Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L.

v.

Eurocontrol

121st Session **Judgment No. 3571**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Q. L. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 7 March 2013 and corrected on 4 April, Eurocontrol's reply of 5 July, the complainant's rejoinder of 13 September, Eurocontrol's surrejoinder of 20 December 2013, the complainant's further submissions of 4 March 2014 and Eurocontrol's final comments thereon of 24 April 2014;

Considering the applications to intervene filed by Mr M. D. and Ms K. H. on 16 May 2013 and the letter of 10 July 2013 in which Eurocontrol stated that it had no objection to these applications;

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 Eurocontrol's refusal to convert his limited-term appointment into an appointment for an undetermined period and the reduction of the basis for calculating his contributions to the Eurocontrol Pension Scheme to reflect his actual working time.

The complainant, who joined Eurocontrol on 1 May 2008, was assigned to the Maastricht Upper Area Control Centre as a Junior Simulator Pilot under a one-year limited-term appointment. This appointment was renewed for three consecutive terms.

The new employment policy which had been approved by Eurocontrol on 25 April 2002, announced by Office Notice No. 12/02 of 30 April 2002 and incorporated into the Staff Regulations governing officials of the Eurocontrol Agency and the General Conditions of Employment of servants of the Eurocontrol Centre at Maastricht, provided that "[w]here the tasks performed [were] of a lasting nature, officials and servants recruited from 1 May 2002 onwards [would] be offered appointments for an undetermined period", and that, "[w]here the tasks performed [were] of limited duration or [had] an uncertain future, officials and servants recruited from 1 May 2002 onwards [would] be offered limited-term appointments". Article 9 of Annex X to the General Conditions of Employment states that, where a servant is recruited to perform tasks which are of limited duration, "the duration of the appointment shall correspond to the duration of the tasks, but may not exceed five years". The appointment in question may be renewed, but the "total length of the appointment, including its renewal period, may not exceed seven years". Furthermore, "[w]here a post is of a lasting nature, the appointment may be converted into an appointment for an undetermined period", subject to satisfactory performance.

Although the complainant worked part time (60 per cent), he chose to contribute to the Eurocontrol Pension Scheme as though he were performing his duties on a full-time basis. His pension contributions were therefore calculated by reference to the basic salary of a servant performing those duties at 100 per cent.

By Office Notice No. 08/09 of 19 February 2009, Eurocontrol informed its staff that several amendments would be made as of 1 March 2009 to the Staff Regulations and Staff Rules, in particular to Article 3 of Annex IIa to the General Conditions of Employment concerning part-time work. Pursuant to that article, the complainant's

contributions to the Pension Scheme were henceforth to be calculated by reference to his basic salary. In other words, his contributions would be reduced to reflect the fact that he was working at 60 per cent and not 100 per cent. The complainant learnt of this change through the decision of 5 April 2012 informing him of the renewal of his appointment until 30 April 2014.

On 20 July 2012 the complainant submitted an internal complaint against that decision, in which he said that he wished to continue to contribute to the Pension Scheme as though he were working full time and requested the conversion of his limited-term appointment into an appointment for an undetermined period. The Joint Committee for Disputes, to which the matter was referred, issued a divided opinion on 31 October 2012. Two of its members recommended that the internal complaint should be allowed, since the need for simulator pilots was sufficiently stable and lasting to justify granting an appointment for an undetermined period, and that the contributions to the Pension Scheme could therefore continue to be calculated on the basis of a full-time salary. The other two members recommended, however, that the internal complaint should be dismissed on the grounds that, in the exercise of its discretionary authority, the Organisation was under no obligation to convert the complainant's appointment, and that the aforementioned Article 3 precluded the complainant from contributing to the Pension Scheme as if he were working full time. The complainant was informed by a memorandum of 10 December 2012, which constitutes the impugned decision, that his internal complaint had been dismissed as unfounded, in accordance with the opinion of the latter two members of the Committee.

On 7 March 2013 the complainant filed a complaint with the Tribunal asking it to set aside the impugned decision, to order Eurocontrol to convert his limited-term appointment into an appointment for an undetermined period, to authorise him to continue to contribute to the Pension Scheme on the basis of a full-time salary until the date on which he actually retires and to award him costs in the amount of 4,000 euros.

Eurocontrol asks the Tribunal to dismiss the complaint as groundless.

During the proceedings, on 19 August 2013 the complainant received a memorandum, signed by the Principal Director of Resources, informing him of the decision not to renew his appointment, which was due to expire on 30 April 2014. In his further submissions, the complainant notes that this memorandum was not signed by the Director General and that it does not mention any delegation of authority. He therefore asks the Tribunal to declare that decision null and void, or at least inoperative. He further requests reinstatement in his former post at the same grade and step, the payment of his remuneration and of "lost benefits" from 1 May 2014 to the day on which he is effectively reinstated and the payment of 5,000 euros in damages.

In its final comments, Eurocontrol asks the Tribunal to dismiss the claims related to the decision of 19 August 2013 as irreceivable, because internal means of redress have not been exhausted.

CONSIDERATIONS

1. This complaint seeks the setting aside of the decision of 10 December 2012 dismissing the complainant's internal complaint concerning the conversion of his appointment and a change in the basis for calculating his contributions to the Eurocontrol Pension Scheme. In his further submissions the complainant also requests the setting aside of the decision of 19 August 2013 informing him of the non-renewal of his appointment.

The receivability of the claims related to the decision of 19 August 2013

2. Article VII, paragraph 1, of the Statute of the Tribunal provides that "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable

Staff Regulations". The only exceptions allowed under the Tribunal's case law to this requirement that internal means of redress must have been exhausted are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure, where there is an inordinate and inexcusable delay in the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see Judgment 2912, under 6).

According to the Tribunal's case law regarding compliance with this requirement to exhaust internal means of redress, a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see Judgment 3420, under 10).

In the instant case, the above-mentioned claims have been raised by the complainant for the first time before the Tribunal and have not therefore formed the subject of an internal appeal. Moreover, none of the above-listed exceptions to the requirement that internal means of redress must be exhausted applies. These claims are therefore irreceivable.

3. As the claims related to the decision of 19 August 2013 are irreceivable, the Tribunal will examine the merits of two claims concerning, firstly, the conversion of a limited-term appointment into an appointment for an undetermined period and, secondly, the reduction of the basis for calculating the complainant's contributions to the Eurocontrol Pension Scheme to reflect his actual working time, that is, 60 per cent.

Conversion of the limited-term appointment into an appointment for an undetermined period

4. The complainant submits that he is entitled to an appointment for an undetermined period. He bases this contention on the new

employment policy introduced in 2002 and the provisions of Annex X to the General Conditions of Employment applicable to servants appointed for an undetermined or limited period from 1 May 2002. He also submits that Eurocontrol has breached the principle of non-discrimination, in that servants performing the same duties do not hold the same kind of contract, and that it has failed to honour its general duty of care and good faith, in that the theoretical improvement in servants' terms of employment has been accompanied by a considerable drop in compensation in the event of termination of service, with the result that even the situation of servants appointed for an undetermined period has deteriorated.

5. According to Article 4 of Annex X to the General Conditions of Employment, "[t]he servant shall be appointed for an undetermined period where the duties corresponding to the post for which he is applying are of a lasting nature". This provision means that the complainant would be entitled to the conversion of his contract if it were established that his post was indeed of a lasting nature. It is, however, plain from the explanations given by Eurocontrol and from the supporting documentation which it provides that the Organisation requires a permanent complement of nine simulator pilots and that any additional needs, for which it sometimes has to call on other servants, are subject to short-term fluctuations. For this reason, the duties entrusted to servants other than the above-mentioned nine cannot be regarded as lasting in nature. Moreover, the existence of two different kinds of appointment for the two above-mentioned categories of employment does not constitute a breach of the principle of non-discrimination since, as has just been stated, it is warranted by the very nature of the Organisation's requirements. Lastly, there is no evidence to substantiate the submission that the general duty of care and good faith has been breached. It may be concluded from the foregoing that the complainant had no entitlement to an appointment for an undetermined period.

The reduction of the basis for calculating contributions to the Pension Scheme to reflect actual working time

6. The complainant holds that the decision to reduce the basis for calculating his contributions to the Eurocontrol Pension Scheme breaches the principle of equality as well as his acquired rights. In his opinion, the principle of equality is undermined because the disputed measure does not apply to simulator pilots appointed for an undetermined period, and because servants who work part time because they have chosen to do so are allowed to contribute as if they worked full time. He adds that Eurocontrol has unilaterally breached an acquired right by reducing the basis for calculating his contributions to the Pension Scheme to 60 per cent. Eurocontrol takes the view that there is no rule or principle which prevents an organisation from amending terms of employment when it offers a renewal of appointment. It adds that the complainant is not in the same situation as the servants to whom he refers as examples. With regard to his claim to have an acquired right, Eurocontrol considers that no principle demands that a contract must necessarily be renewed on the same terms as the previous contract.

7. According to the Tribunal's case law as established in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment to an official's detriment of a provision governing her/his status constitutes a breach of an acquired right only if it adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her/him to stay on. In order to decide whether there may have been a breach of an acquired right, it is necessary to determine whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832 (see also in this connection Judgment 2986, under 16, and the case law cited therein).

8. In the instant case, the Tribunal considers that, on account of its magnitude, the alteration of the basis for calculating the complainant's contributions to the Eurocontrol Pension Scheme breached a fundamental

and essential term of employment. It is clear from the file that this alteration, which had a detrimental effect for the complainant, was made without his consent, since the decision to renew his appointment of 5 April 2012, in which the amendment in question was stipulated, was taken in a unilateral manner by the Organisation. Moreover, the Tribunal notes that, at the time of the previous renewal on 6 January 2010, the Organisation had not stipulated any such alteration, even though the amendment of the General Conditions of Employment which provided for it had already entered into force, and that the Organisation itself acknowledges that this alteration did not apply automatically to the complainant, which shows that there was indeed an acquired right at stake. The complaint must therefore be allowed on this point.

9. Since he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 3,000 euros.

The applications to intervene

10. Two applications to intervene have been filed by servants who say that they are in a similar situation to that of the complainant, a fact with the Organisation expressly accepts in its comments on their applications. These servants must therefore be given the benefit of the rights recognised in this judgment in favour of the complainant. In accordance with the Tribunal's case law, the interveners are not, however, entitled to costs (see Judgments 1629, under 27, 2196, under 22, and 2315, under 36).

DECISION

For the above reasons,

1. The Director General's decision of 10 December 2012 is set aside insofar as it rejected the complainant's request to maintain the basis for calculating his contributions to the Pension Scheme at 100 per cent.

2. Eurocontrol shall take all necessary steps to restore the complainant's rights in respect of the contributions to the Pension Scheme.

3. It shall pay the complainant costs in the amount of 3,000 euros.

4. All other claims are dismissed.

5. The interveners shall enjoy the rights established by this judgment in respect of the complainant.

In witness of this judgment, adopted on 11 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ