

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 2)

v.

Eurocontrol

140th Session

Judgment No. 5029

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 13 March 2022, Eurocontrol's reply of 12 September 2022, the complainant's rejoinder of 6 January 2023, Eurocontrol's surrejoinder of 7 April 2023, the complainant's first further submissions of 24 June 2024, Eurocontrol's comments thereon of 24 September 2024, the complainant's second further submissions of 7 January 2025 and Eurocontrol's comments thereon of 11 February 2025;

Considering the additional documents and information submitted by Eurocontrol on 18 November and 6 December 2024 in response to requests for further submissions from the President of the Tribunal;

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 his performance appraisal for 2019 and the rejection of his complaint of psychological harassment.

The complainant joined the Upper Area Control Centre in Maastricht, the Netherlands, on 24 August 1987 as an air traffic controller. At the material time, he had held the position of senior operational support

expert in the generic job of administrator at grade AD11, step 8, since 1 February 2013. He was placed on sick leave between 22 January and 7 August 2020. He retired on 1 October 2021.

In his performance appraisal report for the reference period from 1 January to 31 December 2019 – which was not completed until 21 September 2020 due to his illness-related absence, without any formal intermediate appraisal interview taking place during the year under review – the complainant, after being interviewed on 24 August 2020 by his new supervisor for 2019, received an overall assessment of “unsatisfactory” on the grounds that, in particular, he had not met three of the five objectives set for 2019 and that his performance reflected shortcomings in his conduct. The complainant had expressed his disagreement before the report was completed and submitted for signature by the countersigning manager, Mr H.

In accordance with Article 7 of Rule of Application No. 3a on the drawing up of the appraisal report provided for in Article 43 of the General Conditions of Employment governing the staff of the Eurocontrol Maastricht Centre (hereinafter “the GCE”), the appraisal report was sent to the Joint Reports Committee, which delivered its opinion on 11 November 2020. The Committee found that there had been a clear gap in communication between the complainant and his reporting manager, Mr S., since December 2018; the countersigning manager, Mr H., had not made any comments on Mr S.’s assessment; Mr S. had acknowledged that the complainant had performed his tasks satisfactorily, but the assessment had been conducted using a “glass half empty approach” and focused solely on the complainant’s failings; the proper procedure had not been followed as there had not been an intermediate interview and appraisal report that would have enabled the complainant to improve the situation and rectify the shortcomings criticised; the assessment of the three “not met” objectives had not taken into account the complainant’s good performance on everyday tasks; and he had not been warned of the failings of which he was criticised. The Committee recommended that the negative assessment of the three objectives not met should not be upheld and, consequently, that the overall assessment of “unsatisfactory” should be cancelled, and suggested

that support be put in place to address the communication gap between the complainant and Mr S.

On 16 December 2020 the Director General upheld the “unsatisfactory” overall assessment in the appraisal report and informed the complainant that assistance would be provided, with the support of the human resources unit, to improve communication with Mr S. and help him adapt to the changing environment, structures and management style.

On 25 February 2021 the complainant lodged an internal complaint against the decision of 16 December 2020 on the basis of Article 91(2) of the GCE, alleging, in particular, procedural flaws, failure to comply with the applicable rules and discrimination on the grounds of his state of health. He also stated that he had experienced derogatory treatment, which he considered amounted to psychological harassment, by his immediate supervisor, Mr S. and Mr H., and requested that an investigation be opened into these individuals. The Head of Human Resources and Services, Ms D., acknowledged receipt of the internal complaint on 5 March 2021 and forwarded it to the Joint Committee for Disputes, but advised the complainant that there could be a “moderate delay”^{*} in dealing with his internal appeal and that he should await the Director General’s final decision before taking his case to the Tribunal.

By a letter of 14 December 2021, the Director General informed the complainant that, following a preliminary review, he had concluded that the complaint of psychological harassment – contained in his internal complaint of 25 February 2021 – did not satisfy the “minimum criteria for receivability”^{*} laid down by Rule of Application No. 40 concerning harassment pursuant to Article 12a of the Staff Regulations governing officials of the Eurocontrol Agency (applicable *mutatis mutandis* to staff governed by the GCE) and that it therefore could not be pursued. He also referred to an “administrative investigation that might concern [him]”^{*} which had been initiated by the Agency and, according to the Director General, was the reason why the complainant had lodged his harassment complaint.

^{*} Registry’s translation.

On 31 January 2022 the complainant's counsel wrote to the Director General to complain about what he regarded as the Agency's shortcomings with regard to the handling of complaints of psychological harassment and internal complaints. On 24 February the Local Committee for Prevention and Protection at Work wrote to Ms D. asking her, *inter alia*, to explain why formal complaints of psychological harassment were not dealt with in accordance with the applicable rules.

In his reply of 8 February 2022 to the letter of 31 January, the Director General denied the accusations, stating that the Organisation had appropriate procedures for dealing with internal appeals and harassment complaints, and warned the complainant's counsel that he would no longer tolerate such accusations.

Alleging a paralysis in the internal appeal procedure, on 13 March 2022 the complainant filed the present complaint against the implied rejection of his internal complaint of 25 February 2021. In the complaint form, he nevertheless identifies the impugned decision as the decision of 14 December 2021 rejecting his complaint of psychological harassment. He asks the Tribunal to set aside that decision, as well as the decision of 16 December 2020 confirming the "unsatisfactory" overall assessment of his performance in 2019 and the related appraisal report, to order the removal of that report from his personal file and to recognise that he suffered psychological harassment. He also claims a total of 50,000 euros in compensation for the moral injury he considers he has suffered and 2,500 euros for the costs incurred in the proceedings relating to his complaint of harassment and the internal appeal proceedings, as well as 7,000 euros in costs for the present proceedings.

In its reply, Eurocontrol notes that the complaint is irreceivable for failure to exhaust the internal means of redress because, firstly, the decision of 14 December 2021 was not contested before the internal appeal bodies within the prescribed time limits and, secondly, the complainant should have awaited the Director General's final decision on his performance appraisal before bringing the matter before the Tribunal. In addition, it submits that by challenging the decision of 16 December 2020 in his internal complaint and referring to the decision of 14 December 2021 in the complaint form, the complainant has

not identified the decision adversely affecting him. Lastly, it considers that the claim seeking recognition of psychological harassment – which amounts to a request for an injunction or declaration of law – falls outside the Tribunal’s jurisdiction. It therefore asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

In its surrejoinder, Eurocontrol has provided the opinion delivered by the Joint Committee for Disputes on 8 June 2022, in which the Committee – which had met on 22 October 2021 – recommended that the internal complaint be considered receivable and well-founded, and invited the administration to conduct an investigation into the harassment complaint. In response to requests for further submissions by the President of the Tribunal, the Organisation also forwarded the final decision of the new Director General, dated 18 November 2024, by which the complainant was informed that his internal complaint had been rejected as irreceivable in respect of his allegations of psychological harassment and as unfounded in respect of the part concerning his performance appraisal for 2019.

In his second further submissions, the complainant asks the Tribunal, “[o]n an exceptional basis, and in view of [Eurocontrol’s] conduct both as regards the substance and the tainted and subverted procedure”*, to order the Organisation to pay punitive damages of 25,000 euros. In addition, he argues that the “very late provision”* of the opinion of the Joint Committee for Disputes and the final decision obliged him to file additional written submissions, which incurred legal costs, and he therefore raises the costs of the proceedings before the Tribunal to 12,000 euros.

In its final comments, Eurocontrol submits that the complainant’s second further submissions do not cast doubt on the validity of the decision of 18 November 2024, which stated the reasons for which it had been taken, was based on a rigorous examination of the facts and complied with the applicable provisions. It therefore confirms its request that the complaint be dismissed in its entirety.

* Registry’s translation.

CONSIDERATIONS

1. In his complaint, the complainant seeks the setting aside of, firstly, the implied decision rejecting his internal complaint of 25 February 2021, directed against the Director General's decision of 16 December 2020 to confirm his appraisal report for 2019, including the overall assessment of "unsatisfactory", and, secondly, the Director General's explicit decision of 14 December 2021 to reject on grounds of irreceivability the complaint of psychological harassment which the complainant had included in the aforementioned internal complaint. He also asks the Tribunal to recognise that he suffered psychological harassment, to set aside his appraisal for 2019 and to remove the disputed appraisal report from his personal file.

2. Eurocontrol submits that the complaint is irreceivable insofar as it is directed against the Director General's decision of 14 December 2021 to reject the complaint of psychological harassment, given that the complainant had not first exhausted the internal means of redress to challenge that decision. It follows, in its view, that the claim seeking recognition by the Tribunal that the complainant suffered psychological harassment is also irreceivable, especially as the Tribunal does not, in any event, have jurisdiction to make such a ruling of law or to issue injunctions of that kind against organisations.

This objection to receivability is well-founded.

3. The Tribunal observes in that regard that the internal complaint lodged by the complainant on 25 February 2021 against the aforementioned decision of 16 December 2020 also contained a complaint of psychological harassment, in which the Director General was asked to order an investigation.

By the time the present complaint was filed with the Tribunal, the Director General had rejected that harassment complaint by a decision of 14 December 2021, against which the complainant ought to have lodged a new internal complaint, pursuant to Article 91(2) of the GCE, within three months of the date of its notification.

The Tribunal has already held that a complaint of harassment, when contained in an internal complaint lodged on the basis of Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency (which is in every respect identical to Article 91(2) of the GCE applicable in this case), must be regarded as having been submitted under a separate procedure, provided for by Article 5(2)(a) of Rule of Application No. 40 concerning harassment pursuant to Article 12a of the Staff Regulations (applicable *mutatis mutandis* to staff covered by the GCE). In accordance with aforementioned Rule of Application No. 40, any decision on that complaint of harassment, whether express or implicit, ought therefore to be challenged using the remedies and within the time limits specified by Article 92 of the Staff Regulations (or Article 91 of the GCE).

By failing to do so before referring his case to the Tribunal, the complainant contravened the requirement laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress be exhausted (see Judgment 4956, consideration 4).

4. In his rejoinder, the complainant submits that he no longer had to challenge an initial decision taken by the Director General under the internal appeal procedure, as it would have been absurd for him to think that the Director General could go back on his decision and retrospectively reverse it. However, this attempt at justification clearly cannot be accepted, as it would be tantamount to presupposing the futility of an internal appeal and, *a fortiori*, of the internal appeal procedure as a whole, whenever the official or body of an international organisation which took the initial decision is also the one required to take the final decision, which is frequently the case in practice.

5. In his second further submissions, the complainant argues that his complaint of harassment was again rejected by the decision taken by the new Director General on 18 November 2024, by which the latter expressly responded to the internal complaint of 25 February 2021, and that he could therefore request that his complaint before the Tribunal be extended to include the decision of 18 November 2024, since it had the effect of confirming the initial decision rejecting his complaint of

harassment taken by the former Director General on 14 December 2021.

However, the Tribunal observes that, while referring to his predecessor's decision of 14 December 2021, which he stated he supported, the new Director General also rightly considered that the internal complaint of 25 February 2021 was irreceivable for the reasons set out above, in that it sought to challenge the initial decision. Firstly, the internal complaint of 25 February 2021 could not challenge a decision taken after the date on which it was lodged and, secondly, no internal complaint was lodged against the decision of 14 December 2021 within the prescribed time limit, with the result that the complainant did not exhaust the internal means of redress available to him under the GCE.

In addition, the Tribunal notes that the decision of 18 November 2024 merely confirmed the decision of 14 December 2021. It was not therefore a new decision on the issue of harassment and, consequently, did not trigger a new time limit within which the complainant was required to submit an internal complaint pursuant to Article 91(2) of the GCE (see, to this effect, Judgments 4560, consideration 6, and 4116, considerations 4 and 5).

6. It follows from considerations 3 to 5 above that, pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, the present complaint must be declared irreceivable insofar as it is directed both against the decision of the former Director General of 14 December 2021 to reject the complaint of psychological harassment and against the decision of the new Director General of 18 November 2024 to confirm that initial decision. The same applies, in any event, to the claim requesting the Tribunal to recognise that the complainant experienced harassment.

Furthermore, the complainant's request for the disclosure of particular documents relating to the "administrative investigation which may concern [him]"*, which had been initiated by the Agency and which, according to the Director General, was the reason why he had

* Registry's translation.

submitted his complaint of harassment, must be rejected insofar as it falls outside the scope of the present dispute.

7. Eurocontrol submits that the complaint is also irreceivable insofar as it seeks the setting aside of the complainant's performance appraisal for 2019. In particular, it argues in that regard that the complainant should have waited for the Director General's final decision on his internal complaint of 25 February 2021 insofar as it related to his performance appraisal for 2019 before bringing the matter before the Tribunal.

This objection to receivability is also well-founded.

8. In justification for filing a complaint with the Tribunal without awaiting the outcome of the internal appeal procedure, the complainant alleges that the procedure was paralysed.

However, the Tribunal observes that, while it is true that the period of more than three and a half years which elapsed between the submission of the complainant's internal complaint on 25 February 2021 and the adoption of the Director General's final decision of 18 November 2024 deciding on that complaint insofar as it related to the performance appraisal for 2019 is unreasonable in itself, it cannot find in this case that the internal appeal procedure was paralysed at the time when the complainant filed the present complaint, that is on 13 March 2022.

Under the Tribunal's case law, a complainant is entitled to file a complaint directly with the Tribunal against the initial decision which she or he intends to challenge where the competent bodies are not able to determine the internal appeal within a reasonable time having regard to the circumstances, provided that she or he has done her or his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a final decision within a reasonable time (see, in particular, Judgments 4820, consideration 6, 4819, consideration 3, 4660, consideration 2, 4271, consideration 5, 4268, considerations 10 and 11, 4200, consideration 3, 3558, consideration 9, 2039, consideration 4, or 1486, consideration 11).

In the present case, just over a year passed between the submission of the internal complaint on 25 February 2021 and the filing of the complaint with the Tribunal on 13 March 2022. Meanwhile, on 5 March 2021, the Head of Human Resources and Services, Ms D., had acknowledged receipt of the internal complaint and forwarded it to the Joint Committee for Disputes, but advised the complainant that there could be a “moderate delay”^{*} in dealing with it.

The file shows that the complainant never enquired about the progress of his internal appeal insofar as it was directed against the decision of 16 December 2020 confirming his unsatisfactory assessment for 2019. The email of 31 January 2022, sent by his counsel to the Director General to criticise what he considered to be the Agency’s systemic failings with regard to the handling of complaints of psychological harassment and related internal complaints, did not mention the internal complaint of 25 February 2021 or even the complainant’s individual situation and cannot therefore be regarded as a reminder of his own internal complaint.

Accordingly, the Tribunal considers that the complainant, who did not do “his utmost, to no avail, to accelerate the internal procedure”, was not, when he filed the present complaint, faced with a paralysis of the internal appeal procedure allowing him to appeal directly to the Tribunal. His complaint must therefore also be declared irreceivable insofar as it is directed against the performance appraisal for 2019.

9. In view of all the foregoing, the complaint must be dismissed as irreceivable in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

^{*} Registry’s translation.

In witness of this judgment, adopted on 16 May 2025, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLEMENT GASCON

RENÉ M. VARGAS M.