

NINETY-FOURTH SESSION

Judgment No. 2204

The Administrative Tribunal,

Considering the complaints filed Ms N. A., Mr V. B., Mr J.-C. B., Ms P. B., Mrs M. C. (her second complaint), Mr F.-X. D., Mr R. D., Mr P.-H. F. (his third complaint), Mrs M. L. (her third complaint), Ms V. L., Mr M. M., Mr E. M., Mr D. M., Ms P. S., Mr G. T. (his third) and Mrs R. v. C. (her third) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 25 July 2001;

Considering also the complaints filed by Ms L. D. and Mr J.-M. P. (his fourth complaint) against Eurocontrol on 25 July 2001;

Considering the Agency's replies of 14 November, the complainants' rejoinders of 21 December 2001 and Eurocontrol's surrejoinders of 12 April 2002;

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

Having examined the written submissions and disallowed the complainants' applications for hearings;

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

A. Article 12 of Annex IV of the Agency's Staff Regulations includes the following provisions:

"An official who enters the service of the Agency after:

- leaving the service of a government administration or of a national or international organisation, or
- engaging in an employed or self-employed activity,

shall have the right, on becoming established with the Agency, and if the Regulations or the Contract to which he was subject in his previous post so allow to pay to it either the actuarial equivalent of the retirement pension rights acquired by him by reason of the activities referred to above or the sums repaid to him."

In this respect, the Staff Regulations of officials of the European Communities are similar.

Article 12bis of Annex IV provides as follows:

"For the purposes of applying the provisions of [Article 12] relating to agreements that may be concluded between the Organisation and pension schemes governed by Member State legislation, the provisions of agreements concluded in this regard between the European Communities and a Community Member State which is also a member of EUROCONTROL shall be applicable *mutatis mutandis* as from their date of entry into force, once the State concerned has advised EUROCONTROL of its formal acceptance of this procedure."

The complainants, who joined Eurocontrol between 1971 and 1995, all work in Brussels. Prior to being recruited by the Agency they worked in Belgium in various commercial corporations or government administrations and were thus covered by the Belgian state pension scheme.

On 21 May 1991, following a legal action initiated by the EC Commission, the Belgian state enacted a law

enabling officials of the European Communities to transfer their pension rights by subrogation by law. On 17 February 1997 a new law made it possible to extend the application of the provisions of the law of 21 May 1991 to other institutions governed by public international law by means of a royal decree.

By a letter of 3 April 1997 the Director General of Eurocontrol informed the Belgian government that transfers of pension rights by subrogation between the Kingdom of Belgium and the Agency had been accepted in principle. In August 1997, a draft royal decree implementing the law of 21 May 1991 as amended was submitted to Eurocontrol. The government was informed, in a letter of 5 November 1997 from the Director of Human Resources, that a working group comprising representatives of the Member States was to be set up to examine the status of the Organisation's staff pension scheme. In its report of 10 October 1998, that working group recommended that the principle of subrogation be rejected. On 1 February 2000 the Director General wrote to the Belgian Minister of Social Affairs and Pensions informing him that the draft royal decree had been rejected on the grounds that the system provided for in the Agency's Regulations involved transfers of actuarial reserves.

Between 5 May and 15 June 2000 the complainants asked the Director General to take a "complete, precise and detailed decision" on the problem of transfers of pension rights. On 20 September the Director of Human Resources sent each complainant a memorandum informing them that their request was unfounded in law. Between 27 November and 11 December 2000 the complainants submitted internal complaints to the Director General. The matter was referred to the Joint Committee for Disputes, which recommended, in an opinion delivered at its session of 27 March 2001, that the internal complaints be rejected as unfounded. By a memorandum of 20 April 2001, which constitutes the impugned decision, the Director of Human Resources, acting on behalf of the Director General, informed the complainants that their internal complaints had been rejected.

Meanwhile, on 6 November 2000 a staff member in a similar situation to that of the complainants initiated proceedings against the Belgian state in the court of first instance in Liège, seeking redress in respect of the state's failure to adopt a royal decree extending the application of the law of 21 May 1991 to the Agency. The complainants are interveners in those proceedings. On the date when the present complaints were filed, no royal decree authorising transfers of pension rights for staff members of Eurocontrol had yet been adopted.

B. The sole plea entered by the complainants is that of a breach of the duty of assistance and care owed under Article 24 of the Agency's Regulations. They consider that Eurocontrol must take all appropriate steps to end the situation of failure and paralysis which they currently face. Relying on a judgment by which the European Court of Justice set aside a decision of the EC Commission on the grounds that the latter had failed to honour its duty to assist officials in a situation similar to theirs, they seek technical, legal and financial assistance from the Agency in the proceedings before the court of first instance in Liège. They suspect that the Agency has not acted with due diligence in dealing with the Belgian authorities.

The complainants ask the Tribunal to set aside the impugned decision and to order Eurocontrol to pay costs.

C. In its replies Eurocontrol points out that, with only two exceptions, the complainants are less than 55 years old. They therefore have several years ahead of them before they assert their rights to a pension. Since there is no reason to believe that an agreement on transfers of pension rights will not be reached in the mid-term between Belgium and Eurocontrol, the defendant invites the Tribunal to examine the receivability of the complaints from the point of view of the complainants' *locus standi*.

The Agency explains that, unlike the provisions of the Staff Regulations of officials of the European Communities, Eurocontrol's Staff Regulations are not directly applicable to states. Thus, Article 12 of Annex IV does not create a right to the transfer of pension rights. The condition "if the Regulations or the Contract to which he was subject in his previous post so allow" must be given a broad interpretation, to the effect that a transfer will be possible "only if the competent national authorities have provided for or authorised it". In the absence of an agreement with the Belgian state, the complainants have no right to a transfer. Consequently, the case law they cite cannot be transposed to the present case and they cannot invoke the duty of assistance provided for in Article 24.

Eurocontrol submits that the subrogation mechanism entails an additional cost for organisations and that the European Communities are in fact trying to obtain its abolition. Moreover, since that transfer mechanism is contrary to both the letter and the spirit of Article 12 of Annex IV of the Regulations, the Agency was entitled to reject it.

The Agency describes the complainants' position as "paradoxical" insofar as they are seeking its assistance to obtain the adoption by the Belgian state of a royal decree which the Agency is refusing. The publication of a decree which had not been accepted by Eurocontrol could lead to a reduction in pension benefits or to an increase in pension contributions as a result of its additional burden on pension financing, which is already problematic. It considers that it cannot be accused of failing to act with due diligence or to honour its duty of care: it has taken the necessary steps to obtain an agreement with the Belgian authorities, but unlike the European Communities it has no statutory provisions enabling it to compel its Member States to accept a transfer of pension rights against their will. It is endeavouring to reconcile the interests of its staff with the financial stability of its pension scheme. It points out that a new transfer system complying with the Regulations should soon be adopted in a law amending or replacing the law of 21 May 1991.

D. In their rejoinders the complainants submit that Eurocontrol's arguments on receivability are irrelevant. There is no doubt as to their *locus standi*, which cannot be affected by any age condition. They have a legitimate interest in obtaining the technical, legal and financial assistance of the Agency in order to anticipate, as far as possible, the evolution of their career from a financial point of view.

They consider that Article 24 must be interpreted broadly and that there is no basis for requiring a link with any directly applicable statutory provision. To accept Eurocontrol's reasoning would be to deprive the article in question of all useful effect. According to the complainants, the Agency has not acted quickly enough in this matter, which has been pending for several years, and it has not provided them with any real assistance.

E. In its surrejoinders Eurocontrol maintains its position on the receivability of the complaints. On the merits, it points out that although it is unable to provide the assistance requested by the complainants, it is concerned about the problem of transfers of pension rights. It denies as unfounded the allegation that it has failed to act with due diligence and considers that the complainants' immediate material interests are not threatened by the fact that the said transfers are not possible at the present time.

CONSIDERATIONS

1. By two separate complaints 18 staff members of Eurocontrol are appealing to the Tribunal against decisions of 20 April 2001 by which the Director General of the Agency, endorsing an opinion issued on 27 March 2001 by the Joint Committee for Disputes, dismissed their internal complaints challenging decisions of 20 September 2000 rejecting their applications for the transfer of their pension rights. Since the complaints arise from the same facts and raise the same issues the Tribunal will join them, as indeed was requested by the parties.

2. The background to the dispute is as follows: prior to joining Eurocontrol, all the complainants worked in Belgium for various commercial corporations or government administrations and were thus covered by the Belgian pension scheme. They asked for Article 12 of Annex IV of the Agency's Regulations, which is cited under A, to be applied to them. In the absence of an agreement between Eurocontrol and the Belgian government, they were unable to obtain the transfer of pension rights that they sought, despite the fact that this situation had been resolved for officials of the European Communities following a judgment delivered by the European Court of Justice on 14 February 1990. The complainants therefore adopted two lines of action. Firstly, on 3 May 2000 they served formal notice on the Belgian Minister for Social Affairs and Pensions to take all appropriate measures to enable employees of Eurocontrol to transfer their pension rights. On 6 November 2000 a staff member in a situation similar to that of the complainants initiated proceedings against the Belgian state in the court of first instance in Liège, and 98 other staff members, including the complainants, applied to intervene in the case. Secondly, during May and June 2000 the complainants, referring to Article 92(1) of the Staff Regulations, asked the Director General to take measures to "end the situation of failure and paralysis regarding the option and right to obtain a transfer of pension rights". They also asked him to "take all necessary steps to obtain any agreements that may be required with the Belgian state and the pension schemes involved", to "make all appropriate contacts on this matter and adopt a proactive approach", to exchange all appropriate information with the Belgian authorities, to calculate, for each of them, the actuarial equivalent of their pension rights and provide them with the results of that calculation.

3. These requests were replied to on 20 September 2000 by the Director of Human Resources, who indicated that the Director General was aware of the importance of the problem thus raised. He wished to provide the

complainants with all relevant information concerning their problem. Contrary to their belief, their statutory position was not equivalent to that of officials of the European Communities, and they could not assert any right against the Member States. Those states, and particularly Belgium, remain free to authorise or prohibit transfers of pension rights. Moreover, Article 12 of Annex IV of the Agency's Regulations stipulates that the transfer of pension rights must be effected by payment in capital, at the time of the transfer, of the actuarial equivalent of the pension rights acquired under the previous scheme, whereas Belgian law, which was applied to the officials of the European Communities, provides for monthly payment to the European institution of the monthly pension benefits owed to the former Belgian civil servant. This system, which is known as subrogation, was not compatible with the rule laid down in Article 12, but negotiations were under way to reach an agreement with the Belgian authorities.

4. The complainants were not satisfied with this reply. Between 27 November and 11 December 2000 they submitted internal complaints to the Director General on the basis of Article 92(2) of the Regulations, arguing that the Regulations were in fact enforceable against the Member States, that the transfer of their rights was legally possible and indeed an obligation, and that the Agency had failed to defend the interests of its staff members and to honour its duty of assistance, protection and care under Article 24 of the Regulations.

5. These internal complaints were referred to the Joint Committee for Disputes. In the opinion it delivered at its session of 27 March 2001, the Committee recommended that the complaints be rejected by the Director General, who did so by decisions of 20 April 2001 which the complainants seek to have set aside.

6. Eurocontrol expresses doubt as to the *locus standi* of most of the complainants, who are still far from the age of retirement, but it appears to acknowledge that this objection may be less justified as regards one complainant born in September 1943 and another born in June 1945. In fact, all the complainants, regardless of their age, have an obvious interest in ascertaining as soon as possible the conditions on which the pension rights acquired by virtue of their employment prior to joining Eurocontrol may be transferred to their new pension scheme. The issue of whether the complainants have an objective right to such a transfer, which the defendant denies, has little bearing on the receivability of the complaints. Irrespective of the outcome of the dispute, they have a legitimate interest in ensuring that their arguments are taken into consideration. Consequently, the complaints are all receivable.

7. The arguments exchanged by the parties as to the extent of any rights which the complainants may have in relation to the transfer of their pension rights are largely of no avail. It can be established by comparing the applicable texts that the legal status of Eurocontrol officials is not identical in all respects to that of EC officials. Similarly, it is clear that in view of the wording of Articles 12 and 12bis of the Regulations, staff members who have the option of having the actuarial equivalent or lump-sum repurchase value of their previously-acquired pension rights paid to the Agency, provided that their previous regulations or contract so permit, can only exercise that option if the national legislation governing their previous employment authorises the transfer. The Belgian law of 17 February 1997 provides that the provisions of the law of 21 May 1991 authorising the transfer by subrogation of EC officials' pension rights can be extended to other institutions governed by public international law, but that extension is subject to the existence of a royal decree, which has not been adopted. Whatever interpretation may be given to the statutory provisions relied on by the complainants, the solution to the problem necessarily involves the agreement of the Belgian authorities. Consequently, the only question to be addressed is that of whether the Agency has acted with due diligence in its negotiations with the Belgian government and thereby honoured the duty of assistance and care that it owes not only under Article 24 of the Staff Regulations but also under the general principles of the law of the international civil service.

8. The complainants consider that the Agency has not done so, and they criticise it in particular for failing to take into account, despite having accepted them in April 1997, the Belgian government's proposals for applying the subrogation system used for EC officials to staff members of Eurocontrol.

They consider that the Agency has not shown due diligence since, according to statements made by the Belgian authorities in May 2000, after acknowledging receipt of the draft royal decree in its letter of 5 November 1997 it did not renew contact with the Belgian Ministry of Social Affairs and Pensions. That letter, which was sent by the Director of Human Resources to the Belgian authorities, stated that the Agency had decided to set up a working group of national experts which would be responsible for examining, inter alia, the issue of transfers of pension rights. The Director of Human Resources had concluded thus: "I shall of course keep you informed of the results of the work carried out by this group, in which Belgium has been invited to participate."

The working group issued its report on 10 October 1998. It advocated the rejection of the Belgian proposal,

particularly because it would burden the Agency's budget with an additional cost, 97 per cent of which would be borne by the Member States, with the exception of Belgium. These conclusions were adopted by the Agency's Provisional Council at its Session of 12 and 13 November 1998. Belgium's representative on the Provisional Council of Eurocontrol was responsible for informing the Belgian minister concerned and for initiating a process of conciliation which, as confirmed by a letter of 8 January 1999, proved unsuccessful. Negotiations appear to have been pursued during 1999. The Agency having been informed that the Belgian authorities were studying the possibility of reviewing the subrogation principle which was causing difficulties for Eurocontrol, the Director General wrote to the Belgian Minister of Social Affairs and Pensions on 1 February 2000 asking the Minister to inform him of his intentions.

9. That letter of reminder shows that the Agency cannot be accused of failing to act in these difficult negotiations. The defendant explains very clearly why the subrogation system, which is too expensive for Eurocontrol and contravenes the provisions of the above-mentioned Article 12, was not considered to be in the interests of the Agency following the report of the working group and the decision of Eurocontrol's Provisional Council. Since the letter of 1 February 2000, negotiations have continued with the Belgian authorities. Eurocontrol received confirmation that discussions were in progress between Belgium and the European Communities with a view to replacing the principle of subrogation by a transfer of the repurchase value of the pension annuities, and that a new draft law was to be submitted to the *Conseil d'Etat* and subsequently to the Belgian Parliament. By a minute of 26 March 2002, the staff of Eurocontrol were informed of the progress of these discussions and of the fact that "if the ratification deadlines [...] are observed, in January 2003 [the Human Resources Directorate] will be able to implement the transfer procedure with Belgium".

10. Regardless of the outcome of those discussions, the Tribunal considers that in the current state of affairs Eurocontrol has neither breached its duty of assistance and care nor failed to act with due diligence. It cannot be criticised for having refused a solution which was contrary to its own interests and which has been called into question by the European Communities. Furthermore, none of the complainants has yet had to suffer the consequences for his pension rights of the absence of a satisfactory solution, which clearly requires the agreement of the Belgian authorities.

11. Since the claims for annulment cannot succeed, the claims for costs must likewise fail.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet