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

106th Session **Judgment No. 2782**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 October 2007, the Organisation's reply of 21 December 2007, the complainant's rejoinder of 25 January 2008 and Eurocontrol's surrejoinder of 7 April 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1968, joined Eurocontrol in May 1989. He currently works as an air traffic controller at grade O6 at the Eurocontrol Centre at Maastricht.

Facts relevant to this dispute are set out in Judgments 2559 and 2560 delivered on 12 July 2006 in cases also concerning Eurocontrol. It should be recalled that in September 1992 Eurocontrol's Permanent Commission approved a salary adjustment methodology applicable as from 31 December 1991, modelled on that which had just

been adopted by the institutions of the European Community. This methodology was to apply until 30 June 2001, but its application was extended for two years pending the adoption by the European Union of a new adjustment methodology. The new methodology took effect on 1 July 2004 and a salary adjustment of 3.4 per cent was applied as from that date. The adjustment due for the period 1 July 2003 to 30 June 2004 was the issue that gave rise to the two cases resulting in the two above-mentioned judgments. The complainants in the case leading to Judgment 2559 sought the cancellation of their payslips for January and/or February, March and April 2004 insofar as they did not provide for an adjustment of salaries "in accordance with the 'methodology of the European Union'". Their complaints were dismissed by the Tribunal. However, in Judgment 2560, the Tribunal allowed the complaints filed by 34 members of staff who were contesting their payslip of 31 July 2004, which did not show any adjustment for the period 1 July 2003 to 30 June 2004. It referred the case back to the Agency for a decision on the adjustment of salaries and pensions for the period 1 July 2003 to 30 June 2004 in accordance with the applicable regulations.

In pursuance of the latter judgment, Eurocontrol's Permanent Commission decided that the 3.4 per cent adjustment would be granted for the above-mentioned period and that the resulting salary arrears would be paid not only to the 34 complainants in the case leading to Judgment 2560, but also to all members of staff and to all former members of staff in receipt of a retirement pension. These arrears were paid in December 2006. Interest on the arrears, at a rate of 8 per cent per annum calculated from July 2004, was also paid, but only to the complainants.

On 8 March 2007 the present complainant – who was not a party to the case culminating in Judgment 2560 – lodged an internal complaint with the Director General in which he requested payment of the interest on arrears which some of his colleagues had received. This internal complaint, along with those lodged by numerous other serving and former members of staff, was referred to the Joint Committee for

Disputes. In its opinion of 19 June 2007 the Committee unanimously recommended that the complaints be rejected as being legally unfounded. By an internal memorandum of 11 July 2007, which constitutes the impugned decision, the Director of Human Resources informed the complainant that his internal complaint was rejected.

B. The complainant contends that the Agency committed a breach of contract which was censured in Judgment 2560 and for which it is directly liable vis-à-vis its staff, irrespective of whether they were party to the case leading to the said judgment. By paying the adjustment to staff who had not filed a complaint with the Tribunal, the Agency partially redressed this breach. But the complainant states that he has suffered direct injury because of the fact that this adjustment was not paid at the right time. In accordance with the "principle of full compensation for injury", he must therefore be awarded interest on arrears so as to place him in the situation in which he would have found himself had the Agency not committed the breach. Moreover, payment of such interest is required by virtue of the principle of equal treatment. Citing the Tribunal's case law, the complainant considers that the interest must be calculated as from the first month in which the adjustment ought to have been applied.

The complainant asks the Tribunal to quash the impugned decision, to order the payment of "due and payable" interest on the amount paid in December 2006, to rule that this interest for the months in which the adjustments were due amounts to 8 per cent per annum and to order Eurocontrol to pay him interest on these sums and 3,000 euros in costs.

C. In its reply the Agency explains that the decision to extend the benefit of Judgment 2560 to the whole of its staff was taken in order to "maintain social cohesion"; indeed, it was only vis-à-vis the 34 complainants in the case in question that Eurocontrol was obliged to draw all the appropriate conclusions from the judgment, including the payment of interest on the sum due. Citing the Tribunal's case

law, the Agency submits that these 34 complainants were entitled to interest on arrears because they had submitted a formal request for payment. Since the complainant did not claim salary arrears as from 1 July 2003, he cannot claim interest on the sum that he nevertheless received as back pay. As the complainant is *de facto* and *de jure* in a different situation to the 34 complainants, there has been no unequal treatment.

D. In his rejoinder the complainant reiterates all his submissions. He adds that he is claiming interest on arrears by way of compensation or damages for injury resulting from Eurocontrol's breach of one of its contractual obligations. He maintains that, according to certain provisions of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, such interest is due *ipso jure* on any adjustment of salaries and pensions which was not applied in due time, without there being any need to submit a formal request for payment or to institute legal proceedings. He states, however, that the internal complaint that he submitted constitutes such a request.

E. In its surrejoinder the Agency fully maintains its position. It explains that only a formal request for payment of the adjustment due for the period 1 July 2003 to 30 June 2004 could have formed the basis of a claim for interest on arrears.

CONSIDERATIONS

1. In Judgment 2560, delivered on 12 July 2006, the Tribunal allowed a complaint filed by 34 staff members of Eurocontrol who were contesting their payslip of 31 July 2004 because it did not show any salary adjustment for the period 1 July 2003 to 30 June 2004. In consideration 7 of that judgment, the Tribunal set aside the impugned decisions – on the grounds that they had breached several articles of the Staff Regulations governing officials of the Eurocontrol Agency – and referred the case back to the Organisation for a decision on the

adjustment of salaries and pensions for the above-mentioned period.

Pursuant to that judgment it was decided that the 3.4 per cent adjustment awarded as from 1 July 2004 would be backdated to 1 July 2003. It was also decided that the resultant salary arrears for the period 1 July 2003 to 30 June 2004 would be paid not only to the officials who had filed a complaint with the Tribunal, but also to all other members of staff and to all former members of staff in receipt of a retirement pension; these payments were made in December 2006. However, the 8 per cent interest on arrears was paid only to the members of staff who had filed a complaint with the Tribunal.

2. The complainant, like 250 other serving or retired staff members of Eurocontrol, lodged an internal complaint challenging the decision not to pay him interest on arrears. The Joint Committee for Disputes issued its opinion on 19 June 2007. According to that opinion, the complainants were not in the same situation *de facto* and *de jure* as the members of staff who had filed the complaints leading to Judgment 2560, and interest on arrears was due only to members of staff who had formally requested payment of an adjustment as from 1 July 2003. The Committee added that Judgment 2560 applied only to the parties to the proceedings before the Tribunal and not to third parties; consequently, in paying the salary arrears to staff who had not claimed them, the Organisation was not performing a legal obligation but was making an *ex gratia* payment. The internal complaints were rejected on 11 July 2007 on the basis of that opinion.

3. The complainant's claims are set out under B above.

While he accepts that Judgment 2560 has no direct bearing on his situation, the complainant submits, in substance, that the Agency was obliged to compensate fully for the injury caused to its staff by the unlawful conduct identified in the judgment but, by refusing to pay interest on arrears, it compensated only partially for this injury. He argues that payment of this interest is necessary in order to place him in the situation in which he would have found himself but for the Organisation's unlawful conduct.

4. The Organisation mainly echoes the reasoning contained in the opinion of the Joint Committee for Disputes. It explains that "maintaining social cohesion was clearly the reason" for its voluntary decision to extend the benefit of Judgment 2560 to the whole of the staff, and it argues that since the complainant had no right to claim the salary arrears paid in December 2006, he clearly had no right to claim interest on those arrears.

5. It is not disputed that only the parties to the proceedings leading to the delivery of Judgment 2560 could seek its enforcement. But this does not mean that that judgment remains without effect for staff members who, although they did not participate in those proceedings, are *de facto* in a situation identical to that of colleagues who did. It is clear from Judgment 2560 that the Organisation breached the provisions of the Staff Regulations by not taking any measure to adjust salaries and pensions for the period under consideration. Staff members who were not party to the proceedings are entitled, for the same reasons as those stated in the judgment, to receive the salary arrears paid to the staff members who participated in those proceedings, provided that they are in the same situation.

Consequently, in deciding to extend the scope of Judgment 2560 to all serving or retired members of staff, the Organisation did not, as it avers, merely respond to social considerations. Given that it acknowledges that it had a legal obligation to pay the disputed adjustment to those staff members who had claimed it, the Agency cannot deny that it had the same obligation to other staff members; in paying them this adjustment it did therefore perform a legal obligation.

6. But does this mean that the Agency must pay the interest claimed in the complaint?

(a) In the absence of any particular rule requiring the Organisation to pay interest on arrears to a staff member where a benefit due to that person is paid belatedly, such interest is not in

principle due until the creditor – i.e. the staff member to whom the benefit is owed – has served notice on the Organisation to pay. This apparently harsh solution is justified because no particular formalities are required for the service of such notice, it being sufficient for the creditor to request payment of the amount due. At first sight, it would appear that the Tribunal should therefore find that the complainant, who did not request the adjustment due as at 1 July 2003, is not entitled to the payment of interest on arrears.

(b) However, this rule does not apply where the debt is one which falls due on a fixed date. In such a case the due date is equivalent to the service of notice (*dies interpellat pro homine*). The debtor owes interest on arrears as from that date, without any need for the creditor to establish that he or she has requested payment of the due sum. The same applies where the debt falls due periodically at a fixed date, as in the case of a salary.

The salary adjustment at issue forms an integral part of the salary. Moreover, the salary, plus increments, is due on precise dates at the end of every month. In the instant case the payment of the staff member's salary, including the adjustment thereto, did not depend on a request from that person. The claim for interest on arrears is therefore well founded.

7. It follows that the complaint must be allowed and that the impugned decision must be quashed.

The Organisation must pay the complainant the interest he claims on the salary adjustment which was due to him. This interest shall be set at a rate of 8 per cent per annum and must be calculated using a methodology similar to that applied to the staff members who were party to the proceedings leading to the delivery of Judgment 2560.

8. The complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organisation shall pay the complainant interest at the rate of 8 per cent per annum on the amount corresponding to the adjustment which he received for the period 1 July 2003 to 30 June 2004.
3. It shall also pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet