

SEVENTY-NINTH SESSION

***In re* BORRELLO and CHANT**

Judgment 1461

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Miss Sarah Jane Chant on 12 October 1994 and by Miss Carole Françoise Borrello on 13 October 1994 and corrected on 19 and 24 October 1994, Eurocontrol's replies of 19 and 26 January 1995, the complainants' rejoinders of 10 March and the Organisation's surrejoinders of 28 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The background to this case is set out under A in Judgments 1403 (in re Tejera Hernandez) and 1411 (in re Bidaud).

Both complainants are clerical staff in category C at Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. Miss Borrello joined the Agency in 1990 and has a grade C4 post. Miss Chant took up duty in 1991 and is at grade C5.

On 10 and 16 November 1993 they wrote to the Director of Personnel applying for the "typist's allowance" provided for in Rule No. 7, Section 2a, Article 4a of the Rules of Application of Eurocontrol's Staff Regulations. Clerical staff in category C may sometimes qualify for that allowance.

Having got no reply within the four months prescribed by Article 92 of the Staff Regulations, they sent the Director General memoranda on 6 and 7 June 1994 lodging internal "complaints". By letters of 13 July 1994 - the impugned decisions - the Director of Personnel rejected their "complaints" on the Director General's behalf.

B. The complainants submit that the practice at Eurocontrol is to grant the typist's allowance to clerical staff who spend much of their working time on jobs that involve the use of a typewriter or a computer keyboard. They qualify for the allowance because they spend over half the time on computer work. By refusing to let them have it the Agency has broken the rules.

There is also breach of the rule against retroactivity: the Administration may alter the requirements for granting the allowance for the future but not apply to them a decision yet to be taken.

Lastly, they plead discrimination in that the Agency granted the allowance to staff in other units who are in like case.

They ask the Tribunal to quash the decision to reject their "complaints"; to rule that they are eligible for the typist's allowance; to order the Agency to pay them the allowance as from dates in November 1993, plus interest on the arrears; and to award them costs.

C. The Agency replies that nothing in the rules entitles a clerical officer to the typist's allowance. It has no practice in the matter, having granted the allowance to some such officers only in exceptional instances.

The complainants' jobs were technical when they joined the Agency and they did not then qualify for the allowance. Nor do they now since their duties have not changed. Only a tiny fraction of their time is spent on

typing or on computer work.

Eurocontrol did act in accordance with the rules and did not disregard the rule against retroactivity.

It denies discriminating against the complainants: it has not granted the allowance to anyone in their unit.

D. The complainants contend that their duties have changed since they joined the Agency and deny that they are technical. They press their pleas.

E. In its surrejoinders Eurocontrol maintains that the complainants' duties are mostly technical and of a kind that demands use of a keyboard. It enlarges on its pleas.

CONSIDERATIONS:

1. Eurocontrol recruited Miss Borrello on 16 September 1990 and Miss Chant on 1 April 1991 as class II clerical staff. It assigned them to the technical division of the Central Flow Manual Unit (CFMU) of its Experimental Centre, and they held grade C5. On 1 January 1992 it promoted Miss Borrello to C4. In November 1993 the complainants claimed payment of the "typist's allowance" provided for in Article 4a of Section 2a of Rule No. 7 concerning remuneration. Having got no reply from the Administration, they submitted "complaints" in June 1994 against the implied rejection of their claims. By two letters dated 13 July 1994 and identical in substance, one in English and the other in French, the Director of Personnel rejected their "complaints" on the Director General's behalf for lack of merit. Those are the decisions they are impugning.

2. Since the two complaints raise the same issues of fact and law and seek the same redress they are therefore joined to form the subject of a single judgment.

3. Article 4a of Section 2a of Rule of Application No. 7 reads:

"An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance."

Although the article does not confer the allowance on clerical staff Eurocontrol acknowledges that in exceptional instances, ad hoc and by analogy it has granted the allowance to some clerical staff in category C provided they spend at least three-fifths of their time typing or half of it working on a computer keyboard. But in reply to the complaints it makes out that to qualify for the allowance the staff member must have duties akin to the secretarial and typing tasks which the allowance is intended to reward and that though the complainants do use a keyboard such use is incidental to other work that is neither in quality nor in quantity akin to that of someone whose main job is typing.

4. The complainants challenge the construction that Eurocontrol puts on a rule that it has itself made on the grant of the allowance to clerical staff. They argue that the Tribunal affirmed the rule in Judgment 1403 (in re Tejera Hernandez) of 1 February 1995 and that they satisfy the criteria endorsed therein. The Director of the CFMU said as much in a letter of 7 June 1994 to the Director of Personnel when he affirmed that they spent three-fifths of their time typing or half of it working on a computer keyboard.

5. Their plea succeeds. Those are indeed the "objective criteria" which Judgment 1403 acknowledged under 11 and 12, pointing out that such broad construction of the rule goes back to 1965 and that Eurocontrol's practice puts it under an obligation.

6. None of the criteria Eurocontrol applied in earlier cases required that clerical staff claiming the grant should be performing tasks akin, either mostly or incidentally, to those of a secretary or typist. The Agency fails to show that it imposed this further requirement in the past and that it therefore forms part of the practice affirmed in the judgment. By rejecting the complainants' claims on such grounds Eurocontrol is in breach of the rule by which it is bound through its acknowledged practice of granting the allowance to clerical staff. Moreover, by refusing the allowance only to the complainants under that mistaken pretext, it has discriminated against them. So the impugned decisions cannot stand.

7. Since the decisions are set aside the complainants are also entitled to payment of the interest on arrears that they claim. As Judgment 1403 said under 7, interest on arrears is due by virtue of the principle of equal treatment

embodied in the Staff Regulations. The principle lays on the Organisation the duty to pay such interest so as to restore parity between someone who got the allowance at the due date and someone who got it later.

DECISION:

For the above reasons,

1. The Director General's decisions of 13 July 1994 are set aside.
2. Eurocontrol shall pay the typist's allowance to Miss Chant as from 10 November 1993 and to Miss Borrello as from 16 November 1993, together with interest at the rate of 10 per cent a year on the amounts due.
3. It shall pay each of them 1,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner