

FORTY-SEVENTH ORDINARY SESSION

***In re* HAAS**

Judgment No. 473

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Edouard Haas on 16 October 1980 and brought into conformity with the Rules of Court on 29 October 1980, the Agency's reply of 12 March 1981, the complainant's rejoinder of 9 April 1981 and the Agency's surrejoinder of 23 July 1981;

Considering the applications to intervene filed by

Mr. Roger Blau,
Mr. Georges Brentener,
Mr. Paul Emerling,
Mr. René Fisch,
Mr. Jean Ronk,
Mr. Jean Roulleaux,
Mr. André Thill;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 12 of Annex IV to the Staff Regulations Governing Officials of the Eurocontrol Agency;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, who is a citizen of Luxembourg, joined the staff of the Agency in February 1969 and became an "established" official later that year. On 14 March 1979 an Act was passed in Luxembourg on, among other things, transfers from one pension scheme to another. The complainant applied on 22 November 1979 to the pension fund for private salaried employees in Luxembourg for transfer of his acquired rights to the Agency, and on 13 February 1980 he applied to the Agency for permission to transfer his pension rights under the scheme. By a letter dated 6 March 1980 the Director of Personnel and Administration of the Agency dismissed the complainant's application, and on 27 May he appealed to the Director-General. That appeal was dismissed on 23 July 1980, and that is the decision now impugned.

B. The complainant points out that the Staff Regulations lay down, in Article 12 of Annex IV, the possibility of paying to the Agency either the actuarial equivalent of retirement pension rights acquired with another pension fund or the sums repaid to him from that fund. Article 12 requires the Agency to determine the amount and stipulates that there may be such transfer only if the rules 1 to which the Agency official was formerly subject so allow.⁽¹⁾ The rules did not so allow in Luxembourg until the Act mentioned above came into force in 1979. The purpose of the Act was to amend and supplement the Social Insurance Code, and it prescribes the arrangements for transfer from a pension scheme in Luxembourg to the scheme of an international body. The complainant immediately, within the prescribed time limits, exercised his right under the Act to apply for transfer of his pension rights from the Luxembourg scheme. The Agency's objections to transfer are in his view quite unfounded. When he became an established official the law of Luxembourg did not allow the transfer of his pension rights. He was therefore unable to apply for it, and the Agency is mistaken in contending that his application was irreceivable. The Agency also pleads that, even if the application were receivable, it cannot compute the amount to be transferred since it does not have the basic tables required for the calculation. To that the complainant replies that according to the Staff Regulations it is for the Committee of Management to approve such tables ("mortality and invalidity tables" and "assumed salary increases") and has been under a duty to do so since 1963, when the Staff Regulations

came into force. It would be wrongful to deprive him of a right which the competent authorities of the Agency ought to have granted him long ago. Transitional provisions may indeed be under study, but he should not have to suffer inconvenience for the oversight of the Agency, which under the Staff Regulations assumes a duty to assist him. The complainant invites the Tribunal to declare his complaint receivable and well-founded and to award, him costs.

C. In its reply the Agency contends that the applications to intervene filed by Mr. Ronk and Mr. Roulleaux are irreceivable on the grounds that they have failed to exhaust the internal means of redress. As to the complaint itself, it observes that the complainant's claim ceased to be receivable after he became an established official and has for long been time-barred. Besides, when he became established he had no right to transfer. In support of his claim he is relying on the law of Luxembourg and the rules of the European Communities. He also refers to a decision of the Luxembourg courts, but he does not rely on any rule of the Agency, except a draft amendment to Article 12 cited above. The complainant has therefore recognised by implication that he has no right to transfer which he can enforce against the Agency. He clearly cannot rely on information in a staff union paper about the European Communities. Since the Agency possesses legal personality in public international law it is bound only by the provisions of the Staff Regulations and Staff Rules adopted by Eurocontrol authorities. Those texts do not mention, even though they may sometimes reproduce, the rules of the European Communities. The law of Luxembourg fits the system in force in the Communities but has no legal effect with regard to Eurocontrol. Although it confers certain rights to transfer either on officials when they become established or, under transitional provisions, on those already established, it in no way alters the staff regulations of the European Communities or those of the Agency. There is still no possibility of transferring the pension rights of those who are already established since, unlike the Communities, the Agency has taken no exceptional measures to allow it. The material rule is indeed Article 12 of Annex IV, which sets three conditions for the transfer of pension rights: (1) the Agency's consent; (2) direct payment to the Agency's pension scheme by the pension scheme of the official's former employer; and (3) payment at the time when the official becomes established. In further explanations of the purpose of the rule the Agency states that the rule was not intended to apply where, after becoming established, an official wishes to make a transfer so as to increase his pension rights under the Agency's scheme. Indeed that would be of very real advantage to the official since the amount of the pension depends not on the sums actually paid over but on the level of salary paid at the time of retirement. The Agency accordingly invites the Tribunal to dismiss the complaint as unfounded under Agency rules, to declare the applications by Mr. Ronk and Mr. Roulleaux irreceivable and to award costs against the complainant.

D. In his rejoinder the complainant points out that if the Agency adopted transitional measures allowing the transfer of pension rights by established officials his claim might be entertained. Article 12 of Annex IV does not cover the case of officials like the complainant who on becoming established were unable to apply for transfer. In his letter of 6 March 1980 the Director of Personnel and Administration acknowledged the need to amend Article 12 so as to make it applicable to established officials. The European Communities have also had to make special arrangements and, since the Act was passed in Luxembourg on 14 March 1979, officials of the Communities who are in the same position as the complainant have been able to have their rights transferred. The complainant acknowledges that before the Act was passed his right to transfer was in practice meaningless. To contend that only an amendment to Article 12 of Annex IV might make his claim allowable is to recognise that he has a right to transfer and that there is a gap in the rules. He therefore abides by the arguments and claims put forward in his original memorandum.

E. In its surrejoinder the Agency denies that the Director of Personnel and Administration ever acknowledged the need to amend Article 12. Nor does the Agency have any obligation in the matter. It does recognise the considerable material advantage to the complainant in obtaining the transfer of his rights after having several promotions, but it firmly maintains that the material provisions apply only when an official becomes established. It cannot be charged with an oversight or refusing assistance since it is under no legal obligation to amend Article 12 of Annex IV. In any event, although the complainant's rights cannot be transferred, he still holds them and may even increase them by contributing to the pension fund in Luxembourg. The Agency therefore abides by its original arguments.

CONSIDERATIONS:

The applications to intervene

Mr. Blau, Mr. Brentener, Mr. Emering, Mr. Fisch and Mr. Thill have applied to intervene and they have rights which may be affected by the judgment to be given. So do Mr. Ronk and Mr. Roulleaux, even though they have

not filed a claim with the Organisation, and their applications too are therefore receivable.

The receivability of the complaint

The complainant filed his complaint within the time limit set in Article VII of the Statute of the Tribunal. The fact that the Registrar invited him to supplement his complaint in accordance with article 7 of the Rules of Court has no bearing on the question of receivability. In any event the complaint was brought into conformity with the Rules within the one-month time limit set in article 7.

The lawfulness of the impugned decision

1. Article 12 of Annex IV to the Staff Regulations Governing Officials of the Eurocontrol Agency reads:

"An official who enters the service of the Agency after leaving the service of a government administration or of a national or international organisation or of an undertaking shall have the right, on becoming established with the Agency, and if the Regulations or the contract to which he was subject in his previous post so allow, to pay to it either:

- the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organisation or undertaking; or
- the sums repaid to him from the pension fund of the government administration, organisation or undertaking at the date of his leaving its service.

In such case the Agency shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid."

2. It is established that when the complainant, a citizen of Luxembourg, joined the staff of the Agency on 17 February 1969 he did not make an application under Article 12. It was not open to him to do so, since although he had contributed from 1967 to 1969 to the pension fund for private salaried employees in Luxembourg, the law of the country did not at the time allow the repayment of contributions.

On 14 March 1979 a law was passed in Luxembourg which in section 7 authorised the repayment of contributions. It was only after that enactment, on 13 February 1980, that the complainant applied to the Director of Personnel of the Agency for permission to purchase from the pension fund in Luxembourg the pension rights which he had acquired before joining the Agency. The Director rejected that application on 6 March 1980 on two grounds: first, it ought to have been made when he had become an established official and it was therefore time-barred; and, secondly, the Agency did not have the mortality and invalidity tables or schedules of assumed salary increases which were needed for computing the amount of the pension corresponding to the rights transferred.

3. What the complainant is claiming runs counter to the express provisions of the Staff Regulations. To qualify under the provisions relating to the repayment of contributions, the transfer must be made when the official becomes established with the Agency. The complainant made his claim over ten years after he became an established official, and it was therefore time-barred.

The law of Luxembourg cannot in itself give rise to rights enforceable against an international organisation nor retroactively lay obligations on it.

4. It is true that the complainant alleges oversight on the part of the Organisation in failing to amend its rules after the law was passed in Luxembourg, and he relies on decisions of the Appeals Court of Luxembourg and on practice in the European Communities.

These pleas fail.

The provisions of Annex IV are clear and precise. They are not in conflict with any general principle of law. Although amendments to the rules were submitted to the Committee of Management of the Agency several months ago and they would satisfy the complainant's claim, the text of Article 12 is still as set out above. Besides, to be applicable to the complainant any amendment would have to be expressly made retroactive. Whatever the decisions

of other courts and whatever the practice in other organisations, the Tribunal is bound to apply the rules which are actually in force in the Agency.

There being no need to consider the Agency's second plea, the Tribunal holds that the complaint must be dismissed.

DECISION:

For the above reasons,

1. The applications to intervene are receivable.
2. The complaint and the applications to intervene are dismissed.

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

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner

1. Article 12 reads: "An official who enters the service of the Agency ... shall have the right, on becoming established with the Agency, and if the Regulations or the contract to which he was subject in his previous post so allow, to pay to it" the amounts corresponding to his acquired rights.