

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

119th Session

Judgment No. 3406

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms H. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 19 October 2012, Eurocontrol's reply of 25 January 2013, the complainant's rejoinder of 2 May 2013 and Eurocontrol's surrejoinder of 9 August 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. The complainant entered the service of Eurocontrol on 1 September 2005. She is married and has three children. Her husband, who works for the European Commission, receives from the latter the dependent child allowance for which provision is made in the Staff Regulations of Officials of the European Communities.

The complainant was reminded by an internal memorandum of 15 December 2011 that when a spouse of a Eurocontrol official works for another international organisation, "the organisation employing the official who holds the higher grade pays the allowances" for dependent children, but that the corresponding "tax deduction" applies to both officials. She was advised that, following an analysis of her file, her situation had to be amended with regard to that "tax deduction" and

that her new situation would be reflected in her payslip as from 1 January 2012.

On 5 January 2012 the complainant, believing that an “administrative error” had led to her dependent children not being taken into consideration when the internal tax to which she was subject had been calculated, asked to have that error corrected as from the date on which she had joined Eurocontrol. On 27 February 2012, the Head of the Regulations and Rules Unit replied that her request could not be granted. He explained that the decision to grant “tax relief in respect of their dependent child(ren)” to all officials who had one or more dependent children and who did not receive family allowances from Eurocontrol because their spouse who was working for another international organisation was receiving such allowances, was a “social security measure” and did not “reflect any legal obligation stemming from provisions of the Staff Regulations/GCE or Rules of Application in force at Eurocontrol”.

On 23 May the complainant lodged an internal complaint against the decision of 27 February 2012. On 19 October she filed a complaint with the Tribunal, impugning the implied decision to reject her internal complaint.

On 22 November the Joint Committee for Disputes issued its opinion. A majority of its members recommended that the internal complaint should be allowed, but one member recommended that it should be dismissed as irreceivable and unfounded. The complainant was informed by an internal memorandum dated 18 December 2012 that her internal complaint had been dismissed. She was, however, advised that “in order to put [her] on an equal footing” with other officials who had previously lodged an internal complaint similar to hers, the “correction” which she had requested would be made as of 1 December 2011 and not as of 1 January 2012.

B. The complainant submits that Eurocontrol disregarded her family situation, specifically her three dependent children, when it calculated the internal tax to which she is subject, thereby breaching Articles 62 and 62a of the Staff Regulations governing officials of the Eurocontrol

Agency and Articles 2(2) a) and 3 of Rule of Application No. 27 concerning the method for calculating remuneration and internal tax. In addition, she contends that as the family allowances received by her husband did not appear on her own payslips, they could not be deducted from the family allowances to which she was entitled, which, in her view, is contrary to Article 67(2) of the Staff Regulations. She endeavours to show that Eurocontrol failed to respect “the equivalence of the taxation of Agency officials and European officials” and thus breached Articles 1 and 2(2) c) and d) of Rule of Application No. 27. Moreover, she asserts that Eurocontrol breached the principle of equal treatment since, according to her, all Eurocontrol officials in receipt of family allowances were granted tax relief for dependent children before 15 December 2011.

The complainant requests the setting aside of the implied decision to reject her internal complaint of 23 May 2012 and of the express decision of 27 February 2012. She asks the Tribunal to order Eurocontrol to correct her payslips as from 1 September 2005 and to order it to pay her “the additional remuneration” – plus interest at 8 per cent per annum – which she would have received if she had been granted tax relief for dependent children as from that date. She claims costs in the amount of 5,000 euros.

C. In its reply Eurocontrol submits that the complaint is irreceivable. It points out that, following her internal complaint of 23 May 2012, the complainant was granted tax relief for dependent children as from 1 December 2011, and it contends the fact that she did not receive such tax relief before 1 December 2011 had “an effect which was reflected” in each of the payslips which she received up until that date. As the complainant did not challenge those payslips – which, according to Judgment 1408, are decisions subject to appeal – within the three-month time limit established by Article 92(2) of the Staff Regulations, the Organisation submits that the complaint is time-barred and hence irreceivable in respect of the period prior to 1 December 2011.

On the merits Eurocontrol states that, in accordance with Article 3(2) of Annex V to the Staff Regulations, dependent child allowances are not

taken into account when calculating internal tax, and it explains that the amounts taken into account in determining an official's remuneration are not shown on payslips. The complainant's plea that Article 67(2) of the Staff Regulations was breached is therefore incorrect. Furthermore Eurocontrol endeavours to show that the "principle of equality between Eurocontrol and the European Communities as regards net pay" defined in Rule of Application No. 27 was fully respected. Lastly, it denies that it treated the complainant "unequally or in contradiction with its own rules".

D. In her rejoinder the complainant submits that her complaint is receivable. She explains that it was only on receiving the internal memorandum of 15 December 2011 that she learnt that she had not previously been granted tax relief for dependent children. She says that it was on the basis of this "new fact" that she lodged her internal complaint of 23 May 2012 which was directed not against her payslips for the period prior to 1 January 2012, but against the rejection decision of 27 February 2012. She enlarges on her submissions regarding the merits.

E. In its surrejoinder Eurocontrol maintains its position. On the merits, it states that the complainant was granted tax relief for dependent children as a gesture of goodwill and that she may not ask the Tribunal "to evaluate" this "discretionary choice". It also explains that the complainant was not in the same situation in fact and in law as certain colleagues who were receiving tax relief for dependent children because, unlike the complainant, they received the dependent child allowance.

CONSIDERATIONS

1. The tax relief for dependent children to which a Eurocontrol official whose spouse is an official of another international organisation may be entitled is discussed in Judgment 3405, also delivered this day.

2. In the instant case the complainant, who entered the service of Eurocontrol on 1 September 2005, is married to an official of the European Union with whom she has three children. Her husband, whose grade is higher than hers, therefore received the dependent child allowance from his employer, while in accordance with the applicable Staff Regulations the complainant did not receive this allowance or tax relief for dependent children.

3. By an internal memorandum of 15 December 2011, the Head of the People Management Division informed the complainant, in substance, that a thorough analysis of her file had revealed that her situation had to be amended with regard to the “tax deduction” for her dependent children, that her file had been updated accordingly and that her new situation would be reflected in her payslip as from 1 January 2012.

4. The complainant’s payslip for January 2012 showed an increase of some 300 euros due to the fact that her three dependent children had been taken into consideration when calculating tax.

5. On 5 January 2012 she requested the retroactive application of tax relief for dependent children as from the date on which she had joined Eurocontrol.

As this request was denied by a decision of 27 February 2012, on 23 May 2012 she lodged an internal complaint.

6. The lack of any response to the internal complaint by 22 July prompted the complainant to file a complaint under Article VII, paragraph 3, of the Statute of the Tribunal on 19 October 2012 against what she considered to be an implied rejection of her internal complaint.

7. The complainant enters four pleas in support of her claims, namely:

- breach of Articles 62 and 62a of the Staff Regulations governing officials of the Eurocontrol Agency and of Articles 2(2) a) and 3 of Rule of Application No. 27;

- breach of Article 67 of the Staff Regulations;
- breach of Articles 1 and 2(2) c) and d) of Rule of Application No. 27, and
- breach of the principle of equal treatment.

8. In the meantime, on 3 October 2012, the complainant's internal complaint had been submitted to the Joint Committee for Disputes. On 22 November 2012 the Board issued an opinion recommending by a majority that "the claim should be allowed and the corrections should be made in respect of the past". One of the Committee members considered that the internal complaint was out of time and unfounded.

9. By a decision of 18 December 2012 the Director General dismissed the complainant's internal complaint as time-barred. However, he decided, as a gesture of goodwill, that the requested correction would be made for the complainant as from 1 December 2011 and not 1 January 2012, "in order to place [her] on an equal footing with other complainants who had lodged an internal complaint before [her]" and who, as a result, had been granted tax relief for dependent children as from 1 December 2011 as a gesture of goodwill.

In view of the fact that this express rejection has occurred in the course of the proceedings and has thus replaced the implicit decision originally impugned before the Tribunal, the complaint is to be regarded as being directed against this new decision.

10. Relying on Judgment 1408, Eurocontrol objects to the receivability of the complaint in respect of the period before 1 December 2011. It argues that since the tax relief was reflected in payslips, the complainant should have complied with the time limits for challenging them. As she failed to do so for the period prior to 1 December 2011, her complaint must be declared irreceivable.

11. This objection is well-founded, as under Article 92(2) of the Staff Regulations, a complaint must be lodged within a three-month period which starts to run as from the receipt of each payslip (see

Judgment 1408, under 8). In the instant case, the complainant did not submit her internal complaint until 23 May 2012. As the Director General rightly found in his decision of 18 December 2012 – though he nevertheless granted the complainant this benefit as from 1 December 2011 in order to “put her on an equal footing with other complainants” – she could claim the disputed tax relief only as from 1 February 2012.

12. As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466, 2722 and 2821, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties’ legal relations, which is the very justification for a time bar. In particular, the fact that a complainant may not have discovered the irregularity on which he or she purports to rely until after the expiry of the time limit is not in principle a reason to deem his or her complaint receivable (see, for example, Judgments 602, under 3, and 1466, under 5 and 6).

13. It is true that the Tribunal’s case law as set forth in Judgments 1466, 2722 and 2821 allows exceptions to this rule where the complainant has been prevented by *vis major* from learning of the impugned decision in good time (see Judgment 21), or where the organisation, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see Judgment 752). However, none of these conditions were met in this case.

14. As the payslips preceding that of February 2012 were not challenged within the time limit laid down in Article 92 of the Staff Regulations, the complaint must be dismissed as irreceivable because internal means of redress have not been exhausted, as required by Article VII, paragraph 1, of the Statute of the Tribunal, without there being any need to rule on any other issue.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 November 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 11 February 2015.

(Signed)

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ