

110th Session

Judgment No. 2968

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 2 April 2009 and corrected on 12 May, Eurocontrol's reply of 14 August, the complainant's rejoinder of 26 October 2009 and the Agency's surrejoinder of 8 January 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Czech national born in 1953, joined Eurocontrol in 1993 and is currently serving in Prague, Czech Republic, as an operations expert at grade A*11. He is entitled to a dependent child allowance and an education allowance for each of his two daughters, as well as a household allowance. In accordance with Articles 1, 2 and 3 of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency, these family allowances are paid directly to his former wife, who obtained

custody of the children when the couple divorced in 2002. The complainant's monthly payslips therefore show, on the one hand, the amounts credited to him in respect of each allowance and, on the other hand, a deduction corresponding to all family allowances.

On 26 October 2006 the Human Resources Directorate notified the complainant that, as from 1 September 2006, in accordance with Office Notice No. 5/96, the rate applicable to his daughters' education allowances was rate "U", which corresponds to 100 per cent of the normal ceiling for the allowance. Until then, the applicable rate had been 50 per cent of the normal ceiling. The higher rate was implemented retroactively in December 2006 and was reflected in the complainant's payslip for that month.

By an e-mail of 9 May 2008 the Remuneration Section informed the complainant that it had come to their attention that since September 2006 he had been receiving education allowances which ought to have been paid to his former wife. For the period from 1 July 2007 to 31 May 2008 he had thus received an overpayment amounting to 78,722.99 Czech crowns, and the Agency intended to recover this sum by deducting it from his salary in four instalments as from July 2008. The amount to be recovered for the period from 1 September 2006 to 30 June 2007 had yet to be determined. In order to avoid such measures in future, the complainant was advised to inform the Remuneration Section whenever the amount paid to him in family allowances changed, so that the payments made to his former wife could be adjusted accordingly. An exchange of e-mails ensued, in which the complainant sought explanations as to how this situation had come about. He was informed that, when his daughters' education allowances had increased on 1 September 2006, this change had been processed automatically; the amount paid to his former wife ought to have been adjusted at the same time, but this adjustment, which had to be processed manually, had not been made.

In an e-mail of 16 July 2008 the complainant asked the Head of the Remuneration Section to explain the legal basis for the Agency's decision to recover the above-mentioned amounts. He pointed out that

the error in the payments to his former wife was solely attributable to the Agency and that he had no means of knowing that it had occurred. He therefore considered that the Agency ought to bear the cost of repairing the damage it had caused to her and he invited the Head of the Remuneration Section to stop the recovery of the allowances and to order that he be reimbursed in respect of the amounts already recovered. Having consulted the Employment Regulations Section, the Head of the Remuneration Section replied on 28 July that the decision to recover the allowances from him was based on Article 87 of the Staff Regulations, which relevantly provides that “[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it”. She acknowledged that the error was attributable to the Agency but argued that the complainant ought to have been aware of it, since it was clear from his payslip for December 2006 that the amount deducted from his salary in respect of family allowances had not changed whereas the rate of the education allowance had doubled.

On 11 September 2008 the complainant submitted an internal complaint to the Director General, challenging the decision to recover the allowances on the grounds that Article 87 was not applicable to his case. He also objected to the way in which the matter had been dealt with by the Administration, pointing out that he had not been consulted before the recovery had been initiated and that the e-mail sent to him on 9 May 2008 contained no explanation as to what had happened, no indication of the total amount to be recovered nor any justification for that course of action. Moreover, there was no word of apology and the Administration even blamed him for having failed to inform it of the error. This internal complaint was referred to the Joint Committee for Disputes. In the meantime, the complainant was informed on 12 September 2008 that the amount of the allowances to be recovered for the period from 1 September 2006 to 30 June 2007 was 65,996 Czech crowns, which would be deducted from his salary in two instalments as from November 2008. Furthermore, the Head

of the Administration Services Unit sent him a memorandum on 17 September 2008 in which she apologised for the “regrettable situation” in which he found himself and confirmed the explanations that he had been given by the Remuneration Section.

In its opinion dated 6 January 2009 the Joint Committee for Disputes unanimously recommended that the internal complaint be rejected as legally unfounded. It noted that in December 2006, when his daughters’ education allowances had been increased with retroactive effect from September, the complainant’s salary had risen by nearly 15 per cent in relation to the previous month’s salary, and there was no reason for that increase since the modification of the education allowances ought not to have affected the salary actually paid to him. Under these circumstances, the Committee considered that the overpayment was patently such that the complainant was in a position to be aware of it and that the Agency was therefore entitled under Article 87 to recover the undue payments.

By a memorandum of 27 January 2009 the Director of Human Resources and Administration, acting “for the Director General and by delegation”, informed the complainant that his internal complaint was rejected in accordance with the recommendation of the Committee, whose analysis and conclusions he fully supported. That is the impugned decision.

B. The complainant contends that the Agency’s reliance on Article 87 of the Staff Regulations is legally unfounded. He points out that he repeatedly reminded the Remuneration Section that all family allowances were to be paid to his former wife and that, even though the Remuneration Section has admitted that it was responsible for the error in the payments, the damage caused to his former wife has been repaired at his expense. In his view, the first scenario envisaged by Article 87, namely that the recipient was aware that there was no due reason for the payment, is not applicable to his case, since the payments made to him were in fact due; the overpayment resulted from incorrect deductions. As for the second scenario, i.e. that the

overpayment was patently such that the recipient could not have been unaware of it, he submits that it was practically impossible for him to detect the error, particularly because his payslips do not show all of the mathematical operations behind the various payments and deductions that are made. Indeed, in his payslips for July and August 2008, different amounts were deducted for family allowances, yet the allowances credited to him remained exactly the same. Furthermore, he cannot verify the amount actually paid by the Agency to his former wife each month, since his payslips merely show the deduction made from his salary, and not the amount transferred to her. He rejects the argument of the Joint Committee for Disputes based on the fact that his salary increased by almost 15 per cent in December 2006; that conspicuous increase, he says, was due to the retroactive implementation of the higher rate of education allowance.

The complainant considers that, given the circumstances of this case, the Agency should have informed him well in advance that it intended to recover the overpayment, allowing him to negotiate the repayment schedule, and that it should not have recovered the full amount of the overpayment. He submits that by failing to make the correct payments to his former wife and by subjecting him to the recovery of a large sum, Eurocontrol has harmed his reputation, particularly in the eyes of his daughters. Referring to the Tribunal's case law and to Article 25 of the Staff Regulations, which relevantly provides that any decision adversely affecting an official must state the grounds on which it is based, he also contends that the Agency breached the principles of good faith and equality of treatment. For these reasons, he considers that he is entitled to an award of moral damages.

The complainant asks the Tribunal to quash the impugned decision and to determine a "fair share" of the amount recovered which should be borne by Eurocontrol. He requests that the Agency be ordered to pay him that "fair share", together with interest calculated from the date of each of the deductions that it made in order to recover the overpayment. He also claims "a significant award" of moral damages, and costs.

C. In its reply Eurocontrol objects to the receivability of the complainant's claim for moral damages, since it was not raised in any form in the context of his internal complaint.

On the merits, it argues that the complainant cannot have failed to notice the sudden increase in his net salary in December 2006, and that even a quick glance at his payslip for that month would have enabled him to see that the education allowances for his two daughters had doubled and that he had received substantial back payments in that respect, whereas the amount deducted for family allowances remained unchanged. Emphasising that he was, at the time, an expert at grade A*5, it asserts that he was perfectly capable of working out for himself that the reason for the substantial increase in his net salary was that not all of the family allowances had been paid to his former wife. It adds that, even assuming that the complainant was so "absent-minded" that he did not notice the increase in his net remuneration in December 2006, the fact remains that the same anomaly occurred in the following months, and although the subsequent increases were smaller than in December 2006, they were still significant enough to be noticed by any official. Eurocontrol therefore considers that the conditions of Article 87, which also applies to cases where an overpayment results from the Administration's error, were clearly met and that there was no reason to enter into negotiations with the complainant regarding a share of the overpayment to be borne by the Agency.

Eurocontrol considers it "paradoxical" that the complainant should accuse it of showing bad faith in this case. It observes that he was given all the explanations that he requested and that the schedule of repayments was extremely reasonable in view of his income. Furthermore, although he could not have failed to be aware of the overpayment, he does not appear to have taken the initiative of transferring the unduly paid allowances directly to his former wife, as he might have done. In recovering the overpayment, the Agency had no intention of harming his reputation; it was merely correcting an error of its own making. It therefore submits that there is no reason to

allow his claim for moral damages, if indeed that claim is deemed to be receivable.

D. In his rejoinder the complainant argues that his complaint is entirely receivable. With regard to his claim for moral damages, he points out that his internal complaint was partly directed at the way in which he had been treated by the Administration, and the fact that the Joint Committee for Disputes failed to address this aspect of the case was one of the main reasons why he filed a complaint with the Tribunal. Moreover, he assumed that such a claim could only be raised in proceedings before the Tribunal.

He reiterates his position on the merits, emphasising that it was clearly beyond his capabilities to detect the error. As for the Agency's contention that the recovery schedule was reasonable, he submits that this would have been the case had it not been initiated without warning, and had it been implemented without error: indeed, in October 2008 the whole of the amount to be recovered for the period from 1 September 2006 to 30 June 2007 was deducted from his salary, whereas it was meant to be recovered in two instalments, and he had to ask the Administration to rectify this error.

E. In its surrejoinder Eurocontrol reiterates that the claim for moral damages is irreceivable and maintains its position on the merits. Referring to Judgments 2230 and 2565, it asserts that, even in the absence of a provision such as Article 87, it would have been entitled to recover the overpaid amounts, given that the complainant does not dispute the fact that the payments were undue.

CONSIDERATIONS

1. The complainant impugns the decision of 27 January 2009 by which the Director of Human Resources and Administration, acting for the Director General, endorsed the unanimous recommendation of the Joint Committee for Disputes and rejected his internal complaint.

That complaint was against the Agency's recovery of overpayments in the total amount of 144,718.99 Czech crowns, which were added to the complainant's net salary from December 2006 to May 2008 as the result of an administrative error.

2. Eurocontrol justifies the recovery of overpayments on the basis of Article 87 of the Staff Regulations, which states that “[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it”. It submits that the complainant could not have been unaware of the error, first because he was notified on 26 October 2006 that the education allowances for his two daughters were to increase by 50 per cent with retroactive effect from September 2006, and second because his payslip for December 2006 showed that the increase was paid to him for that month and retroactively for the three preceding months but not deducted, as it should have been, since all family allowances are to be paid directly to his former wife who has custody of their daughters.

3. The complainant contends that Article 87 does not apply to his case because he was not aware of the Administration's error. He submits that the Agency decided to recover the overpayment unilaterally without informing him in advance or allowing him any possibility to negotiate the repayment schedule. By doing so, he argues, the Agency breached its duty of care and violated the principles of good faith and equality of treatment.

4. The Tribunal agrees with the opinion of the Joint Committee for Disputes, according to which the contested recovery of undue payments was lawful under Article 87 of the Staff Regulations, because the overpayment was “patently such that the complainant was in a position to be aware of it”. Comparing the complainant's payslips for November and December 2006, it is clear that the education allowance for each of his daughters was doubled for the

month of December (as it was for the subsequent months) and that additional education allowances for the period from September to November 2006 were paid to him in December, and it is also clear that no corresponding deductions were made for these amounts. The payment of these increased monthly education allowances without a corresponding deduction continued until May 2008, when the error was noticed by the Remuneration Section. Considering that this particular error resulted in an increase to the complainant's net salary for December 2006 of approximately 12.4 per cent, the overpayment was patently such that the complainant could not have been unaware of it and that therefore, according to Article 87 of the Staff Regulations, Eurocontrol was required to recover it. As the Agency was bound to recover the unduly paid amounts, there can be no claim of inequality of treatment. Furthermore, the Tribunal is of the opinion that the e-mail exchanges between the Administration and the complainant regarding the correction of the error, as well as the reasonable repayment schedule, are sufficient to establish that the Agency acted in good faith and fulfilled its duty of care towards him. The complaint is therefore unfounded and must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen

Catherine Comtet