

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P.

v.

Eurocontrol

124th Session

Judgment No. 3827

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. G. S. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 2 June 2014, Eurocontrol's reply of 26 September 2014, the complainant's rejoinder of 7 January 2015 and Eurocontrol's surrejoinder of 9 April 2015;

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 may be summed up as follows:

The complainant challenges the refusal to grant her the lump sum paid to servants whose application to resign is accepted.

Under Annex XIX to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre (in the Netherlands), a lump sum is paid to servants whose application to resign is accepted. The criteria for granting the lump sum, which is subject to the internal tax, are set out in Office Notice No. 34/13. In accordance with paragraph 4 of the sole article of the Annex, the amount to be paid could be eighteen times the last monthly basic salary if the servant's resignation took effect by 1 January 2014 at the latest.

At the material time, the complainant, who was assigned to the Maastricht Upper Area Control Centre, held a grade AST8 post in the Recruitment Unit of the Directorate of Resources. On 29 July 2013 she tendered her resignation to the Director General, with effect on 30 November, provided that she received the above-mentioned lump sum. On 24 August the Director General replied that, as none of the criteria for granting the lump sum were met, it could not be awarded. He therefore inferred that her resignation application was withdrawn.

On 16 September the complainant submitted an internal complaint against this decision, in which she challenged the reasons put forward for the refusal to grant her the lump sum. On 20 December 2013 the Joint Committee for Disputes, to which the case had been referred, issued its opinion, finding that the reasons given for the decision not to award the complainant the lump sum might be inadequate. Noting that in another case the Administration had made contradictory statements regarding its recruitment forecasts, it recommended that the Director General should allow the complaint, since the lack of clarity in the explanations given to the complainant indicated that an error of assessment might have been made.

On 11 March 2014 the Principal Director of Resources, acting by delegation of power from the Director General, explained to the complainant, who had retired on 31 January 2014 at her own request, that the apparent contradiction noted by the Joint Committee for Disputes stemmed from a lack of understanding of the various recruitment and training phases, of which he provided a schedule. Emphasising that a recruitment phase was to be launched by the Recruitment Unit in 2014, he maintained that none of the criteria set out in Office Notice No. 34/13 was met, and he therefore advised the complainant that her complaint was dismissed as unfounded. That is the impugned decision.

The complainant requests the setting aside of the “Director General’s decision” and the payment with interest of a lump sum which should amount to eighteen times her last basic monthly salary and be subject to internal tax.

Eurocontrol submits that the complaint should be dismissed as irreceivable, particularly because the claim for payment of a lump sum equivalent to eighteen times the complainant's salary and subject to internal tax did not form the subject of the internal complaint of 16 September 2013. Subsidiarily, it asks the Tribunal to dismiss the complaint as unfounded.

In her rejoinder, the complainant requests the setting aside of the decision of 11 March 2014 and reiterates her request for the payment, with interest, of the lump sum. If this were to be subject to taxation in the Netherlands, she asks the Tribunal to order Eurocontrol to pay the tax in question. She also claims moral damages and costs.

In its surrejoinder, Eurocontrol maintains that the complaint is irreceivable and asks the Tribunal to dismiss all the claims as groundless.

CONSIDERATIONS

1. Annex XIX to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, entitled "Special Provisions of the General Conditions of Employment relating to the payment of a lump sum in the event of resignation", entered into force on 1 January 2013. It comprises a sole article which reads *in parte qua* as follows:

- “1. Without prejudice to any other benefits to which the servant may be entitled as a consequence of resigning in accordance with Article 49 of these General Conditions of Employment, a lump-sum payment shall be granted to servants whose application to resign in accordance with the provisions of this Annex is accepted.
2. This lump-sum payment shall be equal to:
 - a) twelve times the last monthly basic salary of the servant, including where applicable the expatriation allowance in the case of servants in function group AST and AD;
- [...]
4. For a period of one year commencing on 1 January 2013, the amounts stipulated under paragraph 2 above shall be increased to eighteen times the last monthly basic salary, including, where applicable, the allowances as set out, provided that the resignation takes effect at the latest on 1 January 2014.”

2. Pursuant to the third paragraph of this sole article, on 12 July 2013 the Director General published Office Notice No. 34/13, which defines the criteria for granting the lump sum as follows:

“The Director General will agree to payment of a lump sum in accordance with Annex XIX on the basis of the following criteria concerning the post occupied by the servant asking to resign:

1. The post occupied by the staff member wishing to resign can be left vacant for at least two years following the resignation date of the servant concerned without impairing business requirements; or
2. If the post cannot be left vacant because the associated activities have to continue to be performed, an assessment will be made as to whether these activities can be redistributed among other services. If this is the case, the Director General will agree to pay the lump sum to the resigning staff member; or
3. The function and activities related to the post occupied by the staff member wishing to resign have ceased or have substantially changed.”

3. On 29 July 2013 the complainant, who held a grade AST8 post in the Recruitment Unit of the Directorate of Resources at the Maastricht Upper Area Control Centre, tendered her resignation to the Director General with effect on 30 November 2013, under Article 49 of the General Conditions of Employment. However, she made it clear that this resignation was subject to the payment of the lump sum provided for in the sole article of the above-mentioned Annex XIX and that her application would be withdrawn if the payment of that lump sum were refused.

On 24 August 2013 the Director General refused to pay her the lump sum on the grounds that none of the three criteria set out in Office Notice No. 34/13 was met. In his view, the complainant’s post was not one which could be left vacant for at least two years, since a recruitment process was due to open in 2015. In addition, the activities associated with the post could not be redistributed among other services. In his opinion, the Recruitment Unit, which had a reduced staffing level, would not have been in a position to cope with its workload if the complainant’s resignation had been accepted. Lastly, the activities related to her post had neither ceased nor substantially changed, but would have to continue and perhaps even expand.

4. In the impugned decision of 11 March 2014, the Director General departed from the recommendation of the Joint Committee for Disputes, which considered that the complainant's complaint should be allowed, although it did not expressly state that she was entitled to receive the lump sum. The Committee, which found that the Administration had made contradictory statements in another case, held that the reasons given for the decision not to award the complainant the lump sum might be inadequate. It said that it could do no more than request the Organisation to explain its apparently contradictory statements.

5. The complainant points out that in May 2014 the Organisation had proposed an amicable settlement of the dispute. She regards this proposal as acknowledgement of the unlawful nature of the decision of 11 March 2014.

This submission is misconceived. The Organisation's proposal to resolve the dispute by means of a settlement, which did not in itself imply any admission of liability, could very well have been prompted by a wish to avoid the trouble of pursuing litigation with an employee who had retired.

6. The Organisation emphasises that the decision of 24 August 2013 not to grant the lump sum was taken because, at that time, the workload of the Recruitment Unit, which was understaffed, was still heavy and was even due to increase. It endeavours to show that this workload could not be absorbed by other services and that it would have been necessary to replace the complainant if her resignation had been accepted. Eurocontrol concludes from this that neither the first nor the second criterion was satisfied.

The complainant submits that her activities could have been distributed among other services, in accordance with the second criterion listed in Office Notice No. 34/13. According to her, this was actually done without any difficulty after her retirement on 31 January 2014. It may be inferred from her line of argument that she also contends that, contrary to the Director General's statement, her post could have been left vacant for at least two years, which is the first

criterion for granting the lump sum. She asserts that she was not replaced after her retirement, because no vacancy notice relating to her post has ever been published.

7. It must be recalled that the Tribunal is not competent to rule on the merits of Eurocontrol's choices in respect of its staff management, for they form part of the general employment policy that an organisation is free to pursue in accordance with its general interests (see Judgment 3225, under 6).

In the instant case, in the decision of 24 August 2013 the Director General considered that the complainant's post could not be left vacant for at least two years, since it was necessary in order to cope with the Recruitment Unit's workload and the tasks in question could not be not be redistributed without overburdening the servants who would have been called upon to assume them in addition to their usual functions – a situation which would have resulted in delays jeopardising the smooth operation of the service.

In light of the evidence and the objective justifications furnished by Eurocontrol, the Tribunal considers that, in so deciding, the Director General did not abuse the broad discretion he necessarily enjoys in such matters.

8. In her rejoinder the complainant alleges a breach of the principle of non-retroactivity. She takes the Organisation to task for basing its decision on a long-term manpower plan, dated 1 August 2013, which was not in force when she tendered her resignation on 29 July 2013, in an attempt to show that her post could not be left vacant for at least two years (the first criterion of the Office Notice).

This plea is irrelevant. As the Tribunal has consistently held, an administrative authority, when dealing with a claim, must generally base itself on the provisions in force at the time it takes its decision and not on those in force at the time the claim was submitted. Only where this approach is clearly excluded by the new provisions, or where it would result in a breach of the requirements of the principles of good faith, the non-retroactivity of administrative decisions and the protection of

acquired rights, will the above rule not apply (see Judgments 2459, under 9, and 2985, under 15). In the instant case, however, the decision on the complainant's request, which made no reference to the above-mentioned plan, was actually taken on 24 August 2013, in other words after the plan had entered into force.

Moreover, it is self-evident that the long-term manpower plan of 1 August 2013 was a response to needs which already existed at Eurocontrol when the complainant submitted her request, just a few days before the plan entered into force.

9. The complainant also alleges a breach of the principle of equal treatment. She contends that the resignation of one of her former colleagues, Ms A., to whom some of her duties were assigned after her retirement, was accepted with effect on 1 January 2015 and that Ms A. obtained the lump sum which she herself claims. Eurocontrol replies that the decision to accept Ms A.'s resignation was taken in September 2014 in light of the staffing level of another unit in the Directorate of Resources to which she had been transferred.

This plea must be dismissed, since it has not been established that the two persons were in a factually identical position (see Judgment 3420, under 18).

10. Lastly, the complainant concurs with the opinion of the Joint Committee for Disputes that the Organisation acted in a contradictory manner in a case which forms the subject of another judgment delivered this day. It is, however, plain from the submissions in the file that the instant case and the case with which it is compared were completely unrelated and that the two outcomes were therefore in no way contradictory.

11. In light of the foregoing, the complaint must be dismissed in its entirety without there being any need to examine the merits of the objections to receivability raised by Eurocontrol.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2017, 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 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ