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

101st Session **Judgment No. 2560**

The Administrative Tribunal,

Considering the complaints filed by Mr D.A. (his eighth), Mr G.A., Mr F.A. (his second), Mr J.-C.B. (his second), Mrs M.B., Mrs K.C., Mr E.C., Mrs R.-M.C., Mr P.C., Mr V.D., Mrs C.d.B.D. (her second), Mr B.D.J., Mrs P.D., Mr P.D., Mr R.D. (his second), Mrs D.D., Mrs C.E.-R. (her fourth), Mr J.-M.G., Mrs G.G.-T., Mrs A.G. (her second), Mr P.K., Mr G.L. (his third), Mrs V.L. (her second), Mr P.L. (his second), Mrs M.M. (her second), Mr P.M. (his third), Mr L.O. (his fourth), Mrs M.P., Mr S.R., Mrs P.S. (her second), Mr B.S., Mr G.T. (his fifth), Mr A.V.d.B. (his fourth) and Mrs J.V. (her second) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 2 May 2005 and corrected on 22 June, the Agency's single reply of 5 October 2005, the complainants' rejoinder of 16 January 2006 and Eurocontrol's surrejoinder of 13 April 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 6 of its Rules;

Having examined the written submissions and disallowed the complainants' application for hearings;

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

A. The facts and the legal background of this case are set out under A in Judgment 2559, also delivered this day on the complaints filed by 79 members of staff of the Eurocontrol Agency. Unlike the complainants in the above-mentioned judgment, the complainants in this case filed internal complaints at the end of October 2004 against the payslips issued by the Administration on 31 July 2004 showing no "backpay" for the period from 1 July 2003 to 30 June 2004. In its opinion of 22 December 2004 the Joint Committee for Disputes unanimously recommended rejecting the complaints. By decisions of 31 January 2005, which constitute the impugned decisions, the Director of Human Resources, acting on behalf of the Director General, dismissed the complaints.

B. The complainants contend that the proposal for the adjustment of salaries submitted to the Provisional Council by the Director General on 21 November 2003 for approval in accordance with the approval by correspondence procedure should be considered as having been adopted by the Council at the end of the statutory time limit of four weeks – that is on 19 December 2003 – since according to Article 7 of the Council's Rules of Procedure, failure to reply is deemed to constitute abstention. The Permanent Commission's decision of 8 July 2004 which implements the adjustments of salaries only from 1 July 2004 is therefore, in their opinion, illegal insofar as it breaches that earlier decision.

The complainants argue that under Articles 64 to 65a of the Staff Regulations they are entitled to an adjustment, retroactively if necessary, of their salary and that the Agency's failure to provide for the application of those articles during a certain period (from 1 July 2003 to 30 June 2004) constituted a breach of those provisions. Referring to the Tribunal's Judgments 1641 and 1912, they also accuse the Agency of breaching what is known as the "Flemming" principle.* According to them, to apply rules leading to a substantial reduction in pay is contrary to that principle and to the right of staff members to preserve the essential terms of their employment that were in effect when they were recruited, or in other words, their acquired rights. The Director General had in fact acknowledged the need to comply with the above-mentioned provisions and principles in the proposal he had submitted to the Provisional Council. They contend that the result was a considerable erosion of their pay, which was not maintained at the level enjoyed by officials of the European Union.

Lastly, on the basis of the Tribunal's Judgment 1821, the complainants submit that if an international organisation adopts a methodology for the adjustment of salaries which refers to an external standard but which grants discretion to depart from that standard, it must state the reasons for any such departure. In this case, however, Eurocontrol never explained why its member States had decided to depart from the standards adopted by the European Union. According to the complainants, the real reasons, as reflected in the minutes of the Provisional Council's meeting of 8 July 2004, are clearly unlawful since the idea was to compensate for the fact the Agency would no longer be levying the "crisis contribution" introduced in 1992. The expiry of this inherently temporary

measure had long been scheduled and was meant to allow a return of salaries to their “normal” level.

The complainants ask the Tribunal to set aside the impugned decisions, to declare that the decision “adopted on 8 July 2004 by the Provisional Council and approved on the same date by the Permanent Commission” was unlawful, to cancel their payslips issued on 31 July 2004 which showed no backpay for the period from 1 July 2003 to 30 June 2004, to order the Agency to pay them the adjustment to which they consider they are entitled, plus interest at an annual rate of 8 per cent, and to award them costs.

C. In its reply Eurocontrol explains that, where the adjustment of salaries is concerned, it is the Permanent Commission and not the Provisional Council that takes the final decision. This means that there can be no final decision dated 19 December 2003 and the plea that it was breached is therefore unfounded.

The defendant argues that, for the transitional period from 1 July 2003 to 30 June 2004, only Articles 64 and 65 of the Staff Regulations applied, since the methodology for the adjustment of salaries provided for in the annex referred to in Article 65a was no longer valid after 1 July 2003. Articles 64 and 65 allow considerable discretion to the Provisional Council and the Permanent Commission to decide on the desirability and scope of an adjustment, and they do not stipulate that adjustments must be retroactive. Eurocontrol maintains that the complainants’ references to the case law are not relevant and doubts whether the Flemming principle is applicable to the Agency, given that it employs only international civil servants, whereas that principle, in its view, is purely for the benefit of locally recruited staff. In any case, it denies having breached the principle and asserts that the salary scales at Eurocontrol and at the European Union are the same. It adds that during the transitional period there was no principle, statutory provision or acquired right that obliged it to consider the solution adopted by the institutions of the European Union as a “reference standard” it should follow and that the decision-making bodies, therefore, did not have to give reasons for departing from such a standard. Since it was a decision taken under the “sovereign power” conferred by Articles 64 and 65 of the Staff Regulations, which are the only ones that apply in the circumstances, the reasons given could be succinct.

The defendant denounces what it sees as contradictions in the complainants’ arguments and asks the Tribunal to dismiss their complaints as irreceivable if they do not clarify their claims in their rejoinder.

D. In their rejoinder the complainants maintain that a “decision” approving the Director General’s proposal was in fact taken on 19 December 2003 by the Provisional Council. For the Permanent Commission to approve that decision, the Council would have had to submit it for approval. That never took place, however, because according to the complainants the Agency had mistakenly considered that the Provisional Council’s opinion had to be unanimous and had therefore rejected the proposal concerned.

They reject the defendant’s argument that only Articles 64 and 65 of the Staff Regulations were applicable during the transitional period: Article 65a remained in force and those three articles together prescribe that the adjustment to salaries must be applied retroactively, unless there is no adjustment for the period concerned. They suggest that the Agency’s definition of the Flemming principle is “revolutionary” and is not supported by the case law. While they admit that international civil servants do not have an acquired right to automatic indexation of their salaries, they contend that the discretion vested in the competent authorities in that respect has certain limits insofar as the Flemming principle must be complied with and their right to retain the essential terms of their appointment must not be infringed. They point out that the Director General’s proposal did refer to European Union standards, including for the transitional period, and press their argument that the Eurocontrol bodies should have given reasons for their decision to depart from those standards.

E. In its surrejoinder the Agency argues that, to the extent that the complainants claim the retroactive payment with effect from 1 July 2003 of the salary adjustment granted from 1 July 2004, plus interest, their claim goes further than the proposal put forward in November 2003 by the Director General and the solution adopted by the European Union. It adds that adjustments are inevitably to some extent retroactive but never give rise to the payment of accrued interest.

The defendant admits that it may be argued that the proposals put forward by the Director General in November 2003 were “adopted” by the Provisional Council in view of the fact, when the deadline for replies expired, the number of replies in favour constituted the majority stipulated in Article 7 of its Rules of Procedure; it points out, however, that without the subsequent “approval” of the Permanent Commission (which must be unanimous, express abstentions alone being taken into account), this “adoption” remains without effect. It argues that it is

“excessively formalistic” to suggest that the Provisional Council should have forwarded the proposals concerned to the Permanent Commission, since they would certainly have been rejected in view of the fact that the Commission must reach a unanimous opinion and several States were known to have reservations. On the remaining issues Eurocontrol presses its pleas.

CONSIDERATIONS

1. The complainants impugn the decisions of 31 January 2005 by which the Director of Human Resources, acting on behalf of the Director General of Eurocontrol, rejected their internal complaints against their payslip of 31 July 2004 showing backpay for the months of July and August 2004 but not for the period from 1 July 2003 to 30 June 2004.

2. The material facts may be summed up as follows.

In September 1992 the Permanent Commission of Eurocontrol approved a methodology for the adjustment of salaries which was similar to that adopted by the institutions of the European Community. This methodology for the adjustment of salaries came into effect on 31 December 1991 and was to apply until 30 June 2001.

At the start of the present decade, the European Union initiated a process of administrative reform which was to lead to changes in the terms of employment of its staff and, pending the completion of the process, it decided to extend the application of the methodology for the adjustment of salaries expiring on 30 June 2001 until 30 June 2003. The defendant proceeded to introduce the same extension.

When the process of administrative reform was completed, the European Union adopted a new methodology for the adjustment of salaries which was to take effect on 1 July 2004. For the interim period from 1 July 2003 to 30 June 2004, the Council of Ministers of the European Union, in agreement with the unions, adopted an ad hoc measure on 15 December 2003. A salary scale was calculated on the basis of the salary adjustment methodology that expired on 30 June 2003, but it was decided firstly that there would be no retroactive adjustment for the period 1 July to 31 December 2003, and secondly that the salaries paid from 1 January 2004 according to the new salary scale would be subject to a “special levy” of 2.5 per cent.

Prior to the adoption of the above-mentioned decision by the Council of Ministers of the European Union, the Director General of Eurocontrol had sent a report dated 21 November 2003 to the Provisional Council of the Organisation, in which he recommended, *mutatis mutandis*, adopting the measure that the Council of the European Union would take, subject to linking the date of the introduction of the special levy to the date of adoption of the report’s recommendations.

The adoption of these recommendations was requested according to the statutory procedure of approval by correspondence.

On 8 July 2004 the Provisional Council of the defendant decided in favour of adopting within the Agency the same methodology for the adjustment of salaries as that adopted by the European Union. This solution was advocated by the Administrative Reform Task Force (ARTF), which had been set up by the Director General at the request of the Provisional Council to support him in the task he had been assigned by the Council to study the impact that the European Union’s administrative reform might have on Eurocontrol’s Staff Regulations. This task force was made up of representatives of member States, of the Agency and, in due course, of the staff.

The recommended methodology was to take effect from 1 July 2004. However, no decision was taken for the intermediate period from 1 July 2003 to 30 June 2004. In this respect, in an information bulletin dated 8 July 2004, the Agency’s Director of Human Resources informed the staff that:

“[t]he Provisional Council [had] not given a unanimous opinion on the retroactive application of the aforementioned measures for the period from 01/01/2004 to 31/07/2004 (“transitional” measures). However, further to the approval of the new methodology, the next salary adjustment, if approved by the member States according to the normal procedure, [would] apply retroactively to 01/07/2004”.

On the same day, 8 July, the Permanent Commission approved the recommendations of the Provisional Council. Office Notice No. 7/04 dated 26 July 2004 informed staff of the statutory changes that had been adopted.

The complainants' payslips issued on 31 July 2004 did not show any adjustment of salary or pension for the period 1 July 2003 to 30 June 2004.

3. In October 2004 the complainants filed internal complaints against their payslip of 31 July 2004. They incidentally challenged the lawfulness of the decisions taken on 8 July 2004 by the Permanent Commission on the grounds that those decisions had not provided for an adjustment of salaries for the period 1 July 2003 to 30 June 2004. They claimed retroactive adjustment of their pay for that period.

The internal complaints were referred to the Joint Committee for Disputes, which recommended rejecting them on 22 December 2004.

The Director of Human Resources, acting on behalf of the Director General, followed that recommendation and rejected the internal complaints on 31 January 2005.

4. The complainants ask the Tribunal:

"– to set aside the decision of 31 January 2005 […] rejecting their administrative complaint of 28 October 2004 against their payslip of 31 July 2004 for the month of August 2004;

– to declare unlawful the general decision adopted on 8 July 2004 by the Provisional Council and approved on that same date by the Permanent Commission of Eurocontrol not to adopt transitional measures for the adjustment of salaries for the period from 1 July 2003 to 30 June 2004, or to abstain from adopting such measures, or to adopt such measures with effect only from 1 July 2004;

– to cancel [their] payslip of 31 July 2004 […] for the month of August 2004, which, in application of that general decision or as a result of that abstention, makes no provision for the adjustment of their salaries for that period;

– to order Eurocontrol to pay them the adjustment of their salaries to which they are entitled for the period concerned, plus accrued interest at the rate of 8% per annum starting from the date at which the adjustment should have applied and until full payment has been made;

– to order Eurocontrol to pay costs."

They put forward two pleas in support of their complaints.

As clarified in their rejoinder of 16 January 2005, their first plea is based on the "breach of Articles 1 and 3 of the Permanent Commission's Decision No. 72 of 9 December 1997, and Articles 6 and 7 of the Provisional Council's Rules of Procedure", while the second plea is based on a breach of Articles 64, 65 and 65a of the Staff Regulations, the Flemming principle, the staff's right to preserve the essential terms of employment that were in effect when they were recruited and the obligation to provide reasons, as well as on the unlawfulness of the reasons given for the disputed decisions.

5. Regarding the breach of Articles 64 and 65 of the Staff Regulations, the complainants contend in substance that the defendant "deliberately or at any event knowingly opted, for the period from 1 July 2003 to 30 June 2004, for a solution of continuity as regards the adjustment of staff salaries, by abstaining from introducing any measures in application of Articles 64 and 65 of the Staff Regulations".

6. Article 64 of the Staff Regulations is worded as follows:

"An official's remuneration expressed in the currency of the country where the Agency has its headquarters shall, after the compulsory deductions set out in these Staff Regulations or in any implementing provision, be subject to adjustment to take account of the taxation system applicable and of the living conditions in the relevant country of posting.

The weightings reflecting living conditions in the various countries of posting shall be fixed by the Provisional Council on the proposal of the Director General. The procedure governing the aforesaid adjustment shall be prescribed in a rule laid down by the Director General."

Article 65 of the Staff Regulations reads as follows:

“On the instigation of the Director General, the Provisional Council shall periodically examine the adjustments to salaries and allowances which it deems necessary. It shall take particular account of any variations in public service salaries in the different member countries and of the recruitment needs of the Agency.

These adjustments shall be made by modifying the basic salaries as defined in Annex III or elements of the salaries and allowances as defined in Article 62.

They shall be submitted to the Commission for approval in accordance with the provisions of Article 12, paragraph 1, of the Statute of the Agency.”

Moreover, Article 82(2) of the Staff Regulations, in its version at the material time, stipulated that:

“Should the Commission, in accordance with Article 65, decide to adjust remunerations, it shall at the same time decide on an appropriate adjustment of pensions.”

The rules for implementing the above-mentioned Articles 64 and 65 are defined in Annex VI which is referred to in Article 65a added to the Staff Regulations. In the version in force at the material time, this annex provided as follows:

“Article 1

The Director General shall submit to the first Provisional Council session of each year a report on remuneration trends at 1 July of the year preceding that in which the review is carried out.

The reference period for the review of the components shall comprise the twelve months preceding the 1 July from which the adjustment takes effect.

[…]

Article 3

The Director General’s recommendations shall be examined and approved by the Organisation’s competent bodies in accordance with the provisions of Articles 64 and 65 of the Staff Regulations.

[…]

Article 5

This Annex shall enter into force on the first day of the month following that in which it is approved by the Permanent Commission. It shall take effect on 31.12.91 for a period expiring on 30.6.03 and shall apply to the remuneration review at 1.7.91 in respect of the reference period 1.7.90 to 30.6.91.”

7. It may be deduced from the provisions quoted above that the remunerations of officials and pensions must be periodically examined by the Agency’s competent bodies in order to determine whether and to what extent they should be adjusted in order to take account of variations in certain factors, and that the Agency has an obligation to make arrangements to implement those provisions.

In this case, the fact that Annex VI concerning arrangements for the implementation of Articles 64 and 65 of the Staff Regulations was no longer in force at 30 June 2003 does not relieve the defendant of its obligation to comply with the above-mentioned provisions of the Staff Regulations for the period 1 July 2003 to 30 June 2004.

Although the defendant is right in saying that, for the period in question, any adjustment of salaries had to be based only on Articles 64 and 65 of the Staff Regulations, without reference to arrangements set out in an annex, the Agency was nevertheless under an obligation to adopt for the intermediate period of 1 July 2003 to 30 June 2004, as did the institutions of the European Union, an adjustment methodology complying with the criteria established in the Tribunal’s case law and with the general principles of international civil service law.

By conceding that its collegiate bodies had been unable to achieve the unanimity required for the approval of the Director General's proposal concerning the period in question, the defendant admits that no measure was taken regarding the adjustment of salaries and pension rights for the period 1 July 2003 to 30 June 2004, which constitutes a breach of Articles 64, 65 and 82(2) of the Staff Regulations.

The impugned decisions must therefore be set aside, without any need to rule on the other components of the second plea or on the first plea. Since the Tribunal cannot, under the circumstances, give a ruling on the requested adjustment, the case is referred back to the Agency for a decision on the adjustment of salaries and pension rights for the period 1 July 2003 to 30 June 2004 in accordance with the applicable regulations.

8. As they succeed, the complainants are entitled to costs, which the Tribunal sets at the overall sum of 5,000 euros.

DECISION

For the above reasons,

1. The impugned decisions are set aside.

2. The case is referred back to the Agency for it to proceed as indicated under 7, above.

3. The defendant shall pay the complainants the overall sum of 5,000 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2006, 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 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

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* According to that principle, the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station (see Judgment 2303, under A).

Updated by PFR. Approved by CC. Last update: 21 July 2006.