

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. R. (No. 3)

v.

Eurocontrol

133rd Session

Judgment No. 4469

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr R. D. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 8 June 2018 and corrected on 14 June, Eurocontrol's reply of 26 September, the complainant's rejoinder of 13 November 2018 and Eurocontrol's surrejoinder of 15 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 recover various sums which were allegedly unduly paid to him.

The complainant joined Eurocontrol in 1991. On 11 December 2014 he was promoted from grade FCO8 to grade FCO9, first step, with effect from 1 January 2015. In February 2017, in response to the complainant's request for information concerning advancement to the second step in his new grade – a step which, under the first paragraph of Article 44 of the Staff Regulations governing officials of the Eurocontrol Agency, was to be awarded to him two years after his promotion – the administration informed him that there had been an “error” in calculating his salary. He had already been wrongly receiving the

remuneration corresponding to the second step since 1 February 2015. As a result, a repayment plan was proposed to recover the unduly paid sums, which totalled 5,558.83 euros and for which a deduction from his salary of 1,111.77 euros for five months was envisaged. The complainant expressed his disagreement with the plan and requested that the Agency's method of calculation be further explained.

By email of 1 March 2017, the Head of Pay replied that Article 87 of the Staff Regulations, concerning the recovery of undue payment, applied to his case and that the unduly paid sums would therefore be recovered. A table detailing the sums was attached to the email.

The complainant lodged an internal complaint against this decision on 3 May 2017, in which he requested that the decision be set aside, the sums already recovered repaid, the deductions stopped, and the fees of the lawyer whom he had to engage to defend him reimbursed. The Joint Committee for Disputes delivered a divided opinion on 21 December 2017. Three members of the Committee held that the internal complaint was well founded, while the fourth member recommended that it be dismissed, considering that officials were familiar with payslips and accustomed to reading them and that the complainant should have noticed an irregular increase in his salary as from 1 February 2015. By letter of 22 March 2018 – received by the complainant on 19 April 2018 – the complainant was notified of the Director General's decision to follow the recommendation of the minority member of the Committee and therefore to confirm that the undue payment would be recovered. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and “all previous decisions”^{*}, to order the repayment of any sums recovered by Eurocontrol and to award him moral damages in the amount of 20,000 euros – which takes into account the excessively long time taken to deal with his internal complaint – and costs in the amount of 6,000 euros.

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

^{*} Registry's translation.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 22 March 2018 by which the Director General of Eurocontrol dismissed his internal complaint against the decision taken by the Head of Pay on 1 March 2017 to recover the overpayment of his salary from February 2015 to December 2016.

It had been found that, owing to an error in the IT system, the complainant had received the remuneration corresponding to the second step of grade FCO9 during this period even though he was not entitled to advance to the second step until 1 January 2017 since he had been promoted to grade FCO9 and classified in the first step on 1 January 2015. He received a first pay rise in January 2015, but he was also mistakenly awarded a second one from February 2015.

In this case, Eurocontrol waited for a decision to be taken on the complainant's internal complaint before recovering the additional pay of 5,558.83 euros – which included residual amounts paid at the beginning of 2017 – and the amount was eventually recovered in instalments from the complainant's salary from June to October 2018.

2. The complainant's arguments in support of his claims against the impugned decision consist in essence of the contention that Eurocontrol was not entitled to recover the additional remuneration which had been awarded to him in error.

3. The first paragraph of Article 87 of the Staff Regulations, concerning the recovery of undue payment, provides that:

“Any 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.”

4. It follows from these provisions that, as an exception to the general principle of law that any sum paid in error may normally be recovered subject to the rules on time limits (see, for example, Judgment 4139, consideration 14, and the case law cited therein), where a Eurocontrol staff member receives an undue payment, such

recovery is only possible if one of the two conditions specified is met: namely that the official concerned was aware that there was no due reason for the payment or if the overpayment was patently obvious.

5. With regard to the first condition, the analysis set out below makes plain that there is no evidence to suggest that the complainant was aware that the additional salary constituting the overpayment at issue had been paid by mistake.

A finding that the complainant did in fact notice the error in calculating his salary would also automatically cast doubt on his good faith, since he would then of course have been required to report that error to the Eurocontrol Administration. However, the Tribunal considers that his good faith is borne out by the fact that the Organisation detected the error committed in 2015 owing to a request for information from the complainant, who in February 2017 expressed surprise to the Administration that he had not been awarded a salary increase when he advanced to the second step of his grade. It is difficult to see why the complainant felt it necessary to raise this matter if he was aware that he had, in fact, already been receiving the remuneration corresponding to the step in question since 2015.

The Tribunal notes, moreover, that the Organisation seems eventually to have abandoned the contention that the complainant was aware of the error in question, since it states in its surrejoinder that it “does not accuse the complainant of bad faith”^{*}.

6. The central issue in the dispute is therefore whether, as Eurocontrol argues with reference to the alternative condition laid down in the aforementioned Article 87, the fact of the contested overpayment was “patently such that the complainant could not have been unaware of it”.

In this respect, it should be noted that the Tribunal, which has already ruled on the interpretation of this condition, held on that occasion that the condition should be regarded as having been satisfied

^{*} Registry’s translation.

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 his personal affairs” (see Judgment 3201, consideration 14, *in fine*). The parties’ arguments in the present case will also be examined on the basis of this interpretation.

Several elements in the file lead the Tribunal to consider that the condition in question was not satisfied in this case.

7. First of all, it should be observed that the complainant’s payslip for February 2015, that is, the payslip issued when the complainant’s remuneration was for the first time mistakenly calculated on the basis of the second step of his grade, does not allow the error to be easily detected.

While that payslip did indeed show an increase in the complainant’s basic salary – which will be returned to below – compared with that of January 2015, the “grade” indicated was “FCO9/1”, which referred to the first step of grade FCO9 and thus made it difficult to suppose that the amount of that salary might have been calculated on the basis of another step.

Furthermore, the amount of the reference salary used to calculate the basic salary was identical to that shown in the January 2015 payslip. Only the “multiplication factor” for the reference salary underwent a relative increase. However, the factor in question, which is a variable multiplier used to implement the 2008 Eurocontrol administrative reform, does not depend only on the official’s grade but also on other parameters. Moreover, the value of this multiplier is determined using a somewhat technical method, with which most staff members are obviously unfamiliar, and is expressed by a figure with seven decimal places, a variation in which from one payslip to another can only be detected by a close reading.

It should be added that the payslip for February 2015 was issued in two parts, as the pay for that month included “general backpay” related to the implementation of a new pay scale, which did not make it any easier to interpret.

It is important to note that the error initially made in February 2015, which was thus not easy for the complainant to detect at that point, became still more difficult to identify thereafter, since subsequent payslips were issued on the same bases and the only way the complainant, like most staff members, could ordinarily use to check that no mistakes had been made in calculating his remuneration was to compare it with the amount received in the previous months.

8. Eurocontrol submits that the complainant must have been aware that, under Article 44 of the Staff Regulations, an official is entitled to advance in step only every two years and that, since he was promoted to a new grade on 1 January 2015, he was entitled to such an advancement only as from 1 January 2017. But this argument is irrelevant since, as stated above, the payslip sent to the complainant in February 2015 did not allow him to identify easily – if only because of the reference made therein to the first step of grade FCO9 – that the increase in salary shown owed to the mistaken payment of the remuneration corresponding to the second step of that grade.

9. With regard to the aforementioned multiplication factor, Eurocontrol submits that the complainant could not fail to have noticed the change in that factor appearing on the February 2015 payslip since in 2008 he had been provided with a career simulation on the basis of the new Staff Regulations adopted as a result of the aforementioned administrative reform, which did not mention such a change following his promotion in grade.

However, apart from the fact that the simulation had been made seven years before the promotion in question, which might cast doubt on the validity of the information it contained, Eurocontrol itself states in its submissions that the simulation, which consisted merely of a typical example of the career progression of a staff member in a similar

situation to the complainant, reflected “theoretical career development” alone and, in particular, indicated only “the approximate value of the multiplication factor”. Moreover, in view of the various payslips in the file, the Tribunal notes that the values of that factor given in the simulation did in fact differ from those actually applied in the complainant’s case.

It should also be observed that, although it is true that the Organisation sent to its staff briefing notes regarding the multiplication factor, it is not clear from a reading of these notes that they were sufficiently informative to enable the complainant easily to identify the mistake that was later made.

In these circumstances, the fact that the complainant did not detect the error affecting this multiplier from February 2015 cannot be regarded as establishing his lack of diligence.

10. Last but not least, the complainant reasonably contends that, in the above circumstances, he could regard the pay rise appearing on his February 2015 payslip, both in absolute terms and in comparison with the amount for the previous month, as not involving a significant amount. His basic salary increased by 295.35 euros and his net remuneration by 238.13 euros, while the increase in the total amount of his emoluments (excluding a specific allowance paid in February 2015) was 215.72 euros, which represented rises of 4.20 per cent, 2.56 per cent and 3.90 per cent, respectively.

The Tribunal takes the view that the increase in these various amounts compared with January 2015 was not of such a magnitude that the complainant was bound to have been led to question the accuracy of the calculation of his remuneration, especially as it is clear from the evidence that the complainant worked in shifts and that his salary usually fluctuated from one month to the next to an extent that was comparable to these figures.

For the reasons already stated above, it is also unsurprising that the continued payment of these increased amounts, *mutatis mutandis*, on the complainant’s subsequent payslips did not direct his notice to the Organisation’s error.

11. Eurocontrol states in its reply that its practice is to apply a threshold of 3,000 euros for recovering overpayments, above which it will, as a rule, make such recovery. It explains that, when the total amount of unduly paid sums exceeds this threshold, the error in their payment cannot, in its view, escape the notice of a staff member exercising ordinary diligence. The evidence appears to show that this consideration played a decisive role in the adoption of the impugned decision, given that Eurocontrol states, in response to the complainant's allegation of a difference in treatment compared with other Eurocontrol officials who had also received overpayments, that it had deemed the recovery of these amounts unnecessary because they were below 3,000 euros.

However, besides the fact that the threshold in question does not appear to have a precise basis in the Staff Regulations, the Tribunal holds that, in any event, its application is inappropriate in a case such as this where the total amount of the overpayment results from an initial error of calculation which did not involve a significant sum, could not easily be detected when it took place, and was simply repeated month after month without the staff member concerned being able to identify it by comparing successive payslips. In such a case, the fact that the total amount of unduly paid sums is relatively high does not, in itself, establish that the complainant neglected his duty to exercise ordinary diligence in the management of his personal affairs.

12. Overall, the Tribunal finds that, even though – as the Organisation submits – the complainant is a senior official with considerable experience within Eurocontrol, it cannot be said that the error affecting the amount of his remuneration was so obvious that it could not reasonably escape his notice. It follows that, in accordance with the opinion of the majority of the Joint Committee for Disputes, of which only one member expressed the opposite view, the complainant's internal complaint was well founded.

13. It follows from the foregoing that the Director General's decision of 22 March 2018 must be set aside, without there being any need to rule on the complainant's other pleas directed against it.

The decision initially taken on 1 March 2017 by the Head of Pay will also be set aside. It must be noted that although the complainant asks the Tribunal more broadly to set aside all decisions prior to that of 22 March 2018, he does not identify in his submissions any other administrative decision covered by that claim.

14. As the aforementioned decisions have been set aside, Eurocontrol will be ordered to repay to the complainant the total sum of 5,558.83 euros which was deducted from his remuneration for June to October 2018 on the basis of those decisions.

15. The complainant seeks an award of compensation for the moral injury that the impugned decision allegedly caused him. However, he does not provide any specific evidence of such injury and, having regard to the nature of the impugned decision, which has solely pecuniary effects, the Tribunal finds that the repayment of the deductions from his remuneration is sufficient to compensate him, in this case, for all the injury caused by that decision.

16. The complainant also seeks moral damages for the excessively long time taken to deal with his internal complaint.

The Tribunal notes, in this respect, that more than eleven months elapsed between the lodging of that internal complaint on 3 May 2017 and the notification to the complainant on 19 April 2018 of the decision of 22 March 2018. However, while that timeframe is admittedly unsatisfactory, it cannot be considered unreasonable, particularly in view of the nature of the dispute in question. That assessment is especially warranted given that, as already stated above, Eurocontrol suspended the actual implementation of the proposed salary deductions until the internal appeal procedure had finished, thus protecting the complainant's interests throughout that procedure. Lastly, while it is true that, as the complainant submits, Article 92 of the Staff Regulations provides that the Director General must normally notify the person concerned of his decision within four months, the Tribunal notes that once again the complainant does not provide any specific evidence of injury resulting from the non-observance of that time limit.

This claim for compensation will therefore be dismissed.

17. However, as the complainant has largely succeeded, he is entitled to costs, which the Tribunal sets at 4,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of Eurocontrol of 22 March 2018, as well as the decision of the Head of Pay of 1 March 2017, are set aside.
2. Eurocontrol shall repay to the complainant the sum of 5,558.83 euros which was deducted from his remuneration pursuant to the decisions set aside above.
3. Eurocontrol shall pay the complainant costs in the amount of 4,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2021, 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 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ