Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

119th Session **Judgment No. 3407**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr G. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 7 December 2012, Eurocontrol's reply of 15 March 2013, the complainant's rejoinder of 19 June and Eurocontrol's surrejoinder of 20 September 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 submit an application as a safeguard. 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 the date when he or she became established.

As from 2005, however, the operative date was that of the transfer application. The complainant submitted a transfer application as a safeguard on 31 May 2007.

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". On 4 June, Eurocontrol staff were informed that applications submitted before 1 June 2007 would be regarded as premature. The complainant submitted a new transfer application on 20 June 2007.

An amount corresponding to the actuarial equivalent of the retirement pension acquired by the complainant in Belgium was transferred to Eurocontrol on 22 January 2008, and on 6 February he was advised that, as a result of the transfer, he had been credited with an additional ten years, seven months and eight days of reckonable service, determined on the basis of the new method of calculating pensionable years. On 30 April 2008 the complainant lodged an internal complaint. Like many of his colleagues, he challenged the dismissal of his internal complaint before the Tribunal. Although in Judgment 3034, which was delivered on 6 July 2011 on these challenges, 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.

On 2 August 2011, in pursuance of Judgment 3034, the Administration sent the complainant a new calculation of the additional years of reckonable service credited to him, which was based on his transfer application of 31 May 2007. This calculation proved to be less favourable that the original computation. On 10 October 2011 the complainant sent the Director General a letter asking him to recalculate the number of pensionable years to be credited to him on the basis of a transfer application – dated 13 March 1995 and countersigned by his supervisor at that time – a copy of which he had filed with the Pension Service on 6 October. Having received no reply, he lodged an internal complaint on 10 May 2012. On 7 December 2012, as he considered that his internal complaint had been rejected by an implied decision, he filed a complaint with the Tribunal.

B. The complainant submits that by ignoring his request of 13 March 1995 – of which he produces a copy – Eurocontrol not only failed to execute Judgment 3034 correctly, but also breached the provisions of Office Notice No. 20/11 and those of Article 12 of Annex IV to the Staff Regulations governing officials of the Eurocontrol Agency, which enables an official to have paid to the Organisation the updated capital value of pension rights acquired by virtue of activities exercised before recruitment to Eurocontrol. He also taxes the Organisation with not treating him in the same manner as other officials whose files it had to review in pursuance of Judgment 3034 and with breaching its duty to provide reasons, because it has not replied to either his request of 10 October 2011 or his internal complaint.

The complainant asks the Tribunal to set aside the implied decisions rejecting his request of 10 October 2011 and his internal complaint, to find that the years of pensionable service to be credited to him must be calculated by reference, inter alia, to his basic salary on 13 March 1995 and to award him costs in the amount of 5,000 euros.

C. In its reply Eurocontrol indicates that it never received the transfer application of 13 March 1995. It asserts that the application

should not have been submitted via the complainant's supervisor and that the complainant perhaps retrieved it after submitting it to him. It emphasises that during the proceedings which led to Judgment 3034, to which the complainant was a party, he never mentioned that application, but another sent by e-mail on 24 September 2002 which, as can be inferred from consideration 43 of Judgment 3034, was rightly not considered to be valid in light of the provisions of Office Notice No. 11/91. It submits that it is plain from consideration 44 of that judgment that only one intervener was allowed to provide evidence at a later date that he had indeed submitted a transfer application as a safeguard. In its view, the complainant is seeking to have his file reopened by circumventing the *res judicata* authority of the above-mentioned judgment. As the complainant has not proved that he did in fact submit an application as a safeguard in 1995, there has been no breach of Article 12 of Annex IV to the Staff Regulations.

Eurocontrol adds that, since Office Notice No. 20/11 states that applications for the transfer of pension rights submitted as a safeguard would be carried out "when the transfer becomes possible", it does not apply to the complainant.

Lastly, the Organisation maintains that it did not treat the complainant in a different manner to the other complainants in the cases leading to Judgment 3034 and it emphasises that, after the Committee for Disputes had issued its opinion, it sent him a reasoned response to his internal complaint in a letter of 20 December 2012.

D. In his rejoinder the complainant submits that, since his application of 13 March 1995 had been countersigned by his superior, Eurocontrol may not assert that it did not receive it. In his opinion, it is "very probable" that the application was mislaid when the Organisation moved its Headquarters around that time. There was nothing to prevent him from submitting his application via his supervisor, and according to the case law, if the Organisation thought that he had turned to the wrong body, it should have forwarded the application to the competent body. He contends that in the proceedings which led to Judgment 3034 he did not have to mention

all the applications which he had submitted as a safeguard, because at that juncture he was asking to have the pensionable years to be credited to him calculated by reference to his basic salary on the date when he became established.

The complainant asks the Tribunal to set aside the decision of 20 December 2012 dismissing his internal complaint, if appropriate.

E. In its surrejoinder Eurocontrol submits that the case law on which the complainant relies applies to internal appeals. It adds that in consideration 42 of Judgment 3034 the Tribunal found that in instances where the complainants had failed to substantiate their allegation that they had applied for the transfer of pension rights, the existence of those applications could not be regarded as established.

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 or her right to make such a transfer only within six months of the date of establishment, and the pensionable years credited to him or 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, 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. However, during the above-mentioned negotiations, two series of events of particular relevance to this dispute had taken place, which are worth recalling.

(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 above-mentioned office notice, a number of these officials therefore submitted an initial transfer application in the years following the publication of this notice.

(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. This office notice also took effect on 1 June.

6. On 31 May 2007, the complainant, who had acquired pension rights with a Belgian scheme, submitted an application for the transfer of those rights. This step was also taken on the same date by many other officials in the same situation, in the belief that it would enable them to enjoy the more favourable transfer conditions laid down in the original texts.

7. On 20 June 2007 the complainant submitted another transfer application, as the officials concerned had been invited to do by Information Note to Staff No. I.07/05 of 31 May 2007.

By a decision of the Director General of 6 February 2008, on the basis of this new application, the complainant was credited with pensionable years determined according to the new provisions of the Staff Regulations and Rules of Application in question.

However, like a number of his colleagues, the complainant filed a complaint with the Tribunal in which he impugned the method of calculating these pensionable years.

8. By Judgment 3034, delivered on 6 July 2011, in which the Tribunal ruled on several complaints on this matter, including that of the complainant, the Tribunal dismissed the argument of the officials in question that they 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 and the cases of the officials concerned were referred back to Eurocontrol in order that it should determine the pensionable years to which they were entitled on that different basis.

9. On 2 August 2011, in the wake of the delivery of that judgment, which embodied the same approach as that already taken by the Tribunal in Judgments 2985 and 2986, the Organisation sent the complainant a new calculation of the pensionable years credited to him, based this time on his application of 31 May 2007.

10. On 10 October 2011, the complainant, following the appeal procedure provided for in Article 92 of the Staff Regulations, requested the Director General to recalculate the pensionable years thus determined on another basis. He relied for the first time on an application submitted as a safeguard on 13 March 1995, which had been drawn up in accordance with the instructions contained in the office notice of 27 June 1991 by using a questionnaire annexed to the latter. This application was countersigned by Mr K., one of his supervisors at the time, and the complainant had submitted a copy of it to the pension service on 6 October 2011.

11. As he received no reply within the prescribed four-month period, on 10 May 2012 the complainant lodged an internal complaint to contest the implied decision rejecting his request.

The Director General rejected this internal complaint by a decision of 20 December 2012 on the grounds that the complainant could not rely on an application which he had not mentioned in the proceedings leading to Judgment 3034. It must be noted that this decision departed from the opinion of the majority of the members of the Joint Committee for Disputes, who had recommended that the internal complaint should be allowed, and also from the minority opinion of one Committee member who considered that the authenticity of the document produced by the complainant should be ascertained, if necessary by a handwriting expert.

12. It should first be noted that the complainant, who admittedly was misled by the terms of the above-mentioned Article 92 of the Staff Regulations, was mistaken in thinking that on 7 December 2012 he could impugn before the Tribunal what he took to be an implied decision rejecting his internal complaint. Indeed, it must 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 that period, there had been no implied decision rejecting that internal complaint.

However, as the complainant took care in his rejoinder to impugn, "if appropriate", the aforementioned express decision of 20 December 2012 which had been taken in the meantime, the complaint must be deemed to be directed against that decision (see, for a similar precedent, Judgment 3356, under 15 and 16).

13. Eurocontrol first seeks to show that the Director General's rejection of the complainant's internal complaint was justified, by arguing that the *res judicata* authority of Judgment 3034 prevents the complainant from relying on an application which he had not mentioned in the proceedings culminating in that judgment.

The Organisation is mistaken as to the exact scope of that judgment. Under point 2 of the decision in Judgment 3034 and consideration 41, to which point 2 referred indirectly, the cases of the complainants who, during the period between the publication of the office notice of 27 June 1991 and 31 May 2007, had submitted an application to have their pension rights transferred, as a safeguard, in pursuance of that office notice, were referred back to the Organisation in order that the pensionable years to be credited to them should be determined in accordance with the conditions pertaining to that application. Consideration 41 also made it clear that if several applications had been submitted by the same official before 1 June 2007, the operative date was, of course, that of the first application.

It was therefore incumbent upon Eurocontrol to recalculate the disputed pensionable years by taking into consideration the earliest

application submitted by each of the complainants, and the fact that this application might not have been specifically mentioned in the proceedings leading to Judgment 3034 did not prevent the official in question relying on it when his or her situation was reviewed.

14. Eurocontrol points out that, in consideration 42 of that judgment, the Tribunal ruled on the issue of whether various applications on which some of the complainants relied had actually been made and held that the existence of those applications had not been established. However, not only did the Tribunal take care to state that this finding was based on the "available evidence", which did not prevent the persons in question from subsequently producing new evidence to prove the existence of these applications, it has also been ascertained that, in any case, the complainant was not among the officials referred to there.

Similarly, the Organisation may not infer from the statement in consideration 44 of the aforementioned judgment that it must check whether the applications on which one of the interveners relied had really been filed, that it did not need to carry out such checks in the cases of other officials – quite on the contrary.

More generally, the fact that in Judgment 3034 the Tribunal had occasion to rule on submissions disputing the existence of applications filed as a safeguard was certainly no reason for Eurocontrol to refuse to consider such an application solely on the grounds that it had not been mentioned during the initial proceedings. Indeed, the Tribunal cannot be deemed to have ruled in advance on matters which, by definition, had not been submitted for its consideration.

15. Eurocontrol develops a second, completely different, line of argument in which it vigorously disputes the actual filing of the application dated 13 March 1995, thus calling into question the very truth of the statement on which the complainant bases his claims.

As is well established in the case law, bad faith cannot be presumed and must therefore be proven by the submissions (see, for example, Judgments 2282, under 6, 2293, under 11, or 2800, under 21).

This case law must be applied particularly rigorously in the instant case, where the allegation of bad faith levelled at the complainant is tantamount to an accusation of fraud, or the use of forged documents in legal proceedings.

It must be found that, in fact, by simply stating that it could find no trace of the application in question in its services, the Organisation in no way proves the substance of the inference which it seeks to draw, especially as the complainant does offer some *prima facie* evidence in support of his submissions, in that he produces a copy of the application of 13 March 1995, countersigned by a supervisor, which tends to corroborate not only the existence of this document but also the fact that it was actually filed with Eurocontrol.

16. It is disconcerting that, as the defendant observes, the complainant made no mention of this application in his submissions during the proceedings leading to Judgment 3034, whereas he mentioned not only that of 31 May 2007 but also an e-mail of 24 September 2002 in response to an enquiry from the Directorate of Human Resources, which the Tribunal refused to regard as a valid transfer application. However, the complainant aptly replies to that argument by pointing out that, in that case, he was contending that the pensionable years to be credited to him should be calculated, in accordance with the texts applicable before 1 June 2007, by reference to his basic salary at the date of his establishment and not at that of his transfer application, which made it unnecessary to list all his previous applications.

17. If the Organisation wished to dispute the authenticity of the document produced by the complainant, as recommended by the member of the Joint Committee for Disputes who expressed the minority opinion referred to earlier, it should have investigated the matter more thoroughly, or obtained an expert opinion, which as the file shows, it failed to do.

18. The Tribunal finds that Eurocontrol's supposition that the complainant might have retrieved his application after having it countersigned by his supervisor and might ultimately have forgotten

to file it, seems highly improbable. At all events, it is equally conceivable that Eurocontrol's services might have mislaid this application, especially since, as the complainant points out, this document was submitted around the time of a move. Moreover, the Tribunal is somewhat surprised by the statement in the defendant's surrejoinder that such an incident would "not be possible".

19. Lastly, the Organisation submits that, in any case, it was not obliged to take account of the application in question because in its opinion the complainant mistakenly submitted it through his supervisor.

Clearly the Tribunal will not accept this line of argument.

On the one hand, a steady line of precedent has it that, although rules of procedure should ordinarily be strictly complied with, they must not set traps for staff members who are trying to defend their rights, and they must not therefore be construed with too much formalism. For this reason, the fact that an application has been submitted to the wrong authority does not make it irreceivable and, in these circumstances, it is up to that authority to forward it to the body within the organisation which is competent to examine it (see, for example, Judgments 1832, under 6, 2882, under 6, or 3027, under 7). Contrary to the defendant's submissions, the scope of this case law is not limited to mistakes affecting the filing of internal appeals, even though in practice that is the most frequent situation in which it applies.

On the other hand, in the instant case, the complainant cannot be criticised for having submitted his application via one of his supervisors, since the questionnaire annexed to the office notice of 27 June 1991 indicated that it was to be "returned to Division PF1 [personnel and finance]" and did not expressly state that it was not to be forwarded through the person's supervisors. Furthermore, the Tribunal notes that the French version of paragraph 1 of the notice unfortunately omitted the reference to the division in question and that the complainant's application of 31 May 2007 had also been forwarded via his supervisor without the Organisation raising any objection to this.

20. The Tribunal must therefore find that, by refusing, without any valid reason, to take account of the application of 13 March 1995, on which the complainant relies, in the instant case Eurocontrol incorrectly applied Article 12 of Annex IV to the Staff Regulations and breached the duties imposed on it by Judgment 3034.

21. It follows from the foregoing, without there being any need to consider the complainant's other pleas, that the Director General's decision of 20 December 2012 and the earlier decision rejecting the request for a review of the pensionable years disputed by the complainant must be set aside.

22. The case shall again be referred back to Eurocontrol in order that, as the complainant rightly requests, the pensionable years to be credited to him 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. 13 March 1995.

23. The complainant, who succeeds in full, is entitled to costs, the amount of which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The implied decision of the Director General of Eurocontrol rejecting the request for a review of the pensionable years credited to the complainant and disputed by him, and the decision of 20 December 2012 rejecting his internal complaint, are set aside.

2. The case is remitted to Eurocontrol in order that the pensionable years in question be determined as indicated in consideration 22, above.

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

In witness of this judgment, adopted on 6 November 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 11 February 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ