

110th Session

Judgment No. 2993

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. W. (his third), Mr G. C. D., Mrs Y. F., Mr M. G., Mr R. J. I. (his second) and Mr B. M. M. (his fifth) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 June 2008 and corrected on 25 February 2009, the Agency's reply of 5 June, the complainants' rejoinder of 14 September and Eurocontrol's surrejoinder of 18 December 2009;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are officials or former officials of Eurocontrol serving or having served at the Experimental Centre at Brétigny-sur-Orge (France). Mr M. and Mrs F. retired respectively in June 2005

and December 2008. Facts relevant to this case are given in Judgment 2633, delivered on 11 July 2007. All but one of the present complainants, Mr M., were either parties or interveners in the proceedings leading to that judgment.

Suffice it to recall that by Decision No. 102 of 5 November 2004 the Permanent Commission for the Safety of Air Navigation approved, after consultation with the staff unions, the setting-up of a pension fund for current and future staff, into which employee and employer contributions would be paid. These contributions, and the interest earned on them, would finance pension rights acquired after 1 January 2005. The decision to establish a pension fund to replace the existing pension scheme (hereinafter “the Pension Scheme”) was accompanied by several other measures. On 4 April 2005 the Permanent Commission approved a reduction in pension benefits, an increase in contributions and an increase in the age of retirement. These measures, which took effect on 1 July 2005, were brought to the attention of the staff in Office Notice No. 11/05 of 20 June 2005. The complainants in the case leading to Judgment 2633 challenged “the totality of the measures concerning pensions applied from 1 July 2005”, contending *inter alia* that these measures had been decided on the basis of false information constituted by the actuarial study of 2002. The Tribunal considered that there was no proof that the challenged measures were based on that study.

Between 22 August and 12 October 2007 the complainants filed identical internal complaints challenging “the modifications made to the Pension Scheme in 2005 and all modifications since 2002”. They alleged that the adoption of an increased pension contribution rate adopted by the Permanent Commission was arbitrary and illegal since it was not based on a valid actuarial study. Consequently, it could not be ascertained that the new contribution rate for staff would finance one third of the costs of the Pension Scheme as required by Article 83 of the Staff Regulations governing officials of the Eurocontrol Agency. According to that provision, the employees’ contributions should

represent one third of the benefits payable under the Pension Scheme and the employer's contribution two thirds. The rate of contribution may be modified if an actuarial assessment of the Pension Scheme shows that the employees' contributions are insufficient to finance one third of the benefits payable under the Pension Scheme.

In an opinion dated 25 January 2008 the Joint Committee for Disputes concluded that the internal complaints were inadmissible and legally unfounded. It observed that, in Judgment 2633, the Tribunal ruled on the validity of the pension reform conducted in 2005. Consequently, all the complainants, except Mr M., had the opportunity to question the arguments put forward by the Agency in the proceedings which led to that judgment. They were therefore barred by the principle of *res judicata* from reopening the case. The Committee also held that the internal complaints, including that filed by Mr M., were time-barred since the complainants challenged a decision issued in 2005. A copy of the Committee's opinion was sent to each complainant under cover of a memorandum of 20 February 2008, by which the Director of Human Resources and Administration informed them that the Director General had decided to endorse the Committee's findings and to dismiss their internal complaints as being inadmissible and legally unfounded. That is the impugned decision.

B. The complainants contend that Eurocontrol indicated for the first time during the proceedings which led to Judgment 2633 that the contested pension measures taken in 2005 were not based on the actuarial study of 2002. This means that before the delivery of that judgment on 11 July 2007 they were not aware of all the facts surrounding the pension reform and thus were not in a position to challenge the decision to establish a pension fund or the measures taken in that respect. They contest therefore the Director General's decision to declare their internal complaints inadmissible, pointing out that they were lodged between 22 August and 12 October 2007, that is to say within the prescribed time limit calculated from notification of the judgment informing them of a new fact.

On the merits, they allege that Article 83 of the Staff Regulations has been violated because the contested pension measures, in particular the increase of the employees' contributions, were not based on an actuarial study. Indeed, apart from the study of 2002, on which the Agency, by its own admission, did not rely, no other actuarial assessment was conducted before the contested measures were adopted. They add that, in the absence of a recent actuarial study, neither they nor the staff representatives had a chance to discuss the validity of the measures adopted. They also question the viability of the Pension Scheme as no actuarial study was carried out to serve as the basis of its modification.

The complainants ask the Tribunal to annul the impugned decision and "the decisions concerning their contribution to the Pension Scheme since 2002". They also seek an award of costs.

C. In its reply Eurocontrol submits that the complaints are irreceivable as time-barred. The complainants lodged their internal complaints in 2007 challenging a decision issued on 20 June 2005 by way of Office Notice No. 11/05. Consequently, in its view, the complaints before the Tribunal should be summarily dismissed in accordance with Article 7(2) of the Rules of the Tribunal. In addition, it argues that the Tribunal has already ruled on the merits of the case in Judgment 2633, which has *res judicata* authority, and that therefore the complaints filed by those who were parties to the earlier proceedings amount to applications for review. In its opinion, there is no new fact warranting reopening the case. It stresses that, in its submissions to these proceedings, it explained that no action had been taken on the basis of the actuarial study of 2002. Thus, all the complainants, except Mr M., had the opportunity to comment thereon. Moreover, the Tribunal did consider that statement since Judgment 2633 refers to it.

Subsidiarily, the Agency reiterates that the actuarial study carried out in 2002 did not serve as a basis for the pension reform and that neither the complainants nor the Tribunal could have been unaware of this fact, which was mentioned in the proceedings that led to

Judgment 2633. It maintains that the reform was not based on false information.

Referring to Judgments 1884 and 2211, the defendant asserts that the complaints are abusive and asks for an award of costs. In addition, it asks the Tribunal to authorise it to recover the amount of that award from the complainants' future remuneration.

D. In their rejoinder the complainants reject the Agency's arguments concerning receivability. Firstly, they submit that their complaints are not time-barred since it was not publicly known before the delivery of Judgment 2633 that the pension reform was not based on the actuarial study of 2002. This explanation was not provided until a later stage in the proceedings that led to Judgment 2633 and thus they could not have reacted earlier. They add that Mr M. was not a party to these proceedings. Secondly, they argue that the *res judicata* rule does not apply since a new fact was revealed by the said judgment, i.e. that the measures taken to reform the Pension Scheme were not based on the actuarial study of 2002. On the merits, they reiterate their arguments.

E. In its surrejoinder the Agency maintains its objections to receivability and likewise its position on the merits. It points out that those who were complainants or interveners in the previous case are deemed to be familiar with the arguments developed in the context of that case. Concerning Mr M., it contends that he is not entitled to challenge Judgment 2633 as he was not a party to the case.

CONSIDERATIONS

1. Four of the present complainants are serving officials of Eurocontrol. The other two are former officials. They seek to challenge decisions rejecting their internal complaints with respect to certain measures adopted by Eurocontrol in relation to pensions. In their complaints before the Tribunal they ask that "the decisions concerning their contribution to the Pension Scheme since 2002" be cancelled.

2. The background to the complaints is to be found in Judgment 2633. Briefly, Eurocontrol established a pension fund for the payment of pensions of persons retiring after 1 January 2005 to replace the Pension Scheme that then existed. The Eurocontrol Statute was amended to provide for the establishment of the Fund, and Regulations made for its management. As a result of Office Notice No. 11/05, issued on 20 June 2005, various measures relating to the Fund came into force on 1 July 2005. Those measures had the effect of reducing the benefits previously available and of increasing the contributions previously paid, as well as increasing the retirement age. The decisions giving effect to those measures were the subject of timely internal complaints by a number of serving officials, as well as by one former official. The internal complaints were unsuccessful and some of the decisions rejecting those complaints were the subject of complaints to the Tribunal by which the then complainants asked the Tribunal to set aside “the decisions which produced the 1 July 2005 measures”. A number of other staff members intervened in those proceedings. All but one of the present complainants were either parties to or interveners in those proceedings. The only one of the present complainants who did not participate in those proceedings had lodged an internal complaint but did not pursue the matter further. In the result, the Tribunal dismissed the complaints and applications to intervene by Judgment 2633, delivered on 11 July 2007.

3. Actuarial studies had been conducted into the Pension Scheme in 1999 and 2002. One of the arguments advanced in the proceedings that led to Judgment 2633 was that the contested measures were based on false information constituted by the 2002 actuarial study. It was also stated in the pleadings that, in accordance with Article 83 of the Staff Regulations, changes to the contribution rate and the age of retirement could only be made on the basis of actuarial studies. In its reply in those proceedings, Eurocontrol argued that no action had been taken on the basis of the 2002 actuarial study, which had been conducted with respect to an approach, known as the “global solution”, that had later been abandoned in favour of an

approach based on the pension reform adopted within the European Union. In its surrejoinder it also argued that the “[pension] reform [did] not fall within the narrow context of Article 83.3 of the Staff Regulations”. The Tribunal dismissed the argument that the measures were based on false information, holding that “there [was] no proof that the challenged measures [were] based on the contested 2002 actuarial study; this study was linked to the ‘global solution’ which was not adopted”. The Tribunal made no reference to Article 83 of the Staff Regulations.

4. Following publication of Judgment 2633, the present complainants lodged further internal complaints with the Joint Committee for Disputes, challenging “the modifications made to the Pension Scheme in 2005 and all modifications since 2002”. They argued that, as Eurocontrol had not based the contested measures on the 2002 actuarial study and there was no subsequent study prior to 2005, the measures were introduced in breach of Article 83 of the Staff Regulations. At the relevant time, Article 83.3 provided *inter alia* that:

“Should an actuarial assessment of the pension scheme, carried out by one or more qualified experts at the request of the Permanent Commission, show the official’s contributions to be insufficient to finance one-third of the benefits payable under the pension scheme, the competent budgetary authority may, in accordance with the budgetary procedure, modify either the rate of contributions or the retirement age.”

5. The Joint Committee for Disputes recommended that the internal complaints be rejected on the grounds that they were time-barred and, save in the case of the complainant who had not participated in the proceeding before the Tribunal leading to Judgment 2633, they were precluded by the principle of *res judicata*. Eurocontrol argues to the same effect in these proceedings, as well as contending that the complaints are unfounded.

6. As pointed out in Judgment 2316, the principle of “[r]es *judicata* operates to bar a subsequent proceeding if the issue submitted

for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard”. The principle applies when the parties, the purpose of the suit and the cause of action are the same as in the earlier case (see Judgments 1216, under 3, and 1263, under 4). The parties to these proceedings are not precisely the same as the parties to the proceedings that led to Judgment 2633. And insofar as the present complainants seek the setting aside of decisions taken before those that took effect on 1 July 2005, they raise an issue that was not in contention in the earlier proceedings. However, even if in the respects identified, the proceedings do not fall within the principle of *res judicata*, they are *prima facie* time-barred. So, too, are the present proceedings insofar as they relate to the measures that took effect on 1 July 2005. Moreover, and insofar as there is a coincidence of parties to the earlier proceedings and the present proceedings as they relate to the measures that took effect on 1 July 2005, the purpose of both proceedings is the same, namely, to set aside the measures that took effect on 1 July 2005, and the cause of action is the same, namely, the unlawfulness of those measures. Thus, to that extent, the present proceedings are *prima facie* precluded by *res judicata*.

7. The complainants seek to avoid the time limits within which decisions may be challenged and the principle of *res judicata* on the basis that they were not aware that the 2002 actuarial study had not formed the basis of the measures that were challenged in the earlier proceedings until the Tribunal held to that effect in Judgment 2633. Moreover, they contend that “the Tribunal [was unaware] that no other actuarial studies had been done and commented [on] by the staff representatives according to Article 83 of the Staff Regulations”. They also argue that most of the complainants were unaware that Eurocontrol had stated in its reply in the earlier proceedings that the 2002 actuarial study did not form the basis of the contested pension measures.

8. It may well be that where an organisation conceals the existence of a cause of action, time will run only from such time as the

cause of action is discovered. However, there is no evidence that Eurocontrol concealed the existence of a cause of action from the complainants, either in 2002 or at any time thereafter. On the contrary, the evidence is that, from 1999 onwards, there was extensive consultation with respect to the envisaged pension reform. Accordingly, there is no basis on which the complainants can be exempted from the relevant time limits for challenging decisions.

9. Although the complaints must be dismissed on the basis that they are time-barred, it is convenient to mention two other matters. The first is that although, in form, the present complaints are directed to decisions dismissing internal complaints, to the extent that there is a coincidence of parties in both proceedings and the present proceedings are directed to the pension measures that took effect on 1 July 2005, they are, in substance, applications for review of Judgment 2633. Accordingly, it is appropriate that they be analysed as such, the circumstances in which a judgment may be reviewed constituting exceptions to *res judicata*. The Tribunal will review an earlier judgment on the basis of discovery of a “new” fact, but only if it was “discovered too late to [be] cite[d] in the original proceedings” (see Judgment 442, under 3 and 13). However, the question whether a fact is “new” is always whether it could, with diligence, have been discovered at the time of the earlier proceedings. The fact that Eurocontrol did not base the measures that took effect on 1 July 2005 on the 2002 actuarial study was clearly stated in its reply in the earlier proceedings and could and should have then been discovered. The present complainants who were parties to those proceedings are bound by the way in which their case was conducted, even if they relied on their “mandated representative”. They cannot now raise an issue that could have been raised in their rejoinder in those earlier proceedings.

10. The second matter that should be mentioned is that the present complainants have provided no basis for their assertion of non-compliance with Article 83 of the Staff Regulations, as that provision stood at the relevant time. All that that provision required was an actuarial study showing that the officials’ contributions were

insufficient to finance one third of the pension benefits payable. That might well have been shown by the 1999 actuarial study.

11. Eurocontrol has asked for an award of costs against the complainants on the basis that the present proceedings are abusive. Although the complaints must be dismissed as time-barred, this is not an appropriate case for the award of costs against the complainants.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet