

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

110th Session

Judgment No. 2986

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr D. A., Mr J. A. M., Mr G. A. (his second), Mr D. A., Mr M. B., Mr V. B., Ms C. B., Mr J.-C. B. (his third), Ms P. B. (her second), Ms V. B., Ms G. B., Ms M. C.-V., Ms M. C., Mr P. C. (his second), Ms C. C., Ms C. D. M., Mr B. D. J. (his second), Mr D. D., Ms Y. D. L., Ms G. D. (her second), Ms G. d. T., Mr M. D., Ms A. D. V., Mr R. D. (his third), Ms D. D. (her second), Mr P.-H. F. (his fourth), Mr J.-P. F., Ms N. F., Ms B. F., Mr R. G., Ms G. G.-T. (her second), Ms A. G. (her third), Mr C. H., Ms A. H.-M., Ms J. H., Ms G. I., Ms O. K., Ms V. L.-T. (her fourth), Ms M.-B. M., Mr D. M. (his second), Mr F. M., Mr S. M., Mr A. M. (his second), Ms L. N., Ms C. L. N., Mr L. O. (his fifth), Mr M. O. R. (his second), Ms R. P., Ms M.-E. P., Ms I. P., Mr G. P., Ms M. P. (her second), Ms M.-J. P.-L., Ms M. R., Mr M. R. M., Mr E. R., Mr M. S.-F., Ms P. S.-C., Ms C. S., Ms C. S. B., Ms D. S.-D., Ms P. S. (her third), Mr J. S., Mr B. T., Ms L. T., Mr A. T., Mr A. V. d. B. (his fifth), Mr A. V. S., Mr E. v. E., Mr J.-C. V. L., Ms R. v. L. (her second), Mr D. V. R., Ms C. V. T., Mr F. V. (his second), Mr J.-M. W. (his third), Mr S. W. and Ms M. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 November 2008 and corrected on 10 and 14 January 2009, the Agency's reply of 8

May, the complainants' rejoinder of 17 August and Eurocontrol's surrejoinder of 20 November 2009;

Considering the complaints filed by Ms M. B. (her second), Mr J. C., Ms C. L., Ms K. P., Ms I. T. and Ms D. V. D. against Eurocontrol on 18 February 2009, the Agency's reply of 23 June, the complainants' rejoinder of 2 October and Eurocontrol's surrejoinder of 18 December 2009;

Considering the applications to intervene filed by:

A., N.	G., L.
A., F.	G. F., A.
A., F.	H., K.
B., V.	J., J.-L.
B., M.	K., J.
B.-D., V.	L., B.
C., J.-P.	M., M.
C., A.	M., S.
C., G.	M., M.
C., J.-M.	M., G.
d. S., M. A.	N., M.
d. B. D., C. M.	P., A.
D., F.	R., P.
D. C., G.	R., D.
d. F. e T., M.	R., C.
D.'O., L.	R., F.
D. M., H.	R., R.
d. M., E.	S., T.
D., P.	S., D.
D., M.	S., M.
D., B.	S., M.
D., P.	S., C.
D., A.	S., L.
F., J.	S., B.
F., Y.	T., D.
G., B.	T., J.
G., F.	V., C.

V. A., L.
V. S., M.
V., C.
v. T., N.

V., R.
W., A.
W., J.

and the letter of 12 November 2009 by which the Agency submitted its comments on three of these applications;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. Facts relevant to this case are set out in Judgment 2204 delivered on 3 February 2003.

The complainants, who were all recruited by the Agency prior to 20 June 2005, had previously acquired pension rights in Belgium. They became established before 1 June 2007.

At the beginning of the nineties, under Article 12 of Annex IV to the Staff Regulations governing officials of the Eurocontrol Agency and Article 5 of Rule of Application No. 28 of the Staff Regulations, which sets out the arrangements for implementing the said Article 12, officials were entitled to request the transfer of their acquired pension rights to the Eurocontrol pension scheme within six months of the date of their establishment, if the regulations or the contract to which they had been subject in their previous post so allowed. The pensionable years to be credited were then calculated by reference to their basic salary at that date. As some officials were unable to apply within the prescribed period, it proved necessary to reopen this application period. To this end, “[e]xceptional temporary provisions having the force of service regulations” were adopted. They were published in Office Notice No. 11/91 of 27 June 1991 and became effective as of 1 January 1991. Article 2 of these provisions stipulated that an established official could request the transfer of his pension rights “within six months of the effective date of the [said] provisions or of the date on which such a transfer [would be] rendered possible,

whichever [was] later”. If transfer was not yet allowed under the contract or regulations governing their previous post, the persons concerned could either submit an application as a safeguard, or await the date on which the transfer would become possible. Some 30 complainants had submitted either one or two applications as a safeguard by 31 May 2007.

In order to expedite procedures for authorising the transfer of pension rights from the Eurocontrol pension scheme to a national pension scheme (Article 11 of Annex IV to the Staff Regulations), or from a national scheme to the Agency’s scheme (Article 12 of the same annex), an Article 12bis was adopted. This article entered into force on 1 September 1994 and stated that agreements on the transfer of pension rights concluded between the European Communities and a Community Member State which was also a member of Eurocontrol would apply *mutatis mutandis* to the Agency as from the date of their entry into force, once the State concerned had advised Eurocontrol of its formal acceptance of the procedure.

In the course of the year 2000 a number of officials asked the competent Belgian authorities and then the Agency to adopt measures which would enable them to transfer their pension rights.

Information Note to Staff No. I.02/6 of 26 March 2002 announced that a survey would be carried out in order to collect the information required for assessing the potential budgetary impact of an agreement between Eurocontrol and Belgium permitting the transfer of pension rights. At that point 20 complainants expressed their interest in transferring their rights.

The law regulating the transfer of pension rights between Belgian pension schemes and those of institutions governed by public international law was adopted on 10 February 2003. Within the meaning of this law, the term “institution” referred to “Community institutions and bodies placed on the same footing as these institutions for the purposes of applying the staff regulations governing officials and other servants of the European Communities” and to certain organisations devoted to furthering the Communities’ interests. Article 3, paragraph 2, of this law stated, however, that a royal decree

could extend the application of its provisions to other institutions governed by public international law. This law entered into force on 1 January 2002 pursuant to its Article 29.

Information Note to Staff No. I.05/06 of 27 April 2005 announced a reform of the Eurocontrol pension system, which was reflected in the establishment of a pension fund. The new provisions of the Staff Regulations concerning pensions, which were brought to the staff's attention by Office Notice No. 11/05 of 20 June 2005, took effect on 1 July 2005. The new version of Article 12, paragraph 1, of Annex IV to the Staff Regulations provided that pensionable years should henceforth be calculated by reference to the official's "basic salary, age and exchange rate at the date of application for a transfer".

The royal decree bringing Eurocontrol within the scope of the law of 10 February 2003 was issued on 25 April 2007 and entered into force on 1 June 2007. It stipulated *inter alia* that officials who had become established before 1 June 2007 should submit their transfer application to the *Office national des pensions* within six months of that date.

On 31 May 2007 the Agency published the new version of Rule of Application No. 28 in Office Notice No. 20/07. Pursuant to Article 12, new paragraph 1, of Annex IV to the Staff Regulations, Article 7, paragraph 2, of the aforementioned rule provided that, for the purpose of calculating the number of pensionable years to be credited, the amount of the annual basic salary – which, together with the annual rate of pension-right accumulation, serves as the divisor – was that of the "date on which [the] transfer application [was] received". However, under the terms of paragraph 4 of the above-mentioned notice, officials who had submitted a request for the transfer of their pension rights and whose contract or employment scheme allowed such transfer before the date of publication of the notice "[would] be subject to the former provisions of Article 12 of Annex IV to the Staff Regulations [...] (application of the basic salary, age and exchange rate at the date of establishment)" in cases where the application had been submitted to Eurocontrol. Information Note to Staff No. I.07/05 on the transfer of pension rights between Belgian pension schemes and the

Eurocontrol pension scheme was also published on 31 May 2007. Annex IA to this note contained the transfer application form.

All the complainants requested the transfer of their pension rights between June and November 2007. They agreed to the transfer after being informed of the estimated number of pensionable years which would be credited to them on the basis of the revised provisions, but filed internal complaints against the decisions determining the pensionable years credited to them, because they objected to the fact that these years had been calculated by reference to their basic salary at the date of their transfer application and not at the date of their establishment. Two members of the Joint Committee for Disputes recommended that the internal complaints should be allowed, while the other two recommended that they should be dismissed as unfounded. By memoranda of 26 August and 20 November 2008, which constitute the impugned decisions, the Director General informed each of the complainants that he had decided to dismiss their internal complaints.

B. The complainants contend that they had an acquired right to have the pensionable years credited to them calculated by reference to the basic salary they were receiving at the date of their establishment. Since Article 7, paragraph 2, of Rule of Application No. 28 bases the calculation of these pensionable years on basic salary at the date of the transfer application, they hold that it is unlawful. Similarly, the complainants submit that Article 12 of Annex IV to the Agency's Staff Regulations – which is largely drawn from Article 11, paragraph 2, of Annex VIII to the Staff Regulations of Officials of the European Communities – is unlawful and contrary to the principle of non-retroactivity, unless it may be construed as allowing the official's basic salary at the date of the transfer application to be taken into account only if it was possible for the official to obtain such a transfer between the date of his/her establishment and the date on which he/she became entitled to draw a retirement pension. In their opinion, the application of the new rules defers the date of retirement, thereby lengthening the contributory period. In this connection they draw attention to the fact that some people will lose their right to

reimbursement of part of the transferred capital and that this will be a breach of Community case law.

The complainants further state that their property rights have not been respected because a sizeable portion of the transferred capital, corresponding to the difference between the amount of the basic salary at the date of the transfer application and that at the date of their establishment, has been used for the benefit of the Eurocontrol pension fund and its pensioners.

The complainants contend that the principle of equal treatment has been breached because the royal decree of 25 April 2007 allowed officials who were not established before 1 June 2007 to lodge a transfer application within six months of their establishment, with the result that their basic salary at the date of the application would be that which they received at the date of establishment and that, for an equal amount of pension rights acquired in Belgium, they would obtain a higher number of pensionable years than that credited to officials established before 1 June 2007 who had been unable to transfer their pension rights as of the date of their establishment. In their opinion, by applying the same rule to officials who were not in the same category, in other words by calculating pensionable years to be credited by reference to the basic salary at the date of the transfer application, the Agency treated officials in a different *de facto* and *de jure* situation in the same manner.

Lastly, the complainants take the view that the provisions of paragraph 4 of Office Notice No. 20/07 have been breached, since they submitted transfer applications as a safeguard, or requests which should be regarded as the equivalent thereof, before the entry into force of the royal decree of 25 April 2007 which, because it could not depart from the provisions of the law, made transfers possible retroactively as from 1 January 2002, in accordance with Article 12bis of Annex IV to the Staff Regulations. In their opinion the principle of the protection of legitimate expectations has been infringed because the Agency assured them that the submission of an application as a safeguard would preserve their rights. They add that Eurocontrol may have neglected its duty of care by not inviting them to lodge

such an application before the publication of the royal decree of 25 April 2007.

The complainants seek the setting aside of the impugned decisions and those determining the pensionable years credited to them. They also claim costs.

C. In its reply Eurocontrol asks the Tribunal to order the joinder of all the complaints filed in the context of this case.

Having drawn attention to the fact that Community case law is binding only for the institutions of the European Union, the Agency explains that the amendments to Article 12 of Annex IV to the Staff Regulations and to Rule of Application No. 28 are “legitimate and lawful”, because the pension scheme reform of 2005 entailed a “radical alteration” in its funding method. It adds that the measures taken are consonant with the Tribunal’s case law and it denies that the principle of non-retroactivity has been breached. In its opinion, the adoption of the new method for calculating the pensionable years to be credited does not violate the complainants’ acquired rights. It considers that the overall balance of contractual obligations has not been adversely affected, nor have any fundamental terms of employment which might have induced the persons concerned to accept an appointment or remain in employment been altered, because when the complainants were recruited there was no certainty that they would eventually be able to have their pension rights transferred. The defendant also emphasises that such a transfer is not obligatory, since officials retain the possibility of drawing both the pension acquired with the national pension scheme and that provided by Eurocontrol. In its view, the consequences of the amendment made on 31 May 2007 vary widely from one complainant to another and depend largely on the date on which each person decides to retire. In this connection it produces a table showing the impact of the provisions of the new Rule of Application No. 28 on the calculation of the pensionable years credited to each person: for half of the complainants, there would be no impact at the date on which they could retire on a full pension.

The Agency denies that the complainants' property rights have been disregarded and it states that Eurocontrol's pension fund has not been unduly enriched but that, on the contrary, the reform of the pension scheme put an end to a situation where the transfer of rights long after establishment penalised it financially.

According to the defendant, Office Notice No. 20/07 requires officials, irrespective of whether they became established in the six months following the entry into force of the royal decree of 25 April 2007 or long before that, to submit a transfer application within six months of the date of their establishment or of the entry into force of the decree, but the pensionable years to be credited must be calculated for all of them by reference to their basic salary at the date of the application. In its opinion, far from constituting a breach of the principle of equal treatment, the new rules ended positive discrimination in favour of officials who, after effecting a late transfer of pension rights, were granted the same number of pensionable years as were credited to persons who had submitted an application on becoming established. In this respect it points out that in Judgment 2066 the Tribunal found that "[a] new rule could be less favourable than the old one, and hence be subject to challenge, without necessarily impairing the right to equal treatment".

Lastly, Eurocontrol explains that the fact that an official filed an application as a safeguard or expressed an interest in transferring his/her pension rights in 2002, cannot have the effect of entitling him/her to have the pensionable years credited to him/her calculated by reference to the conditions obtaining on the date on which the application was lodged or on the date on which he/she expressed an interest. Officials did not become entitled to transfer rights acquired in Belgium until 1 June 2007.

D. In their rejoinder the complainants enlarge upon their pleas and in turn request the joinder of their complaints. They submit that Eurocontrol has not demonstrated that the new rules are well founded and that, in the past, even if pension rights were transferred late, the fact that the official's basic salary at the date of establishment was taken into account did not cause any injury to the Agency.

With reference to the issue of acquired rights, they say that the fact that the Agency always informed the staff of any progress made in negotiations with the Belgian authorities concerning the transfer of pension rights encouraged them to enter and/or remain in its service. The same is true of the arrangements for the transfer, insofar as they directed that their basic salary at the date of establishment should be taken into account, for this guaranteed that the time which elapsed between that date and that on which transfer would become possible would not have any adverse consequences on the calculation of the pensionable years credited to them. In reply to the argument that there is no obligation to transfer pension rights, the complainants state that it is less advantageous to draw both a pension from a national pension scheme and that provided by Eurocontrol than to effect the transfer. They consider that the defendant underestimated the impact of the application of the new rules on the calculation of pensionable years.

E. In its surrejoinder the Agency maintains its position.

CONSIDERATIONS

1. Under Article 12 of Annex IV to the Staff Regulations an official who enters the service of Eurocontrol is entitled to have paid to the Agency the updated capital value of the pension rights acquired by him by virtue of his previous activities “if the regulations or the contract to which he was subject in his previous post so allow”.

Rule of Application No. 28 sets out the arrangements for implementing this article and, in particular, the rules for determining the number of pensionable years to be credited in the Eurocontrol scheme in respect of pension rights transferred from another scheme.

2. The original version of these texts stipulated that pension rights had to be transferred when the official became established. Thus, an official could exercise his/her right to make such a transfer only within six months of the date of establishment and the pensionable years credited to him/her were calculated by reference to his/her basic salary at that date.

3. According to the above-mentioned terms of Article 12 of Annex IV to the Staff Regulations, the possibility of effecting such a transfer from a national pension scheme was subject to the existence of provisions authorising this transfer in the national law of Eurocontrol Member States. However, the adoption of laws and regulations to this effect has taken place so gradually that, to date, some States have still not passed such legislation.

4. In Belgium, the host country of Eurocontrol's Headquarters and the country of origin of many of the Agency's officials, the negotiations preceding the adoption of national legislation permitting the transfer of pension rights proved to be long and arduous. Indeed, they gave rise to complaints before the Tribunal which were partly aimed at obtaining redress in respect of the Agency's alleged failure to show due diligence in the negotiations. These complaints were dismissed by Judgment 2204.

In the end it was not until 1 June 2007 that such transfers became possible by virtue of the entry into force of a royal decree of 25 April 2007 which, as from 1 June 2007, brought Eurocontrol within the scope of a Belgian law of 10 February 2003 which had already authorised this kind of transfer for officials of the European Communities.

5. The complainants, all of whom had acquired pension rights with Belgian pension schemes, then requested the transfer of these rights to the Agency's pension scheme, as Information Note to Staff No. I.07/05 of 31 May 2007 invited them to do if they wished to take advantage of this arrangement.

6. However, during the above-mentioned negotiations, two series of events had taken place, which are of particular relevance to this dispute.

(a) On 17 June 1991 the Permanent Commission of Eurocontrol, acting out of consideration for officials who had not submitted their application for the transfer of pension rights within six months of becoming established or, above all, who had been unable to do so

because such transfers had not yet been authorised by the legislation of their country of origin, adopted “[e]xceptional temporary provisions having the force of service regulations” to exempt the persons concerned from the time bar. These provisions, which were subsequently incorporated into the Staff Regulations as Appendix IIIa, specified that requests could be submitted within six months of the effective date of the provisions or, in the case of officials who in their previous post had been subject to regulations or to a contract which did not permit such a transfer, of the date on which such a transfer became possible.

Office Notice No. 11/91 of 27 June 1991, in which the provisions in question were published, explained *inter alia* that, in the case of officials who were as yet unable to benefit from a transfer owing to the contract or regulations governing their previous post, “[a]pplication may, as a safeguard, be made [...], or the date on which the transfer becomes possible can be awaited”.

The possibility of submitting such an application as a safeguard was likely to be of particular interest to officials who had acquired rights under Belgian pension schemes, since on 21 May 1991 Belgium had adopted a law, the specific purpose of which was to authorise the transfer of these pension rights to “institutions governed by public international law”, and bringing Eurocontrol officials within its scope was contemplated at that time.

Pursuant to this office notice, some of the complainants submitted their first application for a transfer.

However, the arrangements foreseen under the law of 21 May 1991, which were based on a legal subrogation mechanism rather than on the transfer of the actuarial equivalent or the repurchase value of pension rights, were deemed to be financially too disadvantageous by Eurocontrol. The Agency consequently refused to conclude an agreement with Belgium on that basis, with the result that Eurocontrol officials could not benefit from the above-mentioned law and, as stated above, they had to wait until 1 June 2007 before it became possible to transfer their pension rights.

(b) In the meantime, the Permanent Commission of Eurocontrol had adopted a radical reform of the Agency's pension scheme that became effective as of 1 July 2005. The numerous measures forming part of this reform, which was aimed at restoring the scheme's financial viability and which the Tribunal found to be lawful in Judgment 2633, included an amendment of the above-mentioned Article 12 of Annex IV to the Staff Regulations.

Under the new version of this Article 12, the number of pensionable years credited to an official who transferred his pension rights acquired with another scheme was no longer calculated by reference to the official's basic salary at the date of his establishment, but by reference to his basic salary at the date of his transfer application and to his age and the exchange rate in force on that date.

This amendment, which echoed that made in 2004 by the European Communities to similar provisions on the transfer of pension rights in the Staff Regulations governing their own officials, placed the Agency's officials in a less advantageous position than they had enjoyed under the original texts. The mathematical formula used to determine the number of pensionable years taken into account in the Eurocontrol scheme, and the fact that the persons concerned had generally become established long before it became possible for them to transfer their pension rights, meant that the number of pensionable years which would henceforth be credited to them was often considerably smaller.

The new version of Rule of Application No. 28, which gave effect to this amendment of the Staff Regulations and which was drafted with some delay, was published in Office Notice No. 20/07 of 31 May 2007, on the eve of the entry into force of the royal decree authorising the transfer of pension rights acquired under Belgian schemes. The office notice explained that officials who, before its date of publication, had submitted a transfer request and whose previous contract or employment scheme had allowed such transfer, would be subject to the former provisions of Article 12 of Annex IV to the Staff Regulations.

7. The complainants, who were not in that situation since they could apply for the transfer of their pension rights only as from 1 June 2007, had pensionable years credited to them in accordance with the new provisions of Article 12 and Rule of Application No. 28.

As they nevertheless considered that they were entitled to benefit from the more favourable provisions previously in force, they lodged internal complaints in accordance with the procedure set forth in Article 92 of the Staff Regulations against the decisions by which the Director General had determined those pensionable years.

The Joint Committee for Disputes issued a divided opinion with respect to these internal complaints. The Director General, concurring with the opinion of two members of this body who held that these decisions were lawful, dismissed the complainants' internal complaints.

8. The 83 complainants are now impugning all these decisions concerning them.

Sixty-one applications to intervene have been submitted by other officials.

9. The complainants seek the same redress and rest on submissions which are mostly very similar. Their complaints shall therefore be joined in order that they may form the subject of a single ruling, as all the parties request.

10. The complainants' main argument is that, generally speaking, the Agency could not lawfully apply to them the new provisions of the Staff Regulations and Rules of Application thereof issued in 2005 and 2007.

11. The complainants preface this argument with the statement that, even supposing that Article 12 of Annex IV to the Staff Regulations should have been applied in its current version, the Agency did not comply with it. Citing the case law of the Court of Justice and the Court of First Instance of the European Union relating to the application of provisions of the Staff Regulations of Officials of

the European Communities which are similar to those of Article 12, they contend that Eurocontrol was under an obligation to credit them with pensionable years in such a way that the pension rights which they had acquired with a national scheme by the date on which they entered the Agency's service were preserved in full. According to the complainants, in order for the provisions of Article 12 to be made consistent with this requirement, they should be construed as meaning that the application of the rule that the pensionable years to be credited are calculated by reference to basic salary at the date of the transfer request is subject to the condition that, when the person concerned became established, such a transfer was already possible.

12. The Tribunal is not bound by the case law of the European Union's judicial bodies. It must further be noted that the judgments relied upon were delivered in a different legal context. Unlike the above-mentioned Article 12 which is in force in Eurocontrol, the provisions of Article 11 of Annex VIII to the Staff Regulations of Officials of the European Communities, which formed the basis of this case law, do not restrict the transfer of pension rights by requiring this to be authorised by the regulations or contract to which the person concerned was subject in his/her previous post. Moreover, more generally speaking, the legal framework governing European Union staff, which allows pension rights acquired in a Member State to be transferred to the Community pension scheme on the conditions established by this case law, differs from that which applies to Eurocontrol staff in that the provisions of the Staff Regulations are not binding on the Agency's Member States. In addition, the interpretation of Article 12 suggested by the complainants conflicts directly with both the letter and the spirit of the provisions of this article, which were formulated with a view to taking account, in all cases, of the person's situation at the date of his/her application for the transfer of pension rights, and not at the date of his/her establishment.

13. The complainants also challenge the lawfulness of Article 12 itself and of the new version of Rule of Application No. 28 by

submitting that the texts in question breach the principle of the non-retroactivity of administrative decisions.

14. However, it is hard to see how this principle has been infringed here. As the Tribunal has often stated, a provision is retroactive only if it effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely alters the effects of this status or of these rights, liabilities and interests in the future (see, for example, Judgment 2315, under 23). The new provisions at issue in the present case did not, however, call into question any decision which already allowed an official to transfer pension rights. Moreover, they were adopted at a time when the possibility of effecting such a transfer was not yet available to the complainants. They did not therefore alter any legal status or impair any right as from a date prior to their adoption and they thus produced effects only in the future.

15. The complainants hold that they had an acquired right to remain subject in the future to the former provisions stipulating that pensionable years credited in the event of a transfer of their pension rights should be calculated by reference to their basic salary at the date of their establishment and not at that of their transfer application.

16. According to the Tribunal's case law as established in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment to an official's detriment of a provision governing his/her status constitutes a breach of an acquired right only if it adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him/her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832 (see also in this connection Judgments 2089, 2682 and 2696).

17. In the instant case, it cannot be held that the amended provisions concerned terms of employment of this nature. Indeed, it is doubtful that the possibility of effecting a transfer of pension rights from a national scheme constituted, in itself, a fundamental term of employment or, in particular, that it was likely to induce officials to enter, then remain in, Eurocontrol's service. This possibility, which was subject to the existence of provisions authorising this transfer in Member States' national law, was at all events purely hypothetical. It should also be noted that the complainants had received no assurances when they were recruited that they might one day be able to effect such a transfer and that this did not dissuade them from joining the Agency. For this reason, the new provisions, which did not call into question the actual possibility of transferring pension rights but merely altered the method of calculating pensionable years credited at the time of the transfer, cannot *a fortiori* be regarded as having adversely affected a fundamental term of employment of the persons concerned.

18. In addition, the application to this case of the three tests established by the Tribunal in Judgment 832 for determining the existence of a breach of acquired rights, namely the nature of the altered terms, the reason for the change and the consequences of allowing or disallowing an acquired right, confirms that no such breach can be found to have taken place here.

19. Regarding the nature of the altered terms of employment, these stemmed not from a clause of the complainants' employment contract or from an individual decision concerning them, but from provisions of the Staff Regulations and relevant rules. While the terms of a contract and some decisions will in principle give rise to acquired rights, this is not necessarily true of such provisions.

20. As for the reasons for the disputed change, there is no doubt that it rested on legitimate grounds. Indeed, the submissions show that the main purpose behind the amendment of Article 12 of Annex IV to the Staff Regulations, which was decided in 2005, and that of the

above-mentioned Article 11 of Annex VIII to the Staff Regulations of Officials of the European Communities adopted the previous year for the same reasons, was to lessen the harmful impact on the resources of the organisations' pension schemes of the time gap between the date of the officials' establishment and that of the actual transfer of their pension rights. That impact was particularly great in the case of the Eurocontrol pension scheme, because the possibility of transferring pension rights to it was subject to the existence of enabling regulations in Member States, which were often passed long after the establishment of the officials concerned. Contrary to the complainants' contention, which is based on an erroneous interpretation of documents issued during the preparatory phase of the reform, the amendment of the provisions in question was thus fully justified, and the fact that it was prompted by financial considerations does not in itself make it unlawful (see, for example, the above-mentioned Judgments 832 and 2682).

21. As far as the consequences of this amendment are concerned, there is no denying that, for some of the complainants at least, it led to their being credited with far fewer pensionable years than would have been the case under the previous provisions. However, this reduction is clearly not so substantial that it may be considered to have upset the balance of their contractual obligations. Its repercussions on the complainants' situation are also tempered by the conditional nature of the possibility to transfer pension rights, which for many other Eurocontrol officials is not available, and by the fact that such a transfer is merely an option which an official is free to waive if he or she prefers to retain his or her pension rights as they stand with another scheme.

22. The complainants also submit that Eurocontrol breached their property rights with this new method of determining the pensionable years to be credited to them. In their opinion, as a result of the somewhat unfavourable conditions on which this pensionable service has been calculated, some of the accrued capital of their transferred pension rights will never be returned to them, but will in fact be used

to finance the general budget of the Agency's pension fund, with the result that they will be unjustly deprived of it.

23. Although the Tribunal has already had occasion to state that international organisations must respect their officials' property rights (see Judgment 2292, under 11), this plea will not succeed in the instant case. The complainants' pension benefits probably do not equate exactly to the capital of their transferred rights, but this situation, which is inherent in the functioning of every social insurance scheme, is in itself by no means abnormal, provided of course that any losses suffered by the persons concerned remain minimal. There is no evidence to show that the conditions on which the pensionable years credited to the complainants were calculated result in non-compliance with this requirement. Moreover, it would in any case be difficult to tax the Agency with thus despoiling its officials, given that the transfer of pension rights acquired with a national pension scheme is, as stated earlier, no more than an option available to them and they can always choose to maintain their pension rights under another scheme.

24. The complainants likewise submit that the new provisions breach the principle of the equal treatment of officials. This principle is not, however, cited here, as is usually the case, in order to demand that similar or comparable situations be governed by the same rules, but in support of the argument that dissimilar situations must be subject to rules taking account of this dissimilarity. In the complainants' opinion, Eurocontrol could not in effect lawfully apply the same provisions to officials who were already established by 1 June 2007 and to those who were not yet established by that date, as the former, unlike the latter, were unable to transfer their pension rights acquired with Belgian pension schemes at the time when they became established.

25. However, where an international organisation is required to apply the principle of equal treatment to officials in dissimilar situations, the Tribunal's case law allows the organisation a broad

discretion to determine the extent to which the dissimilarity is relevant to the rules concerned and to define rules taking account of that dissimilarity (see, for example, Judgments 1990, under 7, or 2194, under 6(a)). When a revision of staff regulations takes place, as occurred here, it will inevitably affect various categories of staff differently, depending on their personal or professional characteristics, such as their age or career pattern, and the organisation should naturally not be required to define specific legal rules for each category. In the instant case, Eurocontrol, which had temporarily established a specific set of rules for some officials, contends that the difference in the situation of the two categories of officials mentioned by the complainants was not such as to require that they be made subject to different rules. The Agency argues that this choice was justified *inter alia* by the fact that this disparity was mitigated by the use of appropriate actuarial coefficients. In light of the available evidence, the Tribunal does not consider that this approach constituted an abuse of the Organisation's discretion in this matter.

26. All the submissions which generally challenge the possibility of making the complainants subject to the new provisions of applicable Staff Regulations and relevant rules will therefore be dismissed.

27. However, some of the complainants argue that they were entitled to remain subject to the former provisions because they had filed a transfer application as a safeguard, before those provisions were amended, on the basis of the above-mentioned office notice of 27 June 1991.

28. As stated earlier, the purpose of this office notice was to publish and explain the arrangements for implementing the provisions of the Staff Regulations adopted on 17 June 1991 which, without altering the condition that the only officials eligible for a transfer of pension rights were those who, in their previous post, were subject to a contract or to regulations which so allowed, authorised those who did not meet these conditions to submit their application within six months of the date on which this transfer became possible.

With reference to these provisions, the office notice added that these persons did not necessarily have to await the entry into force of national laws authorising such a transfer before submitting their application, but that they could do so forthwith “as a safeguard”.

29. The Tribunal will not dwell on the complainants’ argument that it was in fact possible to transfer pension rights from Belgian schemes before 1 June 2007, with the result that officials who had filed a transfer application pursuant to the office notice of 27 June 1991 met the conditions established by that of 31 May 2007 for remaining subject to the former method of calculating pensionable years to be credited. Contrary to that view, the fact that in 1997 it was envisaged that Eurocontrol would be brought within the scope of the above-mentioned Belgian law of 21 May 1991 is of no legal consequence, because the Agency ultimately did not conclude an agreement with Belgium to that effect. Similarly, it is manifestly wrong to argue that the transfer of the pension rights of the persons concerned was possible as from 1 January 2002, the date on which the Belgian law of 10 February 2003 took effect, since it is clear from the actual terms of the royal decree of 25 April 2007 that this law became applicable to Eurocontrol only as from 1 June 2007.

30. It was plain from the instructions in the office notice of 27 June 1991 that a transfer application submitted in advance pursuant to this notice would be regarded by the Agency as having been validly filed, and not as premature. This would prevent the application from subsequently becoming time-barred if, for example, the person concerned did not confirm it within six months of the date on which the transfer became possible.

31. However, these instructions did not give the officials concerned the right to have this application examined, when the time came, in the light of applicable Staff Regulations and relevant rules on the date on which it was submitted.

32. As the Tribunal stated in Judgment 2459, under 9, an administrative authority, when dealing with a claim, must generally base itself on the provisions in force at the time it takes its decision and not on those in force 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.

33. In the instant case, the new provisions of Article 12 of Annex IV to the Staff Regulations and Rule of Application No. 28 provide no indication whatsoever that they were intended to cover only applications submitted after their entry into force. Both the actual terms of these provisions and the circumstances in which they were adopted show, on the contrary, that it was their authors' intention that they should apply to officials who had previously been unable to obtain the transfer of their pension rights.

34. The principles of good faith, non-retroactivity and the protection of acquired rights would have been breached only if the office notice of 27 June 1991 had stipulated that transfer applications submitted as a safeguard pursuant to that notice would in due course be examined in the light of the texts in force on the date on which they were filed. Contrary to the complainants' submissions, no such inference may be drawn, even implicitly, from the terms of this notice. The mere fact of authorising Agency officials to submit an application before the condition permitting its granting was met could not be construed as an undertaking that, once this obstacle disappeared, the application in question would be considered without regard to subsequent developments in the legal framework governing pensions.

35. The complainants submit that Eurocontrol breached the principle of the protection of legitimate expectations to their detriment. Although the Tribunal's case law does recognise this principle (see, for example, Judgments 2008, 2653 and 2682), it has not been disregarded here. Since, as has been stated, the terms of the office notice did not

have the meaning ascribed to them by the complainants as regards the legal rules governing their applications, the Agency was entitled to decide on these applications in the light of the new provisions without violating this principle.

36. Lastly, the complainants are wrong when they state that Eurocontrol breached its duty of care towards its officials by not inviting them, in the period prior to the amendment of Rule of Application No. 28, to submit a transfer application before the entry into force of the new text. Since the complainants' previous contract or employment scheme did not permit them to effect such a transfer before 1 June 2007, and since they could not avail themselves of the transitional provisions applicable to requests already submitted by officials who met this condition, the Agency's conduct in these circumstances did not cause them any injury. Moreover, the duty of care, which an international organisation owes to its officials, obviously does not mean that it must take special steps to exempt them from the normal application of rules which are unfavourable to them.

37. These considerations lead to the conclusion that the pensionable years credited to the complainants were correctly determined, in accordance with the new provisions applicable on the date of the disputed decisions, by reference to the basic salary received by the persons concerned at the date of their transfer applications and not at the date on which they were established.

38. However, the Tribunal must draw attention to the fact that, as was found in Judgment 2985 delivered on this day concerning a complaint filed by an official in the same situation as the complainants, the transfer application to be taken into account for this purpose was not that filed by the complainants after 1 June 2007 but that which they lodged initially pursuant to the office notice of 27 June 1991.

39. By specifying that officials for whom a transfer of pension rights was not yet possible were nevertheless authorised to apply for

such a transfer as a safeguard, this office notice itself gave those officials the guarantee that such applications would be regarded as valid. For this reason, “the date of application for a transfer” which must serve as the reference point for determining the pensionable years to be credited to them, according to the new version of Article 12 of Annex IV to the Staff Regulations, can only be that of the application thus made. By considering, when this transfer finally became possible for persons holding pension rights with Belgian schemes, that the applications submitted by some of them under this arrangement would not be taken into account and that the reference date would be that of a new application which they would have to make, the Agency therefore disregarded the legal effects of their initial application.

40. Admittedly, the office notice of 27 June 1991, whose essential purpose was, as stated earlier, to protect officials against any risk of a time bar, was adopted at a time when the subsequent legal consequences of these transfer applications submitted as a safeguard could not be foreseen. However, since Eurocontrol accepted at the outset the validity of applications presented in these circumstances, the requirements of the principles of good faith, the non-retroactivity of administrative decisions and the protection of acquired rights resulting from definitively established legal situations prevented the Agency from thereafter refusing to give full effect to these applications.

41. The Tribunal further notes that there was no time limit for presenting applications under the office notice of 27 June 1991. Since their submission was not subject to any express time limit, which would indeed have been fairly nonsensical given that the applications were to be made in order to safeguard a right which might arise at a later date, there was nothing to prevent officials from submitting such applications up until the entry into force on 1 June 2007 of provisions rendering possible the transfer of pension rights acquired with Belgian pension schemes.

42. It follows that all the impugned decisions concerning complainants who filed a transfer application as a safeguard pursuant to the above-mentioned office notice of 27 June 1991 during the period from the date of publication of that notice up to and including 31 May 2007 must be set aside. These complainants' cases must be referred back to the Agency in order that the pensionable years credited to them be determined by reference to their basic salary and age and the exchange rate as at the date of their respective initial applications.

43. On the other hand, the complainants who rely on the fact that they had asked Eurocontrol or the Belgian authorities to adopt measures permitting the transfer of their pension rights, but who had not formally presented a transfer application before 1 June 2007, will not be granted the right to benefit from pensionable years calculated on this basis. The same applies, *a fortiori*, to those who merely expressed an interest in transferring their pension rights in the context of the survey conducted on this subject by the Human Resources Directorate in 2002. Only a formal transfer application submitted as a safeguard on the basis of the office notice of 27 June 1991 may be validly taken into consideration in this respect; the fact that some officials are unable to benefit from the advantage in question is the result of their own choice not to file such an application.

44. The interveners who filed transfer applications as a safeguard and who are thus in a similar legal situation to that of the complainants referred to in consideration 42 above shall be granted the rights conferred on the latter by this judgment. The Agency must carry out the requisite checks with regard to the three interveners who claim to be in this category, but whose applications do not appear to be in its records. The persons concerned shall assist it in this matter.

45. The claims of all the complainants other than those referred to in consideration 42, and consequently the applications to intervene from officials other than those referred to in consideration 44, shall be dismissed.

46. Those complainants who succeed in part are entitled to costs, which the Tribunal sets at an overall amount of 8,000 euros.

DECISION

For the above reasons,

1. The disputed decisions of the Director General of Eurocontrol determining the number of pensionable years credited to the complainants referred to in consideration 42, above, and those dismissing these persons' internal complaints are set aside.
2. These complainants' cases shall be referred back to the Agency in order that the pensionable years in question be determined in accordance with the terms and conditions indicated in that consideration.
3. The interveners referred to in consideration 44, subject to the reservation made therein with regard to three of them, shall enjoy the rights which this judgment confers on the complainants referred to in points 1 and 2, above.
4. The Agency shall pay these complainants costs in the overall amount of 8,000 euros.
5. All other claims presented by these complainants are dismissed.
6. The complaints of the other complainants and the applications to intervene referred to in consideration 45, above, are dismissed.

In witness of this judgment, adopted on 11 November 2010, Mr Seydou Ba, Vice-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 2 February 2011.

Seydou Ba

Claude Rouiller
Patrick Frydman
Catherine Comtet