A. and others

v.

Eurocontrol

139th Session **Judgment No. 4958**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms K. A., Ms M. B., Ms A. C. R. (her second), Ms G. G., Ms K. H., Ms D. H., Mr D. K., Mr K. M., Mr R. N., Mr F. O. E., Ms S. R. (her second), Ms W. S., Ms A. V., Ms R. V. d. K., Ms B. V. d. V., Mr J. W. and Ms S. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 12 October 2021, Eurocontrol's single reply of 4 February 2022, the complainants' single rejoinder of 16 April 2022 and Eurocontrol's single surrejoinder of 15 July 2022;

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 none of the parties has applied;

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

The complainants contest Eurocontrol's implied decision to reject their request to be paid the flat-rate shift allowance in lieu of the ancillary remuneration currently paid to them for the shift work they perform.

The complainants are serving officials in the Training Unit of the Eurocontrol Maastricht Upper Area Control Centre (MUAC) in Maastricht, the Netherlands. At the time they filed their complaints with the Tribunal, they held appointments for an undetermined period as Simulator Pilots at grades SC1, SC2, AST2, AST3 and AST4.

They worked on a 60 per cent part-time basis and were subject to irregular work schedules, including night, weekend, and holiday shifts, for which they received compensation (referred to as "ancillary remuneration"), in addition to their monthly remuneration. This compensation was variable, as it was based on accrual of points. Specifically, points accrued proportionally to the time spent on performing shift work, according to the needs of the service, and the number of points accrued in any given month determined the amount of compensation received for that month.

In May 2021, the complainants submitted, individually and on different dates but in identical terms, internal complaints under Article 91, paragraph 2, of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre (the General Conditions of Employment), expressing the view that in compensation for their shift work, they should be paid the flat-rate shift allowance, instead of the point-based "ancillary remuneration". The complainants submitted their internal complaints against their respective three last payslips, specifically asking the Director General to:

– set aside the individual administrative decisions resulting in their three last payslips, as per the timeframe prescribed in Article 91, paragraph 2, of the General Conditions of Employment;
– recalculate their ancillary remuneration based on the flat-rate shift allowance, calculated pursuant to Article 7, paragraphs 1 and 2, of Rule of Application No. 21;
– calculate their ancillary remuneration in the future based on the flat-rate shift allowance;
– award each of them 3,000 euros in moral damages;

– award each of them 1,000 euros in moral damages, in the event the Director General refrain from rendering a final decision within four months, as per Article 91, paragraph 2, of the General Conditions of Employment; and
– award each of them 50 euros in costs.

Having received no decision on their internal complaints, on 12 October 2021, the complainants filed individual complaints directly with the Tribunal impugning the Director General's implied decision to reject their internal complaints.

The complainants ask the Tribunal to set aside the decisions "resulting in the pay slips that fall under the scope of the time limit foreseen in Article 91, §2 of the General Conditions of Employment" and to order Eurocontrol to recalculate their ancillary remuneration according to the calculation of the flat-rate shift allowance in Article 7, paragraphs 1 and 2, of Rule of Application No. 21, by applying the formula "Flat-rate Shift Allowance (Article 7, §1 GCE) x 80% (Article 7, §2 GCE) x 60% (Article 7, §2 GCE)". They also ask the Tribunal to award each of them 4,000 euros in moral damages, including 1,000 euros for Eurocontrol's failure to issue a final decision within four months, as per Article 91, paragraph 2, of the General Conditions of Employment, and 2,500 euros in costs.

Eurocontrol asks the Tribunal to dismiss the complaints in their entirety as irreceivable or, subsidiarily, as unfounded.

CONSIDERATIONS

1. Complaints have been filed by 17 individuals on the staff of Eurocontrol. They each work as a Simulator Pilot and each complaint raises the same legal issue concerning their remuneration, namely their entitlement to the flat-rate shift allowance, a shift allowance payable in a specified way. The circumstances of each are not materially different. Accordingly, the complaints will be joined so that one judgment can be rendered. The general background has been described earlier in this judgment and need not be repeated.

2. The vehicle used by the complainants to bring the matter before the Tribunal is their comparatively recent payslips. Eurocontrol takes issue with the use of this mechanism and argues that the complaints are irreceivable. However, it is unnecessary to address this question as the complaints fail on their merits.

3. The central legal issue presented for determination in these proceedings is comparatively straightforward and narrow in focus.

4. Amendments were introduced, effective 1 January 2006, to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre (the General Conditions of Employment) and the associated Rules of Application. They concerned the creation of an "O" grades structure for executive operational staff and operational support staff and, additionally, the introduction of a flat-rate shift allowance, "applicable to all staff performing shift work". These amendments were introduced by Office Notice No. 20/06. The contentious provisions concerning the new shift allowance were found in Rule of Application No. 21.

5. The main focus of the complainants' pleas is Article 7 of the Rule of Application No. 21 (provided in Attachment 3 to Office Notice No. 20/06). That Article commenced by declaring in Article 7.1 (that is, paragraph 1 of Article 7) that a servant assigned to shift work in accordance with the provisions of Article 56, paragraph 3, of the General Conditions of Employment shall be entitled to an allowance called the flat-rate shift allowance. In the version of the Rule of Application No. 21 in evidence, the amount of the allowance was 1,379.70 euros. While there was no formal definition of shift work, the detailed prescription in Article 7.1 and 7.2 (that is, paragraphs 1 and 2 of Article 7) of the circumstances in which the flat-rate shift allowance was payable and the amount to be paid, being the whole or a proportion of the prescribed amount, provided a definition of sorts. Article 7.3 also provided for the payment of an allowance, in certain circumstances, which was not the prescribed flat-rate shift allowance but a shift

allowance calculated by reference to points accrued, being a number of points per hour worked in specified circumstances.

6. Much of the argumentation of the complainants is to seek to demonstrate that they have been doing shift work of the type for which the flat-rate shift allowance was payable. However, even if this argument was a credible one, it pays no regard to Attachment 4 to Office Notice No. 20/06. The provisions of this Attachment specifically addressed simulator staff and governed their position. Indeed, the Attachment was headed "Special provisions applying to simulator staff and students *[sic]* air traffic controllers in respect of compensation for irregular work/training schedules". Attachment 4 relevantly provided in the opening paragraph under the heading "Simulator staff" that "the work schedule applicable to the function of simulator staff [...] does not meet the criteria of the provisions linked with the flat-rate shift allowance" and then, in the second paragraph under the same heading that "[h]owever in order to acknowledge/recognise the personal and social inconvenience of their irregular work schedules, a compensation based on accrual of points, similar to the provisions of Article 7.3.b of Rule of Application No. 21, will be applied".

7. Quite clearly, without more, the complainants' reliance on the provisions of Article 7 of the Rule of Application No. 21 is misplaced as is their underlying proposition that it applies to them in the respects for which they contend. It does not. However, Attachment 4 to Office Notice No. 20/06 went on to say in the third paragraph under the heading "Simulator staff" that "[t]he provisions mentioned in paragraphs 1 and 2 of Article 7.3 of Rule of Application No. 21 do however not apply". There is obviously some looseness of drafting in the reference to "Article 7.3" but, in context, this was quite obviously a reference to "Article 7" of Rule of Application No. 21. The word "paragraph" is used elsewhere in Rule of Application No. 21 to refer to a numbered sub-element of an article. The expression "paragraphs 1 and 2 of Article 7.3 of Rule of Application No. 21" in the third paragraph of Attachment 4 to Office Notice No. 20/06 is a reference to sub-elements of an article, namely Article 7 of Rule of Application

No. 21. This reinforces what is apparent in any event, as discussed in this and the preceding consideration, namely that Article 7 of Rule of Application No. 21 had no application other than indirectly through the expression "similar to the provisions of Article 7.3.b" in the second paragraph of Attachment 4 to Office Notice No. 20/06, as set out at the conclusion of the preceding consideration. The source of the complainants' right to compensation for shift work and the basis on which such compensation was paid was Attachment 4 to Office Notice No. 20/06 and not Article 7 of Rule of Application No. 21 in the version applicable effective 1 January 2006.

8. The complainants seek to avoid the consequences of Attachment 4 to Office Notice No. 20/06 by calling in aid the principle of *clausula rebus sic stantibus*. This Latin expression refers to a principle whereby a clause in a contract or treaty is to be treated as ineffective or inoperative because there had been a fundamental change in circumstances. Even if this principle permits the Tribunal to ignore express provisions in normative and statutory texts or treat their terms as modified, which may be doubted, the principle's application depends on the complainants producing evidence of new, unforeseen circumstances, which would have required notional revision of the express provisions (see Judgment 1879, consideration 7(c)). In this matter, the complainants have singularly failed to do so.

9. In the result, the various pleas of the complainants are unfounded and should be rejected. Accordingly, the complaints should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 23 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER