

The Administrative Tribunal,

Considering the complaint filed by Mr M. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 December 2004 and corrected on 21 December 2004, the Agency's reply of 17 March 2005, the complainant's rejoinder of 22 April, Eurocontrol's surrejoinder of 27 July, the complainant's additional submissions of 14 September and the Agency's final observations of 5 October 2005;

Considering Article II, paragraph 5, 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 Maltese national born in 1976, joined the Agency on 1 November 1997 as a Controller 2nd class at grade B4 in the Operations Division of the Maastricht Upper Area Control Centre. On 1 December 1998 he became established and was promoted to grade B3, and on 1 December 2003 he was promoted to grade B2.

Starting from 1 July 2000 he received an operational functions allowance in accordance with Article 69(c) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. In its version of 25 March 2002 that article provided as follows:

“Established servants in the Operations Division holding an A, B or C category post and performing operational functions in the control room shall be paid, as from 1.7.2000, an operational functions allowance (‘ATC allowance’) [...].

The amount of this allowance shall be added to the basic salary for the purpose of calculating the contributions to the pension, sickness and accident schemes [...].”

On 9 September 2003 the complainant applied for the post of Expert at the Institute of Air Navigation Services in Luxembourg. By a decision of the Director General of 19 February 2004, he was appointed to that post at grade A7 starting 1 March 2004. The decision indicated, in particular, that his appointment would become permanent at the end of a probationary period of nine months, in accordance with Article 36* of the Staff Regulations governing officials of the Eurocontrol Agency, and that during this probationary period he would continue to receive his grade B2 salary and his status would be that of a servant on secondment, pursuant to Article 39 of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. Article 7 of the decision stated that he would no longer receive the ATC allowance as from 1 March 2004.

An exchange of e-mails took place between the complainant and the Human Resources Directorate from 3 to 30 March 2004. The complainant objected to the withdrawal of the ATC allowance on the grounds that without it his salary during the probationary period was less than the salary he received in his previous post. Referring in particular to the aforementioned Article 39 and to Article 12, paragraph 2,** of Appendix I common to the General Conditions of Employment and the Staff Regulations, he argued that he was entitled not to the operational functions allowance as such but to the difference between his remuneration in his former post, including the said allowance, and his new remuneration. He therefore claimed payment of the salary differential provided for in Article 39 of the General Conditions of Employment.*** The Human Resources Directorate, however, informed him that according to Appendix I, Article 5, staff members on secondment are subject to the conditions of work attaching to the post to which they are seconded and enjoy the corresponding allowances or other compensations; consequently, he could no longer receive the ATC allowance related to his previous post.

On 14 May 2004 the complainant filed an internal complaint against the decision of 19 February 2004, and in

particular against its Article 7. In its opinion dated 22 October 2004, which was sent to the complainant on 15 November 2004, the Joint Committee for Disputes recommended rejecting the complaint on the grounds that the complainant's arguments were unfounded and that the ATC allowance was not payable. In a memorandum also dated 15 November 2004, which constitutes the impugned decision, the Director General notified the complainant that he had decided, in accordance with the Committee's opinion, to reject the internal complaint.

B. The complainant considers that according to Article 39 of the General Conditions of Employment, the ATC allowance should have been taken into account in determining whether his total remuneration on secondment was less than that which he had earned previously, so that he should have received a salary differential. He contends that he earned less during his probationary period and that there was therefore a breach of that article, which according to him is meant to ensure that an official on secondment will not be worse off financially during his period of secondment.

He contends that Articles 5, 6 and 12 of Appendix I common to the General Conditions of Employment and the Staff Regulations have all been breached. He argues that according to Article 5, paragraph 1, of that Appendix a staff member on secondment continues to enjoy all his rights and that the terms of Article 6, concerning the allocation of budgetary expenditure resulting from a secondment, do not prevent the Luxembourg Centre from paying the operational functions allowance to a servant on secondment from Maastricht.

The complainant requests "the quashing of Article 7 of the decision of 19 February 2004", the payment of a salary differential amounting to 2,676.50 euros and 600 euros in costs.

C. In its reply the Agency explains that its staff is divided into two distinct groups: servants assigned to Maastricht, who are subject to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, and officials in other services, who come under the Staff Regulations governing officials of the Eurocontrol Agency. Since the complainant is now subject to the Staff Regulations, which make no provision for an ATC allowance, and since he no longer performs operational functions in a control room, there is no reason to continue paying him the corresponding allowance. Furthermore, during his probationary period, the complainant continued to receive the basic salary of a grade B2 servant, which was higher than that of a grade A7 official.

The defendant points out that, while the position of servants who become officials is indeed covered by Appendix I common to the General Conditions of Employment and the Staff Regulations and by Article 39 of the General Conditions of Employment concerning secondment, the provisions of the latter article do not apply in the complainant's case. It contends that a secondment decision is a mandatory decision taken by the Director General in the interests of the service in order to send a servant or an official to serve temporarily in a post outside the Agency, and that the Agency must therefore compensate the financial effects of the measure imposed on the person concerned. This is not the same, however, as the situation of the complainant, who voluntarily applied for a post in a higher category in order to change jobs and improve his career prospects. It submits that he is misinterpreting the conditions of application of Articles 5 and 6 of Appendix I, particularly since it is clear from Article 5 that during their probationary period officials enjoy the "allowances or other compensations attaching to the post to which they are seconded", that is, those allowances and compensations and no more.

D. In his rejoinder the complainant reiterates that he is claiming not the operational functions allowance as such but the salary differential provided for in Article 39. He argues that he should retain his previously acquired rights and that the Staff Regulations apply to him only at the end of his probationary period, which is governed solely by the provisions concerning secondment and by Appendix I. According to him, by confining the application of Article 39 to secondments imposed by the Director General, the Agency is adding a condition which is not contained in that article. He submits that it is contradictory for the defendant to argue on the one hand that Article 39 should not apply to his case and on the other hand that the article should be applied with reference to Articles 5 and 6 of Appendix I.

E. In its surrejoinder the Agency maintains that the ATC allowance, which provides financial compensation for the constraints inherent to team work, the heavy responsibilities and the stress related to operational functions in the Maastricht control room, is not part of the remuneration and therefore did not have to be taken into account for the calculation of the salary differential.

F. In his additional submissions the complainant recalls that it was the Agency itself which, in its decision of 19 February 2004, "expressly and unreservedly" made Article 39 of the General Conditions of Employment

applicable. He points out further that, since salaries appear to have been adjusted during his secondment, by the same amount in Maastricht and in Luxembourg, the salary differential should remain the same before and after the adjustment.

G. In its final observations the Agency explains that Article 39 applies only within the limits of the provisions of Appendix I of the General Conditions of Employment, which were duly applied. It notes that the complainant's financial claims are inaccurate, because the calculation of the salary differential is much more complicated than that which he has produced.

CONSIDERATIONS

1. The complainant joined Eurocontrol on 1 November 1997 as Controller 2nd class (grade B4 servant) and was assigned to the Operations Division of the Maastricht Upper Area Control Centre.

On 1 December 1998 he became established and was promoted to grade B3. As from 1 July 2000 he received an operational functions allowance, known as the "ATC allowance", provided for in Article 69(c) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, which is granted in accordance with the provisions of Articles 7 and 8 of Rule of Application No. 21bis.

On 9 September 2003 he applied for a post as Expert at the Agency's Institute of Air Navigation Services in Luxembourg. While the competitive procedure was in progress, he was promoted to grade B2 on 1 December 2003.

By a decision of 19 February 2004 the Director General appointed him as Expert at grade A7 from 1 March 2004 and assigned him to Luxembourg. Article 7 of the decision specified that the complainant would no longer receive the ATC allowance after 1 March 2004.

After protesting unsuccessfully against the withdrawal of this allowance, on 14 May 2004 the complainant filed an internal complaint against the decision of 19 February 2004 and particularly its Article 7.

2. The Joint Committee for Disputes considered the complaint and unanimously concluded, in an opinion dated 22 October 2004, that it should be rejected as unfounded in law.

In a decision of 15 November 2004, the Director General rejected the complaint. That is the impugned decision before the Tribunal.

3. The complainant seeks the "quashing of Article 7 of the decision of 19 February 2004", an order that the defendant pay him a salary differential amounting to 2,676.50 euros and an award of 600 euros in costs.

4. With regard to the quashing of Article 7 of the decision of 19 February 2004, the complainant contends that, in accordance with the relevant provisions, in particular Article 39, paragraphs 2(d) and 2(e), and Article 69(c) of the General Conditions of Employment, a person on secondment, as he was, should suffer no financial loss during the period of secondment, which in his case corresponds to his nine-month probationary period. He adds that the provisions of Articles 5 and 6 of Appendix I common to the General Conditions of Employment and the Staff Regulations do not prevent a person on secondment from being paid the ATC allowance which was part of his or her former remuneration and related to his or her original post and that, pursuant to Article 12 of that Appendix, during the probationary period the provisions related to secondment contained in Article 39 of the General Conditions of Employment continue to apply analogously in accordance with Articles 5 and 6 of the Appendix. The complainant points out that neither Article 5 nor Article 6 of the Appendix expressly excludes the payment of the ATC allowance.

On the contrary, he argues, those articles stipulate that the servant must not forfeit any financial benefit during the period of secondment. This means that the ATC allowance must be taken into account when determining the total remuneration attached to the original post of the person on secondment. On that basis, he submits, the salary differential must be calculated and paid.

5. These arguments show that, as the complainant emphasises in his rejoinder, he is in fact claiming not the payment of the ATC allowance as such during the nine-month probationary period, but rather payment of the salary differential between his remuneration for his original post, including the ATC allowance, and his

remuneration on secondment during the probationary period.

The Tribunal must therefore consider the merits of the claim concerning the quashing of Article 7 of the decision of 19 February 2004, which provides that the ATC allowance as such is no longer payable. The Tribunal agrees with the Joint Committee for Disputes that the ATC allowance, which is a specific allowance provided for under Article 69(c) of the General Conditions of Employment and which is granted only to servants of the Maastricht Upper Area Control Centre, cannot be paid to a staff member who no longer works at the Centre. The claim for Article 7 of the decision of 19 February 2004 to be quashed is therefore unfounded.

6. The complainant asks the Tribunal to order the defendant to pay him a salary differential amounting to 2,676.50 euros. He argues that the provisions of Article 39 of the General Conditions of Employment apply during the nine-month probationary period referred to in Article 3 of the decision of 19 February 2004, under the conditions specified in Articles 5 and 6 of Appendix I common to the General Conditions of Employment and the Staff Regulations. He points out that, pursuant to Article 12 of Appendix I, throughout the probationary period the provisions relating to secondment contained in Article 39 continue to apply analogously in accordance with Articles 5 and 6 of the Appendix. These Articles 5 and 6, however, as argued above, do not expressly exclude payment of the ATC allowance. On the contrary, he contends, these articles make it clear that the staff member must not forfeit any financial benefit during the period of secondment.

He deduces that the ATC allowance must be taken into account when determining the total remuneration for the original post of the person on secondment. It is on that basis, he considers, that the salary differential must be calculated and paid.

7. The defendant contends that the complainant's claim is unfounded since it rests on a mistaken interpretation of the statutory provisions governing the appointment of an official or servant to an Agency post unrelated to his original status, as set out in Appendix I common to the General Conditions of Employment and the Staff Regulations.

It contends that the complainant's case is governed not by the ordinary provisions applicable when the secondment outside the Agency is imposed, but by those of Appendix I, which do not provide that allowances attached to previous posts or functions are to be taken into account. It points out that the complainant was transferred from the Maastricht Upper Area Control Centre, where he was a grade B2 servant, to the Institute of Air Navigation Services in Luxembourg, where he was appointed and promoted as a grade A7 official, following his voluntary application for a post in the higher category.

8. The relevant provisions referred to by the two parties are given under A in this judgment.

The Tribunal notes that the decision of 19 February 2004 makes explicit reference to Article 36 of the Staff Regulations, Article 39 of the General Conditions of Employment and Article 12 of Appendix I. It cannot therefore be denied that, during his nine-month probationary period, the complainant was subject to the conditions stipulated in Articles 39 of the General Conditions of Employment and 12, paragraph 2, of Appendix I. According to the terms of Article 12, paragraph 2, of the Appendix, he must therefore be considered as being on secondment during his probationary period and hence entitled to a salary differential if the post to which he is seconded is less well remunerated.

In the present case, it is not disputed that the complainant received the ATC allowance in his original post. This allowance must be included in the calculation of the complainant's total remuneration in his original post, in accordance with Article 39, paragraph 2(d), of the General Conditions of Employment, which expressly refers to Articles 69(b) and 69(c) if applicable.

The complainant's total remuneration on secondment should therefore not be less than the total remuneration of his original post, including the ATC allowance. If that were the case, the complainant would be entitled, for his nine-month probationary period, to a salary differential equivalent to the difference between the total remuneration of his original post, including the ATC allowance, and the total remuneration on secondment for the same period, including all allowances.

9. The complainant is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant, if appropriate, a sum equivalent to the difference between his total remuneration in his original post and his total remuneration in his post on secondment, as explained under 8 above.
2. It shall pay him 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

* According to Article 36, paragraph 1: “Officials other than those in Grades A1 and A2 shall serve a probationary period before they can be established. The probationary period for officials in Category A [...] shall be nine months [...].”

** Article 12, paragraph 2, reads as follows: “Throughout the training or probationary periods referred to in the second paragraph of Article 10 [...], the provisions relating to secondment contained in the original Staff Regulations of the official or servant concerned shall apply analogously under the terms of Articles 5 and 6 [...].”

*** According to Article 39, paragraph 2(d): “A servant on secondment shall be entitled to a salary differential where the total remuneration carried by the post to which he is seconded is less than that of the one corresponding to his grade and step in the Agency, including the allowances referred to in Articles 69(b) and 69(c) if applicable [...]”.