

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. R. (No. 3)

v.

Eurocontrol

135th Session

Judgment No. 4591

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr L. P. D. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 10 July 2018, Eurocontrol's reply of 19 October 2018, the complainant's rejoinder of 6 December 2018 and Eurocontrol's surrejoinder of 5 April 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 challenges the reduction in the amount of his functional allowance calculated in proportion to the reduction in his working hours.

The complainant has been a Eurocontrol staff member since 1991. He is employed in the Network Management Directorate (NMD, formerly CFMU) within Group E1. As such, he is subject to rolling stand-by duty at home on a roster basis. Under the terms of his employment, he receives an air traffic flow and capacity management functional allowance (hereinafter the "ATFCM allowance"), set at 30 per cent of a basic amount, which at the material time was 1,469.15 euros. On 5 April 2017 the complainant applied for permission to work part-time.

With effect from 1 September 2017 the complainant's working hours were reduced, at his request, to 80 per cent. His remuneration was adjusted accordingly in his payslip for September 2017, dated 31 August 2017, which showed a 20 per cent reduction in both his basic salary and his ATFCM allowance compared with his payslip for August 2017.

On 6 September 2017 the complainant lodged an internal complaint challenging the 20 per cent reduction in his ATFCM allowance as shown in his payslip for September 2017. He requested that "the irregularity on [his] payslip for 31/08/2017 and all following ones be corrected so that the amount of [his] ATFCM payment correspond to that laid down by RA 29a, Article 3, §2.2, first indent".

The Joint Committee for Disputes issued a divided opinion on 24 January 2018: two members recommended that the internal complaint be dismissed as unfounded; two other members recommended that it be allowed. By a memorandum of 23 March 2018, which constitutes the impugned decision, the Principal Director of Resources, acting on behalf of the Director General, informed the complainant that he endorsed the opinion of the two members of the Committee who had recommended that the internal complaint be dismissed.

The complainant asks the Tribunal to set aside the impugned decision and to order payment of the whole of the ATFCM allowance retroactively from September 2017 onwards. He further seeks compensation of 25,000 euros for the moral injury he alleges he has suffered, of which 5,000 euros are to compensate for the delay in handling his internal complaint, and an award of 6,000 euros in costs. Subsidiarily, the complainant asks the Tribunal to order that the amounts withheld in respect of his retirement benefit contributions be recalculated on the basis of the amount of the ATFCM allowance actually paid to him.

Eurocontrol asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. In addition to the setting aside of the impugned decision, the complainant asks the Tribunal to order:

- that the whole of the ATFCM allowance (in other words, 30 per cent of the basic amount) be paid retroactively from September 2017 onwards;
- subsidiarily, that the amounts withheld in respect of his retirement benefit contributions be recalculated on the basis of the amount of the ATFCM allowance actually paid to him;
- that compensation of 25,000 euros be paid to him for the moral damage suffered, of which 5,000 euros are to compensate for the delay in handling his internal complaint;
- that he be awarded 6,000 euros in costs.

2. In his first plea, the complainant, relying on Judgment 3661, submits that under the applicable provisions he is entitled to payment of the ATFCM allowance as one of the flat-rate amounts provided for by those provisions, regardless of whether he is working full-time or part-time at a given moment. As is clear, in particular, from an Office Notice dated 18 October 2006, this payment, intended to give value to the periodical validation of the specific professional qualifications required to carry out the post in question, is flat-rate in nature and is linked to the unusual working conditions associated with operational posts in the NMD. According to the complainant, even though he had changed to an 80 per cent working arrangement, his professional qualifications were still required 100 per cent, meaning that the flat-rate allowance payable to him under the relevant provisions was not subject to reduction in the event of a change to his working hours. The “flat-rate” nature of the allowance effectively means that it is an amount that is neither divisible nor adjustable.

3. The relevant provisions applicable to this case can be summarised as follows.

Under Article 69b(2) of the Staff Regulations governing officials of the Eurocontrol Agency, “[o]fficials in the NM Operational Staff Service shall receive an ATFCM allowance, subject to the conditions laid down in a Rule of Application of the Director General. This allowance shall give entitlement to a pension, under the conditions governing the pension scheme set out in the Staff Regulations. It shall be taken into account for the transfer of pension rights.”

Pursuant to the aforementioned provision, Rule of Application No. 29a concerning the function allowances payable to staff in the CFMU Operational Staff Service provides as follows in Article 3, as applicable at the time of the material facts:

“Article 3

1. Pursuant to Article 69b, paragraph 2 [of the Staff Regulations], officials in the NM Operational Staff Service shall receive an ATFCM allowance set at a basic amount of 1,469.15 euros [amount applicable at the material time in this case, as revised annually].

The amount of this allowance shall be adjusted as provided for in Article 65 of the Staff Regulations governing Officials of the EUROCONTROL Agency [a provision without relevance to the present dispute]. This allowance shall be paid monthly and the cost-of-living weighting pertaining to the official’s salary shall be applied.

2. The basic amounts mentioned above shall vary in line with the constraints attaching to the post held as set out below. The resultant rate shall be identical, irrespective of the recipient's grade.

- 2.1 For officials assigned to a post in group E1 who work rolling shifts, the rate shall be set at:

- 100% when the duties must be performed continuously for a period of 24 hours, every day of the week. The rate of 100% is reduced to 80% if the official is exempted for medical reasons from performing night shifts;
- 80% when the duties must be performed continuously for periods of less than 24 hours, every day of the week;
- 60% when the duties in the technical operations must be performed continuously for a period of 12 hours, every day of the week.

A rate of 20% shall be added to the basic rates referred to in the three previous indents when the duties are performed with added stand-by duties.

- 2.2 For officials assigned to a post in group E1 who are on rolling stand-by duty at home, the rate is set at:
- 30% when the duty roster is drawn up on the basis of 6 officials or more;
 - 45% when the duty roster is drawn up on the basis of 5 officials;
 - 60% when the duty roster is drawn up on the basis of 4 officials;
 - 75% when the duty roster is drawn up on the basis of 3 officials or fewer.

[...]

5. When absence through illness or accident lasts for more than 30 calendar days over a three- month period, entitlement to the allowance shall be suspended from the 31st day of absence until the recipient has resumed shift work for 30 calendar days, consecutive or otherwise.

[...]"

Article 62 of the Staff Regulations also provides, in its third paragraph, that allowances, and therefore the ATFCM allowance, form part of remuneration, in the same way as basic salary, family allowances and expatriation allowance.

With regard to part-time working, the first paragraph of Article 67a of the Staff Regulations specifies that “[a]n official working part-time shall be entitled to remuneration calculated as provided for in Annex IIa and the implementing provisions adopted by the Director General”.

In that regard, Annex IIa to the Staff Regulations, concerning part-time work, states, inter alia, in Article 3, that “an official shall be entitled, during the period for which part-time work is authorised, to a percentage of his remuneration corresponding to the percentage of the normal time worked. However, the percentage shall not be applied to the dependent child allowance, the basic amount of the household allowance or the education allowance. [...]” This exhaustive list of exceptions does not, therefore, refer to the ATFCM allowance.

Furthermore, exercising the authority conferred on him by Article 69b of the Staff Regulations, the Director General of Eurocontrol, in Office Notice No. 17/06 of 18 October 2006, entitled “Revision of the conditions of employment of CFMU [for which, now read NMD] operational staff”, explained the following with regard to the creation of the new ATFCM allowance:

“Annex 1

- 2.1 It is intended to compensate, on a flat-rate basis, for the constraints resulting from the unusual working conditions associated with CFMU [for which, now read NMD] operational posts. The new ATFCM allowance will replace the current payment of shift-work and stand-by allowances pursuant to the corresponding provisions of Rule No. 29, which are revoked. [...] The new ATFCM allowance will be set at EUR 1,183.53 per month (100% rate). It will be adjusted annually in the same way as basic remuneration. It will be subject to the cost-of-living weighting. Its rate will vary from 120% to 30% of the aforementioned amount depending on the type of post within E1 [...]
- 2.2. [...] the creation and payment (at a variable rate) of the ATFCM allowance to all CFMU [for which, now read NMD] operational staff (E1 and E2) contribute to the recognition and periodical validation of the specific professional qualifications required for such functions.”

4. The combination of these various provisions, of which the meaning is clear, shows that:

- the flat-rate nature of the ATFCM allowance is linked to the working conditions of operational posts in the NMD;
- the actual amount payable to the member of staff concerned is set at a certain percentage that varies according to her or his differing working conditions and fluctuates between 30 per cent and 120 per cent of the basic amount;
- irrespective of this flat-rate method of calculation, the ATFCM allowance expressly forms part of the remuneration of the member of staff concerned, pursuant to Article 62 of the Staff Regulations; and
- pursuant to Article 3 of Annex IIa to the Staff Regulations, the remuneration of the member of staff who is permitted to work part-time, therefore including the ATFCM allowance, is calculated pro rata to the relevant remuneration for normal working hours.

In view of the above, the complainant, who had changed to part-time work, was not entitled to the continued payment of the whole of his ATFCM allowance at the rate of 30 per cent of the basic amount. It does not matter in that regard that payment of the allowance is, as a matter of principle, intended to contribute to the recognition and

periodical validation of the specific professional qualifications required for the operational functions within the NMD. Those criteria do indeed form minimum requirements for the award of the allowance, but not for the exact method of its calculation.

The complainant's reference to Judgment 3661 is also irrelevant, since that judgment deals with another question altogether, namely whether or not the ATFCM allowance should be taken into account in calculating the transitional allowance connected with admission to the early termination of service (ETS) scheme. As the Tribunal noted in that judgment, the applicable provisions expressly provided that the basic salary to be taken into account should, where applicable, be increased by the whole of the ATFCM payable to the official concerned.

It follows that, contrary to the complainant's submission, he was not entitled to have his ATFCM allowance maintained at the rate that applied to him when he worked full-time. In addition, he is clearly incorrect to allege the breach of an acquired right to the payment of the allowance at that rate, since, in any event, the provisions governing that allowance have not undergone any modification.

5. The complainant also complains that no explanation was provided to him with his payslip for September 2017 and that he was not informed of the identity of the authority who took the decision to reduce the amount of his ATFCM allowance.

The Tribunal considers, however, as is submitted by the Organisation, that an automatic decision, such as that to reduce the amount of an ATFCM allowance, is simply the consequence of putting into practice the change in the complainant's working hours to which he had agreed and that the applicable rules are sufficiently clear. There is therefore no requirement for the Organisation to provide a more detailed formal explanation than that which appeared on the payslip sent to the complainant for September 2017. By reading that payslip, the complainant was able to understand that the amount of his allowance had been reduced by 20 per cent. It was therefore open to him to familiarise himself with the relevant provisions and, if necessary, to request further information in that regard.

The second plea raised by the complainant is unfounded.

6. In his third plea, the complainant submits that he was not heard prior to the decision being taken to reduce his ATFCM allowance.

The Tribunal considers, however, that, since the reduction in the complainant's working hours had been requested by the complainant himself, and since the automatic consequence of that reduction was a reduction in the amount of his ATFCM allowance, there was no right to be heard prior to that decision being taken.

The third plea is also unfounded.

7. In his last plea, the complainant complains about the delay in dealing with his internal complaint. The decision of the Director General, taken by the Principal Director of Resources acting under delegation, is dated 23 March 2018 and was notified to the complainant on 29 May 2018, in other words, eight and a half months after the internal complaint was lodged. He considers that this delay, which significantly exceeds the four-month period provided for in Article 92(2) of the Staff Regulations, is unacceptable and has caused him separate moral injury.

The Tribunal considers, however, that the complainant has failed to establish, particularly in view of the small amount of money at stake compared with the amount of his remuneration, that the time taken to issue a decision on his internal complaint caused him any moral damage (see, to the same effect, Judgments 4487, consideration 14, and 4469, consideration 16).

8. As regards the complainant's request seeking to challenge the amounts withheld from his remuneration in respect of retirement benefit contributions, the Tribunal notes that, in addition to that claim being irreceivable due to its being presented for the first time before the Tribunal, it is manifestly unfounded. The evidence shows that it was at the express request of the complainant that the amount of the contributions in question was maintained at 100 per cent, despite the reduction in his working hours to 80 per cent, as permitted by Article 3 of Annex IIa to the Staff Regulations. Clearly the complainant cannot

complain about a decision by which the Organisation was simply complying with what he himself had requested.

9. It follows from all the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ