

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 12 April 2010

JUDGMENT IN CASE No. 66

Mr. E.

v/ Secretary-General

Translation

(the French version constitutes the authentic text)

JUDGMENT IN CASE No. 66 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Monday 15 March 2010
at 2 p.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Mrs. Louise OTIS,

with Mr. Colin McINTOSH and Mr. Christophe FAVRE providing Registry services.

On 17 March 2009, Mr. E., a former grade A4 official and now pensioner of the Organisation, submitted an administrative appeal against a decision of the Joint Pensions Administrative Section (JPAS) to reduce the household allowance of his OECD pension on the ground that since he also received a pension from the Council of Europe Bank, he was being paid a second household allowance.

By letter of 17 April 2009, the Head of Human Resource Management informed the applicant of the Secretary-General's decision not to grant his appeal.

On 13 July 2009, Mr. E. filed an application (No. 066) asking the Tribunal to annul the Secretary-General's decision, notified on 17 April 2009, rejecting his request, with all the resulting legal consequences.

On 16 November 2009, the Secretary-General submitted his comments asking the Tribunal to declare certain of the applicant's claims to be inadmissible, to consider Mr. E.'s application to be unfounded and to reject all the grounds of complaint and claims contained in the application.

On 14 December 2009, the applicant submitted his reply.

On 28 January 2010, the Secretary-General submitted his comments in rejoinder.

The Tribunal heard:

Maître Jean-Pierre Cuny, Counsel for the applicant;

and Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General.

It handed down the following decision:

The facts

Mr. E. worked as an official of the Organisation for 27 years, namely from September 1963 until April 1990. In May 1990, he joined the Council of Europe Social Development Fund, now known as the Council of Europe Development Bank (hereinafter “the CEB”), where he worked until July 1994 when he retired definitively.

Since he served two international organisations in turn, each with its own pension scheme, Mr. E. is entitled to two retirement pensions, each determined in accordance with the salary scale applicable at the time he stopped work. Thus, since May 1994, Mr. E. has been receiving from the OECD an early pension based on an A4/11 salary together with a household allowance amounting to 6% of this pension. Furthermore, since May 1995, he has been receiving from the CEB a retirement pension based on an A5/9 salary together with a second household allowance corresponding to 6% of that pension.

The Joint Pensions Administrative Section (hereinafter “the JPAS”) administers in full the pension fund of the Organisation and has, since 2008, been responsible for paying the pensions of retirees from the CEB. The Pensions Administrative Committee of the Co-ordinated Organisations (hereinafter “PACCO”) ensures that the pension rules are applied uniformly.

On 21 May 2008, the JPAS decided that under the Pension Scheme Rules, the household allowance paid by the CEB should be deducted from that received by Mr. E. from the Organisation since the former allowance was from another scheme and should, therefore, be subtracted.

As a result of this decision by the JPAS, the amount of 55.17 euros is deducted, monthly, from the household allowance which Mr. E. receives from the Organisation. In addition, the Organisation is claiming reimbursement of 7 220.17 euros of undue payments made between May 1995 and December 2007. Mr. E. has applied to the Tribunal, asking for this decision to be annulled.

The questions in dispute

The applicant is asking the Tribunal to consider the following questions:

1. Was it an essential formality for the matter to have been referred officially to PACCO before the JPAS took the decision to deduct the CEB allowance?

2. Having regard to Article 28.2 of the Pension Scheme Rules set out in Annex X of the Staff Regulations applicable to officials of the Organisation, was the decision of the JPAS founded in law?

3. If relevant, does the two-year time limit provided for in Rule 17/8.3 of the Staff Regulations applicable to officials of the Organisation apply to the reimbursement the applicant is being asked to make?

In law

1. Was it an essential formality for the matter to have been referred officially to PACCO before the JPAS took the decision to deduct the CEB allowance?

The Tribunal replies to this question in the negative. PACCO is an administrative body which ensures the coherent and uniform application of the Pension Scheme Rules. It advises the Organisation on the detailed calculation of entitlement. Its main task is to determine the amount of pension payable upon retirement (Article 31 of the Rules). In this instance, the assessment of the applicant's entitlement vis-à-vis the Organisation was approved by PACCO in 1994.

No provision in the Pension Scheme Rules or the Staff Regulations requires the JPAS to ask PACCO for an opinion after entitlement has been assessed. Any changes occurring after the amount of pension has been determined are dealt with by the administrator of the scheme in accordance with the rules applicable and may be challenged in the usual way.

2. Having regard to Article 28.2 of the Pension Scheme Rules set out in Annex X of the Staff Regulations applicable to officials of the Organisation, was the decision of the JPAS founded in law?

The JPAS decided that the Organisation should deduct the household allowance from the CEB scheme on the basis of Article 28.2 of the Pension Scheme Rules. According to the JPAS, the CEB pension scheme constitutes a scheme separate from that of the Organisation and the two allowances cannot therefore be

accumulated. The accumulation of allowances should first of all be considered and then, if appropriate, the applicability of Article 28.2 to the household allowance.

For purposes of analysis, the text of Articles 1 and 28 of the Rules are set out below:

“Article 1 - Scope

1. The Pension Scheme established by these Rules applies to staff holding indefinite-term or definite or fixed-term appointments in:

8 the Council of Europe,

8 the European Centre for Medium-Range Weather Forecasts (ECMWF),

8 the European Space Agency (ESA) [ex-European Organisation for the Development and Construction of Space Vehicle Launchers (ELDO) and the European Space Research Organisation (ESRO)],

8 the North Atlantic Treaty Organisation (NATO),

8 the Organisation for Economic Co-operation and Development (OECD), and

8 the Western European Union (WEU),

who are not affiliated to any other pension scheme set up by one of these Organisations after 31 December 2000.

Article 28 – Conditions

1. The family allowances comprising household allowance, children's and dependants' allowance, handicapped child allowance and education allowance granted under the Organisation's Staff Regulations and Rules shall be paid:

i) to the recipient of a retirement pension as from the age of 60;

ii) to the recipient of an invalidity pension;

iii) to the recipient of a survivor's or reversion pension.

2. Where the recipient of a pension referred to in paragraph 1, or his household, is entitled under another scheme to family benefits of a same nature for the same children or dependants, the Organisation shall only

pay the difference between the amount of allowances to which he is entitled under the present scheme and that of the benefits received under the other scheme.

3. The household allowance shall be calculated by reference to the pension of the recipient.

4. The amount of the allowance for a child or other dependant payable to the recipient of a survivor's or reversion pension shall be twice the normal amount. »

(...)

(underlining added)

A. Non-cumulative nature of the allowances.

The applicant argues that the phrase « benefits received under the other scheme » in Article 28.2 does not apply in this case since the Pension Scheme of the Organisation and that of the CEB are the same. According to the applicant, the CEB is an institution of the Council of Europe and consequently participates in the same scheme as the Organisation by virtue of Article 1 of the Rules. As a result, the non-cumulative rule should not be applied and the benefits received from the CEB should not be deducted.

This argument cannot be accepted.

The CEB is the oldest international financial institution in Europe. In its capacity as a multilateral development bank, the CEB is legally independent from the Council of Europe and financially autonomous (Articles of Agreement of the CEB, 3rd Additional Protocol of 6 March 1959 and General Agreement of 2 September 1949).

The CEB has never been identified as a Co-ordinated Organisation by attachment to the Council of Europe ; nor has it ever participated in the work of Co-ordination bodies, even as an observer.

The CEB has always had its own pension scheme which, even though based on that of the Co-ordinated Organisations until 1999, nevertheless remained an autonomous scheme with a separate means of financing. After 1999, the Administrative Council of the CEB adopted its own pension scheme rules.

The CEB pension scheme uses the collective funding method, ensuring the financing of pensions by means of the capitalisation of the contributions paid by members of the scheme. The Co-ordinated Organisations'

system on the other hand, uses the budgeting method whereby each institution determines and budgets for the amounts needed to pay pensions. This means that the financing of the schemes is entirely different and follows different actuarial and accounting rules.

The two schemes are entirely independent from one another and there is no institutional collaboration in respect of the rules applicable.

Proof of this is provided by the fact that the applicant receives two pensions rather than one, from his last employer, as would be the case in the Co-ordinated Organisations (Instruction 32.1/1 i) of the Rules). Thanks to the co-operation between Co-ordinated Organisations, responsibility for paying the whole pension is assumed by the last employer. Given the method used by the Co-ordinated Organisations to fund its pensions as opposed to that used by the CEB, this approach is excluded here because of the complexity of calculating actuarial equivalences. Furthermore, under the rules governing retirement from the Co-ordinated Organisations, there is no entitlement to a pension after only 4 years of service. Ten years' service are required. The exception in this case was only possible because of the terms of the individual contract between the applicant and the CEB. The applicant was well aware of the independence of the two schemes one from the other when he filled in the form required by the JPAS for an early retirement pension (Annex no. 3 to the S-G's comments). He declared a single household allowance, namely that which he received from the Organisation.

Consequently, the Tribunal is of the opinion that the CEB pension scheme constitutes "another scheme" within the meaning of Article 28.2 of the Pension Scheme Rules.

B. The applicability of Article 28.2 to the household allowance.

The applicant argues in short that the principle of the non-accumulation of allowances applies essentially to allowances for children or dependants of the same type as those from under another scheme. Household allowances are not therefore subject to this principle.

The Tribunal considers that this interpretation is well-founded in law.

A literal interpretation of Article 28.1 shows that the household allowance is included, for the purposes of application of the Pension Rules, under the heading "Family allowances" in the same way as children's and

dependants' allowances, the handicapped child allowance and the education allowance. However, the principle of non-accumulation, laid down in paragraph 2, limits the scope of application to two categories of family allowances, namely those for children and for dependants. The household allowance, handicapped child allowance and education allowance are not mentioned in paragraph 2. It cannot be argued that the intention was to include them in the expression "of a same nature" since they are clearly referred to separately in paragraphs 3 and 4 of Article 28.

Moreover, both the original version of the text laying down the principle of non-accumulation (Article 28/3) and the amended one which is the subject of interpretation, refer to the non-accumulation of allowances "for the same children" (original version) and "dependants" (added in 2002).

The principle of non-accumulation laid down in Article 28 (3) of the pension rules of the European Patent Office is similar to Article 28.2. It contains the same exception in relation to "the same children". Ruling on the interpretation of the non-accumulation exception, the ILOAT held:

10. Article 28(3) does not help the EPO. It does not deal at all with household allowances but is restricted to benefits "in respect of the same children".

11. (...) Household allowances are different from fixed ones, such as child allowances, the accumulation of which would result in an inequitable double benefit. The Tribunal holds that there are good reasons why Article 28 does not prohibit the accumulation of household allowances and will not read that principle into the article.

(...)

At all events, any ambiguity in the Regulations the EPO has issued should be construed *contra proferentem* and in favour of the staff.¹

Lastly, the Organisation claims, rightly, that it can refer to the Staff Regulations as an instrument for interpreting the Pension Rules. However, Rule 16/1.3 of the Staff Regulations, in which a ban on the accumulation of a household allowance "from another source" is clearly expressed, only applies explicitly to the household allowance of an official, in active service in the Organisation, whose spouse directly or indirectly receives a form of income. The terms, purpose and scope of Rule 16/3 are very different from Article 28.2 and cannot be used to support any reasoning applicable to the present case. What is more, an

¹ ILOAT 9-7-1998, Goettgens, 1755

express distinction is made, in Article 28, between the household allowance and the allowance for children or dependants.

Having regard to the above, it is not necessary to reply to the third question in dispute.

The Tribunal considers that the application is founded and grants in part the requests made by the applicant. It considers that the applicant's claim for the reimbursement of 5 000 euros in respect of legal costs should be granted.

The Tribunal decides:

- 1) The decision of refusal taken on 17 April 2009 is hereby annulled.
- 2) The OECD shall pay the applicant his household allowance without deducting the household allowance he receives from the CEB.
- 3) The Organisation shall repay to the applicant the sums unduly deducted since January 2008, with interest at the legal rate from the dates on which these sums fell due.
- 4) The Organisation shall pay 5 000 euros to the applicant in respect of legal costs.

Done in Paris on 12 April 2010

(signed) Jean Massot
Chairman

(signed) Colin McIntosh
Registrar