Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session **Judgment No. 3201**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), by Mr H.-R. A., Mr G. H., Mr W. P., Mr W. P., Mr H. S. (his second), Mr R.-F. S. (his second), Ms S. T. (her third) and Mr D. W. on 14 February 2011 and corrected on 11 March, the Agency's reply of 1 July, the complainants' rejoinder of 22 September and Eurocontrol's surrejoinder of 23 December 2011;

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 case and the pleadings may be summed up as follows:

A. Pensions paid by Eurocontrol, which are taxable under the tax regime of the country of residence, are subject to a tax weighting intended to ensure that the Agency's pensioners receive a net pension corresponding, within a 1 per cent variation, to that received by European Union pensioners having an equivalent grade and family situation, but whose pensions are taxed internally. In the case of pensioners residing in Germany, such as the complainants, the amount

corresponding to the tax weighting is paid to them at the same time as their monthly pension, and it is their responsibility to pay the tax levied on their pension.

On 22 December 2009 Eurocontrol's Principal Director of Resources sent a letter to several pensioners residing in Germany, including the complainants, informing them that in 2007 the tax weighting on their pensions had been "drastically reduced" following a revision of the German tax law. Since the new tax law had come into force on 1 January 2005, the amounts of gross pension paid to them for 2005 and 2006 had been too high. Accordingly, on the basis of the recommendations of an internal audit report drawn up in 2008, the Director General had decided to re-examine their situation in the light of Article 87 of the Staff Regulations governing officials of the Agency, the first paragraph of which states that "[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it". Moreover, the recipients of the letter were told that the Director General had also decided to seek recovery only from pensioners who had received an overpayment in excess of 3,000 euros per year. By letters of 28 June 2010 Ms D., head of section in the Directorate of Resources, informed the complainants that this situation applied to them, stating the amounts overpaid to each of them and the monthly sums that would be recovered with effect from June 2010. Between 13 July and 20 September, each of the complainants lodged an internal complaint against that decision. In his complaint before the Tribunal, Mr S. impugns the implied decision to reject his internal complaint. The other complainants impugn the decisions communicated to them, together with the opinion of the Joint Committee for Disputes, in letters dated 21 December 2010 which informed them that their internal complaints had been rejected as legally unfounded.

B. The complainants first argue that the decisions of 28 June 2010 are flawed in that they were taken without authority. According to them, Ms D. did not have any delegated authority from the Director

General, and was not therefore authorised to take a decision adversely affecting them.

They also object to the fact that they were not informed that the matter had been referred to the Joint Committee for Disputes, with the result that they were not given a hearing.

The complainants further point out that, according to the case law of the European Union, an undue payment can be recovered only if two conditions are fulfilled, namely that the payment was wrongly made and that this was so obvious that the official concerned could not fail to be aware of it. This latter condition has been interpreted as meaning that the payment has to be reimbursed where the error in making it could not have escaped the notice of “a duly diligent official”. They also point out that, according to the Tribunal’s own case law, an international organisation which has mistakenly overpaid a staff member must take into account any circumstances which would make it unfair or unjust to require repayment of the sum in question, including the good or bad faith of the staff member concerned. In this respect, their own good faith was “beyond question”, since they were not responsible for the mistaken evaluation of the tax weighting. The calculations involved had been so complicated that the Agency itself had had to have recourse to an internal audit procedure, and they can therefore hardly be criticised for failing to realise that the amount of their pensions was incorrect, especially since the Organisation had failed to comply with its undertakings, in October 2005 for example, to show on their pension payslips certain elements, including the amount of their net pension. Since the tax weightings applicable to pensioners living in Germany had been recalculated with retroactive effect from 1 July 2006, to take account of the new tax rules, they could reasonably have concluded that this change implied a decision not to call into question payments made for 2005 and the first six months of 2006.

The complainants state that, since the Agency was aware from November 2006 that overpayments might have occurred, they cannot understand why it almost – “but for a few days” – allowed the five-year time limit set in the second paragraph of Article 87 of the Staff

Regulations to expire before ordering recovery of the overpayments. They contend that the requirement framed in that paragraph was in any case infringed as regards the sums paid out between January and June 2005, since no recovery was made until June 2010.

The complainants also contend that Eurocontrol failed in its duty of care, which according to Judgment 2768 is greater in a particularly complex legal situation, such as they had found themselves in with regard to the determination of their pension rights.

Lastly, they criticise the Agency for failing to give reasons for its decisions of 22 December 2009 and 28 June 2010.

The complainants request the Tribunal to set aside the impugned decisions and the decisions of 28 June 2010, and all the administrative measures taken on the basis of those decisions. They also request reimbursement, with interest, of the sums recovered since June 2010, together with costs.

C. In its reply the Agency informs the Tribunal that the Joint Committee for Disputes delivered its opinion on Mr S.'s internal complaint on 28 April 2011, and that the said complaint was dismissed as unfounded by a decision of 9 June 2011. It states that in the rules governing the Joint Committee there is no requirement to hold hearings, and if a claimant makes a request for a hearing, it is for the Committee to decide whether the request is justified. It points out that in this instance the Committee did not receive any request for a hearing.

The defendant also produces Decision No. XI/14 of 1 February 2009, by which the Director General delegated to the Principal Director of Resources the authority to sign on his behalf certain administrative decisions. It explains that that authority could be transferred by the Principal Director of Resources, in whole or in part, to the officials in the Directorate of Resources, as was done by a decision of 8 January 2010. Since it was within the remit of the unit led by Ms D. to examine the tax laws in force in the countries of residence of the Organisation's pensioners, she had authority to sign the decisions of 28 June 2010.

On the merits, the Agency contends that it has not infringed Article 87 of the Staff Regulations. In its view, the complainants could not have been unaware of the overpayments, since they had all received a notice dated 13 December 2004 stating the amount of their net pension, as well as annual information bulletins specifying the amount of the annual pension increases. Moreover, a straightforward comparison between the amount shown on their tax assessment notices for the years 2005 and 2006, and the amounts corresponding to the tax weighting received on a monthly basis during the same period, showed clearly that the latter were too high (the excess being between 279 and 767 euros per month). It explains that the recalculation of tax weightings with effect from 1 July 2006, referred to by the complainants, did not relate to the application of national tax rules.

The Agency also explains that the changes in the tax system applicable to the pensions it pays to its retirees residing in Germany came into effect in 2005 but were published only in 2006, and the fact that they were not taken into account in calculating the monthly weightings until the end of 2007 was partly due to the absence at the time of the staff members responsible. It contends that the five-year time limit was observed, since the complainants were informed by letters of 22 December 2009 that the undue payments would be recovered.

Lastly, the defendant denies that it failed in its duty of care, given that it confined the recovery to amounts in excess of 3,000 euros a year, that the first instalment of the recovery was timed to coincide with a general pension increase taking effect in June 2010, and that the deductions were spread over several months. In its view, it gave sufficient reasons for each of its decisions.

D. In their rejoinder the complainants develop their pleas. They argue that, even if they had noticed a difference between the amount shown on their tax assessment notices for the years 2005 and 2006 and the amount of the monthly weightings, the difference could have been due to the calculations having allowed for personal factors, such as a spouse’s income, which affect the amount of tax payable. Referring to

a report issued by the German Federal Finance Ministry in December 2004, they point out that the reform of the tax system was adopted in July 2000, and was described in that report as “the most significant tax reduction programme in postwar German history”.

The complainants also state that, according to the documents produced by the defendant, the signature of a person acting on authority delegated from the Director General must be preceded by the words “for the Director General and by delegation”. These words do not appear in the letters of 28 June 2010.

E. In its surrejoinder the Agency reiterates its position, while acknowledging that the reform of the German tax system began in 2000. In its view, the fact that Ms D.’s signature was not prefaced by the words mentioned above does not invalidate the decisions concerned.

CONSIDERATIONS

1. The pensions paid by Eurocontrol to its former staff members are subject to the tax laws of their countries of residence. In order to guarantee that they will receive a net pension corresponding, within a 1 per cent variation, to the pension received by retirees of the European Union having an equivalent grade and family situation, who are taxed at source, a tax weighting is applied to these pensions. Thus, except where the tax on them is deducted at source by the Member State concerned, the monthly pension payments are increased by the amount of a tax adjustment determined by this weighting, which is paid to pensioners each month to compensate for the annual tax payment which they will have to make. It is this latter system, by far the most widespread, which applies to retired staff members of the Agency living in Germany.

2. In 2005 Germany introduced the last stage of a wide-ranging fiscal reform which had begun in 2000 and which was intended to bring about a considerable reduction in the tax burden. As a result,

significant income tax reductions, in addition to those already decided upon, came into effect on 1 January 2005.

3. However, because of operational difficulties resulting partly from a temporary staff shortage in the pensions unit of the Human Resources and Administration Directorate, the Agency was unable to alter the tax weighting applicable to its pensioners residing in Germany until August 2007. As a consequence, in 2005 and 2006 these pensioners received pensions distinctly higher than should have been paid to them having regard to the income tax they actually had to pay. The Director General therefore decided, in accordance with the recommendations of an internal audit carried out in 2008, to recover part of the overpayments received by the persons concerned.

4. On 22 December 2009 the Principal Director of Resources sent a letter to all the pensioners concerned, stating that in accordance with the first paragraph of Article 87 of the Staff Regulations governing officials of the Agency, the sums unduly paid to them would be recovered. The letter explained, however, that the recovery would apply only to amounts exceeding a threshold of 3,000 euros for each of the years 2005 and 2006, that is, 6,000 euros in total.

5. The eight complainants, all German nationals residing in their own country, are among the 45 pensioners who, having been unduly paid sums in excess of this threshold, were affected by the recovery measures.

6. By letters dated 28 June 2010 they were informed that, as announced to them on 22 December, their pensions would be subject to deductions for this purpose, in amounts and on a schedule which were now set out in detail.

7. They all lodged internal complaints, under Article 92 of the Staff Regulations, against the decisions contained in these letters, but their complaints were rejected, following a consultation of the Joint

Committee for Disputes, by decisions of the Director General, most of which were taken on 21 December 2010.

In the case of Mr S., whose internal complaint was handled separately, the decision to reject it was adopted on 9 June 2011. His complaint before the Tribunal, which was filed before that final decision, must be regarded as impugning that decision.

8. The complainants ask the Tribunal to set aside these decisions of 21 December 2010 and 9 June 2011, as well as those of 28 June 2010 and all the administrative measures taken on the basis of the latter, including the decisions of 20 December 2010. They also request, in particular, that Eurocontrol be ordered to reimburse them all the sums deducted from their pensions since June 2010. Although they do not dispute either the fact or the amount of the overpayments they received in 2005 and 2006, they consider that the Agency was not thereby entitled to recover them and, moreover, that the impugned decisions are flawed in various other ways.

9. The complaints seek to challenge pension deductions made under the same conditions and are based on the same submissions. It is therefore appropriate that they be joined to form the subject of a single judgment.

10. In support of their claims, the complainants contend, first, that the decisions of 28 June 2010 are vitiated by lack of authority, since their signatory, Ms D., the head of a unit within the Directorate of Resources, was not properly authorised to take them on behalf of the Director General. However, the Agency has produced as an annex to its reply a decision of 8 January 2010 by which the Principal Director of Resources, who himself has a delegated power of signature from the Director General by virtue of a decision of 1 February 2009, had lawfully subdelegated to all the "Heads of Area, Heads of Unit and Heads of Section" answerable to him the authority to sign documents within their areas of responsibility. Accordingly, Ms D., whose unit was in charge of analysing the tax laws of the

countries in which pensioners reside, did have authority to take the contested decisions on behalf of the Director General.

Admittedly, as the complainants point out, Ms D. did not, contrary to the requirements set forth in the decision of 8 January 2010, include ahead of her signature the words “for the Director General and by delegation”. However, regrettable though that may be, the omission was obviously not a substantial flaw such as to render unlawful the decisions in question.

11. The complainants further contend that the examination of their internal complaints by the Joint Committee for Disputes was tainted with irregularity, since they were not given an opportunity to express themselves orally before the Committee and were thus deprived of the possibility of exercising their right to be heard.

This contention is unfounded. There is nothing in the rules governing Eurocontrol’s Joint Committee for Disputes, nor any general principle applicable to an appeal body of that kind, that would require a complainant to be given the opportunity to make oral submissions. As the Tribunal has already had occasion to state, in particular in Judgments 623 and 2893, all that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities. As the Committee considered that it had gleaned sufficient information about the case from the internal complaints themselves and from the documents in its possession, it was under no obligation to invite the complainants to put their case orally, or indeed to accede to any request to that effect (see Judgments 232, 428 and 1127 and, for a very similar case also relating to Eurocontrol’s Joint Committee for Disputes, Judgment 2893 cited above, under 5).

Moreover, the Tribunal notes that in this instance the complainants did not indicate, either in their internal complaints or subsequently, that they wished to make oral statements before the Committee. Although they assert, without contradiction by the defendant on this point, that they were not informed that the matter had been referred to the Committee, as former staff members of

Eurocontrol they could not be unaware that, before the Director General can take a decision rejecting even part of an internal complaint, the Committee has to be consulted, and they could therefore have asked to be invited to make such statements.

12. The complainants' argument that no adequate reason was given for the impugned decisions is also unfounded. It is evident, on examination, that the decisions contain a clear and precise explanation of the underlying legal and factual considerations. Moreover, the decisions of 21 December 2010 and 9 June 2011 were duly accompanied, when notified to them, by a copy of the opinion of the Joint Committee for Disputes.

13. On the merits, the principal contention of the complainants is that the impugned decisions were taken in breach of the provisions of the first paragraph of Article 87 of the Staff Regulations, according to which recovery of any sum overpaid is possible only "if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it". In their view, neither of the circumstances defined in that provision applied to them.

14. In this connection, the complainants argue that the rules governing pensions are extremely complex, which makes it difficult to detect mistakes made by an organisation, and that in this case the Agency itself had to seek help not only from the internal audit mentioned above, but also from a firm of consultants in determining the impact of the German tax reform on the calculation of the pensions in question.

In the first place, however, apart from the fact that this account of events is not entirely accurate, so far as concerns the possibility of detecting anomalies, the position of an organisation required to pay a very large number of pensions can hardly be compared with that of the recipient of a pension, who has an individual interest in ascertaining that the amount of the pension is correct.

In the second place, although it is true, conversely, that a pensioner does not possess the same technical skills for this purpose as the services of an organisation, the complainants are mistaken in contending that Eurocontrol's stance on the matter would require of them "an understanding in minute detail of the ins and outs of the calculations made". The only question here is whether the mistake affecting the amount of the pensions at issue was sufficiently obvious that, even without accurately gauging its significance and determining its causes, it could not have reasonably escaped the notice of a former staff member exercising ordinary diligence in the management of his personal affairs.

15. It is undeniably difficult to see how the complainants could fail to be intrigued by the fact that, in spite of the marked reduction in their income tax liability for 2005 and 2006, the amount of their gross pensions had not been reduced at all during those two years and had even slightly increased as a result of successive revaluations of the applicable scale. In this respect, the Tribunal notes that the individual simulations provided by some of the complainants as an annex to their rejoinder do not invalidate this arithmetical reality, which was in itself sufficient to show that something was amiss.

16. It is true that, as the complainants point out, the amount of tax they had to pay did not necessarily depend solely on the amount of pension received, but also on other factors such as the income of a spouse, income from capital and any tax reliefs for which they might be eligible. However, even supposing that in some cases it might not have been apparent from their tax assessment notices that the tax weighting applied to their pension was excessive, the complainants could not in any case have been unaware that the rate of income tax applying to them had fallen from 2005 onwards.

As the complainants themselves emphasise in their pleadings, quoting a report from the German Federal Finance Ministry which dates from December 2004, the tax reform then in progress was "the most significant tax reduction programme in postwar German

history", and when it entered its last stage, on 1 January 2005, there would be "another reduction in tax rates, ranging from 15% to a maximum of 42%". It is therefore clear that all German taxpayers, including the complainants, must have known of the reform, at least superficially.

The complainants, who were all former staff members of relatively senior rank, were certainly not unaware that their gross pension included a tax weighting intended to compensate for the national tax they had to pay, and they could therefore hardly fail to be surprised that the amount of the pension had not been reduced at all as a result.

17. The Tribunal also notes that the amounts of the overpayments received by the complainants over the period in question, which ranged from a low of 6,701.24 euros to a high of 18,409.56 euros, accounting for very significant percentages of their respective pensions, were at such a level that it is hard to understand how the recipients could be unaware that they were being overpaid.

Moreover, by emphasising in their pleadings that "considerable" amounts were deducted from their pensions by the Agency, the complainants merely confirm this conclusion because, taking into account the threshold below which no reimbursement was required, the sums overpaid to them exceeded those amounts, by definition, to the tune of 6,000 euros.

18. The complainants are correct in pointing out that, contrary to what they had been told in a note sent to pensioners on 26 October 2005, the monthly pension payslips sent to them during 2005 and 2006 did not include any statement of the amount of their net pension. In effect, this new feature announced in the note was not put into practice until 1 January 2007. However, on 13 December 2004 they had all been sent a notice showing the amount of the net pension they would receive from 1 July 2004 or 1 January 2005. Barring changes in individual situations, that figure increased only slightly during 2005 and 2006, and a pensioner exercising ordinary diligence would have

known from that document that, as a result of the reduction in their annual tax, the net pension had in practice increased considerably by comparison with the theoretical level at which it had thus been set.

The Tribunal is likewise unable to accept another argument of the complainants, namely that the change in the tax weighting of their pension adopted in August 2007 could have led them to believe that the payments made for 2005 and the first half of 2006 would not be reviewed. Even if it is accepted that they were misled on this point when they received the note informing them of this change, especially since the wording of the document could have given the mistaken impression that this measure was to take effect retroactively on 1 July 2006, this circumstance arose after the contested payments had been made and hence could not, by definition, have made it any less obvious to them at the time that they had been made in error.

19. To conclude therefore, the Tribunal considers that this error was so obvious that former staff members exercising ordinary diligence could not fail to be aware of it, this being one of the situations in which Eurocontrol is entitled to recover overpaid sums on the basis of the first paragraph of Article 87 of the Staff Regulations.

20. There is no substance in the complainants' further plea that they are not responsible in any way for the error, that it is entirely the responsibility of the Agency and that its staff ought to have acted sooner to correct it. It is clear that the cause of the excessive pension payments received by the complainants was administrative dysfunction, and this is expressly admitted by the defendant. But the very notion of undue payments presupposes that the overpaid sums were paid in error, and that in itself clearly cannot prevent a claim for their recovery. The complainants' argument to that effect only serves to justify limiting the recovery, in view of the circumstances of the case, to only part of the sums in question, and that is precisely what occurred, since each of the complainants ultimately retains a sum of 6,000 euros.

21. The complainants also argue that the decisions requiring them to reimburse the overpayments partly contravene the rule set forth in the second paragraph of Article 87, according to which "[t]he

request for recovery must be made no later than five years from the date on which the sum was paid”. In their view, this rule means that the decisions of 28 June 2010 could not affect sums paid before 28 June 2005. The Tribunal notes, however, that the letters sent to the complainants on 22 December 2009 and which, contrary to their assertion, were in fact individual decisions concerning them, stated clearly that steps were to be taken under Article 87 to recover the sums they had unduly received in excess of a threshold of 3,000 euros per year. These decisions, having been taken within the five-year time limit, therefore interrupted the time limit and consequently made it legally possible to recover overpayments made since 1 January 2005.

The complainants’ plea that where these payments were concerned the Agency had “but for a few days, exhausted this five-year limit” when it required them to reimburse the overpayments is clearly to no avail, since the prescribed time limit was in fact observed.

22. Lastly, the complainants argue that when the Agency ordered the disputed reimbursements, it failed in the duty of care that every international organisation owes to its staff. But since, as stated earlier, the reimbursement of the sums in question was required only to the extent that they exceeded 6,000 euros and according to a schedule compatible with the incomes of those affected, the Tribunal cannot accept this argument, especially as it is evident from the file that the Agency also took care to mitigate the negative impact of the initial deduction of June 2010 by timing it to coincide with the payment of a general pension increase.

23. It follows from the foregoing that the complaints must be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Seydou Ba, 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 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet