Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**114th Session** **Judgment No. 3181**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr T. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 May 2010, the Agency's reply of 20 August, the complainant's rejoinder of 24 September and Eurocontrol's surrejoinder of 16 December 2010;

Considering the applications to intervene filed by:

A., M.
A., A.
A., S.
A., G.
B., P.
B., G.-O.
B., A.
B., E.
B., C.
B., J.
B., H.
B., O.
B., M.
B., G.
B., I.
B.-E., I.
B., F.
B., H.
B., S.
C., S.
C., L.
C., R.
C., L.
C., R.
C., R.
C., M.
C., P.
C., P.
D., D.
D., F.

D., M.
d.S.., R.
D., F.
D., H.
d.V., A.
D., M.
D., V.
D., R.
D., C.
D., S.
D., F.
D., K.
E., K.
E., M.
E., R.
E., B.
E., B.
E., M.
G., R.
G., D.
G., D.
G., B.
H., K.
H., R.
H., T.
H., F.
H., R.
H., P.
H., C.
H., R.
J., T.
J., F.
J., M.
J., G.
J., A.
J., A.
K., J.
K., F.
K., V.
K., M.
L., A.
L., A.
L., J.-M.
L., M.
L., M.
L., P.
L., F.
M., P.
M., S.
M., S.
McC., H.
McC., J.
McM., A.
M., S.
M., J.
M., K.
M., S.
M., J.
M., R.
N., J.
N., F.
O., R.
O., R.
O., W.
O., A.
O., M.
P. M., I.
P., M.
P., S.
P., M.
P., T.
P., É.

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|---|---|
| P., C. | v.B., J. |
| P., V. | v.B., M. |
| S., A. | V.d.B., J. |
| S., S. | V.d.B., R. |
| S., N. | v.d.R., J. |
| S., K. | v.d.K., A. |
| S., E. | v.d.P., J. |
| S., S. | v.L., M. |
| S., J. | V.W., I. |
| S., K.-F. | V., A. |
| S., R. | V., R. |
| S., J. | V., M. |
| S., J.-M. | W., A. |
| S., J. | W., P. |
| S., P. | W., W. |
| T., C. | Z., O. |
| U., S. | Z., R. |

and the letter of 2 July 2010 in which the Agency stated that it had no objections to these applications, despite its reservation regarding the amount of the costs which the Tribunal might award;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a German national born in 1981, entered the service of Eurocontrol in 2000. He works as an air traffic controller at the Maastricht Upper Area Control Centre.

Facts relevant to this dispute are to be found in Judgments 2560 and 2782, which were delivered in cases also concerning Eurocontrol. It should be recalled that in September 1992 the Permanent Commission for the Safety of Air Navigation approved a salary

adjustment methodology applicable as from 31 December 1991, modelled on that which had just been adopted by the institutions of the European Community. This methodology was to apply until 30 June 2001, but its application was extended for two years pending the adoption by the European Union of a new adjustment methodology. The new methodology took effect on 1 July 2004 and a salary adjustment of 3.4 per cent was applied as from that date.

In Judgment 2560, delivered on 12 July 2006, the Tribunal allowed the complaints filed by 34 officials of Eurocontrol who were contesting their payslips of 31 July 2004 insofar as they did not show any back pay for the period 1 July 2003 to 30 June 2004. The Tribunal set aside the impugned decisions and remitted the case to the Agency for a decision on the adjustment of salaries and pension rights acquired in respect of the above-mentioned period. In pursuance of that judgment, the Permanent Commission decided that the 3.4 per cent adjustment would be granted for that period and that the resulting back pay would be received not only by the 34 officials who had filed a complaint with the Tribunal, but also by other members of staff and pensioners. This back pay was received in December 2006. Interest for late payment, at a rate of 8 per cent per annum calculated from July 2004, was also paid, but only to the complainants.

On 8 March 2007 one member of staff – who had not been a party to the case leading to Judgment 2560 – lodged an internal complaint with the Director General in which he asked to be paid the interest for late payment which some of his colleagues had received. This internal complaint was dismissed but, in the event, in Judgment 2782 of 4 February 2009 the Tribunal ordered the Agency to pay this staff member interest at the rate of 8 per cent per annum on the amount corresponding to the adjustment which he had received for the period 1 July 2003 to 30 June 2004.

On 6 April 2009 the complainant claimed interest for late payment on the sum corresponding to the above-mentioned adjustment pursuant to Judgment 2782 – as did a substantial number of his colleagues at that time. In a letter of 15 September 2009 the Principal Director of Resources explained that he could not accede to

the complainant's request, because it was time-barred, since he had not filed an internal complaint within the prescribed time limit in order to challenge the decision of December 2006 not to pay him that interest. On 25 November 2009 the complainant lodged an internal complaint with the Director General in which he asked him to review the "issue", arguing that Judgment 2782 constituted a new and unforeseeable fact of decisive importance triggering a new time limit for appeal. Before the Tribunal he impugns the implied decision to reject that internal complaint.

The Joint Committee for Disputes met on 29 July 2010 to consider some 200 internal complaints – including that of the complainant – which had been referred to it. In its opinion it concurred with the position adopted by the Principal Director of Resources on 15 September 2009 and consequently recommended the rejection of the internal complaints. The Principal Director of Resources, acting on behalf of the Director General, informed the complainant in a memorandum of 5 November 2010 that he shared that opinion and that his internal complaint was therefore rejected as inadmissible and, subsidiarily, as legally unfounded.

B. The complainant asserts that his complaint is receivable. He points out that, according to Judgment 676, a staff member concerned by an administrative decision which has become final may ask for its review if he or she is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken, or if some new and unforeseeable fact of decisive importance has occurred since then and that, when such is the case, the Administration is under a duty to respond to the request for review by taking a new decision which will trigger a new time limit, even if the original time limit was not respected. He considers that the "precedent" set by Judgment 2782 fulfils both of the above-mentioned conditions. He concludes from this that he was entitled to submit his request of 6 April 2009, which he did within three months of the delivery of the aforementioned judgment, and then to file an internal complaint. In his view, he has thus properly exhausted all internal means of redress.

On the merits, he submits that the Agency, by not extending the benefit of Judgment 2782 to all staff, committed a "serious breach" and violated the principles of transparency, stability, foreseeability and equal treatment.

The complainant asks the Tribunal to set aside the implied decision to reject his internal complaint of 25 November 2009 as well as the decision of 15 September 2009, to order the payment of "due and payable" interest on the back pay received in December 2006 and to set the rate of interest at 8 per cent per annum. In addition, he claims costs in the amount of 6,000 euros.

C. In its reply the Agency contends that the complaint is irreceivable. It points out that when the complainant received the back pay due to him in December 2006, unlike his colleague who initiated the proceedings which led to Judgment 2782, he did not challenge the fact that this sum was not accompanied by interest for late payment. Therefore, in its view, the complaint is time-barred. In this regard, Eurocontrol refers to the Tribunal's case law with respect to the principle that time limits are justified by the need for stability in the parties' legal relations. It recognises that the Tribunal allows exceptions to this principle, but considers that in the instant case no exceptional circumstances exempt the complainant from the time bar. Moreover, the Agency states that in Judgment 2203 the Tribunal clarified the precedent set in Judgment 676, which "has so far remained an isolated one". Lastly, it does not accept that the delivery of Judgment 2782 constitutes a new and unforeseeable fact of decisive importance which could trigger a new time limit for appeals.

On the merits and subsidiarily, the defendant contends that the aforementioned judgment took effect only between the parties and that the Agency was therefore under no legal obligation to extend its effect to all staff.

D. In his rejoinder the complainant reiterates his arguments. He submits that Judgment 2782 does constitute a new fact, because in that judgment the Tribunal set forth a general principle of law for the

first time. In his opinion, the case leading to Judgment 2203 is "fundamentally" different to the instant case, particularly in that the argument that a new fact exists was not relied upon in the earlier case.

E. In its surrejoinder the Agency maintains its position. It explains that, even if Judgment 2782 was "perhaps a new decision" which decided an issue that had never been raised before, this alone does not enable it to be said that the conditions for waiving the time limit defined exhaustively in Judgment 2203 have been met.

## CONSIDERATIONS

1. The dispute now before the Tribunal is a sequel to Judgment 2560 delivered on 12 July 2006. In pursuance of that judgment, the Agency decided that the salary adjustment which had been granted as from 1 July 2004 would be paid retroactively as from 1 July 2003, not only to the officials who had filed the complaints leading to the above-mentioned judgment, but also to other members of staff and to pensioners. The corresponding back pay was received in December 2006, but only the officials who had filed a complaint with the Tribunal received interest for late payment at a rate of 8 per cent per annum.

2. In Judgment 2782, delivered on 4 February 2009, the Tribunal allowed the complaint filed by a staff member who challenged the fact that he had not been paid that interest.

3. Relying on the precedent established in that judgment, the complainant, like several of his colleagues, then asked the Director General to pay interest for late payment on the back pay received in December 2006. As this request was rejected, he lodged an internal complaint. On 21 May 2010 he filed his complaint with the Tribunal impugning the implied decision to reject his internal complaint and requesting the payment of that interest.

4. On 5 November 2010 the Principal Director of Resources, acting on behalf of the Director General, finally dismissed the aforementioned internal complaint in accordance with the recommendation made by the Joint Committee for Disputes on 29 July 2010.

5. The Agency submits that the complaint has been lodged out of time and that the complainant's claim must fail in light of the Tribunal's abundant case law on the time bar. It states that, when he received the back pay in December 2006, he did not protest against the fact that it was not accompanied by interest for late payment, unlike his colleague who considered that he was entitled to such interest and therefore filed both an internal complaint and then the complaint which the Tribunal allowed in above-mentioned Judgment 2782.

Relying on Judgments 602, 1166, 1466, 2463 and 2722, it recalls that the Tribunal has repeatedly stated that time limits are an objective matter of fact and that it will not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very purpose of time limits. It adds that the only exceptions to this rule that the Tribunal has allowed are where the complainant has been prevented by *vis major* from learning of the impugned decision in good time, or where the organisation, in breach of the principle of good faith, has deprived that person of the possibility of exercising his or her right of appeal by misleading him or her or concealing some paper from him or her, but it contends that none of these circumstances obtained in the instant case.

6. In his rejoinder the complainant counters this objection to receivability by saying that, while it is true that he did not claim interest for late payment after receiving his back pay in December 2006 and that he did not intervene in the proceedings leading to the above-mentioned Judgment 2782, he did, however, send a request to the Director General "within three months of the delivery of the [aforementioned] judgment" and thereafter lodged an internal complaint. He submits that the said judgment does indeed constitute a

new fact justifying a request for review because, for the first time, it establishes a general principle of law on the matter, namely that "where the debt is one that falls due on a fixed date, interest for late payment is due *ipso jure* as from that date, without the need for any prior action by the creditor, because in such a case the due date is equivalent to the service of notice".

In his submissions the complainant draws attention to the fact that in consideration 1 of Judgment 676, which was delivered in a case bearing some similarities to the instant case, the Tribunal held that a staff member concerned by an administrative decision which has become final may ask the organisation to review his situation, either "when some new and unforeseeable fact of decisive importance has occurred since the decision was taken", or when he is relying "on facts or evidence of decisive importance of which he was not and could not have been aware before the decision was taken". In his opinion, Judgment 2782 constituted a "new precedent" of which he was not and could not have been aware.

7. The question here is therefore whether Judgment 2782 constitutes "a new and unforeseeable fact of decisive importance" which has occurred since the back pay was paid in December 2006 without interest for late payment.

8. The precedent established in Judgment 676, on which the complainant relies, was cited by the Tribunal in Judgments 2203, under 7, 2722, under 4, and more recently in Judgments 3002, under 14 and 15, and 3140, under 4.

9. The Tribunal is of the opinion that, in the instant case, the complainant's argument that the delivery of Judgment 2782 constituted a new and unforeseeable fact of decisive importance, within the meaning of the above-cited case law, is to no avail. In Judgment 676 the Tribunal did accept that the delivery of one of its judgments could be described in those terms and could therefore have the effect of reopening the time limit within which a staff member may lodge an appeal. But the circumstances of that case were very

special in that the Tribunal, in the previous judgments which it cited in that case, had formulated a rule which had greatly altered the situation of certain staff members of an organisation and which, although already applied by the organisation, had until then not been published or communicated to the staff members concerned. No exceptional circumstances of that nature exist in the instant case where, moreover, the delivery of Judgment 2782 cannot be regarded as unforeseeable.

Nor can it be considered that the delivery of that judgment enables the complainant to rely on facts or evidence of decisive importance of which he was not and could not have been aware before the impugned decision was taken.

10. In this case, in December 2006 the complainant received a payslip for back pay which made no mention of interest for late payment. At that point he did not lodge any internal complaint against the non-payment of that interest, unlike his colleague who initiated the proceedings leading to Judgment 2782. Since, as stated in the foregoing consideration, the conditions established in Judgment 676 for reopening the time limit for lodging an appeal were not met, the complainant could not rely on Judgment 2782 in order to submit in April 2009 a request which he ought to have made within the prescribed time limit running from the date on which he received the above-mentioned payslip which, according to the case law, constitutes an administrative decision.

11. As the complainant submitted his request out of time, the requirement laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must be exhausted has not been met, and both the complaint and the applications to intervene must be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 13 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Patrick Frydman
Catherine Comtet