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

111th Session **Judgment No. 3034**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs G. A., P.D.H., I.D'H., M.D.K. (his third), D.D.S., R. D. (his third), O. D. (his second), Ms N. E.-D., Ms G. G. (her third), Messrs J. G. (his third), J.A. I.A. (his fourth), Ms J. M. (her third), Ms M. Q. (her second), Messrs T. R. (his fourth) and R. T. (his second) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 29 December 2008, the Agency's single reply of 17 April 2009, the complainants' rejoinder of 29 June and Eurocontrol's surrejoinder of 2 October 2009;

Considering the complaints filed by Messrs P. C. (his second), J.-L. C. (his third), M. F., L. G. (his third), Ms F. G. (her fourth), Messrs D. H. (his second), P. K. (his third), A. L. (his second), Ms M. L.-M. (her third), Messrs S. L. (his third), M. M. (his fourth), M. M. (his third), A. M. B. (his second), A. O. (his third), R. O. (his second), Ms C. P., Messrs J.C. P.M., T. P. (his third), W. R., M. S. (his third), D. S. (his second), D. S., P. S., L.V.d.B., K.V.d.M. (his second), M.V.N., E.V.R. and P.V.R. (his second) against Eurocontrol on 2 February 2009, the Agency's single reply of 24 June, the

complainants' rejoinder of 24 July and Eurocontrol's surrejoinder of 30 October 2009;

Considering the complaints filed by Messrs M. A. and P. Q. (his third) against Eurocontrol on 28 September 2009 and supplemented on 8 March 2010, the Agency's single reply of 20 May, the complainants' rejoinder of 9 June and Eurocontrol's surrejoinder of 30 July 2010;

Considering the complaints filed by Messrs G. D. (his third), R.D.K. (his third), K. E. (his second) and T. T. (his second) against Eurocontrol on 28 September 2009 and supplemented on 12 March 2010, the Agency's single reply of 20 May, the complainants' rejoinder of 10 June and Eurocontrol's surrejoinder of 30 July 2010;

Considering the complaints filed by Messrs J.-B. C. (his third) and H. P. against Eurocontrol on 26 February 2010, the Agency's single reply of 29 April, the complainants' rejoinder of 3 June and Eurocontrol's surrejoinder of 30 July 2010;

Considering the applications to intervene filed by Mr P. B., Ms G. C., Ms A.D.B., Messrs J.-M. D., P. G., G. L., M. M., P. P., M. R., M. S., F. V. and R.v.Z., and the letters of 26 January 2010, 9 March 2010, 29 April 2010, 29 March 2011 and 21 April 2011 in which the Agency stated that it was not opposed to these applications;

Considering the applications to intervene filed by Messrs M. M. and J.M. B. and the letters of 19 April 2011 in which the Agency submitted its comments thereon;

Considering Articles II, paragraph 5, and VII 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 case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are set out in Judgment 2204, delivered on 3 February 2003, and in Judgments 2985 and 2986, delivered on 2 February 2011.

The complainants, who were all recruited by the Agency prior to 25 April 2007, had previously acquired pension rights in Belgium. They became established before 1 June 2007.

At the beginning of the nineties, under Article 12 of Annex IV to the Staff Regulations governing officials of the Eurocontrol Agency and Article 5 of Rule of Application No. 28 of the Staff Regulations – which sets out the arrangements for implementing the said Article 12 – officials were entitled to request the transfer of their acquired pension rights to the Eurocontrol pension scheme within six months of the date of their establishment, if the regulations or the contract to which they had been subject in their previous post so allowed. The pensionable years to be credited were then calculated by reference to their basic salary at that date. As some officials were unable to apply within the prescribed period, it proved necessary to reopen this application period. To this end, "[e]xceptional temporary provisions having the force of service regulations" were adopted. They were published in Office Notice No. 11/91 of 27 June 1991 and became effective as of 1 January 1991. Article 2 of these provisions stipulated that an established official could request the transfer of his pension rights "within six months of the effective date of the [said] provisions or of the date on which such a transfer [would be] rendered possible, whichever [was] later". If transfer was not yet allowed under the contract or regulations governing their previous post, the persons concerned could either submit an application as a safeguard, or await the date on which the transfer would become possible. A number of complainants had submitted either one or two applications as a safeguard by 31 May 2007.

In order to expedite procedures for authorising the transfer of pension rights from the Eurocontrol pension scheme to a national pension scheme (Article 11 of Annex IV to the Staff Regulations), or from a national scheme to the Agency's scheme (Article 12 of the same annex), an Article 12bis was adopted. This article entered into force on 1 September 1994 and stated that agreements on the transfer of pension rights concluded between the European Communities and a Community Member State which was also a Member of Eurocontrol would apply *mutatis mutandis* to the Agency as from the date of their

entry into force, once the State concerned had advised Eurocontrol of its formal acceptance of the procedure,

In the course of the year 2000 a number of officials asked the competent Belgian authorities and then the Agency to adopt measures which would enable them to transfer their pension rights.

Information Note to Staff No. I.02/6 of 26 March 2002 announced that a survey would be carried out in order to collect the information required for assessing the potential budgetary impact of an agreement between Eurocontrol and Belgium permitting the transfer of pension rights. At that point some officials expressed their interest in transferring their rights.

The law regulating the transfer of pension rights between Belgian pension schemes and those of institutions governed by public international law was adopted on 10 February 2003. Within the meaning of this law, the term "institution" referred to "Community institutions and bodies placed on the same footing as these institutions for the purposes of applying the staff regulations governing officials and other servants of the European Communities" and to certain organisations devoted to furthering the Communities' interests. Article 3, paragraph 2, of this law stated, however, that a royal decree could extend the application of its provisions to other institutions governed by public international law. This law entered into force on 1 January 2002 pursuant to its Article 29.

A Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions was adopted on 16 July 2003. Paragraph 2 thereof laid down that "[t]he Director General will consult with the trade union organisations concerned […] on all general matters connected with the staff and their employment conditions, including working conditions, remuneration and related aspects, before taking a decision or submitting proposals for a decision to the Provisional Council/Permanent Commission".

Information Note to Staff No. I.05/06 of 27 April 2005 announced a reform of the Eurocontrol pension system, which was reflected in the establishment of a pension fund. The new provisions of the Staff Regulations concerning pensions, which were brought to the staff's

attention by Office Notice No. 11/05 of 20 June 2005, took effect on 1 July 2005. The new version of Article 12, paragraph 1, of Annex IV to the Staff Regulations provided that pensionable years should henceforth be calculated by reference to the official's "basic salary, age and exchange rate at the date of application for a transfer".

The Royal Decree bringing Eurocontrol within the scope of the Belgian law of 10 February 2003 was issued on 25 April 2007 and entered into force on 1 June 2007. It stipulated inter alia that officials who had become established before 1 June 2007 should submit their transfer application to the *Office national des pensions* "within six months of that date".

On 31 May 2007 the Agency published the new version of Rule of Application No. 28 in Office Notice No. 20/07. Pursuant to Article 12, new paragraph 1, of Annex IV to the Staff Regulations, Article 7, paragraph 2, of the aforementioned rule provided that, for the purpose of calculating the number of pensionable years to be credited, the amount of the annual basic salary – which, together with the annual rate of pension-right accumulation, serves as divisor – was that of the "date on which [the] transfer application [was] received". However, under the terms of paragraph 4 of the above-mentioned notice, officials who had already submitted a request for the transfer of their pension rights and whose contract or employment scheme allowed such transfer before the date of publication of the notice "[would] be subject to the former provisions of Article 12 of Annex IV to the Staff Regulations […] (application of the basic salary, age and exchange rate at the date of establishment)". Information Note to Staff No. I.07/05 on the transfer of pension rights between Belgian pension schemes and the Eurocontrol pension scheme was also published on 31 May 2007. Annex IA to this note contained the transfer application form.

All the complainants requested the transfer of their pension rights at that point. They agreed to the transfer after being informed of the estimated number of pensionable years which would be credited to them on the basis of the revised provisions, but filed internal complaints against the decisions determining the pensionable years credited to them, because they objected to the fact that these years had

been calculated by reference to their basic salary at the date of their transfer application and not at the date of their establishment. Two members of the Joint Committee for Disputes recommended that the internal complaints should be allowed, while the other two recommended that they should be dismissed as unfounded. As Messrs A. and Q. did not receive a reply to their internal complaints within the four-month time limit laid down in Article 92(2) of the Staff Regulations, they challenge the implied decision rejecting their internal complaints. By memoranda of 26 August or 20 November 2008, or of 25 June or 23 November 2009, which constitute the impugned decisions, the Director General informed the other complainants that he had decided to dismiss their internal complaints as unfounded. The Director General explained that the internal complaints of Messrs D., D.K., E. and T. were also inadmissible because they had been submitted through their immediate superiors only after the expiry of the three-month time limit established in the above-mentioned Article 92.

B. Four complainants, Messrs D., D.K., E. and T., state that their internal complaints were filed within the prescribed time limits but, since they had not received any reply "more than one year after the filing date", two of them had forwarded a copy of their internal complaints to the Director General and had asked him to inform them of his decision. They explain that, in doing so, they were merely sending a reminder to the Administration and were certainly not filing internal complaints. In their opinion, the Director General was wrong to hold that their action was time-barred.

On the merits, the complainants submit that, in breach of the Memorandum of Understanding of 16 July 2003, the trade union organisations were not consulted about the draft amendment of Article 12 of Annex IV to the Staff Regulations and the Permanent Commission's decision of 5 November 2004 to approve the amendments to that article was therefore unlawful. They infer from this that it was also unlawful to calculate the pensionable years to be credited to them by reference to their basic salary on the date of the transfer application.

Furthermore, the complainants consider that by employing this method of calculation, Eurocontrol "infringed the pension rights" which they had acquired with the Belgian scheme to which they had previously been affiliated. Since the aforementioned Article 12 is largely drawn from Article 11, paragraph 2, of Annex VIII to the Staff Regulations of Officials of the European Communities, they rely on Community case law in support of this submission. In their view, their property rights have been violated because Eurocontrol "has appropriated a not insubstantial share of the transferred capital" by converting it on the basis of the salary received on the date of the transfer application.

The complainants contend that the principle of equal treatment has been breached. They consider that, by applying the same method of calculation to officials who are not in the same category, because some became established before and others after 1 June 2007, for example, the Agency treated officials in a different *de facto* and *de jure* situation in the same manner.

The complainants further rely on a violation of Article 12bis of Annex IV to the Staff Regulations, because "pursuant to th[at] article […] the law of 10 February 2003 […] entered into force on 1 January 2002". They add that, in breach of paragraph 4 of Office Notice No. 20/07, no account was taken of the fact that some of them had submitted applications to transfer their pension rights as a safeguard.

Lastly, they allege that the Agency has not fulfilled its duty of care, for in calculating the pensionable years to be credited to them by reference to their basic salary on the date of the transfer application, it ignored their interests. In addition, they tax it with not including the fraction of their pensionable service expressed in days in its "conversion calculation". Several complainants also criticise it for having adopted Office Notice No. 20/07, publishing the amendment to Rule of Application No. 28, on the eve of the entry into force of the royal decree of 25 April 2007 which made it possible to transfer pension rights acquired with Belgian schemes.

The complainants ask the Tribunal to set aside the impugned decisions and to find that the pensionable years to be credited to them

must be calculated by reference to their basic salary on the date when they became established. Each of them also claims costs in the amount of 4,000 euros.

C. In its replies Eurocontrol asks the Tribunal to join all the complaints filed in the context of this case.

The Agency states that the contentions of several complainants that they learnt of the impugned decisions belatedly are not credible and that "it is not fooled by the liberties taken with time limits". It submits that the complaints of Messrs G. and I.A. are time-barred since, as they claim that they learnt of the reply to their internal complaints on 29 September 2008, under Article 93(2) (*recte* 3) of the Staff Regulations they had a period of three months, in other words until 28 December 2008, in which to file a complaint with the Tribunal. In fact their complaints were filed one day later. While it does not dispute the receivability of the complaints of Messrs A. and Q., it points out that the Director General rejected their internal complaints in memoranda of 1 October 2009. Lastly, it maintains that the internal complaints of Messrs D., D.K., E. and T. were not submitted through their immediate superiors within the prescribed time limits, which means that their complaints are irreceivable.

On the merits, the Agency draws the Tribunal's attention to the fact that in Judgment 2633, which it delivered in a case that also concerned the reform of the Eurocontrol pension scheme, it already dismissed a plea related to the infringement of the Memorandum of Understanding of 16 July 2003. It says that the trade union organisations participated in meetings of the various working groups which studied the reform between 1997 and 2005. It produces a draft document dated 21 October 2004 which summarises the trade union organisations' position and it emphasises that they did not comment on the amendment of Article 12 of Annex IV to the Staff Regulations.

The Agency points out that, unlike their counterparts working in the institutions of the European Union, Eurocontrol officials are not entitled to transfer their pension rights unless the Member State where they have acquired them so permits, and Community case law is

binding only for the said institutions. It considers that the amendment of Rule of Application No. 28, which followed the amendment of the aforementioned Article 12, does not entail any infringement of pension rights acquired in Belgium. If the rule limiting years of reckonable service to the number of years of affiliation to the previous pension scheme had not been accompanied by a clause ensuring that the official is reimbursed for the surplus capital transferred, property rights might have been infringed, but that is not the case here.

The Agency explains that the complainants are not in the same situation in fact and law as their colleagues who were able to transfer pension rights before 31 May 2007 under the rules in force at the time. They are among the officials to whom the new rules are applied once the Member States where these rights were acquired authorise such a transfer. It recalls that in Judgment 2066 the Tribunal stated that "[a] new rule could be less favourable than the old one, and hence be subject to challenge, without necessarily impairing the right to equal treatment".

According to Eurocontrol, the plea relating to a breach of Article 12bis of Annex IV to the Staff Regulations and of paragraph 4 of Office Notice 20/07 is "ludicrous", since the law of 10 February 2003 did not became effective for Agency staff until 1 June 2007, which means that applications for a transfer from Belgian pension schemes to the Eurocontrol scheme were receivable only as from that date.

In reply to the contention that it did not fulfil its duty of care, the Agency says that the amendments made to Article 12 of the aforementioned Annex IV and to Rule of Application No. 28 were lawful and were necessary as part of the reform of the Eurocontrol pension scheme, which entailed a "radical alteration" in its funding method. It produces a table showing the impact of the new version of the above-mentioned Rule on the calculation of the pensionable years to be credited to each complainant. This purports to show that any possible loss would largely depend on the date on which each person decided to retire. For some complainants the impact would even be nil. Eurocontrol therefore invites the Tribunal to find, by consulting the

documents produced by the complainants themselves, that, contrary to their assertions, pensionable service was expressed in years, months and days.

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

Messrs G. and I. A. deny that their complaints are irreceivable because, as they were notified of the reply to their internal complaints on 29 September 2008, the three-month period in which they could file a complaint with the Tribunal began to run on the next day and therefore ended on 29 December 2008. Messrs A. and Q. note that the decisions of 1 October 2009 were taken well after the expiry of the four-month time limit established in Article 92(2) of the Staff Regulations. Messrs D., D.K., E. and T. maintain that their internal complaints were lodged within the prescribed time limits.

On the merits, the complainants enlarge upon their pleas. In their view, the draft document produced by Eurocontrol does not show that the amendment made to Article 12 of Annex IV to the Staff Regulations was discussed with the trade union organisations, let alone that any consensus was reached on the matter. They submit that the reference to Judgment 2633 is irrelevant in the instant case.

The complainants contend that it is at the date of retirement that the fraction of pensionable service expressed in days is ignored. In their opinion, the tables produced by the Agency confirm that it neglected its duty of care and that they have suffered injury, because they are all obliged to defer their retirement if they do not wish to suffer a loss in the amount of pension they draw. They point out that this loss, resulting from the fact that pensionable years to be credited have been calculated by reference to the basic salary they were receiving on the date of the transfer application, and not on the date on which they became established, can amount to approximately 30 per cent. According to them, Eurocontrol can hardly claim that transfer applications submitted on the basis of its own rules as a safeguard are irreceivable.

Messrs A. and Q. explain that, if necessary, in addition to the quashing of the implied rejection of their internal complaints, they seek the setting aside of the explicit decisions taken on 1 October 2009. With the exception of Messrs D., D.K., E. and T., the other complainants formulate a new claim seeking to have the fraction of pensionable service expressed in days "converted into cash" and to have the corresponding sum paid to them.

E. In its surrejoinders the Agency reiterates its position. It maintains that the complaints filed by Messrs G. and I. A. are time-barred and states that, at Eurocontrol, the authors of the relevant provisions "clearly decided that the date on which the reply to an internal complaint is received should count when calculating the time limit for filing a complaint with the Tribunal". It submits that the claim which most of the complainants have added in their rejonders, seeking to have the fraction of pensionable service expressed in days converted into cash, is new and therefore irreceivable.

On the merits, the Agency argues that the issue raised in that claim is unconnected with the question of transferring pension rights, and that in reality the complainants are challenging the contents of Article 3 of Annex IV to the Staff Regulations. It emphasises that the transfer of pension rights is not compulsory, but when officials decide to avail themselves of this option, they do so in full knowledge of the facts, after receiving a calculation of the pensionable years which will be credited to them. It points out that the royal decree of 25 April 2007, which entered into force on 1 June 2007, contains no provisions suggesting that transfer applications submitted prior to that date could be accepted.

CONSIDERATIONS

1. Under Article 12 of Annex IV to the Staff Regulations an official who enters the service of Eurocontrol is entitled to have paid to the Agency the updated capital value of the pension rights acquired by

him by virtue of his previous activities "if the regulations or the contract to which he was subject in his previous post so allow".

Rule of Application No. 28 sets out the arrangements for implementing this article and, in particular, the rules for determining the number of pensionable years to be credited in the Eurocontrol scheme in respect of pension rights transferred from another scheme.

2. The original version of these texts stipulated that pension rights had to be transferred when the official became established. Thus, an official could exercise his/her right to make such a transfer only within six months of the date of establishment and the pensionable years credited to him/her were calculated by reference to his/her basic salary at that date.

3. According to the above-mentioned terms of Article 12 of Annex IV to the Staff Regulations, the possibility of effecting such a transfer from a national pension scheme was subject to the existence of provisions authorising this transfer in the national law of Eurocontrol Member States. However, the adoption of laws and regulations to this effect has taken place so gradually that, to date, some States have still not passed such legislation.

4. In Belgium, the host country of Eurocontrol's Headquarters and the country of origin of many of the Agency's officials, the negotiations preceding the adoption of national legislation permitting the transfer of pension rights proved to be long and arduous. Indeed, they gave rise to complaints before the Tribunal which were partly aimed at obtaining redress in respect of the Agency's alleged failure to show due diligence in the negotiations. These complaints were dismissed by Judgment 2204.

In the end, it was not until 1 June 2007 that such transfers became possible by virtue of the entry into force of a royal decree of 25 April 2007 which, as from 1 June 2007, brought Eurocontrol within the scope of a Belgian law of 10 February 2003 which had already authorised this kind of transfer for officials of the European Communities.

5. The complainants, all of whom had acquired pension rights with Belgian pension schemes, then requested the transfer of these rights to the Agency's pension scheme, as Information Note to Staff No. I.07/05 of 31 May 2007 invited them to do if they wished to take advantage of this arrangement.

6. However, during the above-mentioned negotiations, two series of events had taken place, which are of particular relevance to this dispute.

(a) On 17 June 1991 the Permanent Commission of Eurocontrol, acting out of consideration for officials who had not submitted their application for the transfer of pension rights within six months of becoming established or, above all, who had been unable to do so because such transfers had not yet been authorised by the legislation of their country of origin, adopted "[e]xceptional temporary provisions having the force of service regulations" to exempt the persons concerned from the time bar. These provisions, which were subsequently incorporated into the Staff Regulations as Appendix IIIa, specified that requests could be submitted within six months of the effective date of the provisions or, in the case of officials who in their previous post had been subject to regulations or to a contract which did not permit such a transfer, of the date on which such a transfer became possible.

Office Notice No. 11/91 of 27 June 1991, in which the provisions in question were published, explained inter alia that, in the case of officials who were as yet unable to benefit from a transfer owing to the contract or regulations governing their previous post, "[a]pplication may, as a safeguard, be made […], or the date on which the transfer becomes possible can be awaited".

The possibility of submitting such an application as a safeguard was likely to be of particular interest to officials who had acquired rights under Belgian pension schemes, since on 21 May 1991 Belgium had adopted a law, the specific purpose of which was to authorise the transfer of these pension rights to "institutions governed by public

international law", and bringing Eurocontrol officials within its scope was contemplated at that time.

Pursuant to this Office Notice, some of the complainants submitted their first application for a transfer.

However, the arrangements foreseen under the law of 21 May 1991, which were based on a legal subrogation mechanism rather than on the transfer of the actuarial equivalent or the repurchase value of pension rights, were deemed to be financially too disadvantageous by Eurocontrol. The Agency consequently refused to conclude an agreement with Belgium on that basis, with the result that Eurocontrol officials could not benefit from the above-mentioned law and, as stated above, they had to wait until 1 June 2007 before it became possible to transfer their pension rights.

(b) In the meantime, the Permanent Commission of Eurocontrol had adopted a radical reform of the Agency's pension scheme that became effective as of 1 July 2005. The numerous measures forming part of this reform, which was aimed at restoring the scheme's financial viability and which the Tribunal found to be lawful in Judgment 2633, included an amendment of the above-mentioned Article 12 of Annex IV to the Staff Regulations.

Under the new version of this Article 12, which was adopted on 5 November 2004, the number of pensionable years credited to an official who transferred pension rights acquired with another scheme was no longer calculated by reference to the official's basic salary at the date of his establishment, but by reference to his basic salary at the date of his transfer application and to his age and the exchange rate in force on that date.

This amendment, which echoed that made in 2004 by the European Communities to similar provisions on the transfer of pension rights in the Staff Regulations governing their own officials, placed the Agency's officials in a less advantageous position than they had enjoyed under the original texts. The mathematical formula used to determine the number of pensionable years taken into account in the Eurocontrol scheme, and the fact that the persons concerned had generally become established long before it became possible for them

to transfer their pension rights, meant that the number of pensionable years which would henceforth be credited to them was often considerably smaller.

The new version of Rule of Application No. 28, which gave effect to this amendment of the Staff Regulations and which was drafted with some delay, was published in Office Notice No. 20/07 of 31 May 2007, on the eve of the entry into force of the royal decree authorising the transfer of pension rights acquired under Belgian schemes. The Office Notice explained that officials who, before its date of publication, had submitted a transfer request and whose previous contract or employment scheme had allowed such transfer, would be subject to the former provisions of Article 12 of Annex IV to the Staff Regulations.

7. The complainants, who were not in that situation since they could apply for the transfer of their pension rights only as from 1 June 2007, had pensionable years credited to them in accordance with the new provisions of Article 12 and Rule of Application No. 28.

As they nevertheless considered that they were entitled to benefit from the more favourable provisions previously in force, they lodged internal complaints in accordance with the procedure set forth in Article 92 of the Staff Regulations against the decisions by which the Director General had determined those pensionable years.

The Joint Committee for Disputes issued a divided opinion with respect to these internal complaints. The Director General, concurring with the opinion of two members of this body who held that these decisions were lawful, dismissed the complainants' internal complaints.

8. The 51 complainants are now impugning all these decisions concerning them.

9. In their original complaints registered on 28 September 2009, two of the complainants, Messrs A. and Q., challenged what they deemed to be implied decisions rejecting their internal complaints,

after the expiry of the four-month time limit as from the date on which they were lodged, pursuant to Article 92(2) of the Staff Regulations.

However, attention must be drawn to the fact that the rules concerning the receivability of complaints before the Tribunal are established exclusively by its own Statute. In particular, the possibility of lodging a complaint against an implied rejection is governed solely by the provisions of Article VII, paragraph 3, of the Statute, which states that an official may file a complaint "[w]here the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it". When an organisation forwards a claim before the expiry of the prescribed period of sixty days to the competent advisory appeal body, this step itself constitutes "a decision upon [the] claim" within the meaning of these provisions, which forestalls an implied rejection which could be referred to the Tribunal (see, on these points, Judgments 532, 762, 786 or 2681). As it is not disputed that, in the instant case, the Agency had forwarded the complainants' internal complaints to the Joint Committee for Disputes within this prescribed period of time, the persons concerned were wrong in believing that they could challenge the implied rejection of these complaints.

Subsequently, however, by decisions of 1 October 2009, the Director General explicitly rejected the two internal complaints in question after the Committee had given its opinion. As in their rejoinders the persons concerned have indicated that they also challenge these explicit decisions inasmuch as this may be necessary, their claims must be deemed to be directed against these decisions and in this respect their complaints should be assimilated with those of the other complainants.

10. Numerous applications to intervene have been submitted by other officials. Some of them are interveners in several cases.

11. The complainants do not object to the joinder of all the complaints which has been requested by the Agency. Since these complaints seek the same redress and rest on submissions which are

mostly very similar, the Tribunal considers that they should be joined in order that they may form the subject of a single ruling.

12. The Agency raises several objections to the receivability of the complaints.

13. First, it submits that many of the complainants were notified of the impugned decisions well before the date mentioned in their submissions, so that in reality their complaints were filed out of time. It considers that their assertions in this respect are "not in the least credible" and that the persons in question have taken "liberties […] with the time limits".

However, in accordance with the principles governing the burden of proof when determining the receivability of complaints, it is up to the organisation which intends to rely on late submission to establish the date on which the impugned decisions were notified (see Judgments 723, under 4, or 2494, under 4). Since the Agency has failed to produce any acknowledgement of receipt or other document attesting to the date on which the decisions in question were notified, it has not furnished proof of the alleged late submission. This argument will therefore not be accepted.

14. Secondly, Eurocontrol submits that Messrs G. and I. A., who themselves say that they received the decisions concerning them on 29 September 2008, were time-barred when they impugned these decisions before the Tribunal on 29 December 2008. It contends that their complaints were lodged after the expiry of the three-month period, beginning on the day of notification of the decision rejecting an internal complaint, laid down in Article 93(3) of the Staff Regulations.

It must be emphasised in this respect that, as stated earlier, the conditions governing the receivability of complaints before the Tribunal are governed exclusively by the provisions of its own Statute. As was recently recalled in Judgment 2863, which was delivered in a case also concerning Eurocontrol, an organisation which has recognised the jurisdiction of the Tribunal may not depart from the rules which it has thus accepted. Article VII, paragraph 2, of the

Statute of the Tribunal states that, "[t]o be receivable, a complaint must […] have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published". It is therefore unlawful for Article 93 of the Staff Regulations to set a different time limit for filing a complaint by specifying that that limit is three months instead of ninety days. Moreover the Tribunal's case law indicates that the time limit laid down in the above-mentioned Article VII, paragraph 2, starts to run on the day after, and not on the day on which, the impugned decision is taken (see, for example, Judgment 2244, under 5).

In the instant case, this period for filing a complaint expired on 28 December 2008. However, as that was a Sunday, the complaints of the persons concerned could still be filed on the following day (see Judgments 306, 517 and 2250, under 8). Since they were registered on 29 December 2008, as stated earlier, they are therefore receivable.

15. Thirdly, the Agency submits that the complaints of Messrs D., D.K., E. and T. are irreceivable because their internal complaints were not submitted through their "immediate superiors" within three months, as required by Article 92(2) and (3) of the Staff Regulations.

While the complainants contend in a convincing manner that they did lodge their internal complaints within the applicable time limit, the evidence on file shows that they were probably not submitted through the complainants' immediate superiors. However, as the Tribunal has frequently stated, the procedural rules for lodging an internal appeal must not set a trap for staff members who are endeavouring to defend their rights; they must not be construed too pedantically and, if they are broken, the penalty must fit the purpose of the rule. For that very reason, an official who appeals to the wrong body does not on that account forfeit the right of appeal. In such circumstances this body must forward the appeal to the competent body within the organisation in order that it may examine it and the person concerned is not deprived of his/her right of appeal (see, in this connection, Judgments 1832, under 6, and 2882, under 6).

In accordance with that case law, this objection to receivability will thus be dismissed.

16. On the other hand, the Agency is right to challenge the receivability of a claim added by most of the complainants in their rejoinder, seeking the payment of a sum corresponding to the conversion into cash of the fraction of their pensionable service expressed in days. As the Tribunal has consistently held, a complainant may not, in his or her rejoinder, enter new claims not contained in his or her original complaint (see Judgments 960, under 8, 1768, under 5, or 2996, under 6). For this reason, this additional claim can only be dismissed.

17. The complainants' main argument is that, generally speaking, the Agency could not lawfully make them subject to the new provisions of the Staff Regulations and Rules of Application thereof which had been introduced as part of the pension scheme reform that entered into force in 2005.

18. They first submit that, contrary to the terms of the Memorandum of Understanding of 16 July 2003, the representative trade union organisations at Eurocontrol were not consulted about the amendment of Article 12 of Annex IV to the Staff Regulations before its adoption on 5 November 2004.

As the Tribunal already noted in the aforementioned Judgment 2633, the evidence on file indicates that the Agency's trade unions were widely associated in preparations for the pension reform. Their representatives were invited to participate in numerous meetings on this subject and the Agency has produced as an annex to its reply a draft document, entitled "Text of compromise proposal on pension reform as discussed with social partners on 13.10.04", which proves that such consultation really took place. While the plan to amend Article 12 of Annex IV to the Staff Regulations does not seem to have been specifically debated at that meeting, the trade union organisations were nonetheless informed of it. In addition, it must be noted that, contrary to what the complainants seem to think,

compliance with the Memorandum of Understanding of 16 July 2003 does not signify that consensus between the Agency and these organisations must be achieved on any substantive amendment of an article of the Staff Regulations. This argument will therefore be dismissed.

19. The complainants then state that, even supposing that Article 12 of Annex IV to the Staff Regulations should have been applied in its current version, the Agency did not comply with it. Citing the case law of the Court of Justice and the Court of First Instance of the European Union relating to the application of provisions of the Staff Regulations of Officials of the European Communities which are similar to those of Article 12, they contend that Eurocontrol was under an obligation to credit them with pensionable years in such a way that the pension rights which they had acquired with a national scheme by the date on which they entered the Agency's service were preserved in full. According to the complainants, in order for the provisions of Article 12 to be made consistent with this requirement, they should be construed as meaning that the application of the rule that the pensionable years to be credited are calculated by reference to basic salary at the date of the transfer request is subject to the condition that, when the person concerned became established, such a transfer was already possible.

20. This Tribunal is not bound by the case law of the European Union's judicial bodies. It must further be noted that the legal context of this case law is different. Unlike the above-mentioned Article 12 which is in force in Eurocontrol, the provisions of Article 11 of Annex VIII to the Staff Regulations of Officials of the European Communities, which formed the basis of this case law, do not restrict the transfer of pension rights by requiring this to be authorised by the regulations or contract to which the person concerned was subject in his/her previous post. Moreover, more generally speaking, the legal framework governing European Union staff, which allows pension rights acquired in a Member State to be transferred to the Community pension scheme on the conditions established by this case law, differs

from that which applies to Eurocontrol staff in that the provisions of the Staff Regulations are not binding on the Agency's Member States. In addition, the interpretation of Article 12 suggested by the complainants conflicts directly with both the letter and the spirit of the provisions of this article, which were formulated with a view to taking account, in all cases, of the person's situation at the date of his/her application for the transfer of pension rights, and not at the date of his/her establishment.

21. The complainants also submit that the Agency breached their property rights with this new method of determining the pensionable years to be credited to them.

22. Although the Tribunal has already had occasion to state that international organisations must respect their officials' property rights (see Judgment 2292, under 11), this plea will not succeed in the instant case. The complainants' pension benefits probably do not equate exactly to the capital of their transferred rights, but this situation, which is inherent in the functioning of every social insurance scheme, is in itself by no means abnormal, provided of course that any losses suffered by the persons concerned remain minimal. There is no evidence to show that the conditions on which the pensionable years credited to the complainants were calculated result in non-compliance with this requirement, even though they are indeed less favourable than those provided for under the previous rules. Moreover, it would in any case be difficult to tax the Agency with thus despoiling its officials, as it must be emphasised that the transfer of pension rights acquired with a national pension scheme is no more than an option available to them, which they are free not to use if they prefer to maintain their pension rights as they stand under their original scheme.

23. The complainants likewise submit that the new provisions breach the principle of the equal treatment of officials. This principle is not, however, cited here, as is usually the case, in order to demand that similar or comparable situations be governed by the same

rules, but in support of the argument that dissimilar situations must be subject to rules taking account of this dissimilarity. In the complainants' opinion, Eurocontrol could not lawfully apply the same provisions to officials established by 1 June 2007 who had pension rights with Belgian schemes, and to officials who were established by that date but whose pension rights acquired with their original scheme could already be transferred, or indeed to officials who had acquired pension rights with Belgian schemes but who became established after that date, as the former, unlike those in the latter two categories, were unable to transfer their pension rights at the time when they became established.

24. However, where an international organisation is required to apply the principle of equal treatment to officials in dissimilar situations, the Tribunal's case law allows the organisation a broad discretion to determine the extent to which the dissimilarity is relevant to the rules concerned and to define rules taking account of that dissimilarity (see, for example, Judgments 1990, under 7, or 2194, under 6(a)). When a revision of staff regulations takes place, as occurred here, it will inevitably affect various categories of staff differently, depending on their personal or professional characteristics, such as their age or career pattern, and the organisation should naturally not be required to define specific legal rules for each category. In the instant case, Eurocontrol, which had temporarily established a specific set of rules for some officials, did not consider that the difference in the situation of the categories of officials mentioned by the complainants was such as to require that they be made subject to different rules. In light of the available evidence, the Tribunal does not consider that this approach constituted an abuse of the Organisation's discretion in this matter.

25. In the complainants' opinion the Agency breached its duty of care towards its officials by issuing and then applying the new provisions of the Staff Regulations and Rules of Application thereof determining the pensionable years to be credited when pension rights are transferred, since these provisions "plainly ignored the interests" of

the staff members concerned. But the duty of care which an international organisation owes to its officials obviously does not imply that the organisation must, as a matter of principle, refrain from adopting rules which are less favourable to its staff than those previously in force, or that it must exempt staff from the normal application of such rules.

26. Some complainants submit, more specifically, that the Agency breached this duty of care by publishing the amended version of Rule of Application No. 28 just before the entry into force, on 1 June 2007, of the Royal Decree permitting the transfer of pension rights acquired with Belgian pension schemes. While it would certainly have been advisable to have drafted this amendment sooner, from the legal point of view it simply gave effect to the new version of Article 12 of Annex IV to the Staff Regulations, which had been in force since 1 July 2005. In itself, the amendment did not therefore deprive the persons concerned of any legal right, and, as stated above, the duty of care which an organisation owes to its officials does not require it to abstain from making them subject to the applicable rules solely because they are unfavourable to them.

27. The complainants tax the Agency with ignoring the fraction of pensionable service expressed in days in calculating the amount of their pensions. Contrary to what they apparently believe, this issue, which is tantamount to challenging the lawfulness of Article 3 of Annex IV to the Staff Regulations defining the conditions for payment of pensions, does not solely affect the situation of officials who transfer pension rights acquired with a national scheme. But it must be observed that this plea in fact concerns the determination of the amount of an official's pension on his/her retirement, and not the calculation of the years of pensionable service which may be allocated to him/her in the course of his/her career. This plea is therefore of no avail against the impugned decisions in the instant cases.

28. Some of the complainants argue that they were entitled to remain subject to the former provisions because they had filed

a transfer application as a safeguard, before those provisions were amended, on the basis of the above-mentioned Office Notice of 27 June 1991.

29. As stated earlier, the purpose of this Office Notice was to publish and explain the arrangements for implementing the provisions of the Staff Regulations adopted on 17 June 1991 which, without altering the condition that the only officials eligible for a transfer of pension rights were those who, in their previous post, were subject to a contract or to regulations which so allowed, authorised those who did not meet these conditions to submit their application within six months of the date on which this transfer became possible.

With reference to these provisions, the Office Notice added that these persons did not necessarily have to await the entry into force of national laws authorising such a transfer before submitting their application, but that they could do so forthwith "as a safeguard".

30. The Tribunal will not dwell on the complainants' argument that it was in fact possible to transfer pension rights from Belgian schemes before 1 June 2007, with the result that officials who had filed a transfer application pursuant to the Office Notice of 27 June 1991 met the conditions established by that of 31 May 2007 for remaining subject to the former method of calculating pensionable years to be credited. Contrary to that view, the fact that as from 2002 it was envisaged that Eurocontrol would be brought within the scope of the above-mentioned Belgian law – which was in the process of being drafted and which was finally promulgated on 10 February 2003 – is in itself of no legal consequence. Only the actual extension of the scope of the law, which did not occur until the entry into force, on 1 June 2007, of the Royal Decree of 25 April 2007, could make it possible to transfer pension rights acquired with Belgian schemes to the Agency's scheme. In this connection, it is also manifestly wrong to argue that the law of 10 February 2003 applied to Eurocontrol as from its entry into force on 1 January 2002, because Article 3 of this law stipulated that the extension of its application to other institutions governed by public international law was subject to the issuance of a

royal decree which itself determined the date on which this extension took effect and, in this case, as stated earlier, this was set at 1 June 2007.

31. It was plain from the instructions in the Office Notice of 27 June 1991 that a transfer application submitted in advance pursuant to this notice would be regarded by the Agency as having been validly filed, and not as premature. This would prevent the application from subsequently becoming time-barred if, for example, the person concerned did not confirm it within six months of the date on which the transfer became possible.

32. However, these instructions did not give the officials concerned the right to have this application examined, when the time came, in the light of applicable Staff Regulations and relevant rules on the date on which it was submitted.

33. As the Tribunal stated in Judgment 2459, under 9, 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.

34. In the instant case, the new provisions of Article 12 of Annex IV to the Staff Regulations and Rule of Application No. 28 provide no indication whatsoever that they were intended to cover only applications submitted after their entry into force. Both the actual terms of these provisions and the circumstances in which they were adopted show, on the contrary, that it was their authors' intention that they should apply to officials who had previously been unable to obtain the transfer of their pension rights.

35. The principles of good faith, non-retroactivity and the protection of acquired rights would have been breached only if the Office Notice of 27 June 1991 had stipulated that transfer applications submitted as a safeguard pursuant to that notice would in due course be examined in the light of the texts in force on the date on which they were filed. No such inference may be drawn, even implicitly, from the terms of this notice. The mere fact of authorising Agency officials to submit an application before the condition permitting its granting was met could not be construed as an undertaking that, once this obstacle disappeared, the application in question would be considered without regard to subsequent developments in the legal framework governing pensions.

36. These considerations lead to the conclusion that the pensionable years credited to the complainants concerned were correctly determined, in accordance with the new provisions applicable on the date of the disputed decisions, by reference to the basic salary received by the persons concerned at the date of their transfer applications and not at the date on which they were established.

37. However, the Tribunal must draw attention to the fact that, as was found in Judgments 2985 and 2986 delivered on 2 February 2011 concerning similar cases, the transfer application to be taken into account for this purpose was not that which these officials had filed after 1 June 2007 but that which they lodged initially pursuant to the Office Notice of 27 June 1991.

38. By specifying that officials for whom a transfer of pension rights was not yet possible were nevertheless authorised to apply for such a transfer as a safeguard, this Office Notice itself gave those officials the guarantee that such applications would be regarded as valid. For this reason, the “date of application for a transfer” which must serve as the reference point for determining the pensionable years to be credited to them, according to the new version of Article 12 of Annex IV to the Staff Regulations, can only be that of the application thus made. By considering, when this transfer finally

became possible for persons holding pension rights with Belgian schemes, that the applications submitted by some of them under this arrangement would not be taken into account and that the reference date would be that of a new application which they would have to make, the Agency therefore disregarded the legal effects of their initial application.

39. Admittedly, the Office Notice of 27 June 1991, whose essential purpose was, as stated earlier, to protect officials against any risk of a time bar, was adopted at a time when the subsequent legal consequences of these transfer applications submitted as a safeguard could not be foreseen. However, since Eurocontrol accepted at the outset the validity of applications presented in these circumstances, the requirements of the principles of good faith, the non-retroactivity of administrative decisions and the protection of acquired rights resulting from definitively established legal situations prevented the Agency from thereafter refusing to give full effect to these applications.

40. The Tribunal further notes that there was no time limit for presenting applications under the Office Notice of 27 June 1991. Since their submission was not subject to any express time limit, which would indeed have been fairly nonsensical given that the applications were to be made in order to safeguard a right which might arise at a later date, there was nothing to prevent officials from submitting such applications up until the entry into force, on 1 June 2007, of provisions rendering possible the transfer of pension rights acquired with Belgian pension schemes.

41. It follows that all the impugned decisions concerning complainants who filed a transfer application as a safeguard, pursuant to the above-mentioned Office Notice of 27 June 1991, during the period from the date of publication of that notice up to and including 31 May 2007 must be set aside. These complainants' cases must be referred back to the Agency in order that the pensionable years credited to them be determined by reference to their basic salary and age and the exchange rate as at the date of their respective initial

applications. If several applications were submitted as a safeguard by the same official before 1 June 2007, the operative date will naturally be that on which the first application was made.

42. In many of the instances where the complainants stated in their complaint that they had submitted an application to have their pension rights transferred on the basis of the Office Notice of 27 June 1991, the Agency disputes the accuracy of this statement. The persons concerned, who have produced no evidence whatsoever to substantiate their allegations, do not take issue with the Agency's position in this respect in their rejoinder. In the circumstances, the Tribunal considers that the available evidence does not establish that these applications were made.

43. In addition, it must be made clear that the officials who had asked Eurocontrol or the Belgian authorities to adopt measures permitting the transfer of their pension rights, but who had not formally presented a transfer application before 1 June 2007, will not be granted the right to benefit from pensionable years calculated on this basis. The same applies, *a fortiori*, to those who merely expressed an interest in transferring their pension rights in the context of the survey conducted on this subject by the Human Resources Directorate in 2002. Only a formal transfer application submitted as a safeguard on the basis of the Office Notice of 27 June 1991 may be validly taken into consideration in this respect; the fact that some officials are unable to benefit from the advantage in question is the result of their own choice not to file such an application.

44. The interveners who filed transfer applications as a safeguard and who are thus in a similar legal situation to that of the complainants referred to in consideration 41 above shall be granted the rights conferred on the latter by the present judgment. The Agency must carry out the requisite checks with regard to the intervener who claims to be in this category, but whose applications do not appear to be in its records. The person concerned shall assist it in this matter.

45. The claims of all the complainants other than those referred to in consideration 41, and consequently the applications to intervene from officials other than those referred to in consideration 44, shall be dismissed.

46. Those complainants who succeed in part are entitled to costs, which the Tribunal sets at an overall amount of 8,000 euros.

DECISION

For the above reasons,

1. The disputed decisions of the Director General of Eurocontrol determining the number of pensionable years credited to the complainants referred to in consideration 41, above, and those dismissing these persons' internal complaints are set aside.
2. These complainants' cases shall be referred back to the Agency in order that the pensionable years in question be determined in accordance with the terms and conditions indicated in that consideration.
3. The interveners referred to in consideration 44, subject to the reservation made therein with regard to one of them, shall enjoy the rights which the present judgment confers on the complainants referred to in points 1 and 2, above.
4. The Agency shall pay these complainants costs in the overall amount of 8,000 euros.
5. All other claims presented by these complainants are dismissed.
6. The complaints of the other complainants and the applications to intervene referred to in consideration 45, above, are dismissed.

In witness of this judgment, adopted on 12 May 2011, 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 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet