Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2893**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. A. M. L. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 May 2008 and corrected on 15 October 2008, the Organisation's reply of 16 January 2009, the complainant's rejoinder of 29 April and Eurocontrol's surrejoinder of 15 July 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. On 12 December 2000 the Eurocontrol Agency issued an invitation to service companies to tender for the provision of the services of a safety expert at its Headquarters in Brussels (Belgium) who would assist the Safety, Quality Management and Standardisation Unit to implement and monitor programmes. Bureau Veritas, a company whose Aeronautics and Space Division is located at Blagnac, in the south-west of France, responded to this invitation by

offering the services of the complainant, a French national born in 1962. The Agency accepted this offer. The contract provided that, from 26 March 2001, the complainant would be placed at the Agency's disposal for an initial period of 160 working days ending on 31 December 2001 with possible one-year extensions, up to an overall maximum period of five years. This arrangement, which was subsequently renewed six times, ended on 31 May 2007. The parties do not agree on either the number of days actually worked each year, or on the place where this work was, or should have been, carried out during the period 1 December 2001 to 30 November 2006 (hereinafter the "reference period").

On 23 May 2006 Eurocontrol published a notice of competition for a post of safety expert. Having applied and been selected for the post, the complainant signed his letter of appointment on 23 March 2007 and took up his duties, at grade A6, on 1 June 2007. The letter specified that he was entitled to a foreign residence allowance equal to 4 per cent of the total amount of his basic salary plus household allowance and dependent child allowance.

On 2 August 2007 the complainant sent the Director General an internal complaint directed against his payslip for June 2007, in which he sought the payment of an expatriation allowance as from 1 June 2007. Provision is made for this allowance in Article 4 of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency. The case was referred to the Joint Committee for Disputes which examined it at a meeting on 20 December 2007 and recommended in its opinion of 25 January 2008 that the internal complaint should be dismissed as unfounded. The Director General informed the complainant in an internal memorandum of 20 February 2008 that he was dismissing his internal complaint. That is the impugned decision.

B. The complainant contends, with regard to "[his] natural and habitual centre of vital interests", that at the time he was recruited by Eurocontrol he was working and living in France and that the work which he had done indirectly for the Agency during the reference period had no objective or factual links with Belgium. He had not

established any lasting links with that country, because he was performing a contract without having any intention of leaving France for a length of time, or of severing all his connections with France, especially as the contract was not permanent and could therefore end without notice at the end of each calendar year. On the other hand, he had retained strong and lasting social and emotional ties in France.

He considers that his rights of defence were violated because the Joint Committee for Disputes did not give him an opportunity to present his case.

The complainant comments that, throughout his period of employment by Bureau Veritas, his contract contained a mobility clause under which it was agreed that he could be asked at any time to carry out temporary assignments in France or abroad and that he had thus been called upon to carry out assignments in Brussels during the reference period. He adds that during that period he did not spend a single weekend or day of leave away from his home in France.

The complainant emphasises that since his recruitment by Eurocontrol on 1 June 2007, and having moved his family to Brussels on a permanent basis on 18 June 2008, he has had to make and is still making extra efforts. For example, the fact that his wife had to leave her job in order to follow him to Belgium has placed a considerable burden on the family budget.

The complainant submits that he meets the conditions laid down in Article 4(1)(a) of Rule of Application No. 7 with regard to nationality and habitual residence outside the country where the duty station is located and that, for this reason, by refusing to grant him the expatriation allowance, Eurocontrol committed an obvious error of judgement and, in doing so, breached the above-mentioned provisions.

He requests the setting aside of the decision of 20 February 2008, the granting of the expatriation allowance, compensation in the amount of 10,000 euros for moral injury and 5,000 euros in costs.

C. In its reply Eurocontrol submits that during the reference period the complainant plainly carried out his main occupation in Brussels. Even if it were to be accepted that he performed tasks unconnected

with his work for the Agency, this other activity could only constitute a secondary, or even subsidiary activity, for his main, habitual work was that which he did for the Agency at its Headquarters in Brussels. According to the Agency, it was normal for the complainant to be required to travel abroad on temporary assignments, but this circumstance does not alter the fact that the place where he carried out his main occupation was Brussels. During the reference period, he went on only two to eight temporary assignments a year, which represented a minor proportion of his work for the Agency, and he was regularly and continuously in Brussels, except for certain short periods, such as holidays. Indeed, he rented a flat in Brussels in order to be based there. The Agency deduces from the foregoing that the complainant does not meet the conditions of Article 4(1)(a) of Rule of Application No. 7 and that he is therefore not entitled to the expatriation allowance.

The Agency comments, in respect of the complainant's argument that his centre of vital interests remained in France and never shifted to Belgium, that the criterion of the centre of vital interests is subjective and is therefore not one of the objective criteria set forth in Article 4 of Rule of Application No. 7. In support of its argument the Agency relies on Judgments 1099, 1150 and 2597 of the Tribunal. It considers that the fact that the complainant retained interests in France was a personal choice stemming from his subjective situation, but that this does not preclude his having established objective links with Belgium.

The Agency submits that the complainant lived in Brussels for a sufficient length of time to establish lasting ties with Belgium. His situation is therefore clearly not comparable to that of an official who has never lived and/or worked in Brussels. The disadvantages attached to his new job are certainly smaller than those encountered by such an official and are in any case offset by a foreign residence allowance in accordance with Article 4(2) of Rule of Application No. 7.

Lastly, the Agency observes that the complainant did not indicate in his internal complaint that he wished to be heard by the Joint Committee for Disputes. The legal provisions concerning the Committee do not stipulate that a person filing an internal complaint must be heard.

D. In his rejoinder the complainant reiterates that during the reference period he was never assigned to a branch office of Bureau Veritas in Belgium, that he remained attached to the Blagnac office and that his temporary assignments started and ended at his place of work, namely Toulouse-Blagnac. He holds that he never settled in Brussels and that Bureau Veritas paid all the expenses in connection with his temporary assignments. It was therefore quite natural that, in order to reduce these expenses, Bureau Veritas asked him to find a furnished flat. Lastly, the complainant draws attention to the fact that Eurocontrol acknowledges that he was not living in Belgium with his family.

The complainant submits that, contrary to the Agency's allegations, the annual number of his temporary assignments during the reference period ranged from five to 16 and that they constituted the bulk of his work.

He adds that the Agency did not inform him that he should indicate in his internal complaint that he wished to be heard by the Joint Committee for Disputes, and that he was not aware that the provisions concerning the Committee do not provide for an automatic hearing of the person filing an internal complaint.

As for the case law on which the Agency bases its submissions, the complainant considers that the rulings in Judgments 1099, 1150 and 2597, all of which concerned the European Patent Organisation, are not applicable to his case because his situation is quite special. He says that during the reference period he was virtually at the service of an international organisation, namely Eurocontrol. The fact that he was placed at its disposal through a contract concluded between

Bureau Veritas and the Agency does not alter the fact that he was working in Belgium only in order to be at the service of the Agency. Consequently, regard should be had to the exception provided for in the last sentence of Article 4(1)(a) of Rule of Application No. 7, according to which circumstances arising from work done for an international organisation, inter alia, must not be taken into account for the purpose of assessing entitlement to payment of the expatriation allowance.

E. In its surrejoinder the Agency emphasises that the complainant had to perform his tasks in Brussels at the Agency's Headquarters and that he had to seek prior permission for any absence. Furthermore, the fact that the complainant rented a flat shows that his presence was regularly required in that town. It submits that the complainant's private journeys between Toulouse and the Agency should not be treated as official travel. The contract did not call for frequent journeys between Toulouse and Brussels. If the complainant reached an agreement with his employer that he would spend his weekends with his family, that arrangement did not derive from the contract with the Agency.

Eurocontrol points out that the provisions governing the Joint Committee for Disputes were published in an office notice which can be consulted by every official on the Agency's intranet site. The complainant cannot therefore plead ignorance of their existence and content.

Lastly, the Agency is of the view that the complainant is wrong to rely on the exception based on the notion of work done for an international organisation, which is to be found in the last sentence of the above-mentioned paragraph 1(a). The purpose of this provision, which refers to persons who receive an expatriation allowance because they are employed by an international organisation or a State, is to prevent the loss of this benefit when these persons subsequently join the Agency. The complainant is clearly not in this situation, as he was not employed by Eurocontrol before he took up his duties and never received an allowance of this kind.

CONSIDERATIONS

1. The complainant, a French national, was employed by the service company Bureau Veritas as from February 1997. As from May 1998 he worked as a "general space engineer" at its Aeronautics and Space Division, which is located in Blagnac in the south-west of France.

As from March 2001 he was placed at the disposal of the Eurocontrol Agency, as a safety expert, on the basis of a service contract concluded between the Agency and this company. The assignment given to the complainant, which consisted in assisting the Safety, Quality Management and Standardisation Unit of Eurocontrol to implement and monitor its programmes, was carried out at the Agency's Headquarters in Brussels.

This service contract, which was renewable for one-year periods at the end of each calendar year, for no more than five years in total, was in fact renewed six times between January 2002 and May 2007, for between 168 and 180 working days per annum.

2. At the end of 2005 the senior management of Eurocontrol decided to convert the duties carried out by the complainant within that framework into a staff position which was to be filled by means of a competition. The complainant then applied for this position. He was thus recruited on 1 June 2007 as a safety expert at grade A6.

3. The complainant's letter of appointment stipulated that he would receive a foreign residence allowance equal to 4 per cent of the total amount of the basic salary plus household allowance and dependent child allowance paid to him, but the complainant argued that he was entitled to the expatriation allowance provided for in Article 68 of the Staff Regulations governing officials of the Eurocontrol Agency, which is four times greater.

Although the dispute regarding this allowance arose before the complainant's recruitment, the letter of appointment was signed, as it stood, by both parties after the Agency's Human Resources

Directorate had told the complainant that he could file an internal complaint in this respect under Article 92(2) of the Staff Regulations.

On 2 August 2007 the complainant did in fact lodge an internal complaint against the Agency's decision not to grant him the expatriation allowance, as evidenced in particular by the amount of his emoluments shown on his first payslip.

4. On 20 February 2008 the Director General of the Agency decided to dismiss this internal complaint, in accordance with the unanimous opinion reached by the Joint Committee for Disputes at its meeting on 20 December 2007.

That is the decision which the complainant challenges before the Tribunal by requesting not only the quashing of this decision and any consequent redress, but also the payment of compensation in the amount of 10,000 euros for the moral injury which he believes he has suffered and an award of costs.

5. In support of his claims the complainant first submits that in reaching its opinion the Joint Committee for Disputes did not afford him due process. He asserts that, as he was not informed of the date of the Committee meeting at which his internal complaint would be examined, he was not given an opportunity to put his case himself, or to present oral submissions through counsel, and that he was thus denied the opportunity to exercise his right to be heard.

This line of argument is unfounded. Neither the legal provisions governing Eurocontrol's Joint Committee for Disputes nor the general principles applicable to such an appeal body require that a complainant be given an opportunity to present oral submissions in person or through a representative. As the Tribunal has already had occasion to state in Judgment 623, all that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities. As the Committee considered that it had gleaned sufficient information about the case from the parties' written submissions and documentary evidence, it was under no obligation to invite the complainant to put

his case orally, or indeed to accede to any request to that effect (for similar cases, see Judgments 232, 428 and 1127). Moreover, the Tribunal notes that in this case the complainant did not indicate in his internal complaint, or subsequently announce, that he wished to present oral submissions to the Committee and that, contrary to his assertions, the Agency was under no duty to inform him expressly of the possibility of making such a request.

6. The dispute turns on the application of Article 4 of Rule of Application No. 7 of the Staff Regulations, which concerns the remuneration of Agency officials.

This article, which defines the conditions for awarding the expatriation allowance provided for in the above-mentioned Article 68 of the Staff Regulations, reads (in pertinent part):

> "1. An expatriation allowance shall be paid equal to 16% of the total amount of the basic salary plus household allowance and dependent child allowance paid to the established official:
>
> a) to officials:
>
> - who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and
> - who, during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account;
>
> […]
>
> 2. An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph 1 shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance."

7. It is not disputed that the complainant does not hold and has never held Belgian nationality. Therefore the question of whether, as he submits, he is entitled to the expatriation allowance referred to in paragraph 1 of that article hinges on whether he met both conditions of not habitually residing or carrying out his main occupation in Belgium

during the reference period defined in that paragraph, i.e. between 1 December 2001 and 30 November 2006.

8. The evidence on file shows that for the whole duration of the contract placing him at the disposal of the Agency – which encompassed all of the reference period – the complainant habitually carried out his main occupation in Brussels.

Admittedly the complainant, who remained an employee of Bureau Veritas, continued to perform some tasks for his employer outside that contract and to work from time to time at the Blagnac office. He was also required regularly to go on temporary assignments outside Brussels, including as part of his duties at Eurocontrol. There is no need to rule on the parties' difference as to the exact number of days the complainant worked each year at Eurocontrol's Headquarters, since it is obvious that he did carry out his main occupation in Brussels. Even if the figure of an average of 139 days per annum put forward by the complainant were to be accepted without question, this would not lead the Tribunal to conclude otherwise, since this figure must be compared with the total number of working days in the year which, once leave, official holidays and time off in lieu of overtime have been deducted, amounted to no more than 210. Moreover, the Tribunal observes that in the job application which the complainant submitted in June 2006 for his current post, he himself stated that his work for Eurocontrol accounted for "85 per cent of [his] time in 2006" and "80 per cent between 2002 and 2005", and that he gave as his telephone number at work that of his office at the Agency's Headquarters.

9. The determination of the complainant's habitual place of residence might give more pause for thought, for the evidence on file clearly shows that the complainant maintained his family home in the south-west of France. Nevertheless, during the working week, the complainant habitually resided in a flat which he had been led to rent in Brussels. Furthermore, even if he were deemed to have retained his

habitual residence in France during the reference period, the fact that he carried out his main occupation in Belgium would in any case preclude his entitlement to the expatriation allowance.

10. Lastly, the complainant is wrong, in his rejoinder, to rely on the last sentence of the above-mentioned Article 4(1)(a), which indicates that circumstances arising from work done for an international organisation, inter alia, must not be taken into account for the purpose of assessing entitlement to payment of the expatriation allowance. Indeed, the scope of the exception thus made for the officials of international organisations cannot be extended to the complainant's case since, although he carried out his main occupation for the benefit of such an organisation, his legal status was that of an employee of a private company. Moreover, it should be noted that this exception, which is designed in particular to ensure that international civil servants are not penalised, on moving from one post to another, by the loss of the expatriation allowance which they received in their previous job, is in this respect irrelevant to the complainant's situation.

11. The dismissal of the complainant's claims in consequence of the application of the letter of the above-mentioned Article 4 is, moreover, perfectly consistent with the spirit in which the allowance in question was devised.

12. As the Tribunal has consistently held in several judgments concerning the expatriation allowance provided for in the Service Regulations for Permanent Employees of the European Patent Office, which rests on similar considerations, such an allowance is intended to compensate for certain disadvantages suffered by staff members who are obliged, because of their work, to leave their country of origin. It is therefore natural that it is not granted when, prior to expatriation, the person concerned had objective and factual links with the country of his or her new duty station which substantially lessen these disadvantages (see in this respect Judgments 1099, 1150, 1864 and 2597).

13. This case law concerning the expatriation allowance applicable to the European Patent Office must also apply to the expatriation allowance for which provision is made in the Staff Regulations governing officials of the Eurocontrol Agency, which is granted on similar and even, in some respects, slightly more restrictive conditions.

It is plain that, however strong his connections with France may be, the complainant, who had already carried out his main occupation in Belgium for more than five years and who habitually resided there during the working week, had already established objective and factual links with the country of his new duty station. His situation was therefore in no way comparable to that of a foreign official who suddenly has to move to Belgium without having had any opportunity to become familiar with the working environment and way of life in that country.

14. It should also be remembered that in the case of Eurocontrol officials, paragraph 2 of the above-mentioned Article 4 of Rule of Application No. 7 provides for the payment of a foreign residence allowance equal to one quarter of the expatriation allowance to expatriate officials who do not satisfy the conditions defined in paragraph 1. The terms of this text therefore offer all the more reason to reserve the benefit of the expatriation allowance exclusively for officials who have had no previous connection with the country of their new duty station.

The instant case is a prime example. Although the complainant had previously established connections with the country of his duty station, his recruitment as an official of Eurocontrol undoubtedly entailed certain disadvantages inherent in any expatriation and, in particular, various expenses resulting from the transfer of his family home. But it must be emphasised that, even though he cannot claim an expatriation allowance, the complainant does receive the foreign residence allowance, the purpose of which is precisely to offset these disadvantages.

15. Lastly, the Tribunal notes that, although the complainant submits subsidiarily that the application of the provisions governing the expatriation allowance gives rise to unjustified differences in treatment as between Agency officials, he offers no proof of the existence of such anomalies, which would not, in any case, entitle him to an allowance for which he is not legally eligible.

16. It may be concluded from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet