to impose a sanction, which he claims as compensation for the material injury caused by the two decisions. The sums thus payable to the complainant

for each monthly remuneration shall bear interest at the rate of 5 per cent per annum from the date when they fell due until the date when they are paid.

26. As regards the complainant's claim for the award of 50,000 euros in moral damages, it is well established in the Tribunal's case law, firstly, that international organisations are bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members and that the general principle of good faith and the concomitant duty of care require them to treat their staff with due consideration in order to avoid causing them undue injury (see, for example, Judgment 4559, consideration 10). Secondly, settled case law also holds that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organisation owes to its staff members (see Judgment 4178, consideration 15).

In the present case, it is true that, in his submissions, the complainant provides only succinct arguments to justify the alleged moral injury. Nonetheless, the Tribunal notes, in view of the submissions and evidence on file, that the complainant undoubtedly suffered considerable moral injury as a result of the rather arbitrary way in which he was treated, the infringement of his rights caused by the lack of prior information about the sanction imposed on him and the particularly harsh remarks made about him by the Director General.

Furthermore, the complainant was notified of the Director General's final decision rejecting his internal complaint on 12 October 2021, more than 16 months after he had lodged his internal complaint on 29 May 2020. The Tribunal considers that this delay, which significantly exceeds the four-month period provided for in Article 92(2) of the Staff Regulations, was excessive and unreasonable in the circumstances of the case.

The Tribunal considers that all of the moral injury suffered may be fairly redressed by awarding the complainant compensation of 25,000 euros.

27. The complainant is entitled to costs, which the Tribunal sets at 8,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of 12 October 2021 and that of 27 March 2020 are set aside.
2. Eurocontrol shall reimburse the complainant for all the sums withheld from his pension since 1 April 2020 pursuant to those decisions, on the terms set out in consideration 25, above.
3. The Organisation shall also pay the complainant moral damages in the amount of 25,000 euros.
4. It shall also pay him costs in the amount of 8,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ