

SEVENTY-FIRST SESSION

***In re* RABOZEE-TREMBLOY (No. 3)**

Judgment 1100

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Lucie Damasse Ghislaine Rabozée-Trembloy against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 June 1990, the Agency's reply of 4 October 1990, the complainant's rejoinder of 10 January 1991 and the Agency's surrejoinder of 21 March 1991;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Article 92(2) of the Staff Regulations governing officials of the Agency and Articles 40, 41 and 45 of Annex IV to the Regulations;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. Pensions are calculated on the same basis in Eurocontrol as in the European Communities. But under Eurocontrol's Regulations its pensions are liable to national tax in the country of residence rather than internal tax as in the Communities. To even out the differences in the purchasing power of Communities pensions caused by differences in taxation from country to country Eurocontrol adjusts gross pension rates by means of a weighting factor.

On 1 March 1989 a new statute modifying Belgium's national tax system took effect. It set up two separate tax scales, scale I for someone whose spouse has a separate earned income and scale II for someone whose spouse has no such income.

The complainant, a Belgian citizen, was employed by Eurocontrol from 1 October 1964 until her retirement on 31 August 1989. When she left she was an expert at grade A6/8.

On 27 August 1989 the Agency sent her a detailed statement of pension rights showing a base salary for the purpose of the reckoning equivalent to her former B1/7 salary and a weighting factor - said to be provisional - of 152 per cent.

The pension she drew at the end of September and October 1989 amounted to 96,007 Belgian francs. She contested that sum in her first letter to the Director General dated 6 November 1989 on the grounds that the scale in force on 1 July 1987 entitled her to 106,448 Belgian francs. After receiving the same amount late in November 1989 she sent a further letter of protest to the Director General on 2 December 1989. By a letter of 14 December the Director of Personnel and Finance informed her that because of the revision of pension scales on 1 July 1988 which the Permanent Commission of Eurocontrol approved on 22 November her pension would be recalculated from 1 September 1989 and payment of the difference made by 31 December. On 20 December she again wrote to the Director General complaining that she had not got even what the 1987 scale entitled her to.

An "Information Note to Beneficiaries of Pensions and Allowances" dated 28 December 1989, which the complainant received on 9 January 1990, explained that weighting factors about to be announced would take account of the particulars of tax law in the countries of residence. For married pensioners residing in Belgium it was assumed that the spouse had no independent earned income. The note also said that, since for 1989 withholding taxes ran over the compensatory amounts allowed for, correction would be made in the final statements.

On 1 January 1990 the two new tax scales - I and II - came into force in Belgium.

On 6 January 1990 the complainant got a statement of arrears for September to December 1989. Her net pension

rose to 108,022 Belgian francs a month on the strength of the new pension scale backdated to 1 July 1988 and the new Belgian tax scale II.

On 29 January 1990 she submitted an internal "complaint" under Article 92(2) of the Staff Regulations maintaining that her pension had been 2,413 Belgian francs a month short and that the Agency's reliance on scale II was at odds with Belgian law because her husband was drawing a pension of his own. She asked for a detailed statement of her pension rights. In a letter of 2 February 1990 the Director General offered to meet her as soon as the discrepancy was cleared up. By a letter of 9 April 1990, the decision impugned, the Director of Personnel and Finance dismissed her claims in their entirety on the grounds that her letter of 6 November 1989 was not to be treated as a "complaint", that her letter of 2 December, insofar as it might be treated as such, was irreceivable and without merit and that her "complaint" of 29 January 1990 was premature.

She filed with the Tribunal on 22 June 1990. On 27 June the Ministry of Finance of Belgium approved the weighting factors which the Personnel and Finance department had reckoned for each pensioner. On 10 July the Director of Personnel and Finance informed her of the change dated 6 July in the amount of her pension backdated to 1 September 1989; a weighting factor of 159 per cent was applied as from 1 September 1989 and one of 173 per cent as from 1 January 1990.

B. The complainant submits that her complaint, filed within ninety days of notification of the final decision and after she had exhausted the internal means of resisting it, is receivable under Article VII of the Tribunal's Statute.

On the merits she has two grounds for complaint. One is that she never got the net pension she was entitled to and the other is the large extra sum due in tax at the end of the year because the Agency applied the wrong weighting factor.

She puts the proper weightings at 173 per cent for 1989 and 172 for 1990 and says they would have given her a monthly net pension for each period of 111,423 and 111,448 Belgian francs.

Her four pleas rest on Eurocontrol's breach of obligations arising in particular from Articles 40, 41 and 45 of Annex IV to the Staff Regulations, on the rules on the reckoning of pensions and Belgian tax law, on the principle of equal treatment and on the trust she may reasonably expect to put in the Agency.

Over and above recurrent material injury since September 1989 Eurocontrol's disparaging treatment has caused her moral injury.

She invites the Tribunal to set aside her pension slips from September 1989 insofar as they infringe the rules on the reckoning of pensions and order the Agency to recalculate her pension and pay her the amount unlawfully withheld plus interest. She seeks damages for serious moral injury and costs.

C. In its reply Eurocontrol contends that her complaint is irreceivable. As her internal "complaints" rest on provisional measures the impugned decision cannot be a final one. Besides, she has since gained satisfaction and has no cause of action.

The final reckoning of her pension disposed of her two grounds for complaint, but in any case she never had any. The delay in setting the weighting factors was due to the method used: the Agency had first to await the European Communities' revised figures and then get approval from the national tax authorities. The change in Belgian tax law further held up the procedure. Her other allegations about the provisional weightings, which the final ones retroactively replaced, are irrelevant. Eurocontrol caused her no moral injury; indeed its answers to her letters show considerateness.

The Agency asks the Tribunal to dismiss her complaint and order her to pay costs.

D. The complainant rejoins that her complaint is receivable. That she got satisfaction shows that her action was originally well-founded but in view of the Agency's payments she maintains only her claims to damages for moral injury caused by the Agency's bad faith and to costs.

E. In its surrejoinder Eurocontrol develops its plea that the complaint is neither receivable nor well-founded. It maintains that the complainant suffered no moral injury beyond what she had only herself to blame for. It presses its claim to costs.

CONSIDERATIONS:

1. The complainant, a former employee of Eurocontrol who retired in September 1989, is in dispute with the Organisation over the reckoning of the "weighting" that offsets Belgian tax on Eurocontrol pensions.
2. The reckoning of the complainant's pension is the more difficult because her husband is also a pensioner and an Act of 7 December 1988 which came into force in Belgium just before she retired amended the rules on the taxation of spouses with separate incomes. The new tax rules meant a great deal of paperwork because Eurocontrol had to check the records of many staff and to reach an agreement with the Belgian Government. So it made a provisional reckoning of the complainant's entitlements and told her that it would be setting the final amount later.
3. The complainant found the provisional amount short of her own figure and put successive claims to the Organisation. In reply it told her repeatedly what was being done. On 9 April 1990 the Director General himself forwarded to her a letter from the Director of the Personnel and Finance Directorate which took stock. The Director confirmed that the figures she had been given earlier were just provisional and said that the Organisation was in touch with the Belgian Ministry of Finance over the matter of the weighting applicable to a former official resident in Belgium whose spouse had an earned income; for that purpose it needed a statement from each official and the complainant's claim was therefore premature. In his covering letter the Director General asked her to stop the "torrent of words", which he said made for just the sort of delay she was objecting to.
4. What the complainant is challenging is the Director's and the Director General's letters. She asks the Tribunal to set aside her pension slips from September 1989 on and the decision to reject her claims; order Eurocontrol to recalculate her pension in accordance with the Service Regulations and pay her the sums wrongfully withheld, plus interest "on the sums overdue" and by way of "compensation"; and award her damages for "grave moral injury" and costs.
5. In its submissions Eurocontrol dwells at length on the issues of fact and of law and invites the Tribunal to dismiss the complaint as clearly premature and award costs against the complainant.
6. While her case was pending the complainant had her entitlements determined as from the date of retirement by a decision of 6 July 1990 which she got on 10 July. In her rejoinder she acknowledges having "at last obtained satisfaction" in that the weighting had been retroactively and correctly brought in line with her tax status. But she goes over her grievances yet again, takes Eurocontrol to task for rounding a fraction down instead of up and maintains her claims to moral damages and to costs.
7. In its surrejoinder Eurocontrol takes note of the withdrawal of her other claims and asks the Tribunal to declare her claim to damages irreceivable or, failing that, devoid of merit. It presses its application for an award of costs against her.
8. It is plain from the foregoing that the complaint is premature because it challenges a decision which - for sound reasons that the complainant was given - was stated to be temporary and provisional.
9. The complainant's claim to damages is incidental to her claim to quashing and her withdrawal of the latter makes the former void. In the circumstances she is obviously not entitled to costs either.
10. There remains Eurocontrol's claim to an award of costs against the complainant. In Judgment 885 (in re West No. 10) the Tribunal addressed the issue of abuse of the right of appeal. It said that it was for the Tribunal itself to determine whether a complainant had abused that right and, if so, what ruling was fitting in the circumstances. In Judgment 1056 (in re Verdrager No. 9), however, it held that such a ruling may not include an award of costs against the complainant.

DECISION:

For the above reasons,

The complaint and the Organisation's claim to costs are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President,

and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.