

The Administrative Tribunal,

Considering the eleventh and twelfth complaints filed by Mr P. B. and the first and second complaints filed by Mrs I. N. on 9 June 2006 – Mr B.'s eleventh complaint having been corrected on 26 June – against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), the Agency's replies of 6 October 2006, the complainants' rejoinders of 8 January 2007 and Eurocontrol's surrejoinders of 30 March 2007;

Considering the applications to intervene filed by:

H. A.	G.A.M. H.
M. B.	F. J.
M. B.	M. J.
F. B.	F. K.
B. B.	P. L.
M. B.	Y. L.
R. B.	E. L. V.
R. B.	A. L.
F. C.	J. M.
M. C.	C. M.
J.-P. C.	H.-J. N.
L. C.	M. O.
G. C.	A. P.
P. C.	A. P.
H. C.	M. P.
J. D.	M.-C. R.
A. D. M.	P. A. R.
J. D. P.	J.-C. S.
M. F.	N. S.
J.-P. F.	F. S.
M.-T. G.	C. T.
G. G.	J.-C. T.

I.-D. G.

J.-C. V.

M.-T. G.

H. W.

G. H.

R.W.

Considering Article II, paragraph 5, 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 cases and the pleadings may be summed up as follows:

A. The complainants are former officials of Eurocontrol who retired on 1 January 2005 and are resident in France, one in the outskirts of Paris and the other in the city itself. Pursuant to Article 82(1) of the Staff Regulations governing officials of the Eurocontrol Agency, a cost-of-living weighting is applied to the pensions they receive. As the provisions of Article 2 of Annex VI to the Staff Regulations concerning arrangements for the adjustment of the remuneration components of serving officials were applied by analogy to pensions, the weighting applicable to remuneration was also applied to pensions until 1 July 2005; this weighting was based on the cost of living in the capital city of the Member State in which the retiree had taken up residence. Thus, a weighting of 120.2, based on the average cost of living in the French capital, was applied to the pensions received by the complainants for the months of January to June 2005.

On 27 April 2005 the Director of Human Resources informed the staff that a reform of the Eurocontrol pension scheme would enter into force on 1 July 2005 and would result, inter alia, in a reduction of benefits for future staff members and an increase in contributions by the Organisation and its staff. For existing pensioners, new cost-of-living weightings would be phased in from 1 July 2005 to 1 July 2009. The new provisions of the Staff Regulations relating to pensions approved by the Permanent Commission for the Safety of Air Navigation were the subject of Office Notice No. 11/05 of 20 June 2005 and took effect on 1 July 2005. At that time, Article 2 of Annex VI to the Staff Regulations was amended so that the pension adjustment would be based on the cost of living in the country of residence as a whole instead of in the capital city of that country. Furthermore, an Annex XIII to the Staff Regulations entitled “Transitional measures applicable to officials” was introduced. The relevant provisions of that annex read as follows:

“Article 1

1. The pensions of officials who retire before 1 July 2005 shall be subject to the correction coefficient referred to in point (b) of Article 3(5) of Annex XI to the Staff Regulations of officials of the European Communities for EUROCONTROL Member States in which they have established proven main residence.

The minimum applicable correction coefficient shall be 100.

[...]

2. By derogation from the first subparagraph of paragraph 1, from 1 July 2005 until 1 July 2010, pensions determined before 1 July 2005 shall be adjusted by applying the average of the correction coefficients referred to in points (a) and (b) of Article 3(5) of Annex XI to the Staff Regulations of officials of the European Communities, used for the Member State in which the pension recipient has established proven main residence. [...]

[...]

Article 5

1. In the case of a pension determined before 1 July 2005, the recipient’s pension entitlement shall continue to be determined after that date in accordance with the rules applied when the entitlement was initially determined. [...] However, correction coefficients in force as from 1 July 2005 shall apply immediately without prejudice to the application of Article 1 of this Annex.

[...]

2. When these provisions enter into force, the nominal amount of net pension received before 1 July 2005 shall be guaranteed. [...]

For the purposes of applying the first subparagraph, if the pension calculated on the basis of the provisions in force is less than the nominal pension [...], a compensatory amount equal to the difference shall be granted.

For recipients of a pension before 1 July 2005, the nominal pension shall be calculated each month taking into account the family situation and country of residence at the time of calculation, and the Staff Regulations rules in force on the date preceding 1 July 2005.

[...]”

The new weightings applicable with effect from 1 July 2005 in pensioners' countries of residence were the subject of Office Notice No. 17/05 of 10 October 2005; they were based partly on the cost of living in the capital (80 per cent) and partly on the cost of living in the country of residence as a whole (20 per cent). The new weighting for France was 117.5.

The complainants, as well as 58 other pensioners residing in France, decided to file an appeal. On 14 October 2005 Mr B. filed an internal complaint challenging his pension slips for July, August and September 2005. Mrs N. followed suit on 20 October 2005. The Joint Committee for Disputes, to which the case was referred, delivered its opinion on 6 March 2006, recommending that the complaints be dismissed as unfounded. By a letter dated 16 March 2006, which constitutes the decision impugned by Mr B. in his eleventh complaint and by Mrs N. in her first complaint, the Director of Human Resources, acting on behalf of the Director General, informed each complainant that his or her complaint was dismissed.

Furthermore, on 30 January 2006 both complainants had filed second internal complaints challenging their pension slips for October, November and December 2005. In the twelfth and second complaints that they respectively filed with the Tribunal, Mr B. and Mrs N. challenge the implied decision to dismiss those second internal complaints.

B. The complainants, who apply for joinder of their complaints, put forward identical arguments. As a preliminary issue, they submit that their pension slips for July to September 2005 have no basis in law inasmuch as the decisions establishing the new weightings were not published until 10 October 2005.

On the merits, they contend that the introduction of the new rules contravenes the principle of good faith and the rule against retroactivity. In view of the fact that since the establishment of the Agency only a single weighting, established for each country and based on the cost of living in its capital, had been applied to both remuneration and pensions, they had a legitimate expectation that the rights thus acquired would be safeguarded. Their “financial rights” have been breached inasmuch as the weighting based on the cost of living in the country of residence is considerably lower than the weighting based on the cost of living in the capital of that country. They estimate that in the long run pensioners residing in France will suffer a decline of 11 per cent in their purchasing power.

In addition, the complainants claim that the principle of equal treatment has been breached, arguing that the purpose of the weightings is to maintain such equality among officials, irrespective of their posting, or among pensioners, irrespective of their place of residence, by guaranteeing compliance with the “principle of purchasing power parity”. Under the new rules, however, pensioners no longer enjoy equal purchasing power depending on their place of residence. The complainants deplore the fact that a weighting based on the average cost of living in a country penalises all pensioners residing in the capital of that country or in other towns or areas of the country where the cost of living is high. The application to pensioners of cost-of-living weightings that differ from those applied when they were in service is, in their view, difficult to justify where, as in the present case, they have maintained the same residence in the Paris area as when they were employed. Noting that the weighting cannot be less than 100, they add that applying a weighting of 100 to a pensioner residing in a country where the cost of living is substantially lower than in a country such as Belgium (where the Agency has its Headquarters and for which the weighting is 100) amounts to granting that person an undue benefit compared with pensioners who settle in a country where the weighting is greater than or equal to 100. They further note that the purchasing power of pensioners residing in Belgium reflects the cost of living in Brussels, while the weighting applied to other pensioners is based only on the average cost of living in their country of residence even if they live in the capital.

Lastly, the complainants seek to demonstrate that the underlying reasons for the reform of the Eurocontrol pension scheme – which they hold to be identical to those invoked to justify the reform of the pension scheme for officials of the European Communities – are ill-founded.

In the eleventh and first complaints that they filed respectively with the Tribunal, Mr B. and Mrs N. request that the decision of 16 March 2006 be set aside. In the other two complaints they request that the implied decision to dismiss their second internal complaints be set aside. In all four complaints they further request that the disputed pension slips be annulled, entailing the application to their pensions of a weighting based on the cost of living in the capital of their country of residence, and that they be awarded costs.

C. In its replies the Agency raises the question of whether the complainants have a cause of action. As the general measures and the disputed pension slips cause them no injury, it considers that their complaints are irreceivable. It produces the pension slips sent to the complainants for July to December 2005, which show that they incurred no loss compared with the pension payment received for June 2005.

On the merits, and subsidiarily, the defendant contends that the Permanent Commission's decision and Office Notices Nos. 11/05 and 17/05 are entirely lawful. It points out that from July 2005 onwards the pension slips showed the new weighting of 117.5 and that the complainants were therefore aware of it as soon as they received those pension slips.

The Agency argues that the purpose and spirit of the reform, which was intended to remedy the “disastrous situation” of the pension scheme, cannot seriously be challenged. All the solutions that were envisaged entailed an overall reduction in benefits; under the circumstances, it considers that to assert acquired rights, even though the amount of one's pension is fully guaranteed, is “unreasonable and indecent”. Eurocontrol points out that, for the time being, the reduction in pensions is only virtual since it is offset by the payment of a compensatory amount, and that for the future it is merely hypothetical. It was legitimate to modify the practice of applying the same weightings to pensions as to the remuneration of serving officials in the light of new circumstances, provided in particular that no injury was caused to the staff concerned. As the complainants have suffered no injury, they cannot assert that their acquired rights, the principle of good faith or the rule against retroactivity have been breached.

The defendant submits that equality of treatment must be assessed in terms of identical categories of beneficiaries whose circumstances are identical and that the discussion in the present case must therefore be confined to a comparative study of the situation of pensioners. Since the entry into force of the reform, equality of treatment as between pensioners residing in the same country has been maintained, since an identical weighting based on the average cost of living in the country of residence is applied to them, and this correctly reflects their actual circumstances because nearly all of them live outside the capital. The fact that their purchasing power may vary slightly according to the place in which they have chosen to settle is not the Organisation's responsibility. The purpose of the weightings is not to align pensions with the highest cost of living but to reflect the average cost of living for the majority of pensioners within the same country and to guarantee purchasing power parity among pensioners resident in different countries. Continuing to apply a weighting based on the cost of living in the capital to pensioners who are not resident there could result in unjust enrichment. Eurocontrol adds that there is no regional statistical index in Belgium, so that there is no way of determining a weighting for the country that is different from that for Brussels.

Lastly, the defendant states that the reasons for the reform of the pension scheme were set out in Information to Staff note No. I.05/06 of 27 April 2005. While acknowledging that the reform of the Agency's pension scheme is largely based on that of the European Union, it points out that the Union's reform provisions were not taken over wholesale.

D. In their rejoinders the complainants express surprise at the fact that the Agency is challenging their cause of action before the Tribunal, since it recognised at the internal complaint stage that they had a cause of action. Referring to Judgment 1712, they assert that a cause of action certainly exists: the disputed pension slips cause them injury inasmuch as they constitute individual measures implementing new statutory provisions, measures that will gradually replace the weighting based on the cost of living in the capital with a weighting which, in the case of France, is substantially lower. Even though the total amount of their pension has not declined, they contend that the purpose of the said measures is to reduce their purchasing power quite considerably.

E. In its surrejoinders the defendant maintains that the complainants have not shown that they have suffered actual injury giving rise to a cause of action. On this point it cites a judgment delivered in 2006 in which the Court of First Instance of the European Communities dismissed claims to cancel pension slips which were contested because they applied for the first time a weighting calculated by reference to the average cost of living in the country of residence and no longer by reference to the cost of living in the capital of that country. The Court considered that the claims were irreceivable on the ground that the complainant in question had no cause of action since his financial situation had not deteriorated.

CONSIDERATIONS

1. The complainants are former officials of the Eurocontrol Agency who have been receiving a retirement pension since 1 January 2005. They are resident in France and were covered by the provisions of Article 82(1) of the Staff Regulations in force prior to 1 July 2005, which stipulated that “[p]ensions [...] shall [...] be weighted at a rate above, below or equal to 100%, depending on the living conditions and income tax system specific to the country [...] where the recipient proves he has his residence”. In their case, the weighting was based, until 30 June 2005, on the cost of living in Paris, according to the same rules as were applied to calculate the remuneration of serving officials.
2. On 5 November 2004 Eurocontrol’s Permanent Commission approved a reform of the Organisation’s staff pension scheme (for a general overview of the reform, see Judgment 2633, also delivered this day). This reform, which entered into force on 1 July 2005, provided in particular that the weightings would be modified gradually so that they would eventually be based on the cost of living in the country of residence as a whole and no longer in the capital of that country. As a result, from 1 July 2005 a “mixed” weighting was introduced, 80 per cent of which was based on the cost of living in capitals and 20 per cent on the cost of living in countries of residence, and for pensioners resident in France the weighting was set at 117.5 instead of 120.2 as previously. The transitional measures applicable to officials are set out in Annex XIII to the Staff Regulations. The relevant provisions of Article 5 of that annex are reproduced under A, above.
3. By two complaints, Mr B. challenges, on the one hand, the decision of 16 March 2006 dismissing the internal complaint he had filed against his pension slips – based on the new rules – for July, August and September 2005 and, on the other hand, the implicit decision dismissing the internal complaint he had filed on 30 January 2006 against his pension slips for October, November and December 2005.
4. By two analogous complaints, Mrs N. likewise challenges the decisions dismissing her internal complaints regarding her pension slips from July to December 2005.
5. Fifty former Eurocontrol officials have filed applications to intervene in support of these complaints.
6. Since the arguments adduced in support of the four complaints are identical, the Tribunal shall join them, as requested by the complainants.
7. In the two express decisions that are impugned, the Director of Human Resources, acting on behalf of the Director General, referred to the opinion of the Joint Committee for Disputes, stating that he was fully in agreement with its analysis and conclusions. According to that opinion, dated 6 March 2006 and concerning the case of 60 former officials receiving a retirement pension and residing in France, the measures taken, along the same lines as the European Union, to check the very sharp increase in the cost of pensions did not breach either pensioners’ acquired rights or the principles of legal certainty, of the protection of legitimate expectations, of equal treatment and of freedom of movement, and were adequately explained by reference to the grounds for reform of the pensions of officials of the European Communities.
8. The complainants raise the same arguments before the Tribunal as they unsuccessfully raised before the Joint Committee for Disputes: they claim that the provisions of which they were notified by Office Notice No. 11/05 of 20 June 2005 and the new weightings announced in Office Notice No. 17/05 of 10 October 2005 are unlawful. They submit that the reform of those weightings breached the principle of acquired rights, the principle of good faith, the rule against retroactivity and the principle of equal treatment and that it was based on erroneous reasons.

9. The defendant raises an objection to receivability, arguing that the complainants have no cause of action since the challenged measures have caused them no injury and hence have not adversely affected them.

10. This objection fails. Admittedly, when compared with the pension slips for June 2005, the disputed pension slips show no marked differences since the entry into force of the reform, except for the payment of additional amounts at the end of 2005 which are probably due to adjustments unrelated to the present dispute and which in any case have not been explained by the parties. The only change consists in the reference to a cost-of-living weighting of 117.5 instead of 120.2, but the application of this new weighting does not entail a reduction in the amount of pension, which implies – although this is not indicated in the slips – that the “compensatory amount” referred to in the second paragraph of above-mentioned Article 5(2) of Annex XIII has been paid. However, as the Tribunal stated in Judgment 1712, under 10, recalling a firm precedent, “there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant’s position.” (In a similar vein, see Judgment 2583.) In the instant case, even though the complainants retain their entitlement to a cost-of-living adjustment and the nominal amount of the pensions received prior to 1 July 2005 is guaranteed, they contend that the contested reform will perforce have an impact on the purchasing power of the said pensions. The fact that the Court of First Instance of the European Communities may have dismissed as irreceivable claims regarding the application of a similar reform to the pensions of Community officials in respect of months during which their financial situation had not deteriorated has no bearing on the application of this Tribunal’s settled case law.

11. However, while the complaints are receivable, they are without merit.

12. First, contrary to the complainants’ allegations, no error of law or of fact is discernible in the reasons underlying the reform. Information to Staff note No. I.05/06 of 27 April 2005 stated the reasons for the reform in general terms, pointing out that if no action had been taken, expenditure on pensions would eventually have accounted for 35 to 40 per cent of Eurocontrol’s budget, but that although the reform would lead to a reduction in pension benefits for new staff, “the rights of existing staff [would] be safeguarded as much as possible”. The reasons for the various measures listed, including in particular the weightings, are admittedly not explained in detail, save by reference to the need to provide for the financial security of officials and to protect their acquired rights. Moreover, the note indicates that “[t]he reform of the Agency’s pensions is largely based on that of the European Union” but that “certain improvements have been possible, in particular as regards application of the cost-of-living weightings”. The complainants view this reference to reform of the pensions of European Union officials as the real reason for the changes in weightings, and it is quite clear that many of the reasons invoked to justify a reform of the pensions of European officials are not applicable to the case of Eurocontrol Agency pensioners residing in France. However, these arguments, developed at length by the complainants, are irrelevant since the defendant clearly had no intention of appropriating all the reasons underlying a reform with which it had no connection. The replacement of the weighting based on the cost of living in the capital with that based on the average cost of living in the country of residence, which – it should be noted – was to take effect gradually, is founded on considerations of equity and better reflects the actual circumstances of existing retirees, the vast majority of whom are not resident in capitals.

13. Second, the complainants assert that their acquired rights were breached because the Agency abandoned a practice, applied to them from 1 January to 30 June 2005, involving the application to pensions of the same weightings as were applied to the remuneration of serving officials. But a practice of salary and pension adjustment, even where repeated, does not bind the Organisation that adopted it, which is at liberty to abandon it provided that it does so lawfully (see in this connection Judgment 2089). As for acquired rights, they could not be held to have been breached unless the contested reform impaired a fundamental and essential term of the complainants’ conditions of appointment, which include the right to a pension (see aforementioned Judgment 2089 and the case law cited therein). This is clearly not the case here.

14. Third, the complainants challenge the allegedly retroactive application to them of the weighting of 117.5. It was only on 10 October 2005 that Office Notice No. 17/05 was published, in which the staff were informed that the Provisional Council had approved on 2 August 2005 the cost-of-living weightings applicable as from 1 July 2005, including the weighting of 117.5 for pensioners resident in France. The retroactive effect, however, is merely apparent, since it was by the Office Notice dated 20 June 2005 that the complainants were informed of the new statutory provisions approved by the Permanent Commission on 5 November 2004, including Annex XIII which sets out in detail the methods of calculation used from 1 July 2005 – the date of entry into force of the reform – to

determine the weightings. It was as a result of the application of that method, all the objective components of which were available to the complainants, that the first pension slips after the reform, dated 31 July 2005, showed that the weighting now stood at 117.5. It follows that the plea based on the retroactive application of the disputed measure must in any case be dismissed. It should further be noted that the late publication of the new weightings caused no injury to the complainants.

15. Fourth, the complainants contend that the principle of equal treatment has been breached. They argue that replacing the index based on the cost of living in the capital of the country of residence with an index based on the average cost of living in the country as a whole creates inequality between pensioners and serving officials and penalises all pensioners who are resident in the country's capital. The Tribunal acknowledges that the system adopted may lead to inequality of treatment depending on whether or not a pensioner is resident in the capital or in a city where rents are high, but the system based on the cost of living in the capital is not more equitable, although it is more favourable to pensioners who are not resident in the capital. Moreover, it cannot be concluded from a comparison between the system applicable to serving officials and that which is now applicable to pensioners that the treatment of the latter is discriminatory, since the circumstances of the two categories are clearly different and may warrant the use of different methods of adjustment. Similarly, the complainants' criticism concerning pensioners residing in other countries, some of whom allegedly benefit from distortions due to different weightings, cannot be entertained. All Eurocontrol pensioners residing in France are subject to the same rules and have no ground to complain of discriminatory treatment.

16. Lastly, the complainants question the defendant's good faith, but the pleadings contain nothing to substantiate those allegations, of which no details are given.

17. As none of the pleas raised by the complainants succeeds, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet