Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3356**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr G. V. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 July 2012, Eurocontrol's reply of 26 October, the complainant's rejoinder of 28 November 2012 and Eurocontrol's surrejoinder of 1 March 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. On 1 January 1991 new provisions concerning the transfer of pension rights acquired under a national scheme to the Organisation's pension scheme entered into force at Eurocontrol. Office Notice No. 11/91 of 27 June 1991, which published these provisions, specified that if the regulations or the contract to which officials had been subject in their previous post did not allow them to make such a transfer at that juncture – which was the position of those who had acquired pension rights in Belgium – they could either wait until transfer became possible, or they could submit an application as a

safeguard. The complainant submitted such an application on 1 August 1991. At that point in time, where a transfer was possible, the number of pensionable years to be credited was calculated by reference to the person's basic salary at their date of establishment. As from 2005, however, the operative date was that of the transfer application.

The royal decree authorising the transfer of pension rights acquired with a Belgian pension scheme to the Eurocontrol pension scheme entered into force on 1 June 2007. It stipulated inter alia that officials who had become established before that date – which was the complainant's situation – should send their transfer application to the *Office national des pensions* "no later than the last day of the sixth month following that of the aforementioned date". The complainant submitted a new transfer application on 23 July. In the meantime, on 4 June, Eurocontrol staff had been informed that applications submitted before 1 June 2007 would be regarded as premature.

An amount corresponding to the actuarial equivalent of the retirement pension acquired by the complainant in Belgium was transferred to Eurocontrol on 8 February 2008, and on 20 February he was advised that, as a result of the transfer, he had been credited with an additional one year, four months and ten days of reckonable service, determined on the basis of the new method of calculating pensionable years. The complainant expressed reservations, but did not submit an internal complaint, unlike the officials who filed the complaints with the Tribunal which led to Judgments 2985, 2986 and 3034, delivered in 2011. Although in these judgments the Tribunal found that the pensionable years credited to the complainants had been correctly determined by reference to their basic salary at the date of the transfer application, it set aside the impugned decisions and referred the cases back to Eurocontrol, because it considered that it was their initial application which should have been taken into account. On 20 July 2011 the Director General published Office Notice No. 20/11 informing the staff that it would no longer be possible to submit applications as a safeguard, but that those submitted between 27 June 1991 and the day after the publication of

the said notice and duly sent to the relevant Eurocontrol services would nonetheless be considered admissible.

Having asked the Administration to be allowed to benefit from the application of the above-mentioned judgments to no avail, the complainant reiterated his request on 21 November 2011 by submitting a "petition" (*requête)* to the Director General on the basis of Article 92(1) of the Staff Regulations governing officials of the Eurocontrol Agency. As he received no reply, on 27 March 2012 he submitted a "formal complaint" under paragraph 2 of that article. He impugns the implied decision rejecting that internal complaint.

B. The complainant submits that it is plain from Judgments 2985, 2986 and 3034 that Eurocontrol was bound to grant applications for the transfer of pension rights which had been submitted as a safeguard. He also contends that, by not complying with the provisions of Office Notice No. 20/11, the Organisation breached the principle of *tu patere legem quam ipse fecisti.*

The complainant asks the Tribunal to set aside the impugned decision, to "declare valid" his application of 1 August 1991, to find that he must benefit from the rules on the transfer of pension rights applicable on that date, to order Eurocontrol to recalculate his pension "in accordance with the rules applicable before […] 2005" with a penalty for default, and to award him costs in the amount of 4,000 euros.

C. In its reply Eurocontrol argues that the complaint is time-barred, because the complainant failed to challenge the individual decision taken in 2008 concerning him in due time. It points out that the "petition" (*requête)* of 21 November 2011 was treated as an internal complaint and submitted to the Joint Committee for Disputes. Eurocontrol considers that an implied decision rejecting that internal complaint came into existence on 21 March 2012 and that, in these circumstances, the complaint filed with the Tribunal on 9 July 2012 is irreceivable since it is out of time. It adds that the claims seeking the application of the transfer rules in force in 1991 and the recalculation

of the complainant's pension on the basis of those rules are irreceivable, because internal remedies have not been exhausted.

Eurocontrol recalls that the Tribunal's judgments are delivered *inter partes* and submits that, since the complainant was neither party to, nor an intervener in the cases which led to Judgments 2985, 2986 and 3034, it was under no obligation to extend the benefit of those judgments to him. It explains that its refusal to apply those judgments to the complainant and to officials in the same situation as him was prompted not by a wish to cause injury or by a lack of care, but by concern about the impact of a "beneficial measure" on the financial equilibrium of the pension scheme. It emphasises that, by requesting the application of the rules on the transfer of pension rights in force in 1991, the complainant is calling into question the above-mentioned judgments.

It asks the Tribunal to order the joinder of the complaint with another case concerning the same issue.

D. In his rejoinder the complainant endeavours to show that his "petition" (*requête)* of 21 November 2011 did not constitute an internal complaint. He asks for the setting aside of the Director General's explicit decision of 18 July 2012 dismissing his internal complaint. He admits that the two claims which Eurocontrol deems to be irreceivable are formulated awkwardly, but explains that their purpose is simply to request the benefit of the effects of Judgments 2985, 2986 and 3034, in other words to ask that his pensionable years be determined by reference to his basic salary on the date of his initial transfer application, i.e. 1 August 1991. He reformulates the two claims in question to that effect.

On the merits the complainant enlarges upon his pleas. He accuses Eurocontrol of failing to honour its duty of good faith and of breaching the principle of equal treatment.

E. In its surrejoinder Eurocontrol maintains its position. It stresses that Office Notice No. 20/11 does not apply to the complainant, because it stipulates that transfer applications submitted as a safeguard

will be dealt with "when the transfer becomes possible" (in French "*lorsque le transfert deviendra possible*"). As it has been apprised of three complaints concerning the same issue as the instant complaint, it requests the joinder of all these cases.

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 Organisation 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 the 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 Organisation's officials, the

negotiations preceding the adoption of national legislation permitting the transfer of pension rights proved to be long and arduous. 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 complainant, who had acquired pension rights with a Belgian scheme, asked to have those rights transferred to the Organisation's pension scheme, as Information Note to Staff No. I.07/05 of 31 May 2007 had invited officials 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".

At that point in time 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. Pursuant to the aforementioned office notice the complainant therefore submitted his first application for a transfer on 1 August 1991.

(b) As stated above, on 1 June 2007 before that transfer actually became possible, the Permanent Commission of Eurocontrol had, however, adopted a radical reform of the Organisation'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, included an amendment of the above-mentioned Article 12 of Annex IV to the Staff Regulations.

Under the new version of this Article 12, the number of pensionable years credited to an official who transferred his 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, which was considerably less advantageous.

The new version of Rule of Application No. 28, which gave effect to this amendment of the Staff Regulations, was published in Office Notice No. 20/07 on 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.

7. By a decision of the Director General of 20 February 2008, the complainant was credited with pensionable years determined according to the new provisions of the Staff Regulations and Rules of Application in question. At the time the complainant did not appeal against that decision.

8. However, similar decisions taken at that time with regard to other officials who had requested a transfer of this kind gave rise to numerous complaints before the Tribunal.

By Judgments 2985, 2986 and 3034, delivered on 2 February and 6 July 2011, the Tribunal dismissed the argument in those complaints that the officials in question should have been able to benefit from the application of the previous version of the above-mentioned texts. It therefore held that the pensionable years in dispute had been correctly determined by reference to the basic salary received by the persons concerned at the date of their transfer applications and not at the date at which they became established. However, the Tribunal also decided that, in the case of officials who had initially submitted transfer applications as a safeguard pursuant to the above-mentioned office notice of 27 June 1991, it was that initial application and not, as Eurocontrol had thought, the application which they had lodged after 1 June 2007, which should be taken into account for that purpose. The decisions in question were therefore set aside for that reason. Numerous officials who had filed applications to intervene in those cases were also found to enjoy the same rights as those conferred on the complainants.

9. In the wake of the delivery of these judgments, Eurocontrol decided, by virtue of Office Notice No. 20/11 of 20 July 2011, to terminate the effects of the office notice of 27 June 1991 as from the day after the publication of the new notice. The latter therefore specified that no application submitted as a safeguard would be accepted after that date. The detailed analysis of the reasons for that measure ended with a paragraph – highlighted in bold type – which reads as follows:

> "However, in the interests of transparency of information and legal safety, transfer applications submitted 'as a safeguard' on the basis of […] Office Notice No. 11/91 dated 27 June 1991 between this date and the day after the publication of this Office Notice, and which were duly sent to the relevant EUROCONTROL services before the latter date, will be considered admissible. They will be carried out, at the official or the servant's request, when the transfer becomes possible."

10. On 28 July 2011 the complainant sent an e-mail to the pension service of the Organisation in which he requested the recalculation of his pensionable years on the same terms as those granted to the officials who had been party to the cases giving rise to Judgments 2985, 2986 and 3034. As he received a negative reply, on 21 November 2011 he submitted a "petition" (*requête)* to the Director General and then, on 27 March 2012, he filed an internal complaint against the implied decision rejecting that petition.

On 9 July 2012 he filed a complaint with the Tribunal, impugning what he regarded as an implied decision rejecting his internal complaint.

11. Eurocontrol requests the joinder of the complaint with those filed by three other officials. However, for the reasons stated in Judgment 3355, also delivered on this day, this request will not be granted.

12. Eurocontrol submits that the complaint is irreceivable as it has been filed out of time.

It considers that the letter sent to the Director General on 21 November 2011 in fact constituted an internal complaint submitted on the basis of Article 92(2) of the Staff Regulations and it therefore contends that, since it should be deemed to have been implicitly rejected at the end of the four-month period starting on that date, i.e. on 21 March 2012, the 90 days which the complainant had to file a complaint with the Tribunal therefore expired on 19 June 2012.

13. This objection to receivability is manifestly unfounded for two reasons.

14. First, Eurocontrol was mistaken in considering that the above-mentioned letter of 21 November 2011 had to be regarded as an internal complaint. Notwithstanding the incorrect title of "petition" (*requête)* which its author had given to this letter and the fact that it had been preceded by an exchange of e-mails with the Administration,

it constituted a request submitted on the basis of the aforementioned Article 92(1). The complainant's letter of 27 March 2012 submitted thereafter on the basis of paragraph 2 of the same article was his internal complaint and was expressly described as such. Eurocontrol's argument is also contradicted by the fact that each of these documents contained an express reference to the relevant paragraph of that article under which it had been submitted, and it is clear from the evidence in the file that the complainant submitted his request of 21 November 2011 in that form at the invitation of the Administration itself.

15. Secondly, it should be recalled that the rules governing 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, 2681 or 3034). As it is not disputed in the instant case that Eurocontrol had forwarded the complainant's internal complaint to the Joint Committee for Disputes within this prescribed period of time, there had been no implied decision rejecting that internal complaint.

It follows that, far being out of time as Eurocontrol submits, the complaint filed with the Tribunal was in fact premature.

16. However, by an express decision of 18 July 2012, the Director General subsequently dismissed the complainant's internal complaint after the Joint Committee for Disputes had issued a divided opinion. As the complainant took care in his rejoinder to impugn this express decision, the complaint must be deemed to be directed against it.

17. Eurocontrol also contends that two claims submitted by the complainant are irreceivable in that they go further than those formulated in the internal appeal proceedings, since they seek recognition of the complainant's right to have the Staff Regulations and Rules of Application in force prior to the reform in 2005 applied to him. This contention is factually correct but, in his rejoinder, the complainant corrected the claims in question and again asked simply to benefit from the rights which other officials were found to have in Judgments 2985, 2986 and 3034.

This objection to receivability will therefore also be dismissed.

18. Eurocontrol based its dismissal of the complainant's claims on the consideration that, since the decision establishing the disputed number of pensionable years was not challenged in due time, it had become final and the delivery of Judgments 2985, 2986 and 3034 did not in itself reopen the time limits for an internal appeal. It also took the view that, in accordance with the principle that the Tribunal's judgments produce their effects only between the parties, the complainant, who was neither a complainant nor an intervener in any of the cases giving rise to those three judgments, could not rely on the rights which those judgments conferred on their beneficiaries.

19. This reasoning *per se* is certainly entirely consistent with the Tribunal's long-established case law, as confirmed, for example, in similar cases in Judgments 2463, under 13, 3002, under 14 and 15, or 3181, under 9 and 10.

20. However, in the instant case, the legal context of the dispute is fundamentally altered by the issuance of the above-mentioned office notice of 20 July 2011.

It is plain from the very wording of the above-mentioned paragraph of that notice that the Organisation undertook thereunder to accept as admissible applications submitted earlier as a safeguard on the basis of the office notice of 27 June 1991 and to draw all the legal consequences from their submission. By definition, that undertaking

was bound to be of particular benefit to officials who, like the complainant, had not been party to, or an intervener in the cases leading to Judgments 2985, 2986 and 3034, since the Tribunal had already recognised that the beneficiaries of those judgments were entitled to have such applications accepted.

21. Eurocontrol submits that the provisions of the paragraph in question did not concern holders of pension rights acquired with Belgian schemes. In this connection, relying on the terms of the last sentence of that paragraph according to which the earlier applications submitted as a safeguard would take effect "when the transfer becomes possible" (in French "*lorsque le transfert deviendra possible*"), it contends that this wording means that officials for whom such a transfer was already possible on the date on which the notice entered into force were excluded from the benefit of the office notice of 20 July 2011.

This sole argument is, however, unsound. While the use of the future tense in the French version of the sentence in question might well, or more naturally, be taken to express a sequential relationship between the opening up of the possibility to effect a transfer and the lodging of the official's application, if Eurocontrol intended the paragraph quoted above to refer only to holders of pension rights acquired with national schemes for whom such a transfer was not yet possible when the notice entered into force, owing to the lack of an agreement with the State concerned, clearly this restriction should have been expressly mentioned.

Moreover, it is well established in the Tribunal's case law that when the regulations or rules of an international organisation are ambiguous they must in principle be construed in favour of the interests of its staff and not those of the organisation itself (see, for example, Judgments 1755, under 12, 2276, under 4, or 2396, under 3(a)).

The argument put forward by Eurocontrol must therefore be dismissed.

22. In these circumstances Eurocontrol cannot validly rely on the final nature of the aforementioned decision of 20 February 2008 to evade its duty to review the number of pensionable years credited to the complainant. Indeed, the issuance of the office notice of 20 July 2011 may be regarded as a new, unforeseeable and decisive fact which, in accordance with the Tribunal's case law, reopened the time limit for appealing against this decision. Moreover, Eurocontrol's undertaking to accept transfer applications submitted at an earlier date as a safeguard necessarily implied that it agreed to review decisions of that kind, even when they had become final.

23. For these reasons the Tribunal finds that, by denying the complainant's request, Eurocontrol unlawfully disregarded the above-mentioned provisions of the office notice of 20 July 2011 and thereby breached the principle of *tu patere legem quam ipse fecisti*, which requires every authority to abide by the rules which it has itself established.

24. It follows from the foregoing, without there being any need to consider the complainant's other pleas, that the impugned decision and those previously taken with regard to the complainant must be set aside.

25. The case shall be referred back to Eurocontrol in order that, as the complainant rightly requests, his pensionable years may be determined by reference to his basic salary, his age and the exchange rate in force on the date of his initial application to have his pension rights transferred, i.e. 1 August 1991.

26. The complainant has requested that the order to Eurocontrol to recalculate the pensionable years credited to him be accompanied by a penalty for default. In the absence of any grounds for doubting that Eurocontrol will execute this judgment in good faith and with diligence, as is its duty since it has recognised the Tribunal's jurisdiction, there is no reason to order such a penalty.

27. As the complainant succeeds for the most part, he is entitled to costs, the amount of which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of Eurocontrol determining the pensionable years contested by the complainant and the decisions dismissing his request for a review of that decision and his internal complaint are set aside.

2. The case shall be referred back to Eurocontrol in order that the pensionable years in question may be determined by the method prescribed in consideration 25, above.

3. Eurocontrol shall pay the complainant costs in the amount of 3,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ