Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

v. Z. (No. 3)

v.

Eurocontrol

134th Session **Judgment No. 4514**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr R. v. Z. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 21 June 2018, Eurocontrol's reply of 4 October, the complainant's rejoinder of 13 November 2018 and Eurocontrol's surrejoinder of 22 February 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 Eurocontrol's decision to put an end, with retroactive effect, to the top-up sickness insurance cover received by his wife and, consequently, to recover the sums unduly paid by Eurocontrol under that cover.

In 2014 the complainant notified the administration of changes in his family situation, which led to an update of his entitlement to family allowances and sickness insurance cover for his dependants. On 6 August 2014 he was informed that, as his wife's income was higher than the equivalent of the annual basic salary of an official in the first step of grade 2, it had been decided to terminate her top-up sickness insurance cover as of 1 November 2013. He was further told that the

payment of the household allowance in respect of his son was also terminated with effect from 1 November 2013 on the grounds that from that date he no longer had any dependent children and that his wife's annual income from employment was higher than the annual basic salary of an official in the second step of grade 3.

On 3 November 2014 the complainant lodged an internal complaint against the decision of 6 August 2014. He asked for the setting aside of this decision, back payment of the household allowance for his wife, which had been discontinued as of 1 July 2014, reimbursement of expenses owing under his wife's top-up sickness insurance cover and reimbursement of his legal costs. In an internal memorandum of 20 November 2014, the administration considered that, after analysing the rules applicable to the grant of the household allowance – in particular Article 1(3) of Rule of Application No. 7, concerning remuneration, and its implementing provisions concerning the concept of spouse's income from gainful employment –, it appeared that clarification was needed with regard to determining the amount of the spouse's income from gainful employment to be taken into account. However, the administration considered that, as regards sickness insurance cover, the wording of Article 14(1) of Rule of Application No. 10 was clearer since it stated that taxable income, after deduction of social welfare contributions and professional charges, should be taken into account as the spouse's income from gainful employment. As the applicable provisions were modelled on those applicable to officials of the institutions of the European Union, the administration decided, with the aim of, firstly, maintaining alignment with those provisions concerning the general principles for determining the elements of pay, and, secondly establishing the same definition of spouse's income from gainful employment for the two abovementioned Rules of Application, the complainant's internal complaint concerning the grant of the household allowance should be allowed. On 17 December 2014, the complainant was informed that this allowance was granted to his wife with effect from 1 November 2013.

On 4 February 2016 Eurocontrol issued Information to Staff No. I.16/01, the aim of which was to publish the ceilings for the spouse's taxable income referred to in Article 1(3) of Rule of Application No. 7 and some of its implementing provisions, which were to be taken into account in determining entitlement to household allowance when a staff member had no dependent children and/or a spouse's entitlement to receive Eurocontrol's top-up sickness insurance cover. This information note invited staff members without dependent children who were in receipt of the household allowance to submit their spouse's latest official annual notice of assessment. Concerning top-up sickness insurance cover, the staff members concerned were requested to indicate any change to their spouse's income from gainful employment. On 28 April the complainant informed the administration of his wife's income for 2014 in order for the household allowance for 2016 to be granted. On 13 July, at the administration's request, he submitted his wife's income for 2011 to 2013.

On 1 August 2016 the complainant was informed by a decision of the Head of People and Finance Operations (PFO) that, on the basis of the documents he had provided, his wife's taxable income from gainful employment for the years 2011 to 2014 was higher than the ceiling applicable to top-up sickness insurance cover for that period. As a result, it had been decided to terminate the top-up cover that the complainant's wife had received with effect from 1 January 2011. The reimbursements of medical expenses carried out between 1 January 2011 and 31 December 2014 would be recovered retroactively. On 22 September the complainant asked the Head of PFO to reconsider the decision of 1 August. Since he did not receive any reply, on 27 October 2016 he lodged an internal complaint against that decision, requesting that it be set aside and his legal costs paid. The Joint Committee for Disputes, to which the case was referred, delivered its opinion on 20 December 2017. Two of its members considered that the internal complaint was well founded, referring to the "*res judicata* authority" of the decision taken on the internal complaint lodged by the complainant in November 2014. Another member considered that the overpayment should be recovered only from the date of entry into force of Information to Staff No. I.16/01, and the last member took the view that

the internal complaint was unfounded since the income of the complainant's wife for the years 2011 to 2014 was higher than the ceiling specified in the aforementioned Information to Staff. By an internal memorandum dated 17 April 2018, the complainant was notified that the Principal Director of Resources endorsed the latter opinion and that his internal complaint was therefore dismissed. That is the impugned decision.

The complainant seeks the setting aside of the decision of 17 April 2018 and of all the previous decisions. In addition, he asks the Tribunal to order Eurocontrol to reimburse any sums recovered following the decision of 17 April 2018 and to reinstate top-up sickness insurance cover for his wife, with retroactive effect from 1 August 2016. Lastly, he claims moral damages in the amount of 30,000 euros, 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.

Eurocontrol requests the Tribunal to dismiss the complainant's claims as partly irreceivable, since the claim concerning restoration of top-up sickness insurance cover goes beyond the scope of the dispute, and as wholly unfounded in any event.

CONSIDERATIONS

1. The dispute before the Tribunal concerns the decision of 17 April 2018, confirming the decision of 1 August 2016, by which the top-up sickness insurance cover for the complainant's wife was withdrawn with retroactive effect from 1 January 2011 and it was specified that the amounts of medical expenses unduly reimbursed between 1 January 2011 and 31 December 2014 would be recovered. The evidence submitted by the parties shows that top-up sickness insurance cover was again granted to the complainant's wife on 12 March 2015, with retroactive effect from 1 January 2015, because her income had fallen below the ceiling laid down in the applicable rules following her move to part-time work. According to Eurocontrol, a total of 3,362.71 euros had to be recovered by way of sums unduly

reimbursed between 1 January 2011 and 31 December 2014 under the top-up sickness insurance cover of the complainant's wife.

The Tribunal will examine the complaint having regard to this limited scope.

Eurocontrol's objection to receivability, that the complainant's claim for "sickness insurance cover to be restored to [his] wife [...] with retroactive effect from 1 August 2016" goes beyond the scope of the impugned decision, is therefore accepted.

2. In support of his complaint, the complainant submits that Eurocontrol miscalculated his wife's annual taxable income for the purposes of the ceiling laid down in Article 14(1) of Rule of Application No. 10 concerning sickness insurance cover. For each of the years under consideration, the Organisation failed to take into account the amount of the tax-exempt portions, as provided for under Belgian tax law. According to the complainant, if those exempted portions are subtracted from his wife's annual taxable income, it can be clearly seen that annual income was, in each of the years in question, below the ceiling set by the abovementioned provision.

Eurocontrol, which did not in fact take account of these tax-exempt portions, observes that the complainant merely refers to a personal calculation and does not provide any explanation such as to establish that the amounts contained in the notices of assessment/extracts from the roll issued by the Belgian tax authorities are incorrect. The Organisation also observes that the notices of assessment/extracts from the roll issued by the Belgian tax authorities are very clear on this point: according to the Organisation, they indicate that the exempt portions to which the complainant refers are not taken into account at any point when annual taxable income is calculated and that they only become important at a later stage, when tax payable is subsequently determined.

3. The Tribunal notes that, under Article 14(1) of Rule of Application No. 10, it is annual taxable income "before tax and after deduction of social welfare contributions and professional charges" that

must be taken into account for the purposes of granting top-up sickness insurance cover.

In this case, the dispute turns on whether the tax-exempt portions provided for in Belgian tax law, as well as the social welfare contributions and professional charges referred to in this provision, should be deducted from the income from gainful employment of the complainant's wife. The complainant argues that they should; Eurocontrol disagrees.

4. As is clear from the internal memorandum of the Head of the Regulations and Rules Unit of 20 November 2014, firstly, Eurocontrol bases its position on the fact that the provisions in force within the Organisation in this area are modelled, in principle, on those applicable to officials of the institutions of the European Union. Secondly, the European Council and Commission have defined the spouse's income from gainful employment in an internal directive as taxable income as determined by the national authorities, that is to say, after deduction of social welfare contributions and professional charges. Furthermore, in his internal memorandum of 17 April 2018, the Principal Director of Resources stated that the calculations performed by each tax authority in each Member State of Eurocontrol should not be taken into account. Similarly, Information to Staff No. I.16/01 of 4 February 2016 concerning household allowance and/or top-up sickness insurance cover reiterates that this income is to be taken into account "**before** deduction of tax but **after** deduction of social security contributions and occupational expenses".

5. On examining a sample notice of assessment/extract from the roll issued each year by the Belgian tax authorities, the Tribunal notes that the concept of "taxable income" includes, among other elements, taxable income from gainful employment, this being used to calculate the total taxable income of the taxpayer concerned, which also includes, for example, income from real estate or other income from movable property. It is only after total taxable income has been determined that total taxation is calculated; in this calculation, a portion of total taxable income, and not only of taxable income from gainful employment, is

deducted from the tax base, resulting in a tax reduction. In the same document, basic tax is calculated before the tax reduction is deducted in respect of the exempt portions. It follows that Eurocontrol's interpretation, according to which the tax-exempt portion of the taxable income from gainful employment of the complainant's wife should not be deducted, is correct. There is no need for Eurocontrol to also take into account the various tax exemptions or reductions granted under each national law, after the determination of taxable income from gainful employment.

Furthermore, the complainant's interpretation would lead to the conclusion that a portion of income from gainful employment, though taken into account for calculating taxable income from gainful employment, should then be deducted from that income when reckoning the ceiling applicable to his wife's taxable income from gainful employment, which would lead to the absurd situation in which an amount, after having been taken into account for the determination of taxable income from gainful employment, would then be subtracted from it. That cannot be the intention of Article 14(1) of Rule of Application No. 10.

6. In the light of the foregoing, Eurocontrol was right to consider that the taxable income from gainful employment of the complainant's wife for 2011 (40,270.55 euros), 2012 (42,747.90 euros), 2013 (43,708.30 euros) and 2014 (41,275.55 euros), after social welfare contributions and professional expenses were deducted, was higher than the ceilings applicable for those years, namely 2011 (36,648.84 euros), 2012 (37,271.88 euros), 2013 (37,309.20 euros) and 2014 (38,130.00 euros).

The complainant's plea is therefore unfounded.

7. However, the complainant also argues that the conditions laid down in Article 87 of the Staff Regulations for the recovery of undue payment are not met in the present case. Firstly, he was not aware that there was no due reason for the sums paid under his wife's top-up sickness insurance cover. Secondly, the irregularity or error leading to

these payments was not patently such that he could not have been unaware of it.

Eurocontrol submits that the complainant's argument reflects bad faith, given, in particular, his thorough knowledge of the applicable rules in his capacity as a representative of the Organisation's staff, as well as of the authorised annual ceilings, which he must have noticed had been exceeded.

8. Article 87 of the Staff Regulations, concerning the recovery of undue payment, provides, in the first paragraph, that "[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it".

That provision makes it clear that, as an exception to the general principle of law according to which any sum paid in error may usually be recovered, subject to the rules on limitation periods (see, for example, Judgment 4139, consideration 14, and the case law cited therein), where a member of staff of Eurocontrol has received an undue payment, such recovery is not possible unless one of the two conditions set out therein is satisfied, namely that the official concerned was aware that there was no due reason for the payment or the fact of the overpayment was patent.

9. Regarding the first condition, it should firstly be observed that the decision of 17 December 2014 did not explicitly inform the complainant that it had been duly found that his wife's income from gainful employment for 2013 was higher than the ceilings to be taken into consideration for that year. On the contrary, the ambiguous wording of the internal memorandum of 20 November 2014 and the decision of 17 December 2014 left the complainant not knowing whether it had been clearly decided that he was no longer entitled to top-up sickness insurance cover for his wife as from 1 November 2013. It follows that it cannot reasonably be considered that the complainant was aware of the unlawful nature of the payments made between 1 November 2013 and 31 December 2014. This is especially true since,

as the complainant stated in his internal complaint of 27 October 2016, no response was ever received to his request "to know the calculation method applied and the amounts of income taken into account". By extension, it must be considered that the same applies to the period from 1 January 2011 to 31 October 2013. Whilst Eurocontrol criticises the complainant for not having provided, for each of the years at issue and before the end of the first half of each of those years, proof of income received by his spouse for the previous fiscal or calendar year, in breach of the requirement laid down in Article 14(2) of Rule of Application No. 10, the Tribunal considers that the complainant's failure to provide such proof is very largely counterbalanced by the fact that Eurocontrol did not request such proof on its own initiative when it examined the complainant's situation in 2014. Indeed, it was only in 2016, during a review of payment of the household allowance for 2016, that Eurocontrol requested the production of this proof for 2011 to 2013, following which it also took a decision, on 1 August 2016, regarding top-up sickness insurance cover for the complainant's wife. Moreover, paragraph 3 of Information to Staff No. I.16/01 concerning household allowance and/or top-up sickness insurance cover states, firstly, that any staff members concerned must report any change in their spouse's income from gainful employment and, secondly, that in the event of the checks that could be carried out at any time by Eurocontrol, staff members whose spouses received top-up sickness insurance cover were invited to provide notices of assessment relating to their spouse's income. This is precisely what the complainant did in 2016, when the administration carried out a check, whereas nothing of the kind appears to have been requested of him in 2014.

As a result, the Tribunal finds that it cannot be considered that the complainant was aware of the unlawful nature of these payments. The first condition of Article 87 of the Staff Regulations is therefore not met.

10. Regarding the second condition, it is important to note that the Tribunal has already ruled on the correct interpretation of this condition and considered that it must be regarded as having been met "if the mistake affecting the amount of the [sums paid] was sufficiently obvious that, even without accurately gauging its significance and

determining its causes, it could not have reasonably escaped the notice of a [...] staff member exercising ordinary diligence in the management of [her or his] personal affairs" (see Judgments 3201, consideration 14 *in fine*, and 4469, consideration 6). This interpretation will also be used as a basis for examining the arguments of the parties in the present case.

In this respect, it should be noted that Eurocontrol itself expressly acknowledged in 2014 that the applicable provisions in this area required clarification regarding the determination of the amount of the spouse's income from gainful employment to be taken into account, in particular for the purposes of assessing whether to grant the household allowance. Moreover, it was only in August 2016 that Eurocontrol, after a further examination of the complainant's situation during a review of payment of the household allowance for 2016, decided, on the basis of the interpretation of the concept of taxable income from gainful employment referred to above, to recover the reimbursements of medical expenses made from 1 January 2011 to 31 December 2014 in respect of the complainant's wife. Such a decision could have been taken in 2014 if this interpretation had obviously applied at the time. The lack of an explicit decision in this regard, in particular for income for 2011 to 2013, as well as the failure to initiate a procedure to recover the amounts unduly paid for 2014, are factors that may have strengthened the complainant's conviction that his view had prevailed.

It should also be noted that two members of the Joint Committee for Disputes considered, rightly or wrongly – that is not the point –, that the notice of assessment/extract from the tax roll issued by the Belgian tax authorities was open to different possible interpretations of the concept of taxable income before deductions.

In those circumstances, it cannot therefore be considered that the unlawful nature of the payments made under the top-up sickness insurance cover of the complainant's wife was sufficiently obvious that it could not have escaped the attention of a staff member exercising ordinary diligence in the management of her or his personal affairs. The second condition of Article 87 of the Staff Regulations is therefore likewise not met.

11. Since neither of the conditions to which Article 87 of the Staff Regulations subjects the possibility of recovering undue payments is met, the decision of 17 April 2018 and the decision of the Head of PFO of 1 August 2016 are unlawful and must therefore be set aside, without there being any need to examine the complainant's other pleas.

12. In compensation for material injury, the complainant seeks reimbursement of any sums recovered by Eurocontrol that relate to his wife's top-up sickness insurance cover for the period in question.

Eurocontrol states that the procedure for recovery of undue payment was suspended while the complainant's internal complaint was being examined. However, the Organisation is silent on the question of whether such recovery took place following the final decision of 17 April 2018 impugned before the Tribunal.

13. In these circumstances, the Tribunal considers it appropriate to order, insofar as recovery has taken place, the reimbursement to the complainant of the amounts withheld by Eurocontrol in respect of his wife's top-up sickness insurance cover for 2011 to 2014, that is to say, a total sum of 3,362.71 euros.

14. Regarding moral damages, the Tribunal considers that the cancellation of the recovery of the sum in question is sufficient, in the present case, to compensate the complainant for all the injury he suffered.

15. The complainant also claims an award of 5,000 euros in moral damages for the delay in handling his internal complaint.

The complainant's internal complaint was lodged on 27 October 2016; the Joint Committee for Disputes, after meeting on 13 March and 8 June 2017, delivered its opinion on 20 December 2017; and the final decision was taken on 17 April 2018. The Tribunal does not see how this delay of almost 18 months, though considerable, caused the complainant moral injury in the circumstances of the case, since it is clear from the file that recovery of the undue payment was suspended during the internal appeal procedure.

16. As the complainant succeeds for the most part, he is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of the Principal Director of Resources of Eurocontrol of 17 April 2018 and the decision of the Head of People and Finance Operations of 1 August 2016 are set aside insofar as they provided for the recovery of reimbursements of medical expenses under the top-up sickness insurance cover of the complainant's wife during the period 1 January 2011 to 31 December 2014.
2. Eurocontrol shall, if appropriate, repay to the complainant the sum of 3,362.71 euros, as indicated in consideration 13, above.
3. The Organisation shall pay the complainant 3,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 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 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ