Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D.

v.

Eurocontrol

126th Session **Judgment No. 4018**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 July 2014 and corrected on 25 August, Eurocontrol's reply of 5 December 2014, the complainant's rejoinder of 19 March 2015, Eurocontrol's surrejoinder of 19 June, the complainant's additional submissions of 20 October 2015 and Eurocontrol's final comments thereon of 5 February 2016;

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 may be summed up as follows:

The complainant challenges the decision no longer to pay him an expatriation allowance.

The complainant, a Belgian national, joined Eurocontrol on 1 October 2008 under an appointment for an undetermined period and was assigned to the Maastricht Upper Area Control Centre (the Netherlands). Before being employed by Eurocontrol, he had worked at the Centre for about ten years for companies providing information technology services, which had placed him at the Organisation's disposal. His letter

of appointment, which he signed on 17 September 2008, specified that he would receive an expatriation allowance.

At the material time, Article 4 of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency, which applied by analogy to officials covered by the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, read in pertinent part as follows:

> "1. An expatriation allowance shall be paid equal to 16% of the total amount of the basic salary plus household allowance and dependent child allowance paid to the official:
>
> a) to officials:
>
> - who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and
> - who, during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account;
>
> [...]
>
> 2. An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph 1 shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance."

The complainant was informed by a memorandum of 30 January 2014 that, following a "review" of his administrative file, it had been found that the expatriation allowance had wrongly been paid to him. It was explained that, as he had carried on his main occupation in the Netherlands during the five-year period ending six months before his entry into service, he was not entitled to that allowance and that, as from 1 March 2014, its payment would cease and it would be replaced with a foreign residence allowance. The complainant was also invited to contact the Administration with a view to the recovery of the sums paid to him in error since his entry into service.

On 11 March 2014 the complainant filed an internal complaint challenging that decision, in which he contended that the expatriation allowance, the payment of which had formed the subject of negotiations

before his entry into service, was one of the essential conditions of his employment. On 17 April he was asked to provide evidence of these negotiations. On 14 May he supplied "some email exchanges" on the subject and explained that the negotiations had been "mainly" oral. On 8 July the complainant rejected a settlement proposal made to him on 27 June. The next day he filed his complaint impugning the implied decision to reject his internal complaint of 11 March.

The complainant asks the Tribunal to set aside the decision of 30 January 2014 and to order Eurocontrol to pay him an expatriation allowance until his retirement, as well as the allowances related thereto, and to refund, with interest at 8 per cent per annum, the sums wrongly withheld since 1 March 2014. Subsidiarily, he asks the Tribunal to order Eurocontrol "to compensate for the injury suffered by increasing his net monthly salary by an equivalent amount" as from 1 March 2014. In addition he claims 3,000 euros in damages and 3,000 euros in costs.

In its reply, Eurocontrol submits that the complaint should be dismissed as unfounded. It informs the Tribunal that the Joint Committee for Disputes, to which the internal complaint of 11 March 2014 was referred, met on 29 September 2014 and delivered a divided opinion. Two of its members recommended the dismissal of the internal complaint as unfounded on the grounds that, under the General Conditions of Employment and Rule of Application No. 7, the complainant was not entitled to the expatriation allowance. The two other members recommended that the internal complaint be allowed, as they considered that Eurocontrol had breached the principle of fairness and the principle of the protection of legitimate expectations. In their view, it had been established that negotiations had taken place between the Administration and the complainant regarding the payment of the allowance in question, which therefore formed an essential condition of his recruitment. They also considered that, since the complainant's letter of appointment was "definitive", payment of the allowance had become an acquired right.

In his rejoinder, the complainant informs the Tribunal that by a memorandum of 28 January 2015 his internal complaint was rejected on the grounds that he did not satisfy the requirements of Rule of

Application No. 7 for receiving the expatriation allowance. However, he was notified that although the allowance had been paid to him in error, Eurocontrol would waive the recovery of the sums he had wrongly received between October 2008 and February 2014. In this rejoinder and his additional submissions the complainant presses his claims and also asks the Tribunal to set aside the decision of 28 January 2015 and to find that, should the various sums which Eurocontrol may be ordered to pay him be subject to taxation, he would be entitled to a refund of the tax paid from Eurocontrol. Lastly, he increases his claim for damages to 5,000 euros.

In its surrejoinder and in its final comments, Eurocontrol maintains its position.

CONSIDERATIONS

1. The complainant challenges the decision of 30 January 2014 to end the payment, as of 1 March, of the expatriation allowance which he had received until then. His complaint, which was initially directed against an implied rejection of the internal complaint which he had filed against this measure, must now be regarded as impugning the express decision adopted on 28 January 2015, in the course of proceedings, by which the Director General dismissed this internal complaint as unfounded (see, for example, Judgments 3667, under 1, or 3925, under 2).

2. Article 4(1) of Rule of Application No. 7, the relevant provisions of which are quoted above in the facts, provides for an expatriation allowance. This allowance, which is equal to 16 per cent of the total amount of the basic salary plus household allowance and dependent child allowance, is paid to any official who is not and never has been a national of the State in the territory of which the duty station is located and who, during the five-year period ending six months before he/she enters the service, "did not habitually reside or carry on [his/her] main occupation within the European territory of that State".

Article 4(2) provides that officials fulfilling the same condition of nationality, but not the other condition laid down by Article 4(1), are entitled to a different allowance, namely the foreign residence allowance, the amount of which is, however, considerably lower, since it is equal to only one quarter of the expatriation allowance.

The different rules applying to the two categories of official concerned is of course warranted by the fact that assignment to a foreign country generally entails more difficulties when the official concerned has no previous connections with that country than when he has previously lived or worked there (see, in this connection, Judgment 2893, under 13 and 14).

3. In the instant case, in its above-mentioned decision of 30 January 2014 Eurocontrol substituted the payment of the expatriation allowance, which the complainant had been receiving since his recruitment in 2008, with that of the foreign residence allowance, thereby reducing the main components of his salary by 12 per cent of their basic level. According to the undisputed figures given by the complainant in his written submissions, this measure, which also entailed a corresponding reduction in the amount of certain other benefits, resulted in a monthly loss of income of approximately 1,330 euros.

4. There is no doubt that, when he was recruited by Eurocontrol, the complainant did not fulfil the conditions for entitlement to an expatriation allowance.

Indeed, he had previously been working for several years for companies providing information technology services which, under the contracts that they concluded with Eurocontrol, placed him at the Organisation's disposal to provide assistance to the Engineering Division of the Maastricht Centre in carrying out and following up projects. Thus, he had habitually carried on his occupation in the Netherlands during the five-year reference period mentioned in Article 4(1) of Rule of Application No. 7.

Moreover, the Tribunal notes that the complainant does not contend that he satisfied the criteria for receiving the expatriation allowance set forth in that provision.

5. However, despite the factual circumstances described above, the complainant's letter of appointment, signed on 17 September 2008, specified that he would receive the expatriation allowance. Indeed, this letter of appointment expressly mentioned the payment of the allowance and, although it stated that this benefit was granted "on the conditions laid down in the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre and the Rules of Application", this wording could not be construed, in the instant case, as meaning that the receipt of this allowance was subject to the fulfilment of certain criteria but, on the contrary, it attested that the complainant did meet the eligibility conditions.

6. It is plain from the evidence in the file that the clause providing for the granting of the expatriation allowance to the complainant was deliberately included in the letter of appointment by the signatory parties and was not the result of a mere administrative error, as Eurocontrol now tries to argue.

The complainant has produced an exchange of emails with the Head of the Engineering Division which unambiguously prove that his recruitment was preceded by negotiations precisely concerning the granting of the expatriation allowance and that the Eurocontrol Administration had agreed to grant him this benefit in order that his remuneration would remain similar to that which he had previously received in the private sector.

The defendant organisation's submission that this undertaking on behalf of Eurocontrol is not valid because it was not given by the Director General himself is manifestly misconceived. Apart from the fact that the executive head of international organisation is obviously not the only authority empowered to represent it in a negotiation of this kind, the issue that arises here is not whether this undertaking was legally valid, but whether it was actually given, which would explain

why the clause in question was inserted in the complainant's contract; and, as already stated, the above-mentioned emails show that it was.

Similarly, Eurocontrol's argument that the complainant's letter of appointment did not explicitly refer to an agreement between the parties on this subject "notwithstanding the rules and regulations" does not mean that no such informal agreement existed, since it is hardly likely that an organisation would wish to draw attention in a contract to the unlawful nature of one of the clauses thereof.

In view of the foregoing, the Tribunal will not accept the Organisation's submission that the clause providing for the benefit in question was inserted into the complainant's contract solely as a result of an accidental error in applying Article 4(1) of Rule of Application No. 7. In this connection, the Organisation explains that the Administration of the Maastricht Centre wrongly believed that the complainant's services while he was placed at the disposal of Eurocontrol by private companies prior to his recruitment should be regarded as services for an international organisation within the meaning of Article 4(1), and that they were therefore not to be taken into account when determining whether he was entitled to receive the expatriation allowance. In view of the evidence on file, the Tribunal is of the opinion that, at best, the purpose of this somewhat surprising alleged misunderstanding was to contrive a reason for granting the complainant a benefit which the Organisation had purposefully decided to give him, in breach of the applicable text, in order to be able to offer him a level of remuneration which would persuade him to accept his appointment.

7. However, as Eurocontrol subsequently realised, an international organisation cannot lawfully conclude an employment contract containing a clause that is contrary to its existing staff rules and regulations. The organisation must abide by the provisions it has itself laid down and they therefore take precedence over the clauses of contracts concluded between it and its officials (see, for example, Judgments 1634, under 19, or 2097, under 10).

It follows that a clause which, as is the case here, contravenes the staff rules and regulations is unlawful and therefore cannot apply, even if the contracting parties clearly intended it to do so. Were that not the case, an organisation could evade compliance with its staff regulations on a case-by-case basis, which would seriously undermine the legal framework to which they belong and, in particular, would breach the principle of the equal treatment of officials. This case, where the complainant's situation was reviewed in response to a protest from another servant at the Centre who, though he was in a similar situation to that of the complainant, did not receive an expatriation allowance and who considered that he was a victim of discrimination, in fact illustrates the inherent drawbacks of such non-compliance.

8. It is useful to compare this dispute with that which gave rise to Judgment 3483, in which an official's employment contract made provision for the granting of a benefit which was not mandatory under the Staff Regulations and which the organisation concerned did not intend to pay. Although, in the latter case, the Tribunal found that the disputed contractual clause had to be applied, it did so after expressly noting in consideration 8 of that judgment that the clause had not been unlawfully included in the complainant's contract, since a provision of the organisation's rules permitted the granting of the allowance in question to staff members in the position of the official in question. In this case, on the other hand, there was no provision permitting Eurocontrol to grant the complainant an expatriation allowance.

9. It may be concluded from the above that the Organisation was not only entitled, but bound to end the payment of the disputed allowance to the complainant.

None of the complainant's pleas will therefore lead the Tribunal to call into question the merits of that decision.

10. In particular, the complainant is wrong in thinking that he may rely on an acquired right to the payment of the allowance for which provision is made in his letter of appointment.

It is true that in this case, as the evidence clearly shows, the decision to stop the payment of the allowance, which represented a substantial part of the complainant's remuneration, altered a fundamental term of employment in consideration of which he had decided to enter Eurocontrol's service. In that respect, this measure could well be regarded as breaching an acquired right within the meaning of the Tribunal's case law established in Judgments 61, 832 and 986 (see, for example, Judgments 2696, under 5, or 3074, under 16).

However, it is an established principle that only a benefit that has some basis in law may be protected as an acquired right (see Judgment 1334, under 23). The cancellation of an unjustified benefit will not therefore be regarded as a breach of an acquired right (see Judgments 1241, under 24, and 1446, under 13 and 14). Since, as stated above, the complainant received the expatriation allowance as a result of an unlawful contractual clause, he cannot validly invoke an acquired right to justify the continued payment of the allowance.

11. The complainant also submits that the decision of 30 January 2014 was taken in breach of his right to be heard, since he was not afforded a prior opportunity to comment on this measure. This plea is factually incorrect. An email produced by Eurocontrol shows that the complainant was informed in October 2013 that the Organisation intended to cease paying the disputed allowance and that he therefore had the possibility to express his views on this subject, which he in fact did.

12. Neither does the complainant have any grounds for submitting that this decision is unlawful in that it took effect retroactively on 1 March 2014 whereas he was not notified of it until 3 March. Indeed, there is in any case nothing in the document forming the basis of this allegation to show that it was actually notified late.

13. It follows from the foregoing that there is no reason for the Tribunal to set aside the impugned decision or that of 30 January 2014.

14. Nevertheless, by deliberately including in the complainant's letter of appointment, albeit at his request, a clause stipulating that he would receive the expatriation allowance, although he could not lawfully claim it, Eurocontrol indisputably acted wrongly. Moreover, the subsequent decision to withdraw this benefit, which had been unlawfully granted to the complainant, who wrongly thought he was entitled to it and who had no doubt viewed it as an essential condition when he had decided to accept his appointment, caused him serious injury stemming primarily from that wrongful act.

The complainant therefore has reason to claim, as he does subsidiarily in his complaint, that this injury should be redressed by ordering the Organisation to pay him damages.

15. Contrary to the complainant's submissions, these damages should not be equal to the full amount of the expatriation allowance which he would have received until his retirement. Indeed, they must be assessed taking into account, amongst other things, the unlawful nature of the financial benefit in question – of which the complainant was plainly aware – and the fact that his continued employment with Eurocontrol until retirement age is uncertain.

In view of all the circumstances of the case, and bearing in mind in particular the Organisation's decision not to order the recovery of the payments received in error by the complainant for more than five years before they were stopped, the Tribunal considers that he will receive fair redress for the injury suffered by being awarded 80,000 euros in compensation under all heads, without interest.

16. As he succeeds in part, the complainant is entitled to be paid the 3,000 euros which he requests in costs.

17. The complainant asks the Tribunal to rule that, should the various sums awarded to him by this judgment be subject to national taxation, he would be entitled to a refund of the tax paid from Eurocontrol. However, in the absence of a present cause of action in

this respect, this claim must be dismissed as irreceivable (see, for example, Judgments 3255, under 15, or 3424, under 15).

DECISION

For the above reasons,

1. Eurocontrol shall pay the complainant compensation in the amount of 80,000 euros.
2. It shall also pay him 3,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 1 May 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

(Signed)

PATRICK FRYDMAN DOLORES M. HANSEN YVES KREINS

DRAŽEN PETROVIĆ