

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**D.-T.**

**v.**

**Eurocontrol**

**122nd Session**

**Judgment No. 3661**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. D.-T. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 October 2013, Eurocontrol's reply of 17 January 2014, corrected on 27 January, the complainant's rejoinder of 30 April and Eurocontrol's surrejoinder of 8 August 2014;

Considering Article II, paragraph 5, 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 may be summed up as follows:

The complainant challenges the amount of the transitional allowance paid to her following her admission to the early termination of service (ETS) scheme.

At the material time, the complainant, as a member of the operational staff of the Centre Flow Management Unit (CFMU), received a functional allowance (hereinafter "the ATFCM allowance") under Article 69b(2) of the Staff Regulations governing officials of the Eurocontrol Agency.

By Office Notice No. 22/10 of 22 June 2010, the Director General informed Eurocontrol staff of the introduction of the ETS scheme and the entry into force on the same date of Annex XVI to the Staff Rules, containing temporary provisions relating to the ETS. Under Article 4 of

that annex, an official who was admitted to the ETS scheme would stop work, would cease to enjoy rights to remuneration and would instead be paid a transitional allowance which, in accordance with Article 1(1) of the appendix to the annex, was equal to 70 per cent of the amount of the official's basic salary increased, where applicable, by the allowance referred to in Article 69b of the Staff Regulations.

In July, the members of the operational staff of the CFMU were informed that, during the discussions that preceded the approval of the temporary provisions relating to the ETS scheme, one Member State had objected to the inclusion of the ATFCM allowance in the calculation of the transitional allowance.

On 9 August 2010 the complainant asked to be admitted to the ETS scheme. The Principal Director of Resources reminded her by an internal memorandum of 13 October 2010 that, on the previous day, she had agreed in writing that if she were admitted to the ETS scheme, her ATFCM allowance would be excluded from the calculation of her transitional allowance. He asked the complainant to confirm her acceptance and to renounce any right of appeal. On 14 October 2010 the complainant signed the above-mentioned internal memorandum and added the handwritten comment "read and fully agreed". On the next day the Director General established the list of staff members who were to be admitted to the ETS scheme, including the complainant, who stopped working on 1 July 2012.

On 17 July 2012 the complainant filed an internal complaint challenging her payslip for July 2012 on the grounds that the ATFCM allowance had not been included in the calculation of her transitional allowance. The Joint Committee for Disputes issued its opinion on 16 May 2013. Two of its members recommended that the internal complaint should be upheld, as they considered that the provisions of Annex XVI should be respected whenever a staff member was admitted to the ETS scheme. The other two members recommended that the internal complaint should be dismissed as, in their view, the complainant had no reason to believe that the ATFCM allowance would be included in the calculation of the transitional allowance, having been informed both before and after the publication of Office Notice No. 22/10 that a

Member State had objected to this. On 16 July 2013 the Principal Director of Resources, acting on behalf of the Director General, notified the complainant that he had decided to follow the recommendation of the latter two members of the Committee and to dismiss her internal complaint. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 16 July 2013 and her payslips for July 2012 and the following months. She also asks that Eurocontrol be ordered, as from 1 July 2012, to include the ATFCM in the calculation of her transitional allowance and to pay her the sum thus due together with interest at 8 per cent per annum. She also claims 5,000 euros in costs.

Eurocontrol submits that the complaint should be dismissed as irreceivable since, by signing the internal memorandum of 13 October 2010, the complainant renounced any right of appeal against the decision not to include the ATFCM allowance in the calculation of her transitional allowance. Subsidiarily, it submits that the complaint is groundless.

### CONSIDERATIONS

1. The complainant, by signing the internal memorandum of 13 October 2010 on 14 October 2010, undertook not to bring any appeal proceedings challenging the fact that the ATFCM allowance which she was receiving under Article 69b(2) of the Staff Regulations would not be included in the determination of her transitional allowance in the event that she was admitted to the ETS scheme.

2. Eurocontrol submits that the complaint is irreceivable since, by signing the above-mentioned memorandum, the complainant waived her right of appeal. The complainant considers that her complaint is receivable. In particular, she contends that had she not forgone the inclusion of the ATFCM allowance in the calculation of her transitional allowance, she would never have been admitted to the ETS scheme. Thus she “had no other choice but to sign [this] memo[randum]” and she was therefore “forced” to do so.

3. In view of the serious disadvantages that the complainant would have suffered in this case had she renounced the possibility of admission to the ETS scheme, she cannot be deemed to have freely consented to sign the aforementioned memorandum of 13 October 2010. She is therefore right in saying that it was under duress that she gave an undertaking to Eurocontrol to accept the exclusion of the ATFCM allowance from the calculation of her transitional allowance and not to impugn this measure before the Tribunal.

The Tribunal will therefore ignore this undertaking, which must be considered null and void, without there being any need to examine whether the request that the complainant sign it was lawful, having regard to the Organisation's duty to abide by the regulatory texts which it has itself laid down, in accordance with the principle *tu patere legem quam ipse fecisti*.

4. The appendix to Annex XVI of the Staff Regulations relating to the transitional allowance payable in the event of early termination of service states: "[t]he transitional allowance shall be equal to 70% of the amount of the basic salary [received by the official in question]. [...] The basic salary shall be increased, where applicable, by the allowance referred to in Article 69b of the Staff Regulations payable to the official concerned at the time of early termination of service."

5. It is plain from these provisions that officials who were admitted to the ETS scheme were entitled to the inclusion of the ATFCM allowance in the calculation of their transitional allowance.

The fact that one Member State had notified the Organisation that it objected to these provisions does not prevent their application. Indeed, since this objection had not led to their amendment, the Organisation could not draw any legal consequences from it.

6. The complainant's contention that the Organisation was wrong in refusing to include her ATFCM allowance in the calculation of the transitional allowance paid to her as from 1 July 2012 is therefore well founded.

7. The impugned decision of 16 July 2013 dismissing her internal complaint will therefore be set aside.

8. The Organisation will be required to pay the complainant the sums corresponding to the amounts which she ought normally to have received as her transitional allowance as from 1 July 2012 if her ATFCM allowance had been included in the calculation thereof, less the sums she has already received in that respect. The sums thus paid to the complainant shall bear interest at the rate of 5 per cent per annum from due dates until the date of payment.

9. The Organisation will have to draw up and send to the complainant new payslips including the ATFCM allowance.

10. As the complainant succeeds, she is entitled to costs, which the Tribunal sets at 3,000 euros.

#### DECISION

For the above reasons,

1. The decision of 16 July 2013 is set aside.
2. Eurocontrol shall pay the complainant, as an addition to her transitional allowance, the sums and interest calculated as indicated in consideration 8, above.
3. The Organisation shall draw up and send to the complainant new payslips including the ATFCM allowance.
4. The Organisation shall pay the complainant costs in the amount of 3,000 euros.

In witness of this judgment, adopted on 29 April 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

*(Signed)*

CLAUDE ROUILLER      PATRICK FRYDMAN      FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ