

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G.

v.

Eurocontrol

135th Session

Judgment No. 4592

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. G. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 10 September 2019, Eurocontrol's reply of 20 December 2019, the complainant's rejoinder of 16 March 2020 and Eurocontrol's surrejoinder of 26 June 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 challenges the calculation of the amounts transferred into the Eurocontrol scheme in respect of his previously-acquired pension rights and seeks compensation for the injury he considers he has suffered as a result of alleged negligence on the part of the Organisation.

The complainant is a British citizen born in 1958. Before joining the Eurocontrol Agency, the secretariat of the Organisation, on 1 June 2006, he was a member of a pension scheme in the United Kingdom (CAAPS). By email of 29 March 2018, the complainant enquired through the relevant support department about the procedure for transferring the value of his CAAPS pension rights into the Eurocontrol

pension scheme. After various email exchanges, the complainant sent a transfer request dated 12 April 2018 by registered post, receipt of which was acknowledged by the Organisation on 18 April. On 2 May 2018 the Administration sent the complainant an offer containing a calculation of his pension annuities based, in particular, on the total transferable amount supplied by CAAPS. This amount came to 1,199,026.54 pounds sterling (1,356,364 euros) and was guaranteed by CAAPS until 9 July 2018, the date by which CAAPS needed to receive various documents from Eurocontrol's Pension Service. On several occasions between 2 May and 15 June, the complainant asked the Administration for assistance in relation to the offer conditions and the transfer process, in particular in view of his tax situation given that he resided in Germany but worked for Eurocontrol in Luxembourg.

By email of 29 June 2018, the complainant confirmed that he accepted the offer of 2 May and stated that he would post the official letter that same day. That letter reached the Pension Service on 4 July 2018 while the official in charge of the complainant's file, Ms V.L., was on leave. By email of 17 July, Ms V.L. informed the complainant that certain forms required by CAAPS were missing. The complainant returned the documents in question by email on 23 July, so the complete application was not sent to CAAPS until 26 July.

By email of 1 August 2018, the complainant was informed that CAAPS had refused his transfer request because it had been received after the deadline. Consequently, he could make a new request from 29 September 2018. Having submitted the relevant documents to the Pension Service on 11 October, the complainant received, on 24 October, a second offer containing a calculation of his pension annuities dated 16 October. The calculation was based, in particular, on a total transferable amount which this time was 1,130,144.04 pounds sterling (1,259,101 euros), guaranteed by CAAPS until 10 January 2019.

On 12 November 2018 the complainant lodged a complaint pursuant to Article 92 of the Staff Regulations governing officials of the Eurocontrol Agency alleging the mishandling of his transfer request by the Pension Service and asking the Director General to nominate a member of staff to deal with the matter. On 13 November he signed the CAAPS

declaration form for the transfer of his pension rights and agreed to the second offer. By letter of 21 November 2018, the Pension Service sent to CAAPS the final agreement including, inter alia, the complainant's declaration. In an email of 22 November, the complainant drew Ms V.L.'s attention to the fact that the grade used for the purposes of calculating the annuities was incorrect.

On 12 December 2018 the complainant lodged a second complaint pursuant to Article 92.2 of the Staff Regulations, in which he requested the recalculation of his rights together with compensation for the financial loss caused by the negligence of the Pension Service. By letter of 13 December 2018, CAAPS confirmed that it had sent a payment to Eurocontrol for the transfer value (1,105,108.03 pounds sterling, that is, 1,231,208.39 euros), being the amount of the second offer after deduction of certain taxes.

On 8 January 2019 the complainant signed a "quittance", by which he declared that he took full responsibility for the tax formalities resulting from the transfer, enabling him to receive payment of a lump sum into his bank account for the value of the rights transferred to him.

By internal memorandum of 14 January 2019, the complainant was notified of the Director General's decision in relation to the transfer of his pension rights, which confirmed the number of additional pensionable years of service and the procedure for transferring some of the sums referred to. The transfer took effect on 14 December 2018 and was based on a transferable amount of 1,105,108.03 pounds sterling (1,231,208.39 euros). The complainant's grade was corrected for the purpose of the calculations; whereas the first and second offers had referred to grade AD12/7, Annex 1 to the decision referred instead to grade AD11/1.

Subsequently, on 31 January 2019, the Head of Human Resources informed the complainant that his internal complaint of 12 November 2018 had been transmitted to the Joint Committee for Disputes. By memorandum of 19 February 2019, the Head of Human Resources then informed the complainant that his complaint of 12 December 2018 would be joined with his first complaint before being sent to the Committee to be reviewed at its next meeting.

By an internal memorandum of 21 June 2019, although the complaints had yet to be examined by the Committee, the Head of Human Resources, acting on behalf of the Director General, rejected the complainant's complaints "as being no longer pertinent" on the grounds that, on 8 January 2019, the complainant had accepted the final offer made by the Administration and the corresponding lump sum regarding the transfer of his pension rights. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 21 June 2019. He seeks the recalculation of the sums transferred in respect of his pension rights based on the figure of 1,356,364 euros as stated in the first offer. He seeks the payment of a minimum of 124,869.05 euros by way of redress for the material injury which he alleges to have suffered. He also asks for interest on that sum at the "statutory rate in Luxembourg plus five points". As for damages, the complainant claims 50,000 euros for moral injury plus 10,000 euros for having been denied the right to an effective internal appeal and 10,000 euros for the delay in dealing with his complaint. In addition, the complainant asks the Tribunal to order Eurocontrol to pay the sum of 25,000 euros by way of punitive and exemplary damages. He also claims 3,000 euros for the expenses incurred as a result of his internal complaint and 7,000 euros in costs.

Eurocontrol asks the Tribunal to declare the complaint irreceivable for failure to exhaust internal means of redress and for lack of a cause of action. Subsidiarily, it requests the dismissal of all the complainant's claims as unfounded.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside the decision of the Head of Human Resources of 21 June 2019 taken on behalf of the Director General. In that decision, the Head of Human Resources referred to the complainant's "complaint dated 12 November 2018, amended 12 December 2018", and pointed out that, on 8 January 2019, the complainant had accepted the final offer made by the Administration

and the corresponding lump sum for the transfer of his pension rights from CAAPS. She informed the complainant as follows:

“Therefore, we consider your aforementioned complaint as being no longer pertinent as it is void. The referred transfer is consequently valid and final.”

2. The complainant’s first internal complaint, dated 12 November 2018, was headed: “Complaint under Art 92 of the Staff Regulations”. In it, the complainant complained about the Pension Service’s handling of his request for the transfer of his pension rights from CAAPS. According to the complainant, as a result of the delays encountered, which invalidated the first offer received from CAAPS, the transfer value of the surplus had fallen by more than 110,000 euros by the time he received the second offer. He therefore requested the Director General to nominate somebody to deal with the matter.

3. The complainant’s second internal complaint, dated 12 December 2018, was headed “Complaint under Article 92.2 of the Staff Regulations, made through official channels”. The complainant called it an official complaint. He alleged that the procedure adopted by the Eurocontrol Agency and the errors and negligence on its part had deprived him of a part of his pension rights on the transfer. The complainant noted the difference between the amounts quoted in the first offer and those in the second offer received from CAAPS, and explained that he had accepted the second offer because he had no alternative, even though it was 110,677 euros less. He went on to point out the adverse impact of this difference, arguing that the loss of more than 110,000 euros was completely unacceptable and underlining the offhand attitude, negligence and errors on the part of the Agency in handling his file. He maintained that the Agency’s second offer had caused him irreparable damage, demanded compensation for his financial loss and requested that his entitlement be recalculated using the correct grade and that he be paid the difference, in addition to claiming moral damages and legal fees.

4. In response to the internal complaint of 12 November 2018, the Head of Human Resources and Agency Services wrote to the complainant on 31 January 2019, acknowledging receipt of his first complaint “pursuant to Article 92.2 of the Staff Regulations”, confirming that it would be examined by the competent service and transmitted to the Chairman of the Joint Committee for Disputes and also stating that the document annexed to that response, by which the complaint would be transmitted to the aforementioned Chairman, constituted a decision upon the claim in accordance with Judgment 3889 of the Tribunal.

5. As regards the second internal complaint, dated 12 December 2018, the Head of Human Resources again wrote to the complainant on 19 February 2019, acknowledging receipt of that complaint, again “pursuant to Article 92.2 of the Staff Regulations”, noting the complainant’s agreement to that complaint being joined with the first one, and informing him that the second complaint would also be examined by the competent service and transmitted to the Chairman of the Joint Committee for Disputes. The document transmitting that complaint to the aforementioned Chairman was annexed to the internal memorandum which contained the same statement that it constituted a decision upon the claim in accordance with Judgment 3889 of the Tribunal.

6. Between the submission of the complainant’s complaints of 12 November and 12 December 2018 and the acknowledgments of receipt and responses received from the Head of Human Resources on 31 January and 19 February 2019, the Head of Compensation and Benefits, acting under delegation of the Director General, conveyed the Director General’s decision of 14 January 2019 confirming the transfer of the complainant’s pension rights on the basis of the calculation made by CAAPS, by which the amount transferred was set at 1,105,108.03 pounds sterling (1,231,208.39 euros), in line with the amount of CAAPS’ second offer. The decision stated that the additional pensionable years of service resulting from the transfer came to 20 years, 4 months and 13 days, and explained that the amount transferred was made up of the portion representing those years, being 809,045.43 euros, and the balance

of 422,450.37 euros, of which 200,000 euros would be paid into the complainant's private pension fund and 222,450.37 euros into his usual bank account. In that regard, the decision referred to a "tax quittance" provided to Eurocontrol. This document, signed by the complainant on 8 January 2019 and referred to in the impugned decision, is a declaration by which the complainant accepts full responsibility for declaring to the tax authorities the overall amount paid into his bank account under the terms of the transfer.

7. Eurocontrol challenges the receivability of the complaint on three grounds. First of all, it submits that the complainant's internal complaints were not complaints within the meaning of Article 92.2 of the Staff Regulations, as they were not directed against an act adversely affecting him. Next, it asserts that the impugned decision of 21 June 2019 merely confirmed the earlier final decision of 14 January 2019 concerning the transfer of the complainant's pension rights, and as the complainant never challenged that earlier decision by means of an internal complaint, he has not exhausted the internal means of redress. Lastly, it maintains that the complainant no longer has a cause of action given that he did not challenge that final decision of 14 January 2019, he accepted the transfer of his pension rights and he signed the "tax quittance" on 8 January 2019.

8. Article 92 of the Staff Regulations governing officials of the Eurocontrol agency provides as follows with regard to internal means of redress:

- “1. Any person to whom these Staff Regulations apply may submit to the Director General a request that he takes a decision relating to him. The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.
2. Any person to whom these Staff Regulations 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 he has failed to adopt a measure prescribed by the Staff Regulations. 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 [...];
- 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.

The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 93.”

Furthermore, the Staff Regulations describe the role of the Joint Committee in Articles 9.1 and 10.2, while Articles 14 and 15 of Rule of Application No. 1 of the Staff Regulations provide for the composition of that Committee and determine in broad terms how it is to function. In that regard, Office Notice No. 06/11 of 7 March 2011 stipulates how the Committee is to operate with regard to the handling of complaints made under Article 92.2 of the Staff Regulations. More specifically, Articles 1 and 4 of that Office Notice provide as follows:

“Article 1

The Joint Committee for Disputes is tasked with giving advisory opinions on complaints made pursuant to Article 92.2 of the Staff Regulations and Article 91.2 of the General Conditions of Employment, with the exception of complaints in respect of the application of Rule No. 10. Complaints may only be lodged against a decision taken by the Director General, or the absence of any such decision.

[...]

Article 4

The Director General must seek the opinion of the Joint Committee for Disputes before taking a decision to reject even a part of a complaint lodged under Article 1. The Joint Committee shall give an opinion, stating the grounds on which it is based, preferably no later than sixty days subsequent to receipt of the request for an opinion. The Chairman shall sign this opinion and submit it to the Director General. It shall be

submitted to the party concerned along with the response to his/her complaint.

If no opinion is received within the period prescribed above, the Director General may proceed with his/her decision.”

9. In view of the provisions reproduced above, the Tribunal is astonished that the complainant’s internal memorandum of 12 November 2018 and his note of 12 December 2018, which were essentially seeking compensation for the injury he considered he had suffered as result of the manner in which Eurocontrol had handled the settlement of his pension rights, were treated by the Organisation as complaints within the meaning of Article 92.2 of the Staff Regulations and therefore transmitted by the Head of Human Resources to the Joint Committee for Disputes, whereas in reality they were requests made on the basis of Article 92.1 for a decision to be taken in relation to the complainant.

In other words, Eurocontrol failed to take any decision in relation to the complainant’s requests before referring the matter to the Committee. Although it is true that the complainant himself caused a certain amount of confusion by expressly using the word “complaint” in the aforementioned communications and, in the second, by referring to Article 92.2, in accordance with the Tribunal’s case law, Eurocontrol should nevertheless have re-categorised the communications itself and should have regarded them as requests pursuant to Article 92.1.

However, the Tribunal notes that the dispute before it is regarded by the parties as having reached the stage in the internal appeal procedure where the Joint Committee for Disputes becomes involved. It is therefore in that specific context that the Tribunal will examine the parties’ arguments.

10. As regards the first objection to receivability raised by Eurocontrol, in which it argues that the complaint is irreceivable because the complainant’s communications of 12 November and 12 December 2018 did not constitute complaints within the meaning of the Staff Regulations in that they were directed against a mere preparatory step, it must be concluded that this objection is completely devoid of merit. Contrary to what Eurocontrol maintains, the purpose

of the complaints was not to contest a preparatory step in the settlement of the complainant's pension rights, but to take issue with the negligent way in which he considered that Eurocontrol had handled his file and which he alleged had caused him serious injury.

The Tribunal also notes that the objection thus raised by Eurocontrol is incompatible with the position adopted by the Organisation itself throughout the procedure. Indeed, in her two internal memoranda of 31 January 2019, her two subsequent internal memoranda of 19 February 2019 and in the impugned decision, the Head of Human Resources not only categorised the complainant's requests as complaints, but also specified that they were complaints pursuant to Article 92.2 of the Staff Regulations and that the transmission of the complaints to the Joint Committee for Disputes constituted a decision upon the claims in accordance with Judgment 3889 of the Tribunal. What is more, in its submissions before the Tribunal, Eurocontrol confirms that it treated the complainant's communications as internal complaints; in its surrejoinder, the Organisation declares that, shortly before the scheduled meeting of the Committee, it noted that the issues raised by the complainant in his internal complaints had been resolved by his acceptance of what it calls the third offer, which led to the decision of 14 January 2019, and that is why the complaints were not, in the end, referred to the Committee.

11. As regards the second objection to receivability raised by Eurocontrol, in which it argues that the explanatory statement given by the Head of Human Resources in the impugned decision of 21 June 2019 did not constitute a decision because it merely confirmed the earlier final decision of 14 January 2019 concerning the complainant's unconditional agreement to the transfer of his pension rights from CAAPS, this objection is also without merit. It is clear from the complainant's internal complaints of 12 November and 12 December 2018 that the issues raised therein concerning the Agency's conduct, the negligent manner in which it handled his request for the transfer of his pension rights and the injury suffered as a result of the reduction in the overall sums that he was to receive differed from the subject-matter of the so-called "final" decision of 14 January 2019, namely the actual settlement of the complainant's pension rights. In these circumstances,

Eurocontrol clearly cannot argue that the impugned decision was merely confirmatory in nature.

12. The Tribunal will also reject Eurocontrol's argument that, as a consequence, the complainant did not exhaust all internal means of redress because he did not lodge an internal complaint against the "final" decision of 14 January 2019. The impugned decision in the present case is that of 21 June 2019.

13. Lastly, as regards the third objection to receivability raised by Eurocontrol, in which it argues that the complainant no longer has a cause of action in the context of the present complaint, the Tribunal notes that, in view of the subject-matter of the dispute, the existence of a cause of action can hardly be denied.

14. As for the complainant's contentions in respect of the impugned decision of 21 June 2019, he alleges that a procedural defect renders the decision unlawful and justifies its annulment. In this regard, the complainant asserts that the summary dismissal of his internal complaints without the opinion of the Joint Committee for Disputes first being sought breached the provisions of the Staff Regulations by which Eurocontrol was bound. Eurocontrol acknowledges that the complaints submitted in November and December 2018 were not passed on to the Committee, but explains this by saying that the Administration's reasoned response to those complaints was the decision of 14 January 2019, which the complainant did not challenge. Eurocontrol maintains that those complaints became, in all respects, irrelevant and void following the complainant's acceptance of the "third offer" which led to the decision of 14 January 2019.

15. However, according to the settled case law of the Tribunal, where the rules applicable to an organisation provide for an internal procedure, that organisation is required to observe and apply those rules under the principle *tu patere legem quam ipse fecisti* (see Judgments 4506, consideration 5, and 4310, consideration 9). Given that, in the aforementioned Office Notice No. 06/11, Eurocontrol specifically

provides that the Joint Committee for Disputes is tasked with giving advisory opinions on complaints made pursuant to Article 92.2 of the Staff Regulations, and that, before taking a decision to reject even a part of such a complaint, the Director General must seek the opinion of that committee, Eurocontrol could not, as it in fact did, reject the complainant's complaints without first receiving that opinion, which, moreover, it had undertaken to obtain in the present case.

By acting as it did, Eurocontrol effectively decided to make its own finding, without the benefit of such an opinion, that the complainant's complaint was unfounded and void because of what he had signed on 8 January 2019 and because he had not challenged the final decision of 14 January 2019. The Head of Human Resources thereby disregarded an essential safeguard in the right to an internal appeal, from which all officials of the Organisation are entitled to benefit (see Judgment 4167, under 3), thus rendering the impugned decision unlawful.

16. It follows that the impugned decision must be set aside, without there being any need to examine the complainant's other pleas.

17. In these circumstances the Tribunal's case law recognises that it is appropriate to remit the matter to the Organisation to allow the internal appeal procedure to proceed to its conclusion (see, for example, Judgment 4499, consideration 13).

In that regard, it should be borne in mind that, according to the consistent case law of the Tribunal, "one of the main justifications for the mandatory nature of an internal appeal procedure is to enable the Tribunal, in the event that a complaint is ultimately filed, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies. Appeal bodies play a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from their composition and their extensive knowledge of the functioning of the organisation" (see Judgment 4168, consideration 2; see also Judgments 4499, consideration 13, 3067, consideration 20, and 2781, consideration 15). There is all the more justification for the input

of the internal appeal body in a case such as the present one which involves technical aspects.

18. In the present case, the complainant's internal complaints were summarily dismissed, without an opinion from the Joint Committee for Disputes, solely on the strength of the Organisation's conclusion that, by accepting the transfer of his pension rights, the complainant had abandoned his grievances, but without anyone having considered the basis for that conclusion. The procedural flaw is clearly significant and, since the decision must be set aside due to its unlawfulness, the case must be remitted to the Organisation so that the Committee's opinion can be duly obtained.

19. Whatever the outcome of the present dispute, the effect of the failure to examine the complainant's internal complaints was to delay its final settlement. That failure has in itself caused the complainant moral injury which will be fairly redressed by ordering Eurocontrol to pay him compensation of 10,000 euros.

20. All other claims connected with the alleged unlawfulness of the impugned decision must for the time being be dismissed in view of the fact that the case is remitted to the Organisation. It will be for the competent bodies to address them in the context of that remittal.

21. The complainant is entitled to costs, which the Tribunal sets at 7,000 euros, being the amount he claims.

DECISION

For the above reasons,

1. The impugned decision of 21 June 2019 is set aside.
2. The case is remitted to Eurocontrol, in order for the complainant's internal complaints of 12 November and 12 December 2018 to be duly examined by the Joint Committee for Disputes.

3. Eurocontrol shall pay the complainant moral damages in the amount of 10,000 euros.
4. The Organisation shall also pay him costs in the amount of 7,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 November 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 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ