

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session

Judgment No. 3355

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 October 2012, Eurocontrol's reply of 18 January 2013, the complainant's rejoinder of 30 April and Eurocontrol's surrejoinder of 2 August 2013;

Considering the applications to intervene filed by Messrs R. B., L.P.D.R., P. M., B. R. and C. V. on 16 October 2012 and the letter of 18 January 2013 by which Eurocontrol informed the Registrar of the Tribunal 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 and the pleadings may be summed up as follows:

A. On 1 January 1991 new provisions concerning the transfer of pension rights acquired under a national scheme to the Organisation's pension scheme entered into force at Eurocontrol. Office Notice No. 11/91 of 27 June 1991, which published these provisions,

specified that if the regulations or the contract to which officials had been subject in their previous post did not allow them to make such a transfer at that juncture – which was the position of those who had acquired pension rights in Belgium – they could either wait until transfer became possible, or they could submit an application as a safeguard. The complainant submitted such an application on 16 November 1992. At that point in time, where a transfer was possible, the number of pensionable years to be credited was calculated by reference to the person’s basic salary at the date of their establishment. As from 2005, however, the operative date was that of the transfer application.

The royal decree authorising the transfer of pension rights acquired with a Belgian pension scheme to the Eurocontrol pension scheme entered into force on 1 June 2007. It stipulated *inter alia* that officials who had become established before that date – which was the complainant’s situation – should send their transfer application to the *Office national des pensions* “no later than the last day of the sixth month following that of the aforementioned date”. The complainant submitted a new transfer application on 14 August. In the meantime, on 4 June, Eurocontrol staff had been informed that applications submitted before 1 June 2007 would be regarded as premature.

An amount corresponding to the actuarial equivalent of the retirement pension acquired by the complainant in Belgium was transferred to Eurocontrol on 30 January 2008, and on 26 February he was advised that, as a result of that transfer, he had been credited with an additional three years, nine months and seven days of reckonable service, determined on the basis of the new method of calculating pensionable years. The complainant expressed reservations, but did not submit an internal complaint, unlike the officials who filed the complaints with the Tribunal which led to Judgments 2985, 2986 and 3034, delivered in 2011. Although in these judgments the Tribunal found that the pensionable years credited to the complainants had been correctly determined by reference to their basic salary at the date of the transfer application, it set aside the impugned decisions and referred the cases back to Eurocontrol, because it considered that it

was their initial application which should have been taken into account. On 20 July 2011 the Director General published Office Notice No. 20/11 informing the staff that it would no longer be possible to submit applications as a safeguard, but that those submitted between 27 June 1991 and the day after the publication of the said notice and duly sent to the relevant Eurocontrol services would nonetheless be considered admissible.

Having asked the Director General to be allowed to benefit from the application of Judgment 3034 to no avail, the complainant lodged an internal complaint on 20 February 2012. This was dismissed as unfounded on 18 July 2012, after the Joint Committee for Disputes had issued a divided opinion. That is the impugned decision.

B. The complainant submits that Eurocontrol has breached the principles of legal certainty, equal treatment, good faith and the protection of acquired rights. In addition he contends that, by not abiding by the terms of Office Notice No. 20/11, Eurocontrol has also breached the principle of *tu patere legem quam ipse fecisti* and that it has not honoured its duty of care towards him.

The complainant asks the Tribunal to set aside the impugned decision, to find that the pensionable years credited to him must be calculated by reference to his basic salary on 16 November 1992 and to award him costs in the amount of 5,000 euros.

C. In its reply Eurocontrol argues that the complaint is time-barred, because the complainant failed to challenge the individual decision taken in 2008 concerning him in due time.

Eurocontrol recalls that the Tribunal's judgments are delivered *inter partes* and submits that, since the complainant was neither party to, nor an intervener in the cases leading to Judgments 2985, 2986 and 3034, it was under no obligation to extend the benefit of those judgments to him and that he has no grounds for alleging a breach of the principle of equal treatment. It explains that its refusal to apply those judgments to the complainant and to officials in the same situation as him was prompted not by a wish to cause injury or by a

lack of care, but by concern about the impact of a “beneficial measure” on the financial equilibrium of the pension scheme. It emphasises that, as Office Notice No. 20/11 indicates that applications for the transfer of pension rights submitted as a safeguard will be processed “when the transfer becomes possible”, it does not apply to the complainant.

It asks the Tribunal to order the joinder of the complaint with two other cases concerning the same issue.

D. In his rejoinder the complainant enlarges upon his pleas.

E. In its surrejoinder Eurocontrol maintains its position. As it has been apprised of a third complaint pursuing the same claim as the instant complaint, it requests the joinder of all these cases.

CONSIDERATIONS

1. Under Article 12 of Annex IV to the Staff Regulations governing officials of the Eurocontrol Agency, an official who enters the service of Eurocontrol is entitled to have paid to the Organisation the updated capital value of the pension rights acquired by him by virtue of his previous activities “if the regulations or the contract to which he was subject in his previous post so allow”.

Rule of Application No. 28 sets out the arrangements for implementing this article and, in particular, the rules for determining the number of pensionable years to be credited in the Eurocontrol scheme in respect of the pension rights transferred from another scheme.

2. The original version of these texts stipulated that pension rights had to be transferred when the official became established. Thus, an official could exercise his/her right to make such a transfer only within six months of the date of establishment, and the pensionable years credited to him/her were calculated by reference to his/her basic salary at that date.

3. According to the above-mentioned terms of Article 12 of Annex IV to the Staff Regulations, the possibility of effecting such a transfer from a national pension scheme was subject to the existence of provisions authorising this transfer in the national law of Eurocontrol Member States. However, the adoption of laws and regulations to this effect has taken place so gradually that, to date, some States have still not passed such legislation.

4. In Belgium, the host country of Eurocontrol's Headquarters and the country of origin of many of the Organisation's officials, the negotiations preceding the adoption of national legislation permitting the transfer of pension rights proved to be long and arduous. In the end it was not until 1 June 2007 that such transfers became possible by virtue of the entry into force of a royal decree of 25 April 2007 which, as from 1 June 2007, brought Eurocontrol within the scope of a Belgian law of 10 February 2003 which had already authorised this kind of transfer for officials of the European Communities.

5. The complainant, who had acquired pension rights with a Belgian scheme, asked to have those rights transferred to the Organisation's pension scheme, as Information Note to Staff No. I.07/05 of 31 May 2007 had invited officials to do, if they wished to take advantage of this arrangement.

6. However, during the above-mentioned negotiations, two series of events had taken place, which are of particular relevance to this dispute.

(a) On 17 June 1991 the Permanent Commission of Eurocontrol, acting out of consideration for officials who had not submitted their application for the transfer of pension rights within six months of becoming established or, above all, who had been unable to do so because such transfers had not yet been authorised by the legislation

of their country of origin, adopted “[e]xceptional temporary provisions having the force of service regulations” to exempt the persons concerned from the time bar. These provisions, which were subsequently incorporated into the Staff Regulations as Appendix IIIa, specified that requests could be submitted within six months of the effective date of the provisions or, in the case of officials who in their previous post had been subject to regulations or to a contract which did not permit such a transfer, of the date on which such a transfer became possible.

Office Notice No. 11/91 of 27 June 1991, in which the provisions in question were published, explained *inter alia* that, in the case of officials who were as yet unable to benefit from a transfer owing to the contract or regulations governing their previous post, “[a]pplication may, as a safeguard, be made [...], or the date on which the transfer becomes possible can be awaited”.

At that point in time the possibility of submitting such an application as a safeguard was likely to be of particular interest to officials who had acquired rights under Belgian pension schemes. Pursuant to the aforementioned office notice the complainant therefore submitted his first application for a transfer on 16 November 1992.

(b) As stated above, on 1 June 2007 before that transfer actually became possible, the Permanent Commission of Eurocontrol had, however, adopted a radical reform of the Organisation’s pension scheme that became effective as of 1 July 2005. The numerous measures forming part of this reform, which was aimed at restoring the scheme’s financial viability, included an amendment of the above-mentioned Article 12 of Annex IV to the Staff Regulations.

Under the new version of this Article 12, the number of pensionable years credited to an official who transferred his pension rights acquired with another scheme was no longer calculated by reference to the official’s basic salary at the date of his establishment, but by reference to his basic salary at the date of his transfer application and to his age and the exchange rate in force on that date, which was considerably less advantageous.

The new version of Rule of Application No. 28, which gave effect to this amendment of the Staff Regulations, was published in Office Notice No. 20/07 on 31 May 2007, on the eve of the entry into force of the royal decree authorising the transfer of pension rights acquired under Belgian schemes.

7. By a decision of the Director General of 26 February 2008, the complainant was credited with pensionable years determined according to the new provisions of the Staff Regulations and Rules of Application in question. At the time the complainant did not appeal against that decision.

8. However, similar decisions taken at that time with regard to other officials who had requested a transfer of this kind gave rise to numerous complaints before the Tribunal.

By Judgments 2985, 2986 and 3034, delivered on 2 February and 6 July 2011, the Tribunal dismissed the argument in those complaints that the officials in question should have been able to benefit from the application of the previous version of the above-mentioned texts. It therefore held that the pensionable years in dispute had been correctly determined by reference to the basic salary received by the persons concerned at the date of their transfer applications and not at the date at which they became established. However, the Tribunal also decided that, in the case of officials who had initially submitted transfer applications as a safeguard pursuant to the above-mentioned office notice of 27 June 1991, it was that initial application and not, as Eurocontrol had thought, the application which they had lodged after 1 June 2007, which should be taken into account for that purpose. The decisions in question were therefore set aside for that reason. Numerous officials who had filed applications to intervene in those cases were also found to enjoy the same rights as those conferred on the complainants.

9. In the wake of the delivery of these judgments, Eurocontrol decided, by virtue of Office Notice No. 20/11 of 20 July 2011, to

terminate the effects of the office notice of 27 June 1991 as from the day after the publication of the new notice. The latter therefore specified that no application submitted as a safeguard would be accepted after that date. The detailed analysis of the reasons for that measure ended with a paragraph – highlighted in bold type – which reads as follows:

“However, in the interests of transparency of information and legal safety, transfer applications submitted ‘as a safeguard’ on the basis of [...] Office Notice No. 11/91 dated 27 June 1991 between this date and the day after the publication of this Office Notice, and which were duly sent to the relevant EUROCONTROL services before the latter date, will be considered admissible. They will be carried out, at the official or the servant’s request, when the transfer becomes possible.”

10. On 27 July 2011 the complainant, acting under the appeal procedure provided for in Article 92 of the Staff Regulations, asked the Director General for a recalculation of the number of pensionable years credited to him on the same terms as those granted to officials who had been party to the case leading to Judgment 3034. As this request was rejected the complainant, citing the aforementioned office notice of 20 July 2011, challenged this new decision.

After the Joint Committee for Disputes had issued a divided opinion, the Director General dismissed his internal complaint by a decision of 18 July 2012.

11. It is the latter decision which the complainant now impugns before the Tribunal.

Five applications to intervene have been submitted by other officials.

12. Eurocontrol requests the joinder of the complaint with those filed by three other members of staff who also seek a review of the number of pensionable years credited when pension rights acquired under Belgian schemes were transferred. However, one of these complaints, filed by an official who was party to the aforementioned Judgment 3034, raises quite different questions of law. The other two,

which form the subject of Judgments 3356 and 3357, also delivered on this day, each contain specific arguments and do not therefore present identical issues of law and of fact for adjudication. It is therefore not appropriate to grant this request for joinder (see, in particular, Judgments 1541, under 3, 3064, under 6, and 3156, under 11).

13. Eurocontrol based its dismissal of the complainant's claims on the consideration that, since the decision establishing the disputed number of pensionable years was not challenged in due time, it had become final and the delivery of Judgments 2985, 2986 and 3034 did not in itself reopen the time limits for an internal appeal. It also took the view that, in accordance with the principle that the Tribunal's judgments produce their effects only between the parties, the complainant, who was neither a complainant nor an intervener in any of the cases giving rise to those three judgments, could not rely on the rights which those judgments conferred on their beneficiaries.

14. This reasoning *per se* is certainly entirely consistent with the Tribunal's long-established case law, as confirmed, for example, in similar cases in Judgments 2463, under 13, 3002, under 14 and 15, or 3181, under 9 and 10.

15. However, in the instant case, the legal context of the dispute is fundamentally altered by the issuance of the above-mentioned office notice of 20 July 2011.

It is plain from the very wording of the above-mentioned paragraph of that notice that the Organisation undertook thereunder to accept as admissible applications submitted earlier as a safeguard on the basis of the office notice of 27 June 1991 and to draw all the legal consequences from their submission. By definition, that undertaking was bound to be of particular benefit to officials who, like the complainant, had not been party to, or an intervener in the cases leading to Judgments 2985, 2986 and 3034, since the Tribunal had already recognised that the beneficiaries of those judgments were entitled to have such applications accepted.

16. Eurocontrol submits that the provisions of the paragraph in question did not concern holders of pension rights acquired with Belgian schemes. In this connection, relying on the terms of the last sentence of that paragraph according to which earlier applications submitted as a safeguard would take effect “when the transfer becomes possible” (in French “*lorsque le transfert deviendra possible*”), it contends that this wording means that officials for whom such a transfer was already possible on the date on which the office notice of 20 July 2011 entered into force were excluded from the benefit thereof.

This sole argument is, however, unsound. While the use of the future tense in the French version of the sentence in question might well, or more naturally, be taken to express a sequential relationship between the opening up of the possibility of effecting a transfer and the lodging of the official’s application, if Eurocontrol intended the paragraph quoted above to refer only to holders of pension rights acquired with national schemes for whom such a transfer was not yet possible when the notice entered into force, owing to the lack of an agreement with the State concerned, clearly this restriction should have been expressly mentioned.

Moreover, it is well established in the Tribunal’s case law that when the regulations or rules of an international organisation are ambiguous they must in principle be construed in favour of the interests of its staff and not those of the organisation itself (see, for example, Judgments 1755, under 12, 2276, under 4, or 2396, under 3(a)).

The argument put forward by Eurocontrol must therefore be dismissed.

17. In these circumstances Eurocontrol cannot validly rely on the final nature of the aforementioned decision of 26 February 2008 to evade its duty to review the number of pensionable years credited to the complainant. Indeed, the issuance of the office notice

of 20 July 2011 may be regarded as a new, unforeseeable and decisive fact which, in accordance with the Tribunal's case law, reopened the time limit for appealing against this decision. Moreover, Eurocontrol's undertaking to accept transfer applications submitted at an earlier date as a safeguard necessarily implied that it agreed to review decisions of that kind, even when they had become final.

18. For these reasons the Tribunal finds that, by denying the complainant's request, Eurocontrol unlawfully disregarded the above-mentioned provisions of the office notice of 20 July 2011 and thereby breached the principle of *tu patere legem quam ipse fecisti*, which requires every authority to abide by the rules which it has itself established.

19. It follows from the foregoing, without there being any need to consider the complainant's other pleas, that the impugned decision and those previously taken with regard to the complainant must be set aside.

20. The case shall be referred back to Eurocontrol in order that, as the complainant rightly requests, his pensionable years may be determined by reference to his basic salary, his age and the exchange rate in force on the date of his initial application to have his pension rights transferred, i.e. 16 November 1992.

21. The interveners, who had likewise submitted transfer applications as a safeguard pursuant to the office notice of 27 June 1991, are therefore in a similar position in law to that of the complainant. They must therefore be granted the benefit of the rights recognised in this judgment.

22. The complainant, who succeeds in full, is entitled to costs, the amount of which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of Eurocontrol determining the pensionable years contested by the complainant and the decisions dismissing his request for review of that decision and his internal complaint are set aside.
2. The case is referred back to Eurocontrol in order that the pensionable years in question may be determined by the method prescribed in consideration 20, above.
3. The interveners shall enjoy the same rights as are established in respect of the complainant by this judgment.
4. Eurocontrol shall pay the complainant costs in the amount of 3,000 euros.

In witness of this judgment, adopted on 9 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ