Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

R.

v.

Eurocontrol

124th Session **Judgment No. 3828**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 17 March 2014, Eurocontrol's reply of 4 July, the complainant's rejoinder of 12 September, Eurocontrol's surrejoinder of 19 December 2014, the complainant's further submissions of 20 March 2015 and Eurocontrol's final comments of 29 April 2015;

Considering the application to intervene filed by Mr T. H. on 4 June 2014 and the letter of 11 July 2014 in which Eurocontrol stated that it had no objection to that application;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges Eurocontrol's refusal to convert her limited-term appointment into an appointment for an undetermined period, the reduction of the basis for calculating her contributions to the Eurocontrol Pension Scheme and the non-renewal of her contract.

At the material time, Article 9, paragraph 2, of Annex X to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre provided that when a post was of a lasting nature,

"the [limited-term] appointment may be converted into an appointment for an undetermined period", subject to satisfactory performance.

The complainant entered the service of Eurocontrol on 1 October 2008 and was assigned to the Maastricht Upper Area Control Centre as a Junior Simulator Pilot on a one-year, limited-term appointment which was subsequently renewed three times. Although she held a part-time position (60 per cent), she chose to contribute to the Eurocontrol Pension Scheme as though she were performing her duties on a full-time basis. Her pension contributions were therefore calculated by reference to the basic salary of a servant performing those duties at 100 per cent.

By Office Notice No. 08/09 of 19 February 2009, Eurocontrol informed its staff that several amendments to the Staff Regulations and Staff Rules would be made as of 1 March 2009, in particular to Article 3 of Annex IIa to the General Conditions of Employment concerning part-time work. Pursuant to that article, the complainant's contributions to the Pension Scheme were henceforth to be calculated by reference to her basic salary. In other words, her contributions would be reduced to reflect the fact that she was working at 60 per cent and not 100 per cent. The complainant learnt of this change through the decision of 5 April 2012 informing her of the renewal of her appointment until 30 April 2014.

On 7 June 2013 the complainant, referring to Article 91, paragraph 1, of the General Conditions of Employment, wrote to the Director General in order to challenge the decision of 5 April 2012 and "request" authorization to continue to contribute to the Pension Scheme as though she were working full time, as well as the conversion of her limited-term appointment into an appointment for an undetermined period. The Administration acknowledged receipt of this "complaint" by a memorandum of 4 July. On 21 October 2013 the complainant, referring to paragraph 2 of the above-mentioned Article 91, asked the Director General to take a decision about her "situation", as her "request" of 7 June had remained unanswered.

In the meantime, the complainant had been informed by a memorandum dated 19 August 2013 that her appointment would expire on 30 April 2014 and would not be extended beyond that date.

In her complaint filed with the Tribunal on 17 March 2014 the complainant impugns the implicit decision to dismiss her internal "complaint" of 21 October 2013. She asks the Tribunal to set aside that decision, to order Eurocontrol to convert her limited-term appointment into an appointment for an undetermined period and to authorize her to continue to contribute to the Pension Scheme as though she were working full time until the date of her actual retirement. She also asks it to find that the decision of 19 August 2013 is null and void. She therefore requests her reinstatement in her former post, at the same grade and step, and the payment of her salary and "lost benefits" for the period between 1 May 2014 and the effective date of her reinstatement. Lastly, she claims 5,000 euros in damages and 4,000 euros in costs.

In its reply, Eurocontrol submits that the complaint should be dismissed as irreceivable and, subsidiarily, as unfounded. It informs the Tribunal that, on 20 December 2013, the Joint Committee for Disputes, to which the "complaint" of 7 June 2013 had been referred, issued a divided opinion. Three of its members recommended that the complaint should be dismissed as irreceivable on the grounds that it was time-barred and, subsidiarily, as unfounded. Eurocontrol adds that the complainant was informed by a memorandum of 11 March 2014 that her "complaint" had been dismissed, as recommended by those three members of the Committee. It asks to have this case joined with another case raising the same pleas and arguments.

In her rejoinder, the complainant reiterates her claims and explains that she is requesting the payment of 5,000 euros in compensation for not being given an appointment for an undetermined period. Since she considers that Eurocontrol's defence argument is "audacious and vexatious", she also requests 5,000 euros in damages under that head. Lastly, she objects to Eurocontrol's request for joinder since the pleas and arguments raised are not the same in both cases.

In its surrejoinder, Eurocontrol maintains its arguments.

In her further submissions, the complainant reiterates her claims and advances new ones.

In its final comments, Eurocontrol maintains its position.

CONSIDERATIONS

1. The Organisation requests the joinder of this complaint with another case forming the subject of Judgment 3829, also delivered this day. However, the Tribunal will not accede to this request since the complainant has objected to this joinder for valid reasons.

2. The complaint, which was initially directed against an implied rejection, must be regarded as impugning the explicit decision of 11 March 2014 by which the Principal Director of Resources, acting by delegation of power from the Director General and in accordance with the recommendation of the majority of members of the Joint Committee for Disputes, dismissed the complainant's request of 7 June 2013, which the Administration described as a "complaint", principally because it considered it to be inadmissible since it was time-barred and subsidiarily because it considered it to be unfounded.

The internal "complaint" of 7 June 2013 was filed against the decision of 5 April 2012 concerning the renewal of the complainant's two-year limited-term appointment and the reduction of her contributions to the Pension Scheme, as she thought that her appointment ought to have been converted into an appointment for an undetermined period and that her contributions should still have been calculated as though she were working full time.

In her complaint before the Tribunal, the complainant essentially seeks not only the conversion of her appointment and authorization to continue to contribute to the Pension Scheme as though she were working full time until the date of her actual retirement, but also the setting aside of the decision of 19 August 2013 terminating her employment.

3. It is necessary to examine whether the complaint satisfies the requirements of Article VII, paragraph 1, of the Statute of the Tribunal insofar as it is directed against the decision of 19 August 2013.

According to that provision, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her

or him under the applicable Staff Regulations". The only exceptions allowed under the Tribunal's case law to this requirement that internal means of redress must have been exhausted are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure, where there is an inordinate and inexcusable delay in the internal appeal procedure although the person concerned has done everything that could be expected of them to try to obtain a final decision, where for specific reasons connected with the personal status of the complainant she or he does not have access to the internal appeal body or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see Judgment 2912, under 6).

In accordance with the Tribunal's case law regarding compliance with this requirement to exhaust internal means of redress, a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see Judgment 3420, under 10).

In the instant case, the complainant's claim seeking the setting aside of the decision of 19 August 2013 was raised for the first time before the Tribunal and did not therefore form the subject of an internal appeal. Furthermore, none of the above-listed exceptions to the requirement that the internal means of redress must be exhausted applies. This claim is therefore irreceivable, as are the other new claims which, moreover, were not presented to the Tribunal until the further submissions were filed.

4. With regard to the claim relating to the conversion of the complainant's appointment and that relating to authorization to contribute to the Pension Scheme as though she were working full time, it must be recalled that, according to the case law, to satisfy the requirement that internal means of redress have been exhausted laid down in Article VII, paragraph 1, of the Statute of the Tribunal, the complainant must not only follow the prescribed internal procedure for appeal, but must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure (see in particular Judgments 1469, under 16, and 3296, under 10).

5. Article 91, paragraphs 1 and 2, of Title VII "Appeals" of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre read *in parte qua* as follows:

> "1. Any person to whom these provisions apply may submit to the Director General a request that he takes a decision relating to him. The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.
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> 2. Any person to whom these provisions apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where it has failed to adopt a measure prescribed by the General Conditions of Employment. The complaint must be lodged within three months. The period shall start to run:
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> [...]
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> - on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person [...]."

6. In her letter of 7 June 2013, the complainant challenged the decision of 5 April 2012 informing her that her appointment had been renewed for two years and that her contributions to the Pension Scheme would be reduced to take account of the fact that she worked 60 per cent and not 100 per cent of working time. She requested the conversion of her appointment and said that she wished to continue to contribute to the Pension Scheme as though she were working full time.

In its memorandum of 4 July 2013, Eurocontrol did not, however, specifically refer to these requests. Although in her letter the complainant mentioned article 91, paragraph 1, of the General Conditions of Employment, the Organisation clearly considered this letter as a whole to constitute a complaint against the decision of 5 April 2012, within the meaning of paragraph 2 of that article.

According to the Tribunal's case law, for a letter addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein her or his intention to challenge the decision adversely affecting her or him and that the request thus

formulated can be granted in some meaningful way (see Judgment 3068, under 16, and the case law cited therein).

Since the complainant clearly expressed her intention to challenge her status as defined in the decision of 5 April 2012, which adversely affected her and which formed the subject of that complaint, the letter of 7 June 2013 must be regarded as an appeal within the meaning of the Tribunal's case law and as a complaint within the meaning of Article 91, paragraph 2, of the General Conditions of Employment. Eurocontrol was therefore right to treat it as such.

Moreover, on receiving the above-mentioned memorandum, the complainant did not dispute this description.

7. However, under Article 91, paragraph 2, of the General Conditions of Employment, that complaint should have been lodged within three months of the date of notification of the decision of 5 April 2012. As the Tribunal has repeatedly stated, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, 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 justification for a time bar. In particular, the fact that a complainant may not have discovered the irregularity on which she or he purports to rely until after the expiry of the time limit is not in principle a reason to deem her or his complaint receivable (see, for example, Judgment 3663, under 7, and the case law cited therein).

It is true that the Tribunal's case law, as set forth in Judgments 1466, 2722 and 3406 for example, allows exceptions to this rule where the complainant has been prevented by *vis major* from learning of the impugned decision in good time, or where the organisation, by deliberately misleading the complainant or concealing some paper from her or him, has deprived that person of the possibility of exercising her or his right of appeal, in breach of the principle of good faith. However, there is nothing in the file to suggest that, in the instant case, the complainant found herself in either of these situations.

As the complainant did not challenge the decision of 5 April 2012 until more than a year after being notified of it, the internal complaint of 7 June 2013 was rightly declared time-barred, as a result of which the complaint filed with the Tribunal, insofar as it concerns the requests regarding the conversion of her appointment and her contributions to the Pension Scheme, is also irreceivable because internal means of redress have not been exhausted, as required by Article VII, paragraph 1, of the Statute of the Tribunal.

8. In her rejoinder, the complainant submits that Eurocontrol's defence is "audacious and vexatious". On this basis, she asks that the Organisation be ordered to pay her damages in the amount of 5,000 euros *ex aequo et bono*. The Tribunal is, however, of the view that the Organisation's pleadings do not exceed the boundaries of the freedom of expression that the parties must be accorded during legal proceedings. The complainant's request must therefore be dismissed.

9. It follows from the foregoing that the complaint must be dismissed in its entirety, as must the application to intervene (see, in particular, Judgment 3291, under 9).

DECISION

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment, adopted on 27 April 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ