

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

R.

v.

Eurocontrol

135th Session

Judgment No. 4593

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J.-P. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 October 2018, Eurocontrol's reply of 25 January 2019, the complainant's rejoinder of 26 February 2019, Eurocontrol's surrejoinder of 5 June 2019, Eurocontrol's further submissions dated 16 October 2020 and the complainant's final comments of 5 January 2021;

Considering the applications to intervene filed by Ms F. A., Mr Y. C., Ms S. G., Mr P. M. and Mr P. Q. on 1 September 2020 and Eurocontrol's comments thereon dated 1 December 2020;

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 withdrawal of his right to supplementary days of annual leave for "travelling time".

The complainant, a French national, joined Eurocontrol on 16 August 1991. He was assigned to the Experimental Centre at Brétigny-sur-Orge (France), which is part of the Eurocontrol Agency, the secretariat of the Organisation. By decision of the Director General

of 21 October 1991, the complainant's place of origin was determined to be Antananarivo (Madagascar), since that is where he had his main family ties. As a result, he was entitled to an additional six days' annual leave, known as travelling time, to return to his determined place of origin.

In 2016, in the context of an administrative reform, changes were made to the way in which travelling time was granted. From that point on, only those officials entitled to the expatriation allowance or foreign residence allowance were entitled to travelling time leave. Furthermore, from then on, the number of additional days' leave for travelling time was set at two and half days, regardless of the distance between the home country and the place of employment. As a transitional measure for those officials recruited before 1 July 2016 who had hitherto been entitled to travelling time without being eligible for an expatriation or foreign residence allowance, the number of days' leave for travelling time was to be reduced by one day per year with effect from 1 January 2018 until the new provisions had been fully implemented in July 2020.

On 26 September 2016 the complainant lodged an internal complaint against the withdrawal of his right to additional days of annual leave for travelling time. By internal memorandum of 22 August 2017, the Director General, endorsing the recommendations of the Joint Committee for Disputes, dismissed the internal complaint as irreceivable on the grounds that the new provisions on travelling time could not be challenged by the complainant since they had not yet been implemented.

In January 2018 the complainant's travelling time leave was reduced from six to five days in accordance with the new provisions. On 6 February 2018 the complainant lodged a new internal complaint challenging the amount of his annual leave for 2018. In its report dated 24 May 2018, the Joint Committee for Disputes issued a divided opinion. Two members considered that the complaint was unfounded since travelling time leave did not, in their view, constitute an acquired right and could therefore be modified. Two other members took the view that the grant of travelling time leave should not derive from the link between the official's nationality and the expatriation allowance and that the effect of the amendments was to unilaterally change decisions

about the place of origin of the officials concerned by introducing a new condition which they considered to be unlawful and unreasonable. Those latter members recommended that the complainant should be awarded a fixed rate of two and a half days' travelling time leave. Another member suggested that the new provisions should only apply to newly-recruited officials.

By internal memorandum of 21 August 2018, the Head of the Human Resources and Services Unit, acting by delegation of the Director General, dismissed the complainant's internal complaint, stating that she shared the opinion of the two members of the Committee who had considered the complaint to be unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 21 August 2018 and to order Eurocontrol to reinstate his entitlement to six days' leave per year for travelling time. In addition, he seeks the payment of compensation calculated on the basis of his daily salary for each day lost from the effective withdrawal of the days for travelling time leave until the date of the present judgment. Subsidiarily, if his entitlement cannot be reinstated, the complainant seeks payment for the additional days worked, on top of his salary. He also requests that this additional payment be reflected in his future retirement pension. The complainant claims 40,000 euros for what he calls "emotional damages" and a further 40,000 euros for the moral injury he alleges he has suffered. The complainant also claims 5,000 euros in damages for the delay in dealing with his internal complaints and 6,000 euros in costs.

Eurocontrol asks the Tribunal to dismiss all the complainant's claims, including those for costs, as unfounded. It acknowledges that the five interveners, who were all identified along with the complainant as "complainants" in the opinion of the Joint Committee for Disputes of 24 May 2018, are in a similar situation in fact and law to that of the complainant.

CONSIDERATIONS

1. In his complaint, the complainant seeks the setting aside of the decision of 21 August 2018 of the Head of Eurocontrol's Human Resources and Services Unit, acting by delegation of the Director General, and accordingly asks that Eurocontrol be ordered, inter alia, to reinstate the six days per year for travelling time to which he had been entitled continuously from October 1991 until 31 December 2017.

Five officials who consider themselves to be in a similar legal and factual situation to that of the complainant have filed applications to intervene.

2. The complainant has been a Eurocontrol official since 16 August 1991. At the time of his recruitment, Rule of Application No. 6 concerning the terms and conditions governing leave provided as follows in Article 8 in Section 3:

“Section 3

TRAVELLING TIME

Article 8

1. To the period of [annual] leave provided for in Section 1 above shall be added travelling time based on the distance by rail between the place of origin and the place of employment, calculated as follows:
 - 50 to 250 km: one day for the outward-and-return journey,
 - 251 to 600 km: two days for the outward-and-return journey,
 - 601 to 900 km: three days for the outward-and-return journey,
 - 901 to 1,400 km: four days for the outward-and-return journey,
 - 1,401 to 2,000 km: five days for the outward-and-return journey,
 - more than 2,000 km: six days for the outward-and-return journey.
2. Where special leave is granted in pursuance of Section 2 above, any travelling time shall be fixed by special decision under the conditions laid down by Office Notice.”

At that time, the provisions for giving effect to Rule of Application No. 8, concerning reimbursement of expenses, also provided the following with regard to the determination of the place of origin, referred to in Article 3.3 of that Rule concerning travel expenses:

“Article 1

An official’s place of origin as referred to in Article 3.3 of Rule No. 8 shall be determined or changed by the Director General according to the criteria laid down in these provisions.

Article 2

1. When an official takes up his appointment, his place of origin shall be assumed to be the place where he was recruited.

If the official so requests within one year after he takes up his appointment, and on production of appropriate documentary evidence, his centre of interests shall be determined as his place of origin, if his centre of interests is not the same as his place of recruitment.

2. For the purpose of this Office Notice:

- ‘place of recruitment’ means the place where an official was habitually resident at the time of recruitment. Places of temporary residence, e.g. for the purpose of study, military service, training periods or holidays shall not be regarded as places of habitual residence.
- ‘centre of interests’ means the place where an official retains:
 - a) his main family ties, which, barring duly substantiated exceptions, means, as chosen by the official:
 - i. mother and father or either parent; failing that grandparents, or one grandparent; failing that parents-in-law, or either parent-in-law; failing that brothers and sisters;
 - or
 - ii. children, or one or more of them;
 - or
 - iii. the spouses’ domicile, provided that
 - it was the permanent residence of both spouses prior to the entry on duty of the first of them to have joined the Agency, whether as an official or as a member of the contract staff, and
 - it is immovable property in respect of which one or both of them has a legal title;
 - b) heritable interests constituted by immovable property in the form of buildings or parts thereof;
 - c) essential civic interests, both active and passive.

If all three criteria referred to in a), b) and c) are not fulfilled by the same place, the official’s centre of interests shall be taken as the place where at least two of the three criteria are met or failing that the place

where the official retains his main family ties, confined in this instance to the official's father, mother or children.”*

3. On 1 July 2016, Eurocontrol amended Rule of Application No. 6, and more particularly Article 8 thereof, concerning travelling time, which thenceforth provided:

- “1. Officials who are entitled to the expatriation or foreign residence allowance shall be entitled to two and a half days of supplementary leave every year, for the purpose of visiting their home country. These provisions shall apply as from 1 July 2016.
2. For officials recruited before 1 July 2016, transitional measures shall apply as follows:
 - a) Where the application of these provisions results in a decrease in the number of days that were previously granted to the official, the decrease is gradually implemented, as follows:
 - In 2018, a maximum of one day of supplementary leave is subtracted from the number of supplementary leave days granted to the official before the year of the implementation of this provision,
 - In 2019, a maximum of one day of supplementary leave is subtracted from the number of supplementary leave days granted to the official before the year of the implementation of this provision,
 - In 2020, provisions of paragraph 1 shall apply.
 - b) Furthermore, where the application of the provisions in paragraph 1 results in an official no longer being entitled to the supplementary leave, this will apply as from 1 July 2020.
3. Where special leave is granted in pursuance of Section 2 above, any travelling time shall be fixed by special decision under the conditions laid down by implementing provisions.”

4. The complainant puts forward six pleas, the first alleging a lack of delegation in favour of the signatory of the decision of 21 August 2018, the second alleging a failure to state reasons in the impugned decision with regard to the complainant's personal situation, the third alleging a breach of the right to be heard, the fourth alleging a breach of acquired rights, the fifth alleging discrimination on grounds of

* Registry's translation.

nationality, and the sixth and final plea alleging an unreasonable delay in dealing with his internal complaints.

5. As regards the first plea, alleging a lack of delegation in relation to the impugned decision of 21 August 2018 signed by Ms S.D., the Head of the Human Resources and Services Unit, the evidence produced by Eurocontrol shows to the Tribunal's satisfaction that Ms S.D. had the authority to take and sign that decision.

Pursuant to Decision No. XI/14 (2016) of 1 December 2016, power had been delegated by the Director General to the Director of Resources (Mr A.V.) to take and sign decisions relating, inter alia, to the internal complaint process. Furthermore, that delegating decision remained in force during the implementation of the new organisation of management at Director level which was introduced by the Director General's Decision No. I/25 of 20 April 2018 concerning the Agency organisation. Article 1 of this decision states the following with regard to the Agency's Human Resources and Services Unit, placed under the authority of the aforementioned Head whose name appears in the impugned decision, until the detailed organisation of that Unit should be provided for in separate decisions:

“Ms [S.D.] enjoys the same delegated powers in human resources and other Agency services areas as formerly exercised by Mr A.[V.] Any delegations and valid sub-delegations already made by Mr A.[V.] in this regard remain valid.”

It follows that, as a result of that reorganisation of the Agency by the Director General, contrary to the complainant's assertions, unless and until separate decisions were made concerning delegation of power within the Unit, the Head of Human Resources enjoyed the powers previously delegated to and exercised by Mr A.V. in that regard.

The first plea is unfounded.

6. As regards the complainant's second plea alleging a failure to state reasons in the impugned decision and in the opinion of two members of the Joint Committee for Disputes to which the decision refers, the Tribunal recalls that, as it stated in Judgment 4164,

consideration 11, “[i]t is well established by the case law that the reasons for a decision must be sufficiently explicit to enable the staff member concerned to take an informed decision accordingly; that they must also enable the competent review bodies to determine whether the decision is lawful and the Tribunal to exercise its power of review”.

In the present case, the Tribunal notes that the impugned decision explains why Eurocontrol considers that the rules for granting travelling time leave should not be characterised as acquired rights and clarifies why the rules were adopted and how they do not discriminate between officials of different nationalities. That reasoning satisfies the requirements under the case law referred to above. Furthermore, the complainant’s arguments in support of his complaint demonstrate his understanding of the reasons underpinning that decision and the consequences in terms of exercising his right to appeal before the Tribunal, a right of which he has not been deprived in any way.

The second plea will be dismissed.

7. As regards the complainant’s third plea, alleging that he was not heard before the impugned decision was taken to his detriment, the Tribunal has already held that the general principle protecting an official’s right to be heard cannot be applied to a general, impersonal decision which is collective in scope (see Judgment 4283, consideration 6). That same case law applies to the situation where, as in the present case, the contested decision is purely and simply the consequence of a general decision of that kind.

The third plea must also be dismissed.

8. As regards the complainant’s principal plea alleging a breach of what he considers to be his acquired rights to six days’ supplementary leave for travelling time, the complainant maintains that this was an essential and determining condition of his accepting the appointment due to the significant distance between his place of origin, being Madagascar, and his place of employment in France. He explains that it allowed him to return regularly to his place of origin to maintain the family ties and heritable interests which had led to the determination of

Madagascar as his place of origin, being his centre of interests. The complainant submits that his passport and that of his wife are full of entry stamps to the place of origin, attesting to their regular visits. He adds that the withdrawal of those six days of leave amounts, in his case, to 3 per cent more work without any additional pay.

9. In its submissions, Eurocontrol relies on the case law of the General Court of the European Union in support of its arguments. However, it is established, as the complainant rightly points out, that the Tribunal is not bound by the case law of other international or regional courts (see, for example, Judgment 4363, consideration 12). Furthermore, the interpretation given by the General Court of the European Union in some of its judgments is not relevant to the resolution of the present case in view of the case law of this Tribunal on acquired rights and the differences in the organisational rules which apply to the present case and those on which the judgments to which Eurocontrol refers were based.

10. The Tribunal recalls that, according to its case law on acquired rights, the amendment of a rule governing an official's situation to her or his detriment constitutes a breach of an acquired right only when the structure of the contract of appointment is disturbed or there is impairment of a fundamental and essential term of appointment in consideration of which the official accepted appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment made must therefore relate to a fundamental and essential term of employment (see, for example, Judgments 4398, consideration 11, 4381, consideration 13 and 14, and 3074, consideration 16, and the case law cited in those judgments).

In the present case, the Tribunal takes the view that the complainant has failed to show that the structure of his contract of appointment has been disturbed by the amendment or that the amendment relates to a fundamental and essential term of employment without which he would not have accepted appointment with Eurocontrol or stayed on there. The Tribunal finds that a benefit granting supplemental leave, the withdrawal of which affects neither the complainant's overall remuneration nor the

days of annual leave provided for in the Staff Regulations governing officials of the Eurocontrol Agency, cannot be regarded as fundamental or essential.

In addition, although the complainant asserts in his submissions that the matter in hand is a condition of employment which, he claims, induced him to accept the appointment at the time of his recruitment, the Tribunal notes that, under the provisions applicable at that time, his place of origin was deemed to be that of his residence at the date of recruitment, in other words, his place of work (in France), that he was not recruited from his actual place of origin (Madagascar) and that the determination of his place of origin as his centre of interests on account of his family ties and heritable interests was made by a decision of the Director General following his appointment. Furthermore, although a specific decision had to be taken in his case, that was simply because it was required under the regulations then in force, which made such a decision necessary in cases where the centre of an official's interests was not the same as her or his place of recruitment. The Tribunal also notes from the submissions that the complainant's place of employment was located in the country in which he had been resident for several years.

Lastly, a 3 per cent change in the complainant's working time without any reduction in his overall remuneration cannot be regarded as having disturbed the structure of his contract of appointment.

The fourth plea must therefore be dismissed.

11. As regards the fifth plea, alleging that the withdrawal of the complainant's travelling time constitutes discrimination as it is based on nationality, the Tribunal notes that the criterion used by the Organisation, which is based on entitlement to expatriation or foreign residence allowance, is relevant to the purpose of travelling time, as it concerns the distinction made between an official's country of origin and her or his place of employment. The complainant's argument that use of this new criterion results in discrimination based on nationality is in any event ineffective in the context of the present dispute. Indeed, the objection raised in this regard is, in fact, an objection to the

conditions on which the expatriation or foreign residence allowance is awarded, rather than travelling time.

The fifth plea is unfounded and must therefore also be rejected.

12. Lastly, as regards the complainant's claim for compensation for the delay in dealing with his internal complaints, the Tribunal notes that his argument in this connection is based, *inter alia*, on an excessively long period of 11 months after he lodged his first complaint; however, that complaint was dismissed by a decision of the Director General, which the complainant has not impugned before the Tribunal and which therefore cannot be taken into account in the present case.

Furthermore, although it is true that the period of six and a half months between the lodging of the internal complaint that is the subject of the impugned decision and the delivery of that impugned decision exceeds the period provided for in Article 92.2 of the Staff Regulations, which constitutes a breach by the Organisation of its own rules, the Tribunal considers that the delay cannot be considered unreasonable in the circumstances of the present case. Moreover, even though that period breached the applicable provisions, the complainant has not adduced any specific evidence of injury arising from the delay.

It is therefore not appropriate to award the complainant any compensation under this head. The sixth plea is dismissed.

13. As a result of the foregoing, the complaint must be dismissed in its entirety. It follows that the five applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 14 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