Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3373**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. K. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 27 December 2011, Eurocontrol's reply of 10 April 2012, the complainant's rejoinder of 14 May and Eurocontrol's surrejoinder of 3 August 2012;

Considering the applications to intervene filed on 16 February 2012 by Ms B. E. and Messrs M. E., F. H., J. O., J. S. and J.v.d.R., and Eurocontrol's comments of 20 March 2012 in which it submitted that only the application by Mr S. was irreceivable, since he was not in the same situation in fact and in law as the complainant;

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. The Maastricht Upper Area Control Centre (hereinafter "the Maastricht Centre") has a team of guards to ensure safety and security. At the material time this team had eight members, including the

complainant, who held the post of coordinator, and the interveners. According to Rule of Application No. 21 of the General Conditions of Employment Governing Servants at the Maastricht Centre, security guards were entitled to payment of a flat-rate allowance for shift work (Article 7) and an allowance expressed in points per hour for stand-by duty (Article 8). The flat-rate shift allowance was paid at the rate of 100 per cent if the duties had to be performed continuously for a period of 24 hours every day of the week; at 80 per cent if the duties had to be performed continuously for periods of less than 24 hours every day of the week; and at 50 per cent if the duties had to be performed continuously for periods less than 24 hours every day of the week excluding weekends (Article 7, paragraph 2). Pursuant to Article 10 of the above-mentioned Rule, security guards working overtime were entitled to compensatory leave, or to extra pay if the compensatory leave could not be taken in the subsequent six months.

At a meeting held on 18 June 2010 the Administration, referring to the need for cost savings as well as the requirement in Article 4, paragraph 3, of Rule of Application No. 21, that a guard could not be assigned to shift duty for at least ten hours following a period of stand-by duty, informed the security team that it intended in the short term to outsource both night shift and stand-by duties, so that the related allowances would no longer be paid, and in the medium term to outsource all the services provided by the security team. Eurocontrol then entered into discussions with the trade union representatives.

By a memorandum of 2 March 2011 the Administration informed the security team that since the discussions had not led to any agreement, and in the interest of the service, stand-by duties would be outsourced with effect from 14 March 2011. A subsequent memorandum of 20 June, replying to a request for clarification sent by the complainant to the Director General, informed the team that night shift work would also be outsourced in the short term and that, in the medium term, all the services provided by the team would be

outsourced. In this memorandum, the Administration assured the complainant that measures to mitigate the financial consequences of the outsourcing of night duties would be examined in consultation with the social partners. On 30 July 2011 the complainant lodged an internal complaint requesting that, in the context of the outsourcing, any decision adversely affecting his interests should be cancelled or suspended until a final agreement was reached on the financial compensation to be granted.

A further consultation meeting took place in November 2011, at which Eurocontrol proposed that in order to mitigate the consequences of the forthcoming outsourcing of night shift work, which would entail a 20 per cent reduction in the flat-rate shift allowance, Rule of Application No. 21 should be amended by adding a new paragraph 8 to Article 7, providing for the payment of a transitional allowance at a decreasing rate for 12 months from 1 January 2012: 100 per cent for the first three months, 50 per cent for the next three months and 25 per cent for the last six months. These decreasing rates would be applied to the difference between the full amount of the allowance formerly paid and the amount of the allowance payable under the new shift pattern. The transitional allowance would be paid cumulatively with the allowance for shift work, which would continue to be paid on the basis of paragraph 7.2 in respect of the day or night work still being performed. In a memorandum of 8 December 2011, the security team was informed that the outsourcing of night shift work would begin on 1 January 2012. The above-mentioned amendment proposed by Eurocontrol took effect on 1 March 2012.

On 27 December 2011 the complainant, concluding in the absence of a reply from the Director General that his internal complaint of 30 July 2011 had been implicitly dismissed, filed a complaint with the Tribunal.

B. The complainant contends that the measures taken by Eurocontrol are quite inadequate because they are intended to compensate, very partially and for a limited time, for the elimination of night work, but

not for the elimination of stand-by duty or the loss of the overtime arising from it. Moreover, the repeated suggestion made to the security guards, during the unsuccessful discussions preceding the implementation of the measures, to take early retirement would also, if they agreed to do so, have a considerable financial impact on the amount of their future pension, and no compensation has been proposed for that.

The complainant points out that for over 15 years he was able to receive the various allowances mentioned above, which represent a significant part of his salary and an essential element of his conditions of employment. Referring to Judgments 986, 2696 and 2972, he submits that his acquired rights have been violated.

The complainant also contends that the decisions announced in June 2010 were taken in breach of the procedures for consulting the trade union representatives.

He requests that the implied decision to dismiss his internal complaint be set aside, and that Eurocontrol be ordered to pay him, until the date when, as a result of salary scale increases and promotions, he reaches the level of remuneration he was receiving on 28 February 2011: a monthly allowance equal to the annual average of the allowance he received in 2010 for stand-by duty; a monthly allowance equal to the average overtime pay received; and a monthly allowance equal to 100 per cent of the flat-rate shift allowance. The complainant also claims interest at 8 per cent per annum, 3,000 euros in damages for breach of the duty of care and the duty of good faith, and 4,000 euros for costs.

C. In its reply, Eurocontrol argues that the complaint filed on 27 December 2011 was premature, because on that date the complainant had not yet had any of his allowances reduced. Stand-by duty was outsourced only from 14 March 2011, night shift work was outsourced from 1 January 2012, and the complainant continued to receive the flat-rate shift allowance at the rate of 100 per cent until 29 February 2012.

Eurocontrol considers that it is under no obligation to grant compensation in respect of the reduction in allowances, which it regards as being "within acceptable limits". Moreover, outsourcing has removed a number of constraints, and this is beneficial for the complainant's health and welfare. Neither the complainant's basic salary nor the family allowances he receives are affected by the outsourcing. Moreover, as a result of the transitional arrangements, the reduction in the allowances is spread over a year, which is adequate for him to make the necessary adjustments to his lifestyle. Regarding the possibility of early retirement before outsourcing is fully introduced, Eurocontrol states that it does not intend to reduce the complainant's pension entitlements.

On the basis of the Tribunal's case law, Eurocontrol argues that the complainant has no acquired right to work shifts, to be on stand-by duty or to work overtime, or to be paid the related allowances, since these allowances are not a fundamental and essential element of his conditions of employment, being dependent on the work actually performed.

D. In his rejoinder, the complainant argues that his complaint is not premature, given that a final decision rejecting his internal complaint was taken by the Director General on 9 May 2012, after the Joint Committee for Disputes, to which the matter had been referred in the meantime, had issued its opinion on 12 March 2012, upholding his claims.

On the merits, and in the light of the significant harm caused to him, he questions the economic argument invoked by Eurocontrol to justify the implementation of the outsourcing process.

E. In its surrejoinder, Eurocontrol maintains its arguments, emphasising that outsourcing is a means of achieving necessary savings at a time when its operating budget is being cut, as well as bringing flexibility and efficiency into the provision of security services, and ensuring that stand-by duties comply in all respects with Rule of Application No. 21.

CONSIDERATIONS

1. The Maastricht Centre security team, of which the complainant is the coordinator, was informed on 18 June 2010 of a plan to outsource the stand-by duty and night shifts which its members had been performing for some 15 years. This reorganisation would not affect their basic salary, but would result in lower remuneration because it entailed a reduction in the flat-rate shift allowance that they had previously received, the loss of the allowance for stand-by duty and a reduction of overtime which would reduce the average weekly hours of work.

On 20 June 2011 the Director General informed the complainant, in reply to the latter's request, that he confirmed the decisions set out in a memorandum of 2 March 2011, namely, the elimination of the allowance for stand-by duty and the reduction in weekly hours of work for the members of the security team. The outsourcing of night work would also be introduced shortly. Measures were being planned, in consultation with the social partners, to mitigate or compensate for the impact of these changes on salaries, since attempts to resolve this issue had so far proved unsuccessful. The decision of 20 June 2011 also included two paragraphs (the third and fourth paragraphs) reading as follows:

> "In the medium term, it has been decided to outsource progressively the [security team] services, based on an analysis of cost efficiency in order to comply with the necessity to allocate the financial resources of the Agency in the most economical manner.
>
> Management is fully aware of the impact of any ensuing modification on your function and remuneration and will offer mitigation measures in line with the obligations of a good employer. Mitigation measures concerning the outsourcing of night duties will be examined within the framework of the Agency consultation process with social partners."

2. On 30 July 2011 the complainant lodged an internal complaint against this decision, asking the Director General to cancel

it or suspend its application until final agreement had been reached on the compensation to be granted for the loss of what he considered to be acquired rights.

On 10 November 2011 Eurocontrol made a proposal to the social partners to amend Rule of Application No. 21 of the General Conditions of Employment, relating to the working conditions and compensation applicable to staff members working shifts, on stand-by or on overtime. The proposed amendment, providing for an allowance paid at a decreasing rate for one year, came into effect on 1 March 2012. According to the complainant, it provides a quite inadequate level of compensation for the loss of remuneration resulting from the reorganisation of the services provided by the security team. The information given on this subject on 8 December 2011 stated that Eurocontrol would "assist any one of [them] willing to seek alternative career opportunities within the Centre through training or other appropriate measures".

3. The complaint now before the Tribunal, which was originally directed against what the complainant took to be an implied decision to dismiss his internal complaint of 30 July 2011, must be regarded as being directed against the explicit decision of 9 May 2012, confirming the aforementioned decision of 20 June 2011, taken by the Director General in the course of the proceedings.

4. Eurocontrol contends that the complaint is premature because the impugned decision had not yet produced its effects on the date when the complaint was filed. It must, however, be recalled that an administrative decision can be challenged from the moment of its adoption, even if it takes effect on a later date. This objection to receivability is therefore irrelevant.

5. The complainant states that he "does not deny that his employer has the right to make significant changes to his working

conditions [but] does not accept that his employer can drastically alter his means of subsistence, since his remuneration is an essential element of his employment". He sees this as a serious infringement of his acquired rights.

6. It is established that the elimination of stand-by duty and night shift work, as well as the elimination of the overtime which was previously worked on a regular basis, will result in a reduction for an indeterminate period of the remuneration received by the complainant from Eurocontrol. The significance of this is not denied by Eurocontrol, though its estimation differs from that of the complainant. The negotiations it has entered into on this subject with the complainant and with his colleagues in the security team, as well as the amendment to Rule of Application No. 21 which it has decided to introduce, show that it is aware that this reduction in remuneration warrants compensation.

In this respect, it matters little that the Director General, in his express decision of 9 May 2012, refused to follow the recommendation of the Joint Committee for Disputes, which criticised Eurocontrol for having "underestimated the legal, financial and social consequences of externalising the provision of some security services to the private sector". Indeed, the only reasons given to justify this refusal were that international organisations have broad decision-making powers as regards outsourcing services, which is not disputed, and that the transitional amendment to Rule of Application No. 21 had been adopted following a careful examination of the consequences of the outsourcing on the situation of the staff, "in order to increase the social acceptability of the measure".

7. The evidence on file shows that the outsourcing of some of the complainant's duties resulted in a sharp drop in his level of remuneration. He had a legitimate expectation that his remuneration would remain stable. According to the complainant, this entitles him to claim an acquired right.

8. However, according to the Tribunal's case law, an acquired right is breached only "when […] an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on." (See Judgment 2682, under 6.)

According to the consistent case law of the Tribunal, an international organisation "necessarily has power to restructure some or all of its departments or units, including by the abolition of posts […] and the redeployment of staff" (see Judgment 2510, under 10). The concept of redeployment must be understood as including not only the assignment of staff to different posts, but also requiring them to accept a new or different method of organising continuous service. It follows that a particular model of organising a service, such as the one previously in force in this case, cannot constitute an acquired right.

9. Nevertheless, given that the new arrangements had a direct financial impact on the complainant, Eurocontrol had to ensure, in accordance with the duty of care owed to its staff, that the implementation of the arrangements did not place the complainant in financial difficulty. The Tribunal considers that by providing for the payment of a degressive allowance for only 12 months, Eurocontrol did not fully comply with this duty.

10. In the light of the foregoing, the complaint must be allowed and the decision of 20 June 2011 confirming the memorandum of 2 March 2011, as well as the decision taken on 9 May 2012 in the course of the proceedings, must be set aside.

11. However, the complainant's claim for payment of full compensation "until the date when, as a result of salary scale increases and promotions, he reaches the level of remuneration he was receiving on 28 February 2011" cannot be upheld.

An indemnity *ex aequo et bono* will enable the complainant to adjust to his changed financial circumstances. The payment for two years, from 28 February 2011, of an indemnity corresponding to the total of the sums received for shift work, stand-by duty and overtime, less the sums already received in respect of the degressive allowance, is sufficient for this purpose. This indemnity shall be calculated as the average of remuneration received during the years 2008, 2009 and 2010. It shall bear interest at the rate of 5 per cent per annum from 1 March 2012, the date of entry into force of the proposal providing for the payment of the degressive allowance.

The case will therefore be remitted to Eurocontrol for calculation of the amount of indemnity as defined above.

12. Since Eurocontrol has accepted at every stage that steps must be taken to mitigate the impact of the new working arrangements, there are no grounds for an award of moral damages.

13. Six of the complainant's colleagues have filed applications to intervene, which they were entitled to do provided that they were in the same situation in fact and in law as the complainant (see Judgment 2985, under 28). This is the case for five of them, whose right to intervene is not disputed by Eurocontrol and who state that they associate themselves with the complaint without seeking to put forward pleas differing from those in the complaint (see Judgments 365, under 1, 366, under 1, and 1792, under 2). These five interveners must be granted the rights recognised above in the present judgment.

The sixth application to intervene, filed by Mr S., must however be dismissed. The comments submitted by Eurocontrol show that the author of this application ceased some ten years ago to provide the services which have now been outsourced, and consequently his remuneration was not reduced when they were eliminated.

14. The complainant, who succeeds in part, is entitled to an award of costs in an amount fixed by the Tribunal at 4,000 euros.

DECISION

For the above reasons,

1. The decisions taken by the Director General of Eurocontrol on 20 June 2011 and 9 May 2012 are set aside.

2. Eurocontrol shall pay the complainant an indemnity with interest, as stated in consideration 11 above.

3. The five interveners whose applications are allowed shall enjoy the rights established by this judgment in favour of the complainant, as stated in consideration 13 above.

4. Eurocontrol shall pay the complainant 4,000 euros in costs.

5. All other claims are dismissed, as is the sixth application to intervene.

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