

B.

v.

Eurocontrol

130th Session

Judgment No. 4280

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 28 May 2018 and corrected on 9 July 2018, Eurocontrol's reply of 20 February 2019, the complainant's rejoinder of 25 March and Eurocontrol's surrejoinder of 28 June 2019;

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 contests the decision not to grant him a retirement pension.

The complainant joined Eurocontrol in April 1993. As from 1 June 1995 he was granted leave on personal grounds initially for a year and later extended several times upon his request. Mid-May 1998 he informed Eurocontrol that he was available to work as from 1 June 1998. The complainant and the Administration had numerous exchanges concerning his reintegration but no post could be found corresponding to his grade and for which he satisfied the requirements before he reached retirement age (65 years of age) on 4 February 2018.

On 28 March 2018 he wrote to the Director General requesting the payment of his retirement pension with effect from 1 March 2018. He explained that he had been available to work since 1 June 1998 even though his reintegration had proved impossible.

On 26 April 2018 the Head of Human Resources and Services informed him that, since he had reached 65 years of age, he was “required to resign”. She added that since he had contributed to the pension scheme for a total period of 26 months he was entitled to the transfer of the actuarial value of his pension rights to a public or private pension scheme under the condition that the scheme fulfilled the criteria outlined in Article 86 of the Staff Regulations governing officials of the Eurocontrol Agency. She explained that the time spent on leave on personal grounds was not considered as years of service; thus, he had not completed the required ten years of service to be entitled to a retirement pension. She also noted that he did not fall under the exceptions outlined in Article 77 of the Staff Regulations, which allowed staff members to be entitled to a retirement pension irrespective of the length of service. That is the decision he impugned before the Tribunal on 28 May 2018.

On 14 February 2019 Eurocontrol wrote to the complainant referring to his letter of 28 March 2018 and his complaint to the Tribunal. It stated that he was entitled to the payment of a monthly retirement pension with effect from 1 March 2018. Eurocontrol would pay him, as from March 2019 and with retroactive effect from 1 March 2018, the monthly retirement pension to which he was entitled, calculated on the basis of his active employment with Eurocontrol from 1 April 1993 to 31 May 1995. It would also pay him interest at a rate of 3.5 per cent per annum (for the period March 2018 to February 2019) to compensate him for the delay in the payment of his retirement pension. In addition, it offered to pay him 5,000 euros for the delay if he agreed to withdraw his complaint. Eurocontrol added that he should inform it of his acceptance of that offer by 15 March 2019, failing which it would consider that he had rejected the offer.

The complainant asks the Tribunal to order the payment of his full and complete retirement pension from 1 June 1998 to March 2018. He also seeks an award of one million euros for emotional injury, pain and suffering, together with one million euros for loss of career path, promotion and decent pension. He further seeks costs.

Eurocontrol asks the Tribunal to reject the complaint as irreceivable and, subsidiarily, as moot, inasmuch as he claims the payment of a retirement pension which he has now received. “[M]ore subsidiarily”, the complaint should be rejected as unfounded.

CONSIDERATIONS

1. The complainant joined Eurocontrol on 1 April 1993, as an expert in the Internal Audit Unit. He was confirmed as a full-time employee following the completion of the six-month probationary period. His multiple requests for leave on personal grounds were granted by decisions dated 19 May 1995, 3 April 1996 and 28 April 1997, for a cumulative period of leave from 1 June 1995 to 31 May 1998. By letter dated 15 May 1998, the complainant informed the Director of Human Resources of his availability for work as from 1 June 1998, stating also: “I understand that my previous position with the Internal Audit Section has since been filled and therefore would ask that you would keep me informed of all positions suitable to my experience.” Despite multiple requests, the complainant was not reinstated.

2. The complainant reached the mandatory retirement age of 65 years on 4 February 2018. By letter dated 28 March 2018, he submitted a request to retire effective 1 March 2018. He also requested the payment of his retirement pension to begin with effect from that date. By letter dated 26 April 2018, the Head of Human Resources and Services notified the complainant that, as he had contributed to the Eurocontrol pension scheme for a total period of 26 months, he was entitled to the transfer of the actuarial value of his pension rights to a public or private pension scheme, under the condition that it fulfilled the criteria in Article 86 of the Staff Regulations. She also noted: “As the amount is based only on 26 months and because at the time of your departure on unpaid leave you were entitled to the payment of the severance grant allowance directly in cash, we can also exceptionally pay the corresponding amount to a pension fund of your choice (disregarding the mandatory criteria of Article 86 of the Staff Regulations) or [...] pay it directly in cash into your bank account number.” The complainant filed the present complaint on 28 May 2018, against the 26 April 2018 decision, requesting: payment of his full and complete retirement pension from 1 June 1998 to March 2018 “as Eurocontrol

has demonstrated it never intended to reinstate [him]”; one million euros for emotional injury, pain and suffering; one million euros for loss of career path, promotion and decent pension; and costs.

3. The complaint is irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal which provides that “[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations”. The complainant has not complied with the provisions of Articles 92(2) and 93 of the Staff Regulations, which require that an internal complaint against an act adversely affecting him be submitted to the Director General within three months, and that an appeal to the Tribunal be allowed only if the internal complaint filed pursuant to Article 92(2) has been rejected by express or implied decision. The letter of 26 April 2018 cannot be considered as a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. Given that the internal means of redress are open to former Eurocontrol officials, the complainant should have requested a review of the decision by the Director General in accordance with the Staff Regulations.

4. In any event, the Tribunal notes that the issue of the payment of his retirement pension is now moot as the letter of 14 February 2019 from the Head of the Legal Service has superseded the letter of 26 April 2018. In that 14 February 2019 letter, it was communicated to the complainant, inter alia, that after a close review of his file, it had been determined that he was indeed entitled to the payment of a monthly retirement pension with effect from 1 March 2018. He was informed that Eurocontrol would pay him the monthly retirement pension as from March 2019 with retroactive effect from 1 March 2018, calculated on the basis of his active employment from 1 April 1993 until 31 May 1995, plus interest on the late payment at a rate of 3.5 per cent per annum for the period from March 2018 until February 2019.

5. Despite having impugned the 26 April 2018 decision, which exclusively addressed the issue of his request for the payment of a monthly retirement pension, the complainant devoted the majority of his complaint ostensibly to challenging his non-reinstatement. The Tribunal finds that these additional claims are also irreceivable for failure to

exhaust the internal means of redress, as he did not challenge, in accordance with the Staff Regulations, any of the decisions not to reinstate him. The complainant's submission that his claims should be considered "receivable by the Tribunal due to the fact that Eurocontrol implicitly made a decision not to reinstate [him]" is unfounded. Regardless of the lack of evidence for this submission, the "implicit" nature of an alleged decision does not relieve the complainant of the requirement to seek review of that decision in accordance with the Staff Regulations prior to bringing a complaint before the Tribunal.

6. As the complainant has not brought any proper final decision before the Tribunal, his claims for moral damages are also irreceivable. The complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ