

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

109th Session

Judgment No. 2942

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Messrs J.-L. C. and Y. V. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 October 2008 and corrected on 3 December 2008, the Agency's replies of 11 March 2009, the complainants' rejoinders of 25 May and Eurocontrol's surrejoinders of 28 August 2009;

Considering the complaints filed by Messrs L. D. B. (his second), R. L., J.M. B. (his second), M.O. R., M. S. (his second), T. T. and J.-M. W. (his second) against the Eurocontrol Agency on 1 December 2008, the Agency's replies of 11 March 2009, the complainants' rejoinders of 25 May and Eurocontrol's surrejoinders of 28 August 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. With effect from 1 June 2006 Eurocontrol's Permanent Commission approved a revision of the conditions of employment of operational staff in the Central Flow Management Unit (CFMU). Their new conditions of employment were published together with the relevant amendments of the Staff Regulations and Rules of Application in Office Notice No. 17/06 issued on 18 October 2006. The new version of Article 5 of the Staff Regulations stipulates that posts of CFMU officials who contribute to the air traffic flow and capacity management (ATFCM) function in real time "shall be grouped in a specific CFMU Operational Staff Service" and divided between the E1 and E2 groups. The E1 group comprises posts "the holders of which carry out duties which ensure the continuous operation of the CFMU, whether by means of shifts, individualised duty rosters, rolling stand-by duty at home, or secondment as support for a period of less than 12 consecutive months". It was further decided that all CFMU operational staff would receive the ATFCM allowance, which was intended to compensate, on a flat-rate basis, for the constraints resulting from the unusual working conditions associated with CFMU operational posts. Article 3 of Rule of Application No. 29a of the Staff Regulations concerning the function allowances payable to officials in the CFMU Operational Staff Service was amended to read as follows:

"1. Pursuant to Article 69b.2 [of the Staff Regulations], officials in the CFMU Operational Staff Service shall receive an ATFCM allowance [...].

[...]

2.1 For officials assigned to a post in group E1 who work rolling shifts, the rate [of the ATFCM allowance] is set at:

- 100% when the duties must be performed continuously for a period of 24 hours, every day of the week;
- 120% when the duties must be performed continuously for a period of 24 hours, every day of the week, with added stand-by duty;

- 100% when the duties must be performed continuously for periods of less than 24 hours, every day of the week, with added stand-by duty;
 - 80% when the duties must be performed continuously for periods of less than 24 hours, every day of the week.
- 2.2 For officials assigned to a post in group E1 who are on rolling stand-by duty at home, the rate is set at:
- 30% when the duty roster is drawn up on the basis of 6 officials or more,
 - 45% when the duty roster is drawn up on the basis of 5 officials,
 - 60% when the duty roster is drawn up on the basis of 4 officials,
 - 75% when the duty roster is drawn up on the basis of 3 officials or fewer.

[...]"

The complainants are Eurocontrol officials working in the same section of the CFMU Engineering Division who are assigned to posts in group E1. In July 2007 each of them wrote to the Director General stating that his administrative situation was incompatible with the provisions of Office Notice No. 17/06. In view of the fact that, according to the complainants, they were required to work rolling shifts every day of the week with added stand-by duty, they requested payment of the ATFCM allowance at the rate of 100 per cent, in accordance with paragraph 2.1 of Article 3 of Rule of Application No. 29a. It appears, however, that the Administration did not receive the requests submitted by Messrs S. and W. Having received no reply from the Director General, each complainant filed an internal complaint in November 2007.

The Joint Committee for Disputes issued its opinion on 4 June 2008. It noted that the Administration had found no trace of the requests filed by the two above-mentioned complainants but gave them the benefit of the doubt. Two of its members considered that the internal complaints were irreceivable, holding that they were manifestly devoid of substance on the grounds that in July 2007 the complainants had requested that they be granted the ATFCM allowance at a rate of 100 per cent on the basis of an arrangement regarding their work schedule that had been abandoned, at their

request, in February 2007. According to these members, it was clear from above-mentioned paragraph 2.1 that “the duties must be performed [...] every day of the week”, i.e. including Saturdays and Sundays, in order to receive the said allowance at a rate of 100 per cent, a requirement that the complainants failed to meet. They concluded that, inasmuch as the complainants were only on rolling stand-by duty at home, they were entitled to the ATFCM allowance at a rate of 30 per cent pursuant to paragraph 2.2 of Article 3 of Rule of Application No. 29a. By contrast, the other two members of the Committee held that the internal complaints were receivable on the grounds that the complainants were still working on the basis of the aforementioned work schedule arrangement on the date that they submitted their requests. They recommended allowing the internal complaints because, in their view, the relevant provisions of Rule of Application No. 29a were unclear and should therefore be construed in the manner most favourable to the staff. They considered that Eurocontrol’s interpretation had resulted in the complainants being treated “differently from some members of the CFMU staff who were in a similar situation and nevertheless received an ATFCM allowance [at the rate of] 100%”.

The complainants were informed individually by memoranda of 20 June 2008, which they challenge before the Tribunal, that the Director General had decided to dismiss their internal complaints as irreceivable and devoid of merit. Messrs C. and V. state that they received the memorandum in question on 22 July; the other seven complainants indicate that they received it on 2 September 2008.

B. With regard to receivability, the complainants affirm that in July 2007 the work schedule arrangement involving rolling shifts was still in force, so that they were fully entitled to claim the ATFCM allowance in accordance with the terms of paragraph 2.1 of Article 3 of Rule of Application No. 29a.

On the merits, they submit that paragraphs 1 and 2.1 of Article 3 have been breached. According to the complainants, the phrase “every day of the week” in the latter paragraph refers only to working days, and when Eurocontrol renders payment of the above-mentioned

allowance conditional also on weekend work, it creates an additional eligibility criterion and restricts the scope of the provision in question.

The complainants further contend that the principle of equal treatment has been breached inasmuch as the officials of the Repetitive Flight Plan (RPL) team and the Network Management Cell (NMC) service – which also form part of the CFMU operational staff – work on the basis of work schedules arrangement involving rolling shifts and receive the ATFCM allowance under paragraph 2.1 even though they are off duty on Saturdays, Sundays and public holidays.

They ask the Tribunal to set aside the impugned decisions, to state that they are “covered by the terms” of paragraph 2.1 of Article 3 of Rule of Application No. 29a and, accordingly, to order Eurocontrol to pay them the ATFCM allowance at the rate of 100 per cent with retroactive effect from 1 November 2006. Lastly, each complainant asks to be awarded 4,000 euros in costs.

C. In its replies the Agency requests that the nine cases be joined, since the complainants work in the same section and their complaints are couched in identical terms.

Eurocontrol contends that, since the complainants requested to receive the ATFCM allowance at a rate of 100 per cent in July 2007 because of an arrangement regarding their work schedule that they had abandoned on 22 February 2007, their complaints are manifestly devoid of merit and hence irreceivable. The claims for payment of the allowance at a rate of 100 per cent with retroactive effect from 1 November 2006 are, in its view, also irreceivable on the grounds that the initial requests were not filed until July 2007.

On the merits and subsidiarily, the Agency asserts that the complainants’ working hours are governed by Office Notice No. 21/03 of 16 June 2003 concerning the “flexitime system”, and that paragraph 2.1 of Article 3 of Rule of Application No. 29a is therefore inapplicable in the present case. Moreover, the fact that the complainants perform their duties only from Monday to Friday, and not “every day of the week” as paragraph 2.1 requires, is not in dispute. The Agency points out that the complainants are only on

rolling stand-by duty at home and that they receive the ATFCM allowance in that capacity at a rate of 30 per cent pursuant to paragraph 2.2 of above-mentioned Article 3. Lastly, Eurocontrol denies that the principle of equal treatment has been breached: unlike the complainants, the officials belonging to the RPL team and the NMC service work rolling shifts, including Saturdays, Sundays and public holidays.

D. In their rejoinders the complainants state that they have no objection to the joinder of their complaints.

They deny that the arrangement regarding their work schedule has been abandoned and maintain on this point that, aside from the fact that they are on stand-by duty at home, they also take turns on duty in the workplace in order to provide a continuous service every day of the week from 7 a.m. to 5.15 p.m. As evidence of this they produce duty rosters for 2007 to 2009, from which they infer that Office Notice No. 21/03 is not applicable to them. They further submit that, according to consistent precedent, the filing of a request is subject to no deadline other than that of a reasonable time, and that their requests of July 2007 were not filed within an “unreasonable” time limit.

On the merits, the complainants point out that the officials of the RPL team and the NMC service do not work on weekends or public holidays. They add that, in any case, paragraph 2.1 of Article 3 of Rule of Application No. 29a makes no reference either to the seven days of the week or to public holidays.

E. In its surrejoinders the Agency maintains that the complaints are irreceivable. It reiterates its request for a joinder and presses its arguments on the merits. It annexes to its submissions a memorandum of 21 November 2007 from the Head of the Engineering Division requesting that the hours of working time specified in Office Note No. 21/03 be applied to the staff of the section to which the complainants are assigned. The rosters produced by the latter were drawn up, according to the Agency, with a view to ensuring the presence of staff, on a voluntary basis, at all times between 7 a.m. and 5.15 p.m., but they never acquired any formal status. It reaffirms

that the officials of the RPL team and the NMC service must work every day of the week, including Saturdays, Sundays and public holidays, and produces in support of this assertion the duty rosters for August 2009.

CONSIDERATIONS

1. The complainants are officials of the Eurocontrol Agency assigned to the CFMU Engineering Division. The posts that they occupy all form part of the CFMU Operational Staff Service, specifically group E1. The holders of posts in this group carry out duties which ensure the continuous operation of the CFMU, for instance by means of shifts, individualised duty rosters or rolling stand-by duty at home.

2. The function allowances payable to officials in the CFMU Operational Staff Service are governed by Rule 29a pertaining to the application of Article 69b of the Staff Regulations. Pursuant to Article 3 of this Rule of Application, these officials are entitled to an ATFCM allowance. The basic amount of the allowance varies according to whether the officials work rolling shifts or are on rolling stand-by duty at home.

The complainants all receive the ATFCM allowance set at 30 per cent pursuant to paragraph 2.2 of Article 3 of the above-mentioned Rule.

3. In July 2007 each of the complainants requested that the Director General grant him the ATFCM allowance at a rate of 100 per cent, pursuant to paragraph 2.1 of Article 3 of Rule of Application No. 29a. Internal complaints challenging the refusal to act on these requests were lodged with the Joint Committee for Disputes, which issued a divided opinion. The Director General endorsed the view expressed by two members of the Committee and dismissed the complaints by decisions of 20 June 2008 on the grounds that they were irreceivable and devoid of merit. Those are the decisions that gave rise to the complaints presently before the Tribunal.

4. Those nine complaints advance similar arguments and claims. They should therefore be joined to form the subject of a single judgment.

5. Eurocontrol contends that the complaints are irreceivable. It considers that they are devoid of substance because in July 2007 the complainants requested that they receive the ATFCM allowance at a rate of 100 per cent in respect of an arrangement regarding their working schedule that they had abandoned in February 2007. It adds that the complainants' claims for payment of the ATFCM allowance at the rate of 100 per cent with retroactive effect from 1 November 2006 are irreceivable inasmuch as the initial requests were not submitted until July 2007.

The question as to whether these objections are justified may remain undecided, since the complaints are manifestly devoid of merit for the reasons set out below.

6. The refusal to increase the rate of the ATFCM allowance paid to the complainants from 30 to 100 per cent is based on the argument that they do not work rolling shifts but are simply on rolling stand-by duty at home. Moreover, according to the Agency, paragraph 2.1 of Article 3 of Rule of Application No. 29a is not applicable to them since they do not perform their duties every day of the week.

The complainants consider that this interpretation unduly restricts the scope of above-mentioned paragraph 2.1 and that the impugned decisions also breach the principle of equal treatment inasmuch as some of the CFMU operational staff allegedly receive the ATFCM allowance under paragraph 2.1 without working on Saturdays, Sundays and public holidays.

7. It is plain from the submissions that the complainants do not work rolling shifts but are simply on rolling stand-by duty at home. They do not, as a rule, work on Saturdays and Sundays. Moreover, no concrete evidence has been provided to show that officials whose situation is comparable to that of the complainants in terms of

performance of their duties are paid the ATFCM allowance at a rate higher than 30 per cent. The Tribunal has no reason to cast doubt on Eurocontrol's statement that the officials receiving the ATFCM allowance at a higher rate and who are assigned either to the RPL team or to the NMC service must work rolling shifts and must do so every day of the week, including Saturdays, Sundays and public holidays.

8. In the absence of a practice warranting a different definition of the scope of the provision, paragraph 2.1 of Article 3 of Rule of Application No. 29a must be construed to mean that only officials working rolling shifts and whose working hours are spread over all seven days of the week, including Saturdays, Sundays and public holidays, are entitled to an ATFCM allowance at rates that range from 80 to 120 per cent, depending on their specific working conditions. Contrary to the complainants' assertion, the application of variable rates of payment of the ATFCM allowance, depending on the degree of constraint associated with the obligations imposed on the officials, is consistent with the objectives pursued when the allowance was introduced.

9. It is clear from the foregoing that the impugned decisions are in no way unlawful. The complaints must therefore be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 30 April 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet