

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C.

v.

Eurocontrol

122nd Session

Judgment No. 3658

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 31 October 2013, Eurocontrol's reply of 7 February 2014, the complainant's rejoinder of 20 May and Eurocontrol's surrejoinder of 22 August 2014;

Considering Article II, paragraph 5, 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 the amount of the transitional allowance paid to him following his admission to the early termination of service (ETS) scheme.

At the material time, the complainant, as a member of the operational staff of the Centre Flow Management Unit (CFMU), received a functional allowance (hereinafter "the ATFCM allowance") under Article 69b(2) of the Staff Regulations governing officials of the Eurocontrol Agency.

By Office Notice No. 22/10 of 22 June 2010, the Director General informed Eurocontrol staff of the introduction of the ETS scheme and the entry into force on the same date of Annex XVI to the Staff Rules, containing temporary provisions relating to the ETS. Under Article 4 of

that annex, an official who was admitted to the ETS scheme would stop work, would cease to enjoy rights to remuneration and would instead be paid a transitional allowance which, in accordance with Article 1(1) of the appendix to the annex, was equal to 70 per cent of the amount of the official's basic salary increased, where applicable, by the allowance referred to in Article 69b of the Staff Regulations.

In July, the members of the operational staff of the CFMU were informed that, during the discussions that preceded the approval of the temporary provisions relating to the ETS scheme, one Member State had objected to the inclusion of the ATFCM allowance in the calculation of the transitional allowance.

On 2 August 2010 the complainant asked to be admitted to the ETS scheme. The Principal Director of Resources reminded him by an internal memorandum of 14 October 2010 that, on the previous day, he had orally agreed that, if he were admitted to the ETS scheme, his ATFCM allowance would be excluded from the calculation of his transitional allowance. He asked the complainant to confirm his acceptance in writing and to renounce any right of appeal. On 18 October 2010 the complainant signed the above-mentioned internal memorandum and added the handwritten comment "read and fully agreed". In the meantime, on 15 October 2010, the Director General had drawn up the list of officials who were to be admitted to the ETS scheme, including the complainant, who stopped working on 1 July 2012.

On 23 July 2012 the complainant filed an internal complaint challenging his payslip for July 2012 on the grounds that the ATFCM allowance had not been included in the calculation of his transitional allowance. The Joint Committee for Disputes issued its opinion on 16 May 2013. Two of its members recommended that the internal complaint should be upheld, as they considered that the provisions of Annex XVI should be respected whenever a staff member was admitted to the ETS scheme. The other two members recommended that the internal complaint should be dismissed as, in their view, the complainant had no reason to believe that the ATFCM allowance would be included in the calculation of the transitional allowance, having been informed both before and after the publication of Office Notice No. 22/10 that a

Member State had objected to this. On 16 July 2013 the Principal Director of Resources, acting on behalf of the Director General, notified the complainant that he had decided to follow the recommendation of the latter two members of the Committee and to dismiss his internal complaint. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 16 July 2013 and his payslips for July 2012 and the following months. He also asks that Eurocontrol be ordered, as from 1 July 2012, to include the ATFCM in the calculation of his transitional allowance and to pay him the sum thus due together with interest at 8 per cent per annum. He also claims 5,000 euros in costs.

Eurocontrol submits that the complaint should be dismissed as irreceivable since, by signing the internal memorandum of 14 October 2010, the complainant renounced any right of appeal against the decision not to include the ATFCM allowance in the calculation of his transitional allowance. Subsidiarily, it submits that the complaint is groundless. In its surrejoinder Eurocontrol requests the joinder of this complaint and the complaint filed on the same matter by another official.

CONSIDERATIONS

1. The complainant, by signing the internal memorandum of 14 October 2010 on 18 October 2010, undertook not to bring any appeal proceedings challenging the fact that the ATFCM allowance he was receiving under Article 69b(2) of the Staff Regulations would not be included in the determination of his transitional allowance in the event that he was admitted to the ETS scheme.

2. Eurocontrol has requested the joinder of this complaint with that filed by another complainant. As the conditions for such a joinder are not met, the Tribunal will not accede to this request.

3. Eurocontrol submits that the complaint is irreceivable since, by signing the above-mentioned memorandum, the complainant waived his right of appeal. The complainant considers that his complaint is

receivable. In particular, he contends that had he not forgone the inclusion of the ATFCM allowance in the calculation of his transitional allowance, he would never have been admitted to the ETS scheme. Thus he “had no other choice but to sign [this] memo[randum]” and he was therefore “forced” to do so.

4. In view of the serious disadvantages that the complainant would have suffered in this case had he renounced the possibility of admission to the ETS scheme, he cannot be deemed to have freely consented to sign the aforementioned memorandum of 14 October 2010. He is therefore right in saying that it was under duress that he gave an undertaking to Eurocontrol to accept the exclusion of the ATFCM allowance from the calculation of his transitional allowance and not to impugn this measure before the Tribunal.

The Tribunal will therefore ignore this undertaking, which must be considered null and void, without there being any need to examine whether the request that the complainant signed was lawful, having regard to the Organisation’s duty to abide by the regulatory texts which it has itself laid down, in accordance with the principle *tu patere legem quam ipse fecisti*.

5. The appendix to Annex XVI of the Staff Regulations relating to the transitional allowance payable in the event of early termination of service states: “[t]he transitional allowance shall be equal to 70% of the amount of the basic salary [received by the official in question]. [...] The basic salary shall be increased, where applicable, by the allowance referred to in Article 69b of the Staff Regulations payable to the official concerned at the time of early termination of service.”

6. It is plain from these provisions that officials who were admitted to the ETS scheme were entitled to the inclusion of the ATFCM allowance in the calculation of their transitional allowance.

The fact that one Member State had notified the Organisation that it objected to these provisions does not prevent their application. Indeed,

since this objection had not led to their amendment, the Organisation could not draw any legal consequences from it.

7. The complainant's contention that the Organisation was wrong in refusing to include his ATFCM allowance in the calculation of the transitional allowance paid to him as from 1 July 2012 is therefore well founded.

8. The impugned decision of 16 July 2013 dismissing his internal complaint will therefore be set aside.

9. The Organisation shall be required pay the complainant the sums corresponding to the amounts which he ought normally to have received as his transitional allowance as from 1 July 2012 if his ATFCM allowance had been included in the calculation thereof, less the sums he has already received in that respect. The sums thus paid to the complainant shall bear interest at the rate of 5 per cent per annum from due dates until the date of payment.

10. The Organisation will have to draw up and send to the complainant new payslips including the ATFCM allowance.

11. As the complainant succeeds, he is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of 16 July 2013 is set aside.
2. Eurocontrol shall pay the complainant, as an addition to his transitional allowance, the sums and interest calculated as indicated in consideration 9, above.
3. The Organisation shall draw up and send to the complainant new payslips including the ATFCM allowance.

4. The Organisation shall pay the complainant costs in the amount of 3,000 euros.

In witness of this judgment, adopted on 29 April 2016, 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 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ