

**SEVENTIETH SESSION**

***In re* NIESING (No. 2),  
PEETERS (No. 2) and ROUSSOT (No. 2)**

**(Interlocutory order)**

**Judgment 1096**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr. Cornélis Niesing, Mr. Patrick Peeters and Mr. Jean-Marc Roussot against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 11 May 1990, the Agency's replies of 26 July 1990, the complainants' rejoinders of 16 August and the Agency's surrejoinders of 19 October 1990;

Considering the applications to intervene filed by:

J. Abramowski

D. Aelvoet

H-R. Altmann

A. Barnby

S. Basu

M. Baudot

J. Bodar

B. Boerrigter

P. Boland

V. Brown

H. Burgbacher

M. Castenmiller

R. Celis

M. Chauvet

P. Crick

H. Czech

F. Dahlbuedding

F. Daly

P. David

V. Day  
J-M. De Boever  
J. De Keukelaere Meyer  
M. De Ligne  
A. De Monte  
J. De Winter  
C. Degenaar  
R. Dehouwer  
H. Delachaux  
W. Depouillon  
F. Devillieres  
H. Devry  
D. Doerr  
P. Domogala  
P. Emering  
R. Engels  
A. Enright  
C. Esslemont-Richez  
I. Evans  
R. Evans  
H-J. Exner  
G. Fairfax Jones  
Y. Fauchot  
F. Faurens  
R. Feyens  
J-P. Florent  
C. Galeazzi (Goetz)  
M-T. Garzend  
A. Geirnaert  
H. Goettling  
W. Goettlinger

D. Gordon  
W. Gorlier  
M-T. Guérin  
H. Hauer  
D. Hedley  
G. Heinz  
G. Hembise  
H. Hering  
R. Hess  
J. Hougardy  
R. Janssens  
F. Joris  
L. Kelly  
N. Kieffer  
F. Krella  
H. Kunicke  
G. Lambert  
P. Lascar  
D. Laurent  
G. Lauter  
C. Leclerc  
J. Leclère  
L. Lelarge  
C. Licker  
W. Lockner  
L. Loeser  
Pierre Maes  
J-P. Majerus  
B. Marschner  
J. Martins dos Santos

M. Mathieu  
J. Meredith  
W. Mesman  
M. Minner  
P. Montenez  
C. Nelissen  
A-M. Nieuweling  
L. Olivier  
J. Oury  
G. Peerbooms  
P. Philips  
M. Picard  
J-F. Pieri  
J-M. Pomeret  
V. Priplata  
B. Puthiers  
J. Raes  
J-L. Renteux  
J-J. Richer  
C. Robijns  
J. Ronk  
R. Sampoux  
J-J. Sauvage  
G. Schneider  
G. Schoeling  
W. Sieg  
W. Sillevis  
P. Slingerland  
P. Smith  
J. Sondt  
D. Spragg

S. Starlander  
B. Stefens  
E. Steiner  
A. Sunnen  
B. Swinnen-Stappaerts  
A. Talboom  
E. Talboom  
E. Tant  
R. Thacker  
A. Thill  
R. Tielemans  
J. Timmermans  
J-C. Tumelin  
M. Turcan  
R. Ueberhofen  
J. Uhl  
B. Valdenaire  
J. Van Belle  
G. Van Campenhout  
M. Van der Sluis  
A. Van Dooren  
E. Van Eupen  
J. Van Raayen  
J-P. Vanderspikken  
D. Vanderstraeten  
P. Vercruijse  
P. Vergauts  
H. Vermaesen  
F. Vermoesen  
L. Verwilst

W. Viertelhauzen

N. Vrancken

F. Wagner

E. Watkins

G. Wendling

F. Werthmann

J-P. Willox

D. Winkler

M. Woods

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 62, 67 and 92(2) of the Staff Regulations governing officials of the Agency;

Having examined the written evidence and decided not to order oral proceedings, 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. On 7 July 1987 the Permanent Commission of Eurocontrol approved a decision it had taken on 7 July 1983 to bring in a 5 per cent differential between net pay in the European Communities and net pay at Eurocontrol. On the strength of that decision the Organisation made an initial reduction of 0.7 per cent in the sums it refunded against education expenses staff members had incurred between July 1986 and June 1987. In Judgment 963 of 27 June 1989 the Tribunal ruled on complaints lodged by the same complainants against that initial reduction: it quashed decisions to reduce retroactively the refundable amount of education expenses and it ordered payment of the sums wrongfully withheld from the amounts refunded before July 1987.

Office notice 11/88 of 8 April 1988 informed the staff of Eurocontrol that the Permanent Commission had approved as from 1 July 1986 the alteration of the initial reduction from 0.7 to 0.85 per cent and the application of a further reduction of 0.4 per cent - making a total of 1.25 per cent - in net pay as from 1 July 1987.

In a notice to staff of 25 August 1989 the Director of Personnel and Finance declared on the Director General's behalf that the Tribunal had confirmed the lawfulness of applying the Eurocontrol differential to reimbursement of refundable education expenses for which proof of payment was given but had held that the applicable rate should be the one in force at the beginning of the relevant period, at 1 July of each year. The notice announced the refund of the 0.7 per cent reduction made for the period from 1 July 1986 to 30 June 1987 and of the 1.53 per cent reduction made for the period from 1 July 1987 to 30 June 1988, and a decision to reduce by 1.25 per cent refundable expenses incurred in the period from 1 July 1988 to 30 June 1989.

The complainants are members of the staff of Eurocontrol. When Mr. Niesing and Mr. Peeters got their pay slips for November 1989 and when Mr. Roussot got his for December 1989 they found that the reduction announced for the period from July 1988 to June 1989 had been applied to the refund of the education expenses they had claimed for that period. At the end of February 1990 they submitted internal "complaints" to the Director General under Article 92(2) of the Staff Regulations challenging the lawfulness of the reduction and of any action to reduce pay and allowances. On 11 May 1990 they filed the present complaints against implied decisions to reject their "complaints". The Director of Personnel and Finance wrote them letters on the Director General's behalf on 6 June 1990 expressly rejecting their "complaints" as irreceivable and, subsidiarily, as devoid of merit.

B. The complainants submit that their complaints are receivable. They duly lodged their internal "complaints" against the pay slips that caused them injury and, having got no reply within the sixty-day time limit set by Article VII(3) of the Tribunal's Statute, duly filed their complaints under that provision against the implied rejection.

As to the merits they challenge the lawfulness of the reduction on several grounds.

Their first plea is that there was breach of the rule against retroactivity. The decision the Director General took on 25 August 1989 and put into effect in December 1989 to reduce refundable education expenses by 1.25 per cent applied to the period from 1 July 1988 to 30 June 1989.

Secondly, there was another breach of the same rule in that the decision, which the Permanent Commission of Eurocontrol took "by correspondence", to set the reduction at 1.25 per cent from 1 July 1987 was not notified to the staff until they got office notice 11/88 of 8 April 1988.

Thirdly, Eurocontrol was in breach of the *res judicata* rule: it failed to take proper action on Judgment 963 and indeed put a mistaken and wrongful construction thereon.

Fourthly, even supposing that the reduction was lawful, it was wrong to apply it to sums refunded against education expenses, which are due only on the strength of supporting evidence and are not a component of pay.

Fifthly, the reduction offends against the principle of equal treatment since it discriminates against staff whose education expenses are steep.

Sixthly, the decision to reduce pay and allowances is unlawful because no reasons were given for it and because it is in breach of the rules on how to determine Eurocontrol salaries, of the staff's acquired rights and of their reasonable expectations.

The complainants allege moral injury in the Organisation's wilful failure to comply with Judgment 963 and to answer their internal "complaints".

They ask the Tribunal to set aside the Director General's decision to reduce by 1.25 per cent the sums refunded to them against education expenses incurred between 1 July 1988 and 30 June 1989 and to award them the sums wrongfully withheld, plus interest. They claim moral damages and costs.

C. In its replies Eurocontrol contends that the complaints are premature and therefore irreceivable inasmuch as what they impugn are implied rejections, whereas it rejected the internal "complaints" by express decisions within the time limit of four months set in the Staff Regulations. Its answers to the complainants' pleas on the merits are therefore subsidiary.

There is nothing retroactive, it submits, about the challenged pay slips. As the complainants acknowledge, they are based on the decision taken by the Permanent Commission by correspondence to increase the pay differential to 1.25 per cent. That decision was announced to the staff in the office notice of 8 April 1988, long before the pay slips were issued and the relevant school year began.

Their reliance on *res judicata* is misconceived because the conditions for applying that rule are not met. Besides, the Organisation has more than fulfilled its obligations under Judgment 963 since it has refunded sums deducted against expenses incurred between July 1987 and June 1988, an issue the judgment did not rule on.

The education allowance is made up of two things, a lump-sum payment and "other education expenses" refundable on the strength of supporting evidence, and it is a component of pay under Articles 62 and 67 of the Staff Regulations. Since there is a maximum limit on the refund of "other education expenses" staff have never been entitled to full refund of actual costs, whatever supporting evidence they may submit.

There was no breach of the principle of equal treatment: the same reduction applies to everyone entitled to the refund of "other education expenses".

There is nothing unlawful about holding back pay rises. Indeed the policy is amply warranted by changes in Eurocontrol work, the greater number of exchanges of staff between Eurocontrol and national administrations and cuts in the costs of services to member States and others. It is not in breach of any rule of law. It is essentially a matter of adjusting pay: no acquired right to pay and no reasonable expectations are at issue.

As for the complainants' allegation of moral injury, there is none whatever and the claim is worthless.

D. In their rejoinders the complainants seek to refute the Organisation's pleas.

As to receivability they submit that time limits in the Tribunal's Statute are mandatory especially when they are shorter than the ones in the Organisation's own rules. So their complaints are not premature.

They enlarge on their pleas on the merits, pointing in particular to an inconsistency between the Organisation's view that refunded education expenses are a component of pay and the application of different rates of reduction to such expenses and to pay. They submit that the changes in Eurocontrol's work hardly warrant any cut in salary since the Organisation is booming, with more member States and more worthwhile work to do than ever before.

E. Eurocontrol maintains in its surrejoinders that the complaints, having been filed too soon, are irreceivable. On the merits it again states that the education allowance is part of pay and that the different rates of adjustment were just a temporary discrepancy. Matters of policy are no concern of the complainants' anyway: it is for the competent authorities of Eurocontrol to take whatever action they think right to keep up efficiency.

#### CONSIDERATIONS:

1. The complainants, who are officials of Eurocontrol, seek the quashing of decisions in their pay slips dated from 30 November to 4 December 1989. The pay slips showed a 1.25 per cent reduction in the refund of education expenses they had incurred from 1 July 1988 to 30 June 1989. They submitted internal "complaints" between 23 and 28 February 1990. Having got no replies within sixty days they inferred rejection under Article VII(3) of the Tribunal's Statute and filed on 11 May 1990.

2. Since the three complaints show the same cause of action and raise the same issues they are joined to form the subject of a single ruling.

3. After the date of filing, on 6 June 1990, the Director of Personnel and Finance sent the complainants identical letters on the Director General's behalf expressly rejecting their "complaints". He pointed out that a notice to staff of 25 August 1989 had announced the rate of reduction in the refund of education expenses incurred in 1988-89. He said that though retroactive that notice was not unlawful. It drew the proper conclusions from Judgment 963, delivered on 27 June 1989 on a dispute between the same parties, and was a mere sequel to office notice 11/88 of 8 April 1988, which had already informed the staff of the rate of reduction.

4. The complainants have six pleas. First, they allege that the circular of 25 August 1989 is in breach of the rule against retroactivity because it applies to the period from 1 July 1988 to 30 June 1989. Secondly, office notice 11/88 of 8 April 1988 is in breach of the same rule because it applies the 1.25 per cent reduction as from 1 July 1987. Thirdly, Eurocontrol has misread and misapplied Judgment 963 by imputing to the Tribunal the intention of treating the pay reductions as lawful as to the future. Fourthly, Eurocontrol has acted in breach of the requirement to refund education expenses on the strength of supporting evidence because it has applied the rate of reduction to actual refundable expenditure. Fifthly, there is breach of equal treatment because the reduction in the refund of education expenses differs in effect according to claimants' personal circumstances. Lastly, the very notion of reduction is unlawful and contrary to the principles of the international civil service.

5. In enlarging on the last plea the complainants cite the arguments put forward in support of earlier complaints such as Boland No. 2, de Groote and Lefebvre (see Judgment 1012 of 23 January 1990). There were four such arguments. One was that no reasons had been stated for the decision or the reasons had been wrong or could not be disclosed. Secondly, there was breach of the rules on how to set pay in Eurocontrol. Thirdly, there was breach of the staff's acquired or essential rights. And fourthly, there was breach of trust. They say they will duly submit, if the Tribunal so wishes, the evidence formerly supplied in support of those four arguments.

6. They seek damages for the moral injury they say Eurocontrol's tactics have caused them.

7. The Organisation replies that the complaints are premature and therefore irreceivable. It acknowledges that they were filed after lapse of the sixty-day time limit in Article VII(3) of the Tribunal's Statute for inferring rejection. But it points out that on signing his letter of appointment every Eurocontrol official undertakes to abide by the Staff Regulations and that, like those of the European Communities, the Regulations set a time limit of four months for inferring rejection. The longer time limit is quite to the staff member's advantage, says the Organisation, because it allows for more thorough study of his case. In this instance the complainants acted with a haste that neither the importance nor the urgency of the case warranted. Their case should fail because they filed before exhausting the

internal means of redress.

8. Eurocontrol's submissions on the merits are subsidiary. It denies breach of the rule against retroactivity: it fully informed the complainants of the arrangements for reducing pay in office notice 11/88 of 8 April 1988, long before the start of the period that the docking of the refund in their pay slips relates to.

9. Eurocontrol denies disregarding the rulings in Judgment 963. It paid back the sums wrongfully withheld to the complainants in that case and even to other staff. It went further: it paid back sums withheld for the 1987-88 school year, which had not been at issue. And the complainants can scarcely make out that the Tribunal did not, as to the future, confirm by implication the lawfulness of putting a check on the refund of education expenses.

10. After seeking to refute the complainants' other pleas the Organisation maintains that there is nothing unlawful about the policy of holding pay rises in check. There are indeed several sound reasons for the policy, such as changes in the Organisation's work made by the Protocol that amended the Eurocontrol Convention and came into force on 1 January 1986, the more frequent exchange of staff with national administrations and the need to cut the costs of services to member States and other customers. Alignment with pay in the European Communities is just a practice, not a staff right. It was always approximate and it goes on anyway, even after the reductions. Lastly, the reductions are not in breach of the staff's acquired or essential rights since they are too small to disrupt the structure of contracts of service.

### Receivability

11. All that need be said in answer to the Organisation's comments on receivability is the following. A complaint is receivable under VII(3) where the Administration fails to take any decision upon the claim within sixty days of the date of notification of it. Once an organisation has accepted the Tribunal's Statute it may not derogate from VII(3) by dint of internal rules of its own. The only difference Eurocontrol's own Staff Regulations may make is that it is estopped from objecting to receivability when, in reliance on its own time limit, a staff member has filed a complaint that would be receivable under its Staff Regulations but out of time under VII. (See also Judgment 1095 (in re Gilles) delivered this day.)

12. Since the complaints have met the requirements of VII and the time limits therein the plea of irreceivability fails. The Organisation's belated decisions expressly rejecting the appeals do not alter the substance of the dispute, which turns on the rejection to be inferred from expiry of the time limit in VII(3).

### The pleadings

13. To obtain further submissions on the case the Tribunal puts the following questions to the Organisation so as to elicit information on the reasons and justification for the reduction the complainants are objecting to.

14. A recurring theme of the case law is that a reduction in pay may not be so great as to disrupt the structure of the terms of appointment and that there must be sound reasons for it: see for example Judgments 726 (in re Andres (No. 2) and others) and 825 (in re Beattie and Sheeran).

15. As was said in 10 above, the Organisation has given three reasons for the reduction:

- (a) a reduction in its workload due to amendment of the Eurocontrol Convention by the Protocol,
- (b) the rotation of staff between Eurocontrol and national administrations and
- (c) the need to cut the costs of services to member States and other customers.

16. To carry out its policy Eurocontrol has time and again altered the percentage rates of reduction without the slightest explanation: it put the rate up from 0.7 to 0.85, then to 1.25, and lastly to a figure of 1.53 per cent, and even that is provisional.

17. Over the years, too, decisions have been consistently retroactive. Thus the Permanent Commission's decision of 7 July 1987 was retroactive to 1 July 1986, office notice 11/88 of 8 April 1988 to 1 July 1986 and 1 July 1987, office notice 28/88 of 8 December 1988 to 1 July 1987 and the circular of 25 August 1989 to 1 July 1988.

18. Lastly, the Tribunal comments on two of the Organisation's pleas.

One is that the reduction has but little effect on pay. That seems to be at odds with the view that it is helpful in achieving the set purposes of adaptation to a new workload, easier rotation of staff and cheaper services.

Secondly, though it professes independence of the European Communities in staff matters, Eurocontrol defines the reduction in pay by reference to levels of pay in the Communities.

The Tribunal wants fuller explanations on both points.

19. Since all these are weighty issues and the submissions do not provide all the information a ruling requires, the Organisation is asked to make further submissions.

First, it shall supply full sets of the Permanent Commission's decisions on reduction in pay and of the measures the Director General has taken to put them into effect, together with information on the dates at which the reductions have actually been applied.

Secondly, it shall answer the following questions:

(1) What relevant amendments were made in the Eurocontrol Convention as from 1 January 1986, the date at which the Protocol came into effect? What reforms have been made in the Agency's structure and in the duties of its staff to enable it to cope with its new workload? Have the changes touched everyone alike or just some categories or grades of staff? What connection is there between the flat percentage reduction in all levels of pay and the possibly shifting requirements of the changes?

(2) How can the reductions already applied make for easier exchange of staff with national administrations?

(3) What services does Eurocontrol give member States and other customers? How does it set the costs and just what effect does the reduction have on them? How does the assertion that the reduction has negligible effect on pay square with the aim of cheaper services?

20. For all the foregoing reasons the present judgment is an interlocutory one, the purpose being to allow Eurocontrol time to answer the questions in 18 and 19 above. Rulings on the complainants' pleas and on their claims to damages for moral injury and to costs are reserved.

DECISION:

For the above reasons,

1. The complaints are declared receivable.

2. The Organisation shall file by 11 March 1991 replies to the Tribunal's instructions and questions set out above; the complainants may in turn comment by 10 April 1991 and the Organisation may submit a final brief by 3 May 1991.

3. All the other issues are reserved.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner

