

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

FIFTY-FIRST ORDINARY SESSION

In re PETIT

Judgment No. 573

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Lucien Jules Albert Petit on 28 February 1983, the Agency's reply of 6 May, the complainant's rejoinder of 8 June and the Agency's surrejoinder of 29 July 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 2, 25, 50, 92, 93 and 98 of the Staff Regulations governing officials of the Eurocontrol Agency, Rule No. 14 concerning the crediting of annual pension contributions provided for under Article 98 of the Staff Regulations and Articles 27 to 29 of the Financial Regulations of Eurocontrol;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, born in 1915, was a lieutenant-colonel in the Belgian air force when, on 17 April 1961, he was transferred to the Eurocontrol Association, which was to set up the Agency. On 1 September 1963 he joined the Agency as head of the Personnel and Administration Division at grade A3 and he was seconded from the air force. From 1964 he was paid a Belgian military pension, reduced by two-fifths because it began several years before he reached the air force retirement age of 55. In 1969 he became Director of the General Secretariat at grade A2. In December 1978 the Committee of Management decided to promote him to A1 with effect from 1 February 1978 but to retire him "in the interests of the service" on 1 February 1979 as provided under Article 50 of the Staff Regulations. In February 1980 he reached the Eurocontrol retirement age and from March he received a pension from Eurocontrol corresponding to his service since 17 April 1961. What is in dispute is the calculation of this pension. Article 98 of the Staff Regulations provides that "an official ... who furnishes evidence of having been obliged by reason of his entering the service of the Agency to forfeit in whole or in part the pension rights which have accrued to him in his country of origin and of being unable to obtain the actuarial equivalent of such rights shall be credited ... with annual contributions corresponding to the number of years of pensionable service accrued in his country of origin". Rule No. 14, which came into force on 1 June 1973, required officials to lodge claims under Article 98 within six months and the complainant did so on 16 November 1973. When he left in February 1979 he "furnished evidence" to bear out his claim. In a letter of 17 December the Director of Personnel and Administration observed that the two-fifths of his military pension had been lost only because it had been paid in advance of the due date, and in any event he had not been obliged to forfeit any rights since he had asked for that pension. In replies of 25 and 30 January 1980 he explained that the arrangements for his move to the Agency had required his acceptance of the premature and reduced military pension, with the prospect of compensation under Article 98. On 19 March the Director General informed him of his pension rights, which excluded benefit under Article 98. After further correspondence his case went to the Committee of Management on 8 October 1981 and again on 16 December, but the Director general told him that it would not decide until April 1982. On 29 April the Director General wrote to say that the Committee had decided that he had not been obliged to forfeit any pension rights in Belgium and Article 98 did not apply. On 21 July he submitted an appeal to the Committee, which rejected it in mid-October. The Director General so informed him by a letter of 10 December 1982 -- the impugned decision -- saying that he had failed to challenge in time the letter of 19 March 1980 about his pension rights and his appeal was without merit anyway.

B. The complainant contends that the Committee of Management was not competent to take the decision and that Article 98 so authorises the Director General alone. In fact the Director General had all along been in favour of his claim, but out of personal animosity -- which the complainant accounts for at length -- the Financial Comptroller

withheld approval so that the application could be referred to the Committee, which he knew would turn it down. It was specious for the Committee to hold that he had obtained in full his pension rights in Belgium and that the reduction was due merely to early payment; in fact he had to surrender the two-fifths solely because he moved to Eurocontrol, and Article 98 therefore applies, the calculation to be based on the pension rights he had acquired by 17 April 1961, excluding any he might have acquired thereafter had he continued on secondment. He never asked for early payment: why should he if he was to fare worse than everybody else? He invites the Tribunal to quash the decision, to declare that he qualifies under Article 98(1) of the Staff Regulations in respect of two-fifths of his air force pension to order that the Director General make the calculations stipulated in 98(2), to award interest on the sums due from 1 March 1980, the date of his retirement (which he would donate to charity), and to award him costs.

C. In its reply the Agency raises objections to the complainant's version of the facts. It denies that the Director General favoured his claim, the validity of which was in doubt from the start. There is no evidence to suggest that the Comptroller or the Committee was prejudiced against him. Although Article 98(2) says that it is the Director General who determines the number of years of pensionable service to be credited, Article 3 of Rule No. 14 says it is the "appointing authority" -- in this case the Committee. It was also competent by virtue of Articles 27 to 29 of the Financial Regulations. The conditions for applying Article 98 were not met since there was no involuntary forfeiture of pension rights, the two-fifths reduction being the consequence of early payment. There was no link between the reduction and the complainant's joining the Agency. The Agency invites the Tribunal to dismiss the complaint on the merits and the applications for payment of interest and costs.

D. The complainant's rejoinder goes further into the details of the case, offers corrections of the Agency's version, and maintains and develops his arguments. After initial doubt the Administration was consistently in favour of his claim. The Comptroller did feel hostility and withheld approval so that the case would have to go to the Committee. The Committee was not competent and never affirmed its competence in the matter: the subject is a technical, not a political one, and the Director General is therefore entirely responsible, whatever the official's grade. He explains at length the reasons why in his view Article 98 was applicable and he presses his claims.

E. Eurocontrol enlarges on its arguments in its surrejoinder. In its view the complainant says nothing in his rejoinder to suggest he has met the two conditions for applying Article 98 -- the loss of national pension rights must be both involuntary and real. Instead he indulges in gratuitous allegations of no legal import. He alleges that some sort of bargain was concluded, though he falls short of contending that in 1964 the Director General promised him the benefit of Article 98. As to the first condition, the Belgian Government has confirmed that a pension can be paid early only at the pensioner's request and that the complainant applied for advance payment. As to the second, the Belgian pension fund says that his pension took account of his full period of service up to retirement from the air force and including nearly one year's service with Eurocontrol, which his Eurocontrol pension also takes account of. The two-fifths reduction merely offsets the payment of his pension at the age of 49 and is not a real loss.

CONSIDERATIONS:

1. Article 98(1) of the Staff Regulations governing officials of the Eurocontrol Agency states that an official to whom the Staff Regulations have been applied in accordance with transitional provisions and who furnishes evidence of having been obliged by reason of his entering the service of the Agency to forfeit in whole or in part the pension rights which have accrued to him in his country of origin and of being unable to obtain the actuarial equivalent of such rights shall be credited, for the purpose of his retirement pension in the Agency, with annual contributions corresponding to the number of years of pensionable service accrued in his country of origin.

2. From 1961 the complainant worked for the association which was in charge of putting into effect the Convention setting up Eurocontrol, and when the Agency got under way he joined its staff. In 1964 he became an established official, with retroactive effect from 17 April 1961, as head of the Personnel and Administration Division. In 1969 he was appointed Director of the General Secretariat. He reached the retirement age and retired on 23 February 1979.

When he joined Eurocontrol he was an officer in the Belgian armed forces; he was put on secondment by the Belgian Government, but continued to pay pension contributions. The retirement age for someone in his grade was 55, and at the time he was 49.

His secondment by the Government was for three years, but the period was subject to extension. The Director General of Eurocontrol thought the secondment too short and would have preferred six years to ensure continuity in the complainant's work. But the Belgian Government chose another expedient. In a letter of 15 June 1964 to the Director General the Chief of Staff of the Belgian air force said: "Lt.-Col. Petit ... will be put on early retirement at 1 July 1964 in accordance with Section 3 A(6) of the Consolidated Laws on Military Pensions (pension reduced by two-fifths)". Thus the complainant's assignment to Eurocontrol became final so far as the Belgian Government was concerned.

3. The complainant's early retirement had two consequences under Belgian law.

The first was that he was paid a military retirement pension from 1 July 1964 and at the same time was unconditionally entitled to draw his Eurocontrol salary.

The second consequence was that his pension was reduced by two-fifths.

His case is that the reduction in the amount of his Belgium State pension entitles him to benefit under Article 98(1).

The Committee of Management of Eurocontrol took the view that the reduction in his military pension was not the consequence of his joining the Agency, its sole purpose being to make up for the greater cost to the Belgian State of paying him an early pension.

4. As to the issue of law, the Tribunal holds that the purpose of Article 98(1) is to compensate officials who benefit under the transitional provisions for the loss of accrued pension rights in their own country which they have had to forfeit on joining the Agency. Article 98(1) will not apply unless there is a direct link of cause and effect between the official's joining the Agency and his forfeiture of rights accrued in the country of origin.

5. As to the issues of fact, it is established that when he joined the Agency the complainant had acquired pension rights under the relevant Belgian law. The question is whether the conversion of the full pension payable at a later date into a pension reduced by two-fifths but payable immediately -- a change which in this case proved to the official's disadvantage -- was the normal, if not necessary, consequence of the complainant's joining the Agency.

The fact that the complainant himself applied, in his letter of 31 March 1964, for immediate payment of his pension is not sufficient to establish that he made a willing choice. If it appeared on the evidence that the Belgian Government and the Organisation agreed on a settlement consisting in his resignation in return for immediate payment of the pension, the Tribunal would hold that his letter of resignation was just part of more complicated arrangements in which he merely complied with a formal requirement of the law. In any event immediate payment of a pension requires the officer's application.

6. The evidence is not in the complainant's favour. Although the Director General told the Belgian Government he would like the complainant to have greater stability of employment, he acquiesced when the Chief of Staff of the Belgian air force informed him on 17 June 1963 of his decision to review the complainant's position after three years. It was the Belgian Government which conceived the expedient of paying him an early pension.

The then Director General of the Agency has answered questions addressed to him in the course of the present proceedings. In a letter of March 1981 he recalls that after a change of Chief of Staff he was "pleasantly surprised to hear that a solution had been found" and he had been informed at the time that in any event the complainant might benefit under Article 98(1). Another letter, dated 16 April 1983, is even less precise. All it says is that it is for each official to sort out with his former employer "any modification of his employment position in his own country", that the history of the case goes back some twenty years and that "Mr. Petit's file should shed light on his application for benefit under Article 98".

The evidence also includes attestations' from Belgian air force officers, but they do not bear out the complainant's case. Indeed one of them suggests that the Belgian Government would have been in favour of the complainant's termination to allow his colleagues' promotion within his grade.

The complainant's early retirement did cause him financial injury. But it is not proved that it was the direct result of his joining the Agency. Even supposing he did not consent the conditions set out in Article 98(1) are not fulfilled.

7. The complainant has a further plea that the Committee of Management had no authority to take the impugned

decision.

The Tribunal holds that the complainant is not entitled to financial compensation under Article 98(1) and the Organisation was therefore bound to reject his application. It is therefore immaterial whether the decision was taken without authority: the Organisation would have to take a decision to the same effect even if the impugned one were set aside. The Tribunal need not therefore entertain the plea.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner