

EIGHTY-THIRD SESSION

In re Lacroix (No. 2)

Judgment 1655

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Marianne Lacroix against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 May 1996, Eurocontrol's reply of 14 August, the complainant's rejoinder of 14 October 1996 and the Organisation's surrejoinder of 17 January 1997;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Belgian who was born in 1949, joined the staff of Eurocontrol in 1972. At the material time she was a second-category clerk at grade C3 in the Central Route Charges Office in Brussels.

In October 1993 she hurt her leg in a fall in a swimming pool in Italy. Having provided medical certificates saying that she was unfit for work, she was put on sick leave. In August and again in November 1994 the Organisation's medical adviser examined her. After the second examination he agreed with her own doctor that she should go back to work on 3 January 1995. On 9 January she again failed to report for work on the grounds that she was suffering from "serious neuro-psychiatric disorders". The medical adviser examined her on 24 January and, notwithstanding the medical certificates she had produced, declared her fit to go back to work on 6 February 1995. She did not do so. On the 28 March the medical adviser saw her again and said that she was "fit for sedentary work". By a letter of 27 April the Director of Personnel ordered her to return to work at once and

said that any further absence would be treated as unauthorised and any further application she made for sick leave would have to be backed up by a detailed medical report to the medical adviser.

The complainant supplied a certificate from her own doctor for the period from 1 to 31 May 1995. The medical adviser confirmed his earlier opinion, however, and the Director of Personnel told her in a letter of 15 May that her absence was unauthorised and would be docked from her leave entitlements and then, if need be, from her pay. At Eurocontrol's instructions she underwent a psychiatric examination on 17 June and an orthopaedic one on 3 July. The two specialists said that she was fit for work. By a letter of 13 July the Director of Personnel told her that since her leave entitlements had been exhausted by 30 June she would no longer be paid as from 1 July. She then saw a psychiatrist, who declared her unfit for work.

In a memorandum of 11 October 1995 she filed a "complaint" with the Director General against the Director of Personnel's "decisions" of 15 May and 13 July. She also asked for the setting up of the Invalidation Committee provided for in Article 59(3) of the Staff Regulations and for the immediate payment of the pay withheld. She nevertheless went back to work on 1 December 1995, though she said she was not withdrawing her appeal.

In a report of 7 December the Invalidation Committee said that she was fit for work but recommended transferring her to another unit. It took the view that "she had not been suffering from total permanent incapacity during the period in question" but had been suffering from "intermittent incapacity in that period", which it later set at 34 per cent of the time. In a letter of 28 February 1996 the personnel department, by then known as the Human Resources Directorate, told the complainant that on the Committee's recommendation she would be paid 72,200 Belgian francs for the period from July to

November 1995. But in a memorandum of 6 March 1996 the head of the Remuneration Section revised the reckoning so that the amount she got in the event was only 18,904 francs.

On 30 January 1996 the Joint Committee for Disputes held that her appeal was receivable and sound. In a letter of 13 June 1996 the Director of Human Resources sent her the Committee's report but rejected her appeal on the Director General's behalf.

B. The complainant submits that the Organisation was in breach of Article 59(3) of the Staff Regulations in failing to convene the Invalidity Committee as soon as she had produced medical certificates with which the medical adviser disagreed. The Director of Personnel's "decisions" of 15 May 13 July 1995 were, in her view, improper because they were taken before the Invalidity Committee had been consulted. Moreover, there being no mention of any delegation by the Director General as the "appointing authority", the Director of Personnel had no competence to take any such "decisions".

As for the Invalidity Committee's report, it held good only for the future and the Agency therefore committed a mistake of law in relying on that report in support of its earlier decisions.

Lastly, by failing in its duty of care towards her, Eurocontrol caused her serious financial prejudice.

She seeks the quashing of the "decisions" of 15 May and 13 July 1995; the payment of the sums withheld, plus interest to be reckoned at the rate of 8 per cent a year; and an award of 500,000 Belgian francs in damages. She claims costs.

C. In its reply the defendant Organisation contends that the complaint is irreceivable on the grounds that the complainant did not lodge until 11 October her appeal against the decision of 15 May 1995. She thereby missed the time-limit of three months in Article 92(2) of the Staff Regulations. The letter of 13 July 1995 merely confirmed the decision of 15 May, which declared her absence to be unauthorised and stated the consequences.

Eurocontrol called the Invalidity Committee as soon as the complainant asked it to do so. The Committee was quite able to give an opinion about her fitness for work during the whole of the period of her absence since two of its members had kept a constant watch on the state of her health in that period and it had the opinions of three other doctors. The Director of Personnel received authority from the Director General to take the decisions in question. The fact that the text of the decisions do not mention such delegation does not rob them of effect in law or cast doubt on the actual delegation. The Organisation fulfilled its duty of care towards the complainant since on the strength of the Invalidity Committee's report it reckoned the pay due to her, agreed to transfer her to another unit and even proposed on compassionate grounds to pay her 390,000 Belgian francs, a generous offer which she turned down.

The Organisation asks the Tribunal to declare the complaint irreceivable and, failing that, devoid of merit and to order the complainant to bear the costs in full.

D. In her rejoinder the complainant submits that the letter of 15 May 1995 was a statement of intent and not a decision. In any event there were repeated decisions to withhold her pay, and each of them set off a new time limit of three months for appeal. Even supposing that the Tribunal upholds the defendant's objections to receivability, her appeal may be regarded as out of time only as to her leave entitlements.

She submits that the medical adviser took account only of her orthopaedic disorders in 1995. So much is plain from his recommending that she perform "sedentary work" at a time when her psychological disorders prevailed. The opinions which he expressed before the psychiatrist appointed by Eurocontrol examined her on 17 June 1995 were merely tentative; so the Agency was not free to rely on them to declare her fit for work. Moreover, it was at fault in declining to acknowledge the existence of a dispute long before she made her appeal of 11 October 1995. Even if the Director of Personnel did have delegated authority his decisions suffered from a procedural flaw since they bore no mention of the delegation, as the text conferring authority on him required. Lastly, she says that the Organisation has failed to exercise its duty of care: at a time when she was penniless it let the proceedings drag on, in the end it paid her only a derisory amount, and another staff member made rude remarks about her private life.

E. In its surrejoinder the defendant says that the medical adviser's views related to all the disorders that the

complainant was suffering from, were not tentative and therefore afforded proper grounds for the Director of Personnel's decisions. It points out that the administrative action taken on the strength of his findings were not made retroactive and that the Invalidity Committee's recommendations were made retroactive only insofar as they were to the complainant's benefit.

CONSIDERATIONS

1. Having suffered injury in 1993, the complainant was put on sick leave and by 27 April 1995 had had a total of 703 days' such leave. By a letter of that date the Director of Personnel ordered her to go back to work at once with the Central Route Charges Office. He said that any further absence would be treated as unauthorised and that any further application she made for sick leave would have to be backed up by a detailed medical report.
2. Her own doctor, Dr. Bernard, gave her a certificate, accompanied by a report, saying that she was not fit to work from 1 to 31 May 1995. On 15 May the Director of Personnel told her that the medical adviser of the Organisation would not allow her that sick leave; so any days of absence from 1 May would be docked from her annual leave and, if need be, from her pay.
3. By a letter of 13 July 1995 the Director of Personnel told her that her entitlements to leave had been exhausted by 30 June and that her further absences would be docked from pay, which she would not get from 1 July. On 19 September 1995 the same Director, now called Director of Human Resources, again ordered her to go back to work and confirmed that since her leave was unauthorised she had not been paid since 1 July.
4. On 11 October 1995 she filed a complaint with the Director General seeking the reversal of the Director's decisions of 15 May and 13 July 1995, the immediate payment of the sums withheld and the convening of the Invalidity Committee.
5. By a letter of 30 October the Director of Human Resources told her that the Invalidity Committee had been set up and that she should name a doctor to sit on it. She did so. In its report of 7 December 1995 the Committee said that during the period at issue she had not been suffering from total permanent disability and it set at 34 per cent of the time her actual disability, which it found had been merely intermittent.
6. The complainant went back to work on 1 December 1995.
7. At a meeting on 14 December 1995 the Joint Committee for Disputes took up her appeal of 11 October. In its report of 30 January 1996 it said that the appeal was receivable; expressed "doubt as to whether the Director of Human Resources had had power to take the challenged decisions"; and concluded that the Agency had "failed to comply with the provisions of the Staff Regulations in force" and to "discharge the duty of care that any employer owes someone who has been ill for a long time".
8. By a letter of 13 June 1996, i.e. after the filing of this complaint, the Director of Human Resources told the complainant on the Director General's behalf that her appeal of 11 October 1995 could not "be allowed".

Receivability

9. The Tribunal will first take up the defendant's objections to receivability. Eurocontrol argues that the only challengeable decision is the one of 15 May 1995 because the decision of 13 July 1995 merely confirmed it and that the appeal of 11 October 1995 was out of time because the complainant filed it after the expiry of the time limit of three months in Article 92(2) of the Staff Regulations.
10. The plea fails. The defendant acted on the appeal of 11 October 1995 by convening the Invalidity Committee and the Joint Committee for Disputes and by taking the final decision of 13 June 1996. The attitude it thereby adopted towards the appeal estops it from now objecting to the receivability of the complaint. The complaint is therefore receivable.

The convening of the Invalidity Committee

11. The rules on the grant of sick leave are in Articles 59 and 60 of the Staff Regulations. The staff member

must ordinarily tell the Organisation as soon as he can that he is unfit for work and must supply a medical certificate by the fourth day of absence. He "may be required to undergo a medical examination" if the organisation so decides. Article 59 sets out the two contingencies in which there may be referral to the Invalidity Committee. First, the Director General may refer to the Committee the case of a staff member "whose sick leave totals more than twelve months in any period of three years". Secondly, there may be referral to the Committee in the event of dispute. Article 60 says that "any unauthorized absence which is duly established shall be deducted from the annual leave" and, if such leave is exhausted, against pay.

12. Did the Organisation comply with the rules in this case? It appears on the evidence that during the period at issue the complainant was seen by psychiatrists and orthopaedists. They were not of one mind. On one side were Dr. Bernard, Dr. Pirotte, a neuro-psychiatrist, and Dr. Defleur, a psychiatrist; on the other, Dr. Vermeiren, the Organisation's own medical adviser, Dr. Castro, a psychiatrist, and Dr. Opdecam, an orthopaedist. A difference of opinion first arose when Dr. Bernard gave the complainant a sick leave certificate for May 1995 and Dr. Vermeiren refused to endorse it. The Joint Committee for Disputes, meeting on 14 December 1995, also found later disagreement between Dr. Defleur, who thought her "unfit", and Dr. Vermeiren, who declared her "not disabled".

13. On the strength of the foregoing the complainant maintains that from 15 May 1995 there was disagreement or dispute between the parties about her fitness for work. The defendant contends that at that time there was no disagreement yet and that dispute arose only when she challenged Dr. Castro's and Dr. Opdecam's findings.

14. The defendant's plea cannot be sustained. It is indeed hard to see why the complainant should have had to express her opinion more than once. The conclusion is that there was dispute between the parties by 15 May 1995 as to whether the complainant was fit to go back to work.

15. What attitude, then, ought the defendant to have taken as to that medical dispute? The complainant argues from Article 59(3) that it ought to have convened the Invalidity Committee forthwith. The Organisation retorts with two pleas. In its reply to the complaint it says that since she failed to challenge Dr. Castro's and Dr. Opdecam's findings there was no need to convene the Committee; in the Organisation's submission there was no dispute. In the same brief it further argues that it had no duty to convene the Committee on the grounds that:

"It was the complainant who was to blame for the alleged delay in convening the Invalidity Committee since she took until 11 October 1995 to file her internal appeal and apply for the convening of that Committee."

16. The Tribunal has dismissed the first of those pleas in 14 above. As for the second, it explained in 11 above the two contingencies in which Article 59 provides for the convening of the Committee. In the first contingency the Director General "may" convene the Committee; so he merely has the option, and the exercise of his authority is not subject to review by the Tribunal. In the second contingency, which is the one in point here, the Staff Regulations say that "Cases in dispute shall be referred to the Invalidity Committee for an opinion". That is an obligation, and it is one that falls on the Director General. So it appears from Article 59 that in the event of dispute between the Organisation and the staff member about sick leave the Director General has the duty of convening the Committee so that he may have its opinion and of doing so, in a reasonable time. For that purpose he does not have to await an application from the staff member, who has only the right, not the duty, to ask him to convene the Committee.

17. The conclusion is that after dispute first arose between Organisation and complainant the Director General was bound to convene the Committee within a reasonable time. He took too long to do so. There being no need to entertain the complainant's objection that the Director of Human Resources acted *ultra vires*, the Tribunal holds that the complainant is right in maintaining that the procedure followed by the Director was improper.

The complainant's absences

18. The belated convening of the Invalidity Committee has no bearing, however, on the question as to whether the complainant's absences were authorised or not. If she was fit to go back to work her absences were unauthorised; only if she was unfit were they warranted.

19. The Committee took the matter up when it met on 7 December 1995. Its members were Dr. Bernard, Dr. Vermeiren and Dr. Meuris, the third being co-opted by the first two. They were unanimous that in the period at issue the complainant had not been wholly unfit for work and they estimated at 34 per cent of the time her incapacity, which was only intermittent. In other words, she had been fit for work 66 per cent of the time throughout that period.

20. Eurocontrol endorsed the Committee's findings in a letter which the Human Resources Directorate wrote to the complainant on 28 February 1996. She objects to the findings on the grounds that on 7 December 1995, when the Committee met, it did not have at its disposal enough medical data to enable it to give a proper opinion on the state of her health during the period in question.

21. That argument is unsound. Dr. Bernard was her doctor throughout and, as is plain from the evidence, thoroughly familiar with the state of her health; Dr. Vermeiren, the Organisation's medical adviser, knew her case well; and the Committee had her medical records, which included the findings of the examinations. The conclusion is that the Committee had enough medical data to enable it to express a view on the state of her health at the material time.

22. The defendant reckoned the pay due to her for the period from July to November 1995 and paid the sum due into her account.

The injury sustained

23. The complainant claims the payment of "500,000 Belgian francs in damages for the financial and moral injury attributable to Eurocontrol's unlawful decisions" and of interest to be reckoned at the rate of 8 per cent per year on the sums withheld. But she has merely made a general list of the forms of injury she says she has sustained without affording any particulars or proof.

24. For compassionate reasons and *ex gratia* the defendant has offered her 390,000 Belgian francs in compensation, an amount it sees as generous "inasmuch as she has failed to put any figure on the injury or to offer properly circumstantial and specific proof thereof".

25. The complainant says in her rejoinder that she would have been "willing to accept the Organisation's offer" but in the end turned it down because someone in the Human Resources Directorate made rude remarks about her management of her private life.

26. The defendant says in its surrejoinder that, despite two meetings with its social welfare officer and several reminders on the telephone, the complainant has never given any idea of the injury she has sustained. Although Eurocontrol's decisions of 15 May and 13 July 1995 and the delay in convening the Invalidity Committee did cause her injury, she has never adduced any evidence of it. The Organisation's *ex gratia* offer of 390,000 Belgian francs is an attempt at fair assessment that the Tribunal sees no reason to question.

27. The complainant is entitled to an award of costs. The amount is set at 25,000 Belgian francs.

DECISION

For the above reasons,

1. The Organisation, which shall bear the adverse consequences of the belated convening of the Invalidity Committee, shall pay the complainant 390,000 Belgian francs.

2. It shall pay her 25,000 Belgian francs in costs.

3. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
Michel Gentot
Julio Barberis
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.