

112th Session

Judgment No. 3078

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J.-J. A., Mr F. C. (his second), Mr J.-N. C., Ms J.D.C., Mr J.-L. F. (his second), Mr P.H.C. H., Mr R.J. I. (his third), Mr F.J.M. M. (his second), Mr R. S., Mr S. S. U. and Mr F. V. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 January 2010 and corrected on 27 March 2010;

Considering Eurocontrol's reply of 9 July 2010, the complainants' rejoinder of 17 September and the Agency's surrejoinder of 23 December 2010;

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

Having examined the written submissions;

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

A. The complainants are all officials of Eurocontrol serving at the Experimental Centre at Brétigny-sur-Orge in France. Facts relevant

to this case are given in Judgment 2633, delivered on 11 July 2007. Messrs C., F. and I. were parties to the proceedings leading to that judgment.

Suffice it to recall that in November 2004 the Permanent Commission for the Safety of Air Navigation approved, after consultation with the staff unions, the setting-up of a pension fund for current and future staff, into which employee and employer contributions would be paid. These contributions, and the interest earned on them, would finance pension rights acquired after 1 January 2005. The Permanent Commission approved in April a reduction in pension benefits, an increase in contributions and an increase in the age of retirement. These measures took effect on 1 July. The complainants in the case leading to Judgment 2633 challenged “the totality of the measures concerning pensions applied from 1 July 2005”, contending inter alia that they had been decided on the basis of false information constituted by the actuarial study of 2002. The Tribunal considered that there was no proof that the challenged measures were based on that study and dismissed the complaints.

By an e-mail of 22 January 2009 a newsletter entitled “Pension Fund Update” dated 31 December 2008 was distributed to all Eurocontrol employees. The newsletter described the link between the Pension Scheme, the Pension Fund and the contribution rate. This link was to be found in the mathematical formula used to calculate the contribution rate, which was obtained by subtracting the value of the Pension Fund’s assets from the present value of future pensions, then dividing the result by the present value of projected salaries. On 20 and 21 April 2009 variously, referring specifically to the “new information” presented in the Update, the complainants lodged internal complaints challenging their “net salary of the last 3 months, and in particular [...] the pension contribution rate” on the grounds that it was not based on any valid actuarial study. They contended in particular that the actuarial studies of 1999 and 2002, by the Agency’s own admission, had not been used to calculate the contribution rate; that there was no evidence that any actuarial studies had been

conducted between 2002 and 2007; and that those carried out in 2007 and 2008 were based on the Pension Fund and were therefore invalid for the purpose of establishing the contribution rate of the Pension Scheme. They requested that “valid and transparent” actuarial studies be organised and, for the period from 1999 until such time as the first such study was conducted, a return to the pension scheme conditions of 1999.

These internal complaints were subsequently referred to the Joint Committee for Disputes, which recommended, in an opinion of 27 July 2009, that they be rejected as both manifestly time-barred and inadmissible by virtue of the principle of *res judicata*, the Tribunal having ruled on the matter in Judgment 2633. It considered that the complaints were not grounded, as an audit of the contested actuarial studies had shown that they were reliable and provided a fair estimation of the pension contribution rate. The Committee noted in particular that, although their titles referring to the Pension Fund could have been “misleading”, the contents of the 2007 and 2008 studies amply evidenced that they were based on the Pension Scheme, and not on an “extra-statutory Pension Fund”. By memoranda of 1 October 2009 from the Principal Director of the Directorate of Resources the complainants were informed of the decision to reject their internal complaints as inadmissible and legally unfounded, in accordance with the unanimous opinion of the Joint Committee for Disputes. These are the impugned decisions.

In February 2011 the Tribunal delivered Judgment 2993, dismissing a further set of complaints directed against the same measures. One of the present complainants, Mr I., was also a party to the proceedings leading to that judgment.

B. The complainants contend that, due to the Agency’s “deliberate policy of secrecy”, they only recently became aware of the fact that the Pension Fund’s assets are included in the calculations of the pension contribution rate. They therefore submit that their complaints are receivable, being based on a new fact.

The complainants' main plea is that the Staff Regulations governing officials of the Eurocontrol Agency do not provide for the inclusion of the Pension Fund's assets in the formula for calculating the contribution rate. Indeed, Article 5(1) of Annex XII to the Staff Regulations provides the following formula: "Contribution rate = actuarial value of obligations subsequent to 1 January 2005/actuarial value of projected salaries". The actuarial studies carried out since 2005 are therefore invalid, because they include the Pension Fund's assets in the formula, as indicated in the Pension Fund Update of 31 December 2008, in breach of the formula provided for under Article 5(1) of Annex XII.

The complainants draw a distinction between the Pension Scheme and the Pension Fund, arguing that, as the latter is outside the scope of the Staff Regulations, the actuarial studies required by the Regulations cannot validly be based on the Pension Fund. They advance that, since the Pension Fund is a "private preserve" of the Member States, unregulated by the Staff Regulations, staff members have no legal recourse against Member States' decisions on how to use the Fund's assets. The Member States may therefore dispose of the Fund as they wish and, with the assets of the Pension Fund having a major effect on the Pension Scheme contribution rate, they may arbitrarily raise the contribution rate, thereby cutting salaries without any need for justification and without there being any legal remedy available to staff members in respect of such decisions.

The complainants also accuse the Organisation of a general lack of transparency with regard to these actuarial studies. In particular, they accuse the Agency of providing a "heavily censored version" of the actuarial studies to the staff unions. They ask the Tribunal to set aside all the studies conducted since 1 January 2005 and to order a return to the pension scheme conditions of 1999 pending a valid study.

C. In its reply Eurocontrol argues that the complaints are manifestly irreceivable as time-barred, since they challenge an increase in the pension contribution rate that occurred in 2005. It furthermore considers that the principle of *res judicata* applies, no new fact having emerged since Judgment 2633. The complainants base their

complaints on allegedly new information found in the Pension Fund Update of 31 December 2008. However, according to the Agency, this Update did not contain any information which was not already available to them. The defendant denies the existence of any “deliberate policy of secrecy” concerning the reform of the Pension Scheme and in particular the actuarial studies and asserts that transparency was ensured in all stages of the reform process. In this regard it emphasises that staff members are represented on the Pension Fund Supervisory Board (PFSB), which issues annual reports and, every six months, a newsletter on its activities and on the financial position and performance of the Pension Fund. In addition, representatives of the Staff Union attended the Pension Scheme Technical Working Group’s (PSTWG) first meeting held on 12 September 2008, during which they were provided with relevant documentation, including the 2007 actuarial study. The PSTWG, created in 2007, was established in order to share information with the social partners, and the Organisation further points out that the actuarial studies are available on the Agency’s intranet.

Eurocontrol asserts that the allegation that the unions received a “heavily censored version” of the actuarial studies is false. It explains that up to 31 December 2007 there was only one annual actuarial study report and that the actuary was then asked to split his report in two.

The defendant further argues that the complainants have not provided any explanation as to why they consider the actuarial studies performed since 2005 to be flawed. It stresses that an external audit is conducted every year to verify the validity of the formula used to calculate the pension contribution rate, as well as the correctness and validity of the economic and demographic assumptions on which the actuarial studies are based. Moreover, although the complainants ask the Tribunal to declare the formula used in the actuarial studies for the calculation of the contribution rate to the pension scheme illegal, they themselves nevertheless recognise that the formula used “is a classic formula for a contribution rate, as will be confirmed by any actuarial expert”. The Agency considers that this kind of logic proves that their complaints are vexatious.

It submits that the distinction drawn by the complainants between the Pension Fund and the Pension Scheme is without relevance, since the assets of the Fund are the assets of the Scheme, the latter having no other assets. The title of the actuarial studies was changed to “Eurocontrol Pension Scheme” in 2008 because this was the correct term which best described the content of the document and which should have been used from the beginning, the Pension Fund being merely a financing instrument for the Scheme. The fact that the assets of the Pension Fund are being taken into account by the actuaries in the calculation of the pension contribution rate is in conformity with the Staff Regulations and Annex XII thereto, as well as the Regulations of the Eurocontrol Pension Fund. The actuarial studies made since 2005 cannot therefore be described as “illegal”.

The Agency asks the Tribunal to order that the complainants pay the costs of the proceedings, on the grounds that the complaints are manifestly irreceivable and that the complainants are trying to reopen and reargue a case closed by Judgment 2633.

D. In their rejoinder the complainants press their pleas. They deny the Agency’s allegation that they are trying to reopen issues settled by Judgment 2633 and point out that the present complaints concern the flawed nature of the actuarial studies conducted since 2005, which was not mentioned in the proceedings leading to that judgment. They note, however, that if their claims in the present case are allowed by the Tribunal, this could lead to a review of Judgment 2633. They therefore ask the Tribunal to consider the effects of the new facts discovered about the Pension Scheme on Judgment 2633.

E. In its surrejoinder Eurocontrol maintains its position in full. It draws attention to the fact that none of the studies performed since 2005 has led to a modification of the contribution rate adopted as of 1 July 2005.

CONSIDERATIONS

1. The 11 complainants have filed identical complaints in which they challenge the lawfulness of the actuarial studies carried out since 2005. Since the complaints raise the same issues of fact and law and seek the same redress, they shall be joined to form the subject of a single judgment.

2. The parties' submissions are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainants' application for an oral hearing is rejected.

3. The background to the case is to be found in Judgments 2633 and 2993. The present complaints are filed on behalf of 11 complainants, one of whom, Mr I., was also party to the complaints decided on in both the aforementioned judgments. Judgment 2633 dismissed *in toto* the complainants' (and interveners') claims against the measures introduced with effect from 1 July 2005 in the context of a reform of the Organisation's Pension Scheme, except for the creation of a Pension Fund. Judgment 2993 dismissed *in toto* the complainants' claims against the decisions concerning their contribution to the Pension Scheme since 2002. In the present case, the complainants impugn the Director General's decision of 1 October 2009, which endorsed the unanimous opinion of the Joint Committee for Disputes and rejected their internal appeals as inadmissible and legally unfounded. The complainants challenged their pension contribution rates as contained in their payslips for February, March and April 2009, on the basis that the actuarial studies performed since 2005 were not valid. The Committee considered that the internal appeals were time-barred and covered by the principle of *res judicata*, as the Tribunal had previously ruled on the matter in Judgment 2633.

4. The present case is expressly based on the Pension Fund Update dated 31 December 2008. According to the complainants, this Update made official and explained the presence of the assets of the

Pension Fund in the formula for the calculation of the Pension Scheme contribution rate but did not justify it in statutory terms. The complainants assert that they do not here challenge Judgment 2633, but submit that the issue of the lawfulness of the current Pension Scheme “may be re-opened if significant new facts appear, which were not used by the complainants in that judgment because they could not be known by them, and especially so if the facts in question could not be known due to the deliberate policy of secrecy applied by the defending Organisation”. They argue that their complaints are admissible because they are based on a newly learned fact, which is that the published actuarial studies of 2007 and 2008 were – according to the Pension Fund Update of 31 December 2008 – based on the extra-statutory Pension Fund and not on the statutory Pension Scheme, and are therefore invalid for the purpose of establishing the pension contribution rate. The complainants ask for the cancellation of all actuarial studies conducted since 1 January 2005, and for the return of the pension scheme conditions of 1999, in particular the contribution rate applicable at that time, for the period from 1999 to the date of the first valid actuarial study.

5. In its reply the Organisation contends that the complaints are irreceivable as time-barred because they contest in 2009 an increase in the contribution rate which occurred in 2005. It also contends that the complaints are prevented by *res judicata* as the matter has already been decided by the Tribunal in Judgment 2633, delivered on 11 July 2007. It states that the challenged measures are the reform of the Pension Scheme in 2005 and the consequent increase of the pension contribution rate, and that there are no new elements which could lead to the reopening of the case. Subsidiarily, on the merits, the Organisation argues that the differentiation made by the complainants between Pension Fund and pension scheme is “without relevance”. It adds that the assets of the Fund are the assets of the scheme and that the scheme has no other assets.

6. Mr C. and Mr F. were parties to the case decided in Judgment 2633 but not to the case decided in Judgment 2993. With the exception

of Mr I., the remaining complainants were parties to neither of these cases. As for Mr I., who took part in both of the aforementioned cases, his current complaint must be regarded as an application for review of Judgments 2633 and 2993. The Tribunal may review an earlier judgment on the basis of discovery of a new fact, provided it was discovered too late to be decided in the original proceedings and that it could not have been discovered with due diligence at the time of the earlier proceedings. This principle may apply to his case even if his present complaint is challenging new decisions, namely his recent payslips, as the new decisions stem directly from the previous decision to complement the Pension Scheme by establishing a Pension Fund for the payment of pensions to Pension Scheme members retiring after 1 January 2005. However, as the complaints will be dismissed for the reasons set out below, the question whether *res judicata* is applicable to them may remain undecided.

7. Regarding the complainants not party to the previous cases, it must be considered that they are attacking a decision from 2005 which changed their pension contribution rate. While it is true that the change is reflected in their February, March and April 2009 payslips, it is also true that the claim is based entirely on alleged flaws to the previous authoritative decision, and that this change has been reflected in each of their payslips since the original decision was made to change the Pension Scheme in 2005. Therefore, the basis for the current complaints is the 2005 decision. As such, unless the complaints are based on a new fact, as described above, they are time-barred.

8. (a) The Tribunal notes that the claim that the Staff Regulations do not provide for the inclusion of the Pension Fund assets in the formula for the calculation of the Pension Scheme is neither a new fact, nor founded. The Pension Fund was established by Decision No. 102 of the Permanent Commission dated 5 November 2004. With effect from 1 January 2005 the Statute of the Agency was modified by the addition of Article 17bis which provides:

“A ‘EUROCONTROL Pension Fund’ is established which constitutes a separate category of assets held by the Organisation. The Fund has no legal personality. It is managed as provided for under the Appendix of the present Statute.”

(b) Decision No. 102 also added an appendix entitled “Regulations of the EUROCONTROL Pension Fund” to the Statute of the Agency. The Regulations relevantly provide, under Section I, Article 1(3), of its General Provisions:

“The Fund’s assets shall be used exclusively to pay pension scheme benefits to scheme members in accordance with the Staff Regulations and General Conditions of Employment governing servants at the Maastricht Centre (hereafter ‘the staff regulations’). Any use to cover other obligations of the Organisation, including the granting of loans by the Fund to the Organisation, shall be prohibited.”

(c) Moreover, Section II, entitled “Structure of the Fund”, provides under its Article 4 that:

“The bodies responsible for the Fund shall be the Supervisory Board assisted by the Fund Executive Officer.”

Article 5(1) provided that:

“The Supervisory Board shall comprise 7 members appointed by the Permanent Commission:

- a) 3 Members representing the Member States and proposed by the Provisional Council,
- b) 3 Members representing staff,
- c) 1 Member representing the Director General without voting right.

The appointments shall be for a renewable period of 3 years. The Chairman shall be designated by the Permanent Commission from the members of the Supervisory Board.”

9. It appears that with effect from 1 September 2008 the above-mentioned provisions were maintained with a few small changes, in particular under Article 5 the addition of two members to the Supervisory Board, one representing the Member States and the other representing the staff, and the term of appointment of Board members which was changed from three to four years. Article 7 was relevantly modified to provide, in addition, that:

“The Supervisory Board shall:

[...]

- e) report at least annually on its review of the Fund to the Provisional Council and to the members and beneficiaries of the Fund;
- f) report on a regular basis in a simplified way to the members and beneficiaries of the Fund;

[...]”

This information was available at the time of the changing of the Pension Scheme in 2005 and the complainants could have been aware of it if they had requested the information from the proper channels, i.e. by requesting copies of the annual report approved by the Supervisory Board, by contacting Supervisory Board Members representing staff, or, by reviewing the Statute of the Agency. Furthermore, in light of the above provisions, the Pension Fund cannot be considered extra-statutory. As such, not only is there no new fact to consider, but also the merits of the complaints fail.

10. As the complainants have not brought forth any new and unforeseeable fact of decisive importance which has occurred since Judgment 2633 was delivered, or of which the complainants could not have been aware before the contested decision was taken, the complaints must be dismissed as inadmissible because they are time-barred.

11. The Agency has requested an award of costs against the complainants. As the present complaints were filed before the publication of Judgment 2993, this is not an appropriate case for such an award.

DECISION

For the above reasons,

The complaints are dismissed, as is the Agency’s application for costs.

In witness of this judgment, adopted on 2 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet