

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**118th Session**

**Judgment No. 3357**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr P.E. L. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 26 April 2012 and corrected on 16 June, Eurocontrol's reply of 21 September, the complainant's rejoinder of 31 October 2012 and Eurocontrol's surrejoinder of 1 February 2013;

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 December 1991. 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 15 November. 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 12 March 2009, and on 24 April he was advised that, as a result of the transfer, he had been credited with an additional one year and 15 days of reckonable service, determined on the basis of the new method of calculating pensionable years. The complainant did not submit an internal complaint, unlike the officials who filed the complaints with the Tribunal which led to Judgment 2986, delivered on 2 February 2011, *inter alia*. Although in that judgment 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.

In the meantime, on 2 March 2011, the complainant had asked the Director General to be allowed to benefit from the application of Judgment 2986. As he received no reply, he submitted an internal complaint which was dismissed as unfounded on 27 January 2012 after the Joint Committee for Disputes had issued a divided opinion. That is the impugned decision.

B. The complainant explains that if Judgment 2986 had been applied to him, one year, nine months and nine days of additional reckonable service would have been credited to him. He states that “owing to personal considerations” he did not submit an internal complaint against the decision of 24 April 2009, but as the above-mentioned judgment required a change in the method of calculating pensionable years, it should be applied to everyone. The complainant also contends that he has received unequal treatment for, in his opinion, he is in the same position as the interveners who were found to enjoy the rights established in respect of the complainants by Judgment 2986. He submits that Eurocontrol has not honoured its duty of care by not inviting officials who, like him, had submitted a transfer application as a safeguard, but who were neither party to, nor an intervener in the cases which led to the above-mentioned judgment, to come forward. He wonders whether the fact that he is a staff representative might not have influenced the outcome of his claims.

The complainant requests the setting aside of the implied decision rejecting his request of 2 March 2011 and of the impugned decision. He also asks the Tribunal to refer the case back to Eurocontrol in order that his pensionable years may be determined in accordance with the method set out in Judgment 2986 and to award him 15,000 euros in compensation for moral injury and costs in the amount of 8,000 euros.

C. In its reply Eurocontrol states that the complaint is time-barred, because the complainant failed to challenge the individual decision taken in 2009 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 Judgment 2986 – nor in similar cases resulting in Judgments 2985 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 asks the Tribunal to order the joinder of the complaint with another case concerning the same issue.

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

E. In its surrejoinder Eurocontrol maintains its position.

#### 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 December 1991.

(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 24 April 2009, 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 2 March 2011, in other words before the publication of the aforementioned notice, 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 2986. As he received no reply within the prescribed four-month period, the complainant submitted an internal complaint on 25 August 2011 against the implied decision rejecting this request.

After the Joint Committee for Disputes had issued a divided opinion, the Director General dismissed this internal complaint by a decision of 27 January 2012.

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

12. Eurocontrol requests the joinder of the complaint with those filed by three other officials. However, for the reasons stated in

Judgment 3355, also delivered on this day, this request will not be granted.

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. The complainant's submission that the refusal to extend to him the benefit of the rights recognised in a judgment in favour of other officials involves a breach of the principle of equal treatment and of the Organisation's duty of care towards its staff cannot be accepted in the terms in which it is formulated.

The principle of equal treatment applies only to officials in a similar situation in law and in fact. The position of the complainant, who did not initially challenge the decision determining his pensionable years, is different to that of his colleagues who disputed the decision and were then party to, or interveners in the cases which led to Judgments 2985, 2986 and 3034.

As for Eurocontrol's duty of care, it plainly does not mean that the Organisation is obliged to exempt one of its officials from a time bar or to grant him an advantage to which he is not entitled.

16. Furthermore the complainant manifestly has no reason to insinuate that the decisions concerning him were prompted by a wish to discriminate on account of his role as a staff representative.

Contrary to the view apparently taken by the complainant, who merely comments in this respect that “it [cannot] be proven” that his activities in that capacity were not borne in mind by the Organisation, or that “the possibility [cannot] be ruled out” that they were, the existence of such bias, which would constitute a misuse of authority, may not be presumed. It is incumbent upon the official who intends to rely on a plea of this nature to furnish at least some *prima facie* evidence in support thereof; mere allegations which are moreover purely speculative are immaterial here (see, for example, Judgments 1775, under 7, 2019, under 24, 2927, under 16, or 3182, under 9).

Furthermore, it has been established that, in the instant case, Eurocontrol has given identical treatment to other officials in the same situation as the complainant who asked to benefit from the rights recognised in Judgments 2985, 2986 and 3034, as may be inferred from a number of complaints and applications to intervene filed by those officials with the Tribunal.

17. However, the Tribunal notes, as it did in Judgments 3355 and 3356, delivered on this day, in which it ruled on the complaints filed by some of those officials, that in this case the legal context of the dispute is fundamentally altered by the issuance of the above-mentioned office notice of 20 July 2011.

This notice was applicable on the date of the decision dismissing the complainant’s internal complaint. 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 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.

18. For the reasons set forth in Judgments 3355 and 3356, the Organisation's argument that the provisions of the paragraph in question did not apply to holders of pension rights acquired with Belgian schemes cannot be accepted.

19. In these circumstances Eurocontrol cannot validly rely on the final nature of the aforementioned decision of 24 April 2009 in order 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.

20. 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.

21. It follows from the foregoing that the decision of the Director General of 27 January 2012 and those previously taken with regard to the complainant must be set aside.

22. 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 December 1991.

23. The complainant claims 15,000 euros in compensation for moral injury. This claim is plainly excessive particularly in view of the dismissal of the pleas referred to in considerations 15 and 16, above. However, the unlawful nature of the impugned decisions, which concern an aspect of an official's situation as fundamental as the amount of his pension rights, has undoubtedly caused moral injury to the complainant, which in the instant case will be fairly redressed by awarding him 2,000 euros.

24. As the complainant succeeds for the most part, he is entitled to costs, the amount of which the Tribunal sets at 1,000 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 a review of that decision and his internal complaint are set aside.
2. The case shall be referred back to Eurocontrol in order that the pensionable years in question may be determined by the method prescribed in consideration 22, above.
3. Eurocontrol shall pay the complainant 2,000 euros for moral injury.
4. It shall also pay him costs in the amount of 1,000 euros.
5. All other claims are dismissed.

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