Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Y. (Nos. 5 and 6)

v.

Eurocontrol

126th Session **Judgment No. 4020**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr M. Y. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 26 October 2015 and corrected on 17 November 2015, Eurocontrol's reply of 11 March 2016, the complainant's rejoinder of 13 May and Eurocontrol's surrejoinder of 19 August 2016;

Considering the sixth complaint filed by Mr M. Y. against Eurocontrol on 15 April 2016, Eurocontrol's reply of 17 August 2017, the complainant's rejoinder of 7 October 2017 and Eurocontrol's surrejoinder of 17 January 2018;

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 denial of his second request to benefit from the temporary early termination of service (ETS) scheme and the implied decision to reject his claim for compensation.

By Judgment 3349, delivered in public on 9 July 2014, the Tribunal set aside the decision of the Director General of 9 June 2011 dismissing the complainant's internal complaint directed against the decision not to grant his first request, submitted in 2010, to take advantage of the

ETS scheme. It considered that that decision was tainted with an error of law in that the complainant, as a member of the operational staff of the Central Flow Management Unit, had been excluded as a matter of principle from the scheme.

On 22 September 2014 the complainant asked the Director General to re-examine his request pursuant to the aforementioned judgment. On 4 November 2014 he was informed that early termination of his service would "jeopardise the efficient functioning" of his unit and that his request was therefore refused. On 4 February 2015 he filed an internal complaint challenging that decision in which he sought "its withdrawal or cancellation". The Joint Committee for Disputes issued a divided opinion on 14 July 2015. Two of its members, who considered that the decision of 4 November 2014, which was based on an appraisal of the complainant's situation in 2010, was "correct", concluded that the internal complaint was unfounded. By a letter of 29 July 2015, which constitutes the decision impugned in the complainant's fifth complaint, the Director General endorsed this opinion. On 1 September 2015 the complainant was assigned non-active status.

In his fifth complaint, filed on 26 October 2015, the complainant seeks the setting aside of the impugned decision and that of 4 November 2014 "with all legal consequences". He also asks the Tribunal to instruct the Director General to re-examine his request to take advantage of the ETS scheme within two months of being notified of this judgment. He claims damages in the amount of 224,678.40 euros to compensate for alleged moral and material injury, and costs in the amount of 10,000 euros.

Eurocontrol asks the Tribunal to dismiss all the complainant's claims as being irreceivable in part, because some of them were not entered in the internal complaint, and totally unfounded.

In the meantime, on 27 October 2015, the complainant had filed what he described as an "appeal" against the decision of 29 July 2015, in which he again requested payment of 224,678.40 euros in damages and subsidiarily sought permission to make pension contributions until the age of 65, as the ETS scheme would have permitted. On 15 April

2016 he filed his sixth complaint, impugning the implied decision to reject this "claim for compensation".

In his sixth complaint, the complainant asks the Tribunal to set aside the impugned decision; he maintains his claim for damages and requests the payment of costs in the amount of 5,000 euros.

Eurocontrol asks the Tribunal to dismiss the sixth complaint as irreceivable because it duplicates another pending complaint, because it is time-barred and because internal means of redress have not been exhausted and, subsidiarily, because it is unfounded. Like the complainant, it requests that this complaint be joined with the fifth complaint.

CONSIDERATIONS

1. The complainant and the Organisation request the joinder of his fifth and sixth complaints.

2. It is well settled that complaints may be joined if they raise the same issues of law and the material facts upon which the claims rest are the same such that the Tribunal can deliver a single ruling (see Judgment 3427, under 10). In the instant case, in his fifth complaint the complainant seeks inter alia the setting aside of the decision to dismiss his new request to take advantage of the ETS scheme, and in his sixth complaint he claims damages for the unlawful denial of that request, amongst other relief. As the two cases are clearly interconnected, it is convenient to join them in the interests of the sound administration of justice.

3. Eurocontrol asks the Tribunal to find that the sixth complaint is irreceivable, on the one hand, because it duplicates another pending complaint and the complainant may not submit the same claims twice for adjudication by the same judicial authority and, on the other hand, because it is time-barred in that, in its opinion, the claim for compensation should have been filed at the same time as the internal complaint giving rise to the fifth complaint before the Tribunal. The complainant submits that they are two separate disputes.

4. Eurocontrol objects to the receivability of the claims entered in the fifth complaint in respect of the payment of 194,678.40 euros in material damages, 30,000 euros in moral damages, and costs. It holds that these claims go beyond those submitted at the internal complaint stage.

In accordance with Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations".

The claim regarding the payment of material damages was not included in the complainant's internal complaint and must be dismissed in accordance with that provision, as internal means of redress have not been exhausted.

On the other hand, it is well settled that this rule, that internal means of redress must first be exhausted, does not apply to a claim for moral damages, which constitute a natural form of relief which the Tribunal has the power to grant in all circumstances (see, for example, Judgments 3080, under 25, 2779, under 7, and 2609, under 10). The claim for compensation under this head is therefore receivable.

The same applies to the claim for costs related to the proceedings before the Tribunal (see Judgment 3945, under 5).

5. The complainant's sixth complaint is directed against the implied decision to dismiss an "appeal" filed by the complainant on 27 October 2015 against the decision of 29 July 2015 dismissing his internal complaint of 4 February 2015. However, the latter decision is a final decision within the meaning of the aforementioned Article VII, paragraph 1, of the Statute of the Tribunal. The complainant's "appeal" was therefore irreceivable. It follows that the sixth complaint itself is irreceivable.

6. On the merits, the complainant submits that Eurocontrol has committed errors of law and of fact. He considers that the Director General did not re-examine his request because he based both the decision challenged in his internal complaint and the impugned

decision on the situation prevailing at the time of the original facts, whereas he should have based those new decisions on the situations prevailing at the time when they were taken, that is to say on 4 November 2014 and 29 July 2015, respectively.

7. Eurocontrol submits that the Director General was right to refer to the situation at the time of the original facts when drawing the consequences of the quashing of the decision of 9 June 2011 by the Tribunal in Judgment 3349. In its opinion, since the quashed decision is deemed never to have been taken, the relevant period for assessing the needs and interests of the service in response to the request to take advantage of the ETS scheme was the period between 1 January 2011 and 31 December 2012, i.e. the two-year reference period mentioned in Annex XVI to the Staff Regulations governing officials of the Eurocontrol Agency. The Director General could therefore take into consideration only the circumstances existing at that point in time when taking a decision on the complainant's new request.

8. The plea entered by the complainant raises the question of which legal and factual circumstances must be taken into consideration when taking a new decision after an initial decision has been set aside by the Tribunal.

As stated in Judgments 3034, under 33, and 2459, under 9, when it deals with a claim, an administrative authority must generally base itself on the provisions in force at the time it takes its decision and not on those applicable at the time the claim was submitted. Only where this approach is clearly excluded by the new provisions, or where it would result in a breach of the requirements of the principles of good faith, the non-retroactivity of administrative decisions and the protection of acquired rights, will the above rule not apply.

If, as a result of the Tribunal setting aside an administrative decision, the competent authority must take a new decision on a claim presented to it, the Administration must base that decision on the legal and factual circumstances existing on the date on which it takes its new

decision. Indeed, in that situation, none of the exceptions to the principle established by the case law cited above applies.

9. In the present case, when the Organisation took its new decision on 4 November 2014, the ETS scheme, which was a temporary scheme, had been defunct since 31 December 2012. Consequently, the Organisation had to dismiss the complainant's request, which could no longer be granted in any event. However, the fact that the complainant was thus deprived of the possibility of having his request examined caused him moral injury, which may be fairly redressed by awarding him compensation under this head in the amount of 20,000 euros.

10. The Tribunal will not consider the complainant's other pleas since, even if they were allowed, this would not increase the amount of damages awarded.

11. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. Eurocontrol shall pay the complainant 20,000 euros in moral damages.
2. It shall also pay him costs in the amount of 3,000 euros.
3. All other claims in the fifth complaint are dismissed, as is the sixth complaint.

In witness of this judgment, adopted on 3 May 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ