

FORTY-FIRST ORDINARY SESSION

***In re* BREUCKMANN (No. 3)**

Judgment No. 360

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Elmar Breuckmann on 14 December 1977, the Eurocontrol Agency's reply of 24 February 1978, the complainant's rejoinder of 27 April and the Agency's surrejoinder of 4 July 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 13 and 14 of the International Convention on Co-operation for the Safety of Air Navigation, Articles 92 and 93 of the Administrative Regulations governing the Permanent Staff of Eurocontrol and Articles 8, 9, 11, 12 and 39 of Annex IV to that Statute;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings for the hearing of a witness;

Considering that the material facts of the case are as follows:

- A. After working for the Commission of the European Communities the complainant joined the staff of the Eurocontrol Agency on 15 April 1969 as a principal expert at grade A4. On 4 December 1969, but with retroactive effect from 15 April 1969, he was appointed head of division at grade A3, step 1.
- B. At the time of his recruitment by Eurocontrol, the European Communities, his former employer, paid him a termination benefit since he had not asked the Communities to transfer to Eurocontrol the actuarial value of his pension rights, as was provided for in Article 11 of Appendix VIII to the Staff Regulations of Officials of the Communities. The complainant contends that he reserved the right of transfer which was laid down in Article 12 of Annex IV to the Administrative Regulations governing the Permanent Staff of Eurocontrol and that he received from Mr. Buurman, the then Director of Personnel and Administration, an assurance that on becoming a permanent official he could pay the actuarial equivalent into the Eurocontrol pension fund. Eurocontrol says that that contention is mistaken.
- C. On 11 September 1975 the complainant wrote to the Director of Personnel and Administration. Six years had by then elapsed since he had got his permanent appointment, and he sets the delay down to his own courtesy towards Mr. Buurman. In his letter he formally raised the question of the transfer of the pension rights he had acquired as an official of the European Communities. On this point Eurocontrol replies: "In fact, contrary to what the complainant says in his letter, it was not a matter of transferring the actuarial value of his pension rights from the Communities scheme to the Eurocontrol fund since the termination benefit which his former employer had paid him - and which he had not asked to have transferred - had replaced the actuarial equivalent. The question he raised in his letter was whether he could himself pay Eurocontrol a lump sum to validate earlier years of service",
- D. The complainant's case was referred to a working party in charge of pension matters. The working party dismissed his request that the rules of the Commission of the European Communities should apply to his case, and the Director of Personnel and Administration of the Agency so informed him by letter of 23 December 1975. At its 92nd (April 1976) session the Committee of Management declared that the Eurocontrol Administration should apply the existing rules until they were amended. Eurocontrol adds: "The complainant failed because those rules did not cover his case".
- E. By letter of 13 March 1977 the complainant again applied for transfer of his pension rights. On 28 July he was told that the rules had not changed and that his application must be dismissed, not being in conformity with Article 12 of Annex IV to the Administrative Regulations governing the Permanent Staff. On 14 July the complainant appealed to the authority in charge of appointments. Referring to Article 12, he asked to have applied to his case by analogy the rules in force in the Communities as taken over by the Eurocontrol Administration in a draft working

paper submitted to the Committee of Management. His appeal was dismissed on 16 December. Eurocontrol says that at that time "the Director-General observed, among other things, that Mr. Breuckmann's original claim had been time-barred because he had waived the right of transfer by accepting the termination benefit from the Communities and that since he had never met the conditions laid down in Article 12 he had no rights unless new rules were adopted".

F. In the meantime, on 14 December, the complainant filed a complaint with the Tribunal. In his claims for relief he asks the Tribunal to declare that Eurocontrol should directly apply by analogy Regulation 174.65 of the European Economic Community and Regulation 14/65 of Euratom of 28 December 1965.

G. The defendant organisation points out that in his claims for relief the complainant no longer relies on Article 12 of Annex IV to the Administrative Regulations governing the Permanent Staff or on the Administration's proposal to take over certain texts from the Communities (see E above) - which in any event the Committee of Management turned down. The claims for relief are not the same as in the original appeal and the complaint is therefore irreceivable. In any event the claims are groundless, and for two reasons: "A text published in the European Communities, which in any event appears to be inoperative, cannot be applied by analogy to Eurocontrol if the competent bodies of Eurocontrol have not adopted it. Subsidiarily, the complainant may not ask the Tribunal to order Eurocontrol to apply texts which are not in force in Eurocontrol. A fortiori in the present case, since he has never met the conditions laid down in Article 12 of Annex IV, he may not rely on the provisions of that article in asking for arrangements to be made to enable him to validate his pension rights." Eurocontrol sums up: "Mr. Breuckmann chose to take his termination benefit instead of the actuarial value of his pension rights, and to do with it what he liked. He did not even apply to the Communities in time for the transfer of his pension rights. He has therefore waived the right to such transfer and in any event does not fulfil the qualifying conditions laid down in the rules. What he has been proposing since 1975 is really a purchase of pension rights, but that is not provided for in the staff regulations. Even a transitional amendment to the regulations requires the approval of the Standing Committee on the proposal of the Committee of Management." Eurocontrol therefore asks the Tribunal: principally, to dismiss as unfounded the complainant's claim that the texts in force in the European Communities should apply by analogy to Eurocontrol; subsidiarily, to dismiss the claims for relief as contrary to the rules in force in Eurocontrol.

CONSIDERATIONS:

As to the receivability of the complaint:

1. In the appeal which he submitted to the Director-General of the Eurocontrol-Agency on 14 July 1977 the complainant said in conclusion:

"The purpose of this complaint is to claim my rights as provided under Article 12 of Annex IV of the Staff Regulations, and in absence of a decision by the Committee of Management to apply in analogy the actuarial equivalent fixed by the Commission of the European Communities (vide CE75/57 of 10.3.1975)."

In his claims for relief the complainant asks the Tribunal:

"(1) to accept the complaint; and

(2) to find against the opposing party in the sense that such party should be obliged to recognise the actuarial value of the pension rights being introduced into the Eurocontrol scheme as an analogous decision to Regulations No. 174.65/EEC and 14/65 EURATOM of the Councils of 28 December 1965."

The Agency contends that the claims are irreceivable because they do not correspond to the claims submitted in the internal appeal. It is mistaken. In fact the purpose of both sets of claims is the same: to secure recognition of the complainant's rights to benefit under the Eurocontrol pension scheme. It is true that, whereas the internal appeal refers to Article 12 of Annex IV to the Eurocontrol staff regulations and, in the absence of a decision by the Committee of Management, proposes applying by analogy the "actuarial" solution adopted by the Commission of the European Communities, the purpose of the complaint is merely to have the complainant's rights determined by analogy in accordance with the rules of the Communities. But the sets of claims differ only in respect of the arguments put forward in their favour. The principle whereby the claims submitted to the Tribunal and the claims in the internal appeal must be the same applies only to the substance. In the present case the principle has been

respected.

As to the merits:

2. The complainant does not base his claims on any provision of the Eurocontrol staff regulations. According to Article 12 of Annex IV - the only text that relates to the transfer of pension rights - the Eurocontrol pension scheme shall apply only if the staff member pays a specified amount "when his appointment is confirmed"⁽¹⁾. When the complainant became an official of Eurocontrol he did not pay or have paid any sum of money to secure recognition of his pension rights.

3. Contrary to what the complainant contends, there are no grounds for applying to his particular case, even by analogy, the rules in force for staff of the European Communities. Such application would be warranted only if the Eurocontrol rules overlooked the point in dispute, in other words if they failed to contain a provision which had apparently been left out by omission. But there was no such omission. On the contrary, it appears from the dossier that the Committee of Management of Eurocontrol, having studied the complainant's case, expressly refused to meet his claims by amending the rules.

4. The complainant alleges that he received a promise from the Director of Personnel and Administration at the time of his appointment. There is no need to question that official, who has now retired, to establish that no such promise was made. All that is necessary is to refer to the complainant's own correspondence, particularly the letter he wrote on 11 September 1975 to the Director of Personnel and Administration. It appears from that letter that the complainant merely discussed the question of acquisition of pension rights in the hope that the competent bodies would take a decision in his favour. No trace is to be found of any real promise. Had the complainant been given one, he would presumably have produced it.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. Registry translation.