

V. D. H.
v.
Eurocontrol

138th Session

Judgment No. 4821

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. A. M. V. D. H. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 May 2020, Eurocontrol's reply of 29 July 2020, the complainant's rejoinder of 30 August 2020 and Eurocontrol's surrejoinder of 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, who in 2019 claimed an allowance which he could have claimed as early as 2001, challenges the Organisation's decision to pay the allowance with effect from only five years prior to the date of his claim.

The complainant was appointed by Eurocontrol as an Air Traffic Controller on 1 July 2001 and was assigned to the Maastricht Upper Area Control Centre (MUAC). According to the applicable rules, he was entitled to the payment of an Air Traffic Controller Allowance ("the ATC allowance"), but he did not receive the allowance at the time, and it was not until 2019 that he found out through colleagues that he had been entitled to it since the beginning of his appointment. By an

email of 22 January 2019, he contacted the Administration to enquire about the procedure to recover the total amount of the ATC allowance that was due. On 14 February 2019, the Head of Compensation and Benefits replied that the allowance would be paid as from 1 January 2019 – it would be included in his next salary payment at the end of February – and that the Administration would inform him in due course of its decision regarding the period prior to 1 January 2019. By internal memorandum of 24 April 2019, the complainant was informed that he was entitled to receive the allowance for the three-month period prior to his request, but that his claim was time-barred in respect of any earlier period. Nevertheless, in view of the circumstances, Eurocontrol had decided to pay him the ATC allowance retroactively as from 1 January 2014, that is to say, for the five-year period prior to his request.

On 16 July 2019, in accordance with Article 91(2) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, the complainant filed an internal complaint against that decision seeking payment of the total amount of the ATC allowance as from the date when he became entitled to it. On 21 August 2019, the Administration acknowledged receipt of his complaint and forwarded it to the Joint Committee for Disputes. In a report dated 17 January 2020, two members of the Joint Committee for Disputes concluded that the complainant was entitled to receive the ATC allowance for the entire period, because the non-payment was the result of an error by the Administration, and that his pension rights should be adjusted accordingly. The two other members concluded that the Administration had acted with good will and in accordance with its duty of care by retroactively paying the allowance up to five years despite the fact that the claim was time-barred. By an internal memorandum of 19 February 2020, the Head of Human Resources and Agency Services, acting on behalf of the Director General, dismissed the internal complaint as unfounded, noting that the Organisation had already derogated from the rules by partially accommodating his request for a retroactive payment even though it was time-barred. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision to the extent that it limits the back-payment of the ATC allowance to the period of five years prior to his request and to order the payment of the ATC allowance for the entire period for which he was entitled to receive it. He also claims 3,000 euros for costs.

Eurocontrol asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The factual circumstances as just discussed, are comparatively straightforward. It suffices to state that, under Article 7 of Rule of Application No. 21a of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre (“the General Conditions of Employment”), an employee in the category in which the complainant was employed is entitled to a monthly operational functions allowance (“the ATC allowance”) from the date on which she or he is established (that is to say, at the conclusion of any period of probation). The complainant did not receive it at that time, and when he eventually claimed the allowance in January 2019, Eurocontrol agreed to pay it retroactively from 1 January 2014, and not from the date when he was established. Eurocontrol states that it is not disputed that the staff is entitled to receive the allowance under the terms of the General Conditions of Employment. It however insists that the complainant’s claim for the past payment is time-barred because he did not challenge his payslips from which those payments were excluded within the three-month period required by Article 91(2) of the General Conditions of Employment. Eurocontrol refers to consideration 13 of Judgment 3614.

2. The relevant parts of Article 91(2) of the General Conditions of Employment provided:

“Any person to whom these provisions apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where it [sic] has failed to adopt a measure prescribed by the General Conditions of Employment. The complaint must be lodged within three months. The period shall start to run:

- on the date of publication of the act if it is a measure of a general nature;
- on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if however an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;
- on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided in paragraph 1.

[...]"

3. According to the above provisions, a staff member may submit to the Director General a complaint against an “act adversely affecting him”, which includes a “fail[ure] to adopt a measure prescribed by the General Conditions of Employment”. This would comprehend a failure of the Organisation to pay an allowance due and payable under the General Conditions of Employment such as the allowance presently in question. The complaint has to be lodged within three months of the date of notification of the measure. There is an obvious tension between a failure to adopt a measure and a time limit commencing from the notification of the measure. If a measure has not been adopted then it is, in the ordinary course, not likely that the staff member will be notified of the non-adoption. Importantly, however, Article 91(2) specifies that in each of the instances where the period of three months “shall start to run”, the period does so when the potentially aggrieved staff member is “notified”, that is to say, when the staff member is made aware by notification of the act adversely affecting him. It is the notification which triggers the time limit.

4. As noted earlier, Eurocontrol accepts the complainant was entitled to be paid the ATC allowance from the date he became established. Put slightly differently, this involves an acceptance that it was legally obliged to pay the allowance from that point in time. That legal obligation of the Organisation (and the concomitant legal right of the complainant to payment) has been an ongoing one arising on each

occasion the complainant was paid, and the legal obligation has not been extinguished by the passage of time. It is important to recognise that a time limit of the character being raised in these proceedings does not extinguish legal rights but simply renders them unenforceable.

5. The Organisation's reliance on payslips is unsustainable, particularly given that no payslips were put into evidence to demonstrate, even arguably, that they may have constituted notification for the purposes of Article 91(2), which they did not, in the circumstances of this case.

6. In this case, the complainant became aware of his entitlement in very early 2019 in discussions with colleagues, prompting him to write to the Administration on 22 January 2019 inquiring about the procedure for claiming the allowance. This led to a response from the Administration on 14 February 2019. Fairly read, this communication only addressed his subsisting entitlement to the allowance, and he was told he would be paid the allowance from 1 January 2019. He was told that he would be kept informed once the decision had been taken regarding the period before 1 January 2019. This communication did not constitute notification of a failure to adopt a measure. This occurred on 24 April 2019 when the Administration wrote to him saying the allowance had never been paid though he was entitled to it. In the communication, the Head of Human Resources and Services said, in relation to time limits, that:

“The pay team has paid the allowance to you as from January 2019, i.e. as regards the past period limited to three months prior to your request. For the period before that date a claim would be time-barred. In the meantime, the [Organisation] has considered your request for a payment of the past period. I am pleased to inform you that the [Organisation] decided, in view of the circumstances of this case, to pay the ATC allowance back to five years, as from 01.01.2014. The corresponding payment will be included in your May salary paid at the end of April 2019. My services remain at your disposal for any further information you may need.”

7. Fairly clearly, the concept of “notification”, in the context of Article 91 of the General Conditions of Employment, involves a measure of some formality on the part of the Organisation, particularly given that it triggers a time limit which will, if it passes, deny the right to enforce a right. Informal discussions with colleagues do not constitute notification. The first notification by the Administration of its failure to adopt a measure (that is to say, its failure to pay the ATC allowance from the beginning of the complainant’s employment) was the communication of 24 April 2019.

8. It was from that time that the three-month time limit commenced. It was on 16 July 2019 that the complainant submitted a complaint under Article 91(2). This was within the three-month period specified in that provision. The impugned decision of the Head of Human Resources and Services, made on delegation from the Director General, that the claim for the allowance since commencing employment was time-barred, was erroneous. In the face of the unambiguous concession by Eurocontrol about the complainant’s entitlement, a decision should have been made to accept the complaint and pay the complainant the allowance from the conclusion of his period of probation. It is appropriate, in this case, for the Tribunal to order the payment of the allowance from that date. The complainant has not claimed interest on the arrears and no interest will be awarded.

9. The complainant was legally represented, and he seeks costs in the amount of 3,000 euros. He is entitled to an order in this sum.

DECISION

For the above reasons,

1. The impugned decision is set aside to the extent that it limits the back-payment of the Air Traffic Controller allowance to the five-year period preceding the complainant's claim.
2. Eurocontrol shall pay the complainant the Air Traffic Controller allowance from the date when he was established to 31 December 2018, less any amounts already paid for the period 1 January 2014 to 31 December 2018.
3. Eurocontrol shall pay the complainant 3,000 euros in costs.

In witness of this judgment, adopted on 24 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER