

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A. (No. 5)

v.

Eurocontrol

136th Session

Judgment No. 4696

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr G. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 September 2020, Eurocontrol's reply of 22 January 2021, the complainant's rejoinder of 4 March 2021 and Eurocontrol's surrejoinder of 4 June 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the decision to recover supposed overpayments made to him by way of expatriation allowance.

The complainant, a Greek national, was born in Mons (Belgium) on 30 December 1963. He entered the service of Eurocontrol on 16 September 1991, when he joined the Institute of Air Navigation Services in Luxembourg. As he was a Belgian resident at the time of his recruitment, he received an expatriation allowance of 16 per cent of the amount of his basic salary on account of his assignment to Luxembourg. On 16 September 1993, the complainant was assigned to Eurocontrol's Headquarters in Brussels (Belgium) and continued to receive the expatriation allowance continuously until he retired. On 18 July 2019, the complainant asked the Pensions Service for a

simulation of net pension guaranteed to within 1 per cent, amounting to 5,212.35 euros per month. On 30 July 2019, the complainant asked to retire and to draw his retirement pension with effect from 31 July 2019. By internal memorandum of 31 July 2019, he was informed of the Director General's decision to approve this request with effect from 1 August 2019.

By letter of 13 September 2019, the complainant was informed that an inspection of his file when he retired had revealed that he had been incorrectly receiving the expatriation allowance since his transfer to Brussels, whereas he was only eligible for the 4 per cent foreign residence allowance as a Greek national who had been resident in Belgium before his recruitment at Eurocontrol. The Administration therefore needed to recover the overpayments made during the past five years – that is from 1 October 2014 onwards – pursuant to Article 87 of the Staff Regulations governing officials of the Eurocontrol Agency. By letter of 19 September 2019, the complainant challenged the recovery of the sums claimed.

By letter of 26 November 2019, the Head of the Human Resources and Services Unit confirmed the Organisation's position with regard to the recovery of the amount corresponding to the difference between the expatriation allowance and the foreign residence allowance received since 1 October 2014. The overpayment amounted to 64,243.54 euros. In addition, she stated that she had contacted the Legal Service to check whether it was possible to recover overpayments for more than the five-year period, given that the error was patently such that the complainant's failure to point it out could be regarded as attempted fraud. The complainant was informed, by email of 19 December 2019, that the recovery of the said sums would begin in December 2019.

By letter of 18 February 2020, the complainant lodged an internal complaint against the decision of 26 November 2019. On 9 April 2020, the Administration acknowledged receipt of the internal complaint, specifying that it was a "decision upon the claim" – within the meaning of the Tribunal's case law – the effect of which was to interrupt the 60-day period on the expiry of which an implied rejection decision may arise under Article VII, paragraph 3, of the Statute of the Tribunal. By email of 22 April 2020, the Administration informed the complainant

that the Organisation was experiencing delays in dealing with internal complaints due to the COVID-19 pandemic. On 4 June 2020, it informed him that his internal complaint had been examined by the Joint Committee for Disputes, which was still finalising its report.

On 8 July 2020, following a meeting held on 30 April, the Joint Committee for Disputes issued a divided opinion. Two of its members considered that the internal complaint was well founded since it was not possible to recover undue sums when more than five years had elapsed since payments began and since the complainant was not aware of the irregularity. Two other members considered that the complainant had wrongly received the expatriation allowance since his transfer to Brussels and that the Organisation was entitled to recover the relevant sums from the last five years.

On 16 September 2020, the complainant filed a complaint before the Tribunal against the implied decision rejecting his internal complaint of 18 February 2020.

In his letter of 7 December 2020, the Director General, who shared the opinion of the two members who had concluded that the internal complaint was unfounded, rejected the latter. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 7 December 2020 and to order the Organisation to reimburse all the sums retained from his pension pursuant to that decision, insofar as the expatriation allowance is regarded as having been unduly received. In addition, he seeks damages of 20,000 euros for the moral injury he considers he has suffered and the award of costs.

Eurocontrol asks the Tribunal to dismiss all the complainant's claims as unfounded.

CONSIDERATIONS

1. In his complaint, the complainant seeks the setting aside of the implied rejection of his internal complaint of 18 February 2020 against the decision of 26 November 2019 of the Head of the Human

Resources and Services Unit of the Eurocontrol Agency to recover, for the maximum period of five years from 1 October 2014, the overpayments made to him as a result of his receiving the 16 per cent expatriation allowance instead of the 4 per cent foreign residence allowance from the time of his transfer to Brussels (Belgium) on 16 September 1993 onwards.

2. Eurocontrol submits that the complaint is irreceivable on the grounds that the complainant did not comply with the requirements under Article VII, paragraph 1, of the Statute of the Tribunal to exhaust the internal means of redress available to him as a former official of the Organisation. However, the Tribunal notes that, pursuant to the last sentence of Article 92(2) of the Staff Regulations, an implied decision rejecting the complainant's internal complaint, challengeable before the Tribunal, arose on the expiry of four months from the date on which that internal complaint was lodged, namely on 18 June 2020. Therefore, on 16 September 2020, the date on which the complainant filed his complaint with the Tribunal, the internal means of redress available to him had indeed been exhausted. The complaint is therefore receivable and the objection to receivability raised by the Organisation will be dismissed.

3. After the complainant had filed his complaint with the Tribunal, a final decision was taken by the Director General on 7 December 2020 rejecting his internal complaint. In his rejoinder, the complainant therefore specifies that, ultimately, he is impugning that final decision, which in fact confirmed the earlier contested decision of 26 November 2019.

Since the parties have had ample opportunity to comment in their submissions on that final decision, the Tribunal considers it appropriate to treat the complaint as being directed against that decision.

4. The complainant also requests an oral hearing. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly

informed of their arguments and the relevant evidence. The request for an oral hearing is therefore dismissed.

5. The expatriation allowance which the complainant continued to receive after he was assigned on 16 September 1993 to Eurocontrol's Headquarters in Belgium, his country of residence at the time he was recruited, is governed by Article 68 of the Staff Regulations governing officials of the Eurocontrol Agency, which provides as follows:

"Article 68

The expatriation allowance shall be equal to 16% of the total of the basic salary, household allowance and dependent child allowance to which the official is entitled. The expatriation allowance shall be not less than EUR 574.13 per month.

[...]"

Rule of Application No. 7 of the Staff Regulations concerning remuneration stipulates in particular the following in its Article 4 in relation to the expatriation allowance:

"Article 4

1. An expatriation allowance shall be paid equal to 16% of the total amount of the basic salary plus household allowance and dependent child allowance paid to the official:

a) to officials:

- who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and
- who, during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account;

[...]

2. An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph 1 shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance.

[...]"

6. With regard to the recovery of undue payment, Article 87 of the Staff Regulations provides as follows:

“Article 87

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.

The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Agency is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed.”

The wording of Article 87 is supplemented by Office Notice No. 7/10 of 11 March 2010 which states the following with regard to recovery of undue payments within the Organisation:

“1. Introduction

Pursuant to Article 87 of the Staff Regulations [...], any sum overpaid will 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.

In the interests of clarity and transparency, the present Office Notice clarifies the scope of [that article] and the procedure for [its] implementation.

2. Scope of Article 87 of the Staff Regulations [...]

It should be pointed out that the words ‘patently such’ qualifying the fact that there was no due reason for a payment does not mean that the recipient is excused from making any effort to think about or verify payments, but indicates that any undue payments will be recovered where there has been an error which would not have escaped the attention of a normally diligent recipient, such a recipient being deemed to be aware of the rules governing his/her administrative status.

[...]

3.3 Blatant fraud

Where the amount unduly paid is the result of blatant fraud, percentages in excess of those referred to in paragraph 3.1 above may if necessary be applied.

[...]”

7. In the first place, the complainant submits that Eurocontrol committed an error of law in its interpretation of Article 87 of the Staff Regulations since the mistake made in granting the expatriation allowance was entirely attributable to the Administration, that he acted in good faith at all times and that, bearing in mind that the renewal of the expatriation allowance occurred on his transfer to Brussels in 1993, the Administration was time-barred from taking action.

8. In Judgment 4469, consideration 4, the Tribunal has already stated that Article 87 of Eurocontrol's Staff Regulations constitutes 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. Where a Eurocontrol staff member receives an undue payment, the Tribunal recalled in that judgment that recovery is only possible if one of the two conditions specified in Article 87 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.

9. With regard to this second condition, which is the only one relevant to the present case, in the aforementioned Judgment 4469, this time in consideration 6, the Tribunal pointed out that it had already ruled on the interpretation to be given to the condition that requires the contested overpayment to be "patently such that the complainant could not have been unaware of it". In Judgment 3201, consideration 14, the Tribunal stated that this condition is regarded as being met 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".

10. In the present case, under Article 4(1)(a) of the aforementioned Rule of Application No. 7, the complainant was not entitled to receive an expatriation allowance after his transfer to Brussels and he could not have been unaware of that provision. As the Tribunal has reiterated on many occasions, staff members are expected to know their rights,

ignorance of the law is no excuse and a staff member is deemed to know the regulations and rules governing her or his appointment (see Judgments 4242, consideration 6, and 4166, consideration 4). Moreover, the amount of the expatriation allowance was considerable since it corresponded to 16 per cent of the complainant's basic salary and, for instance, amounted to more than 1,500 euros per month for the majority of the period from 1 October 2014 onwards. The grant of the expatriation allowance was easily discernible as it appeared on each of the complainant's payslips, month after month. The Tribunal considers that, in the circumstances, the Organisation was entitled to conclude that the fact that there was no due reason for this payment was sufficiently obvious that it could not have reasonably escaped the notice of an official exercising ordinary diligence in the management of his personal affairs.

11. Furthermore, given that Eurocontrol does not submit that the complainant deliberately defrauded the Organisation in order to continue to receive the expatriation allowance unlawfully, the complainant's assertion that he acted in good faith is irrelevant. The existence of an error is at the very source of the principle of law concerning the recovery of undue payments and, in this case, either the error must have been known to the complainant since he could not have been unaware of the Organisation's rules relating to the expatriation allowance, or else the situation was one that could not have reasonably escaped the notice of an official exercising ordinary diligence in the management of his personal affairs and who was supposed to know the regulations and rules of his organisation.

12. The Tribunal is not convinced by the complainant's assertion that it was reasonable for him to think that the expatriation allowance was fixed when he first took up his duties and "followed" him until the end of his career. The relevant provisions of the Staff Regulations and of Rule of Application No. 7, mentioned above, cannot be read or interpreted in that way. It is obvious from the very nature of the expatriation allowance that it cannot be fixed permanently for the whole of an official's career and that it is liable to change every time there is

a change in the official's place of employment depending on whether the conditions which initially led to the grant of the allowance continue to exist.

13. Turning to the five-year period settled on by the Administration for the purposes of recovering the expatriation allowance overpaid to the complainant, the Tribunal has already recalled, in the aforementioned Judgment 4166, consideration 5, that, for each payment, the limitation period begins to run from the date on which that payment was made. Accordingly, Eurocontrol was entitled, under Article 87 of the Staff Regulations, to apply its request for recovery to each undue payment within five years of the date when that particular payment had been made, thereby covering the whole of the period referred to in the complainant's internal complaint.

14. The complainant's argument that Eurocontrol committed an error of law in its interpretation and application of Article 87 is therefore unfounded.

15. In the second place, the complainant claims that the request for recovery of undue payments was disproportionate and that there was a "breach [of his] legitimate expectations" in this regard. According to the complainant, it was unfair and inequitable to require him to reimburse a sum of 64,243.54 euros.

It is true that the Tribunal has already stated that, according to its case law, "an organization's right to recover an overpayment must be partially – or fully – denied if the circumstances of the case show that the reimbursement sought would be unfair or inequitable for the staff member concerned" (see Judgment 4139, consideration 14). However, since the submissions show that the complainant's remuneration was in fact too high for more than twenty-six years, and since Eurocontrol can only recover a fraction of the sums in question, limited to five out of those twenty-six years, and has chosen to recover them through a monthly retention from the pension payments it makes to the complainant, the Tribunal considers that the reimbursement decided on by the Organisation is not unfair or inequitable towards the complainant.

This further claim of the complainant's is also unfounded.

16. In the third place, the complainant claims in his submissions that insufficient reasons were given for the impugned decision, leaving him unable to understand how the sum of 64,243.54 euros which he was required to pay back had been calculated. The Tribunal will dismiss this argument as it notes that both the initial decision of 26 November 2019 and the final decision of 7 December 2020 provide the complainant with a good understanding of the reasons behind them and a sufficient explanation of the amount of the repayment claimed and requested from him. Furthermore, the Organisation's reply includes a detailed calculation of how the sum was established, matching the explanations previously given to the complainant.

This further argument is also unfounded.

17. In the last place, the complainant claims that he was a victim of a misuse of authority on the part of the Organisation since the purpose of the decision of 26 November 2019 and, consequently, of the decision of 7 December 2020 was not just to recover the contested sums as such but also to cause him harm. As evidence of this intention to harm him, he points to the other actions taken against him by Eurocontrol, which are the subject of Judgments 4695 and 4697, also delivered in public this day.

However the Tribunal recalls that, according to its case law, misuse of authority may not be presumed. The burden of proof is on the official who pleads it, here being the complainant (see Judgments 4552, consideration 9, and 4437, consideration 23). The Tribunal considers that no misuse of authority has been established, especially given that, in seeking to recover the contested sums, the Organisation was simply applying the provisions of the Staff Regulations which it was entitled, or indeed required, to implement.

This last argument is unfounded.

18. Since none of the pleas entered by the complainant against the impugned decision is founded, his claim for damages for the moral injury he alleges he has suffered as a result of that decision must be dismissed.

19. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ