

SEVENTY-FIRST SESSION

***In re* BOLAND (No. 5),
DE GROOTE (No. 2)
and LEFEBVRE (No. 2)**

Judgment 1122

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Pierre Boland and the second complaints filed by Mr. Pierre De Groote and Mr. Pierre Lefebvre against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 August 1990 and corrected on 8 October, the Agency's reply of 20 December 1990, the complainants' rejoinder of 21 February 1991 and the Agency's surrejoinder of 7 March 1991;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering the applications to intervene filed by:

E. Abel

J. Abramowski

A. Abts

D. Aelvoet

K. Albert

A. Albertini

H-R. Altmann

J. Andriese

R. Angermeyer

H. Ansorge

L. Aridjis

F. Arrasse

B. Bams

A. Barnby

S. Basu

B. Baudier

M. Baudot-Zimmer

J. Beaufils

H-W. Becker
J. Beckers
B. Bedetti
D. Bell
B. Bercq
H. Bergevoet
J. Berthommier
M. Besson
J. Beyer
M. Biardeau
F. Bidaud
N. Bisdorff
R. Blau
L. Bleyens
B. Bocquillon
J. Bodar
H-J. Bolz
C. Bonadio
A. Bonne
H. Bons
F. Bontems
A. Booy
R. Borré
B. Böttigter
M. Borsu
A. Bos
J. Bouillier-Oudot
R. Braun
C. Breeman
C. Breeschoten
T. Brennan

O. Brentener
V. Brown
L. Brozat
M-N. Brun
H. Buck
W. Buckschewski
A. Bulfon
H. Burgbacher
F. Caloo
F. Carrara
F. Carson
B. Cassaignau
L. Cassart
M. Castenmiller
R. Celis
L. Charon
R. Charpantier
C. Chauveau
M. Chauvet
N. Chichizola
P. Chudant
W. Claessens
L. Clarke
N. Clarke
G. Coatleven
C. Collignon
J. Collignon
M. Coolen
E. Corsius
J-M. Cosyns

P. Cracco
P. Crick
A. Cuveliers
H. Czech
P. D'Haese
M. Da Silva
C. Dagneau
F. Dahlbuedding
F. Daly
D. Danaux
H. Dander
B. Darke
H. David
P. David
A. Davister
V. Day
J. De Beurs
W. De Boer
J-M. De Boever
J. De Keukelaere Meyer
P. De La Haye
J. De Lange
M. De Ligne
W. De Love
A. De Monte
J. De Poorter
I. De Riemaeker Luppens
L. De Schepper
A. De Vos
J. De Winter
P. De Zeeuw

J-M. Debouny

G. Debruyn

J. Decarnière

J-M. Dechelle

C. Degenaar

J. Degrand

R. Dehouwer

H. Delachaux

J. Delwarte

P. Demelinne

J. Demesmaeker

W. Depouillon

J. Dessart

E-M. Deter

F. Detienne

F. Devillières

H. Devry

V. Dick

J. Dickmann

P. Domogala

D. Dörr

J. Douplat

J. Doyle

L. Driessen

G. Drost

E. Dubiel

S. Dubuisson

D. Dugailliez

F. Dupont

M. Durasse

U. Eckert
C. Edeb
D. Edgerton
P. Emering
R. Engels
H. Englmeier
A. Enright
R. Erdmann
C. Esslemont-Richez
I. Evans
R. Evans
H. Evers
H-J. Exner
T. Fagulha
G. Fairfax Jones
M. Falk
G. Falkenstein
J. Falkingham
Y. Fauchot
F. Faurens
U. Feldner
A. Feyder
R. Feyens
J. Fiers
R. Fisch
J-L. Flament
P. Flick
J-P. Florent
M. Fontaine
G. Fortin
J. Fortin

J-P. François
Y. François
G. Frost
J. Frusch
C. Fuchter
G. Gabas
C. Galeazzi
M-T. Garzend
G. Gaveau
G. Gaydoul
F. Gehl
O. Geigner
A. Geirnaert
M. Gérard
M. Germans
L. Geurten
M-T. Gilles
R. Gillis
K. Glover
J-P. Godde
I-D. Goossens
D. Gordon
W. Gorlier
L. Götting
H. Göttling
W. Göttliger
M-J. Graas
M. Grebien
W. Gribnau
R. Grimmer

E. Groschel
A. Gruenewaelder
M-T. Guérin
T. Guldemont
A. Guyot
K. Haage
W. Haarmann
J. Haine
J. Haines
C. Hantz
G. Harel
H. Hauer
D. Hedley
H. Heepke
J. Hein
G. Heinz
J. Heller
G. Hembise
G. Hepke
E. Heppner
H. Herbert
H. Hering
H-J. Hermanns
M. Hervot
R. Hess
M. Hitchcock
E. Hochstein
G. Hody
H-J. Hoeld
E. Hofmann
G. Horsman

G. Hostyn

J. Hougardy

E. Huebsch

H. Huizer

Marcel Jacobs

Matheus Jacobs

W. Jagemann

E. Jamez

R. Janssens

S. Janssens-Verreth

F. Joris

A. Jourdain

K-D. Jung

P. Kaisin

A. Kalkhoven

H. Kaltenhäuser

G. Karran

L. Kelly

N. Kieffer

W. Klaes

G. Klawitter

H. Klos

U. Kluvetasch

T. Knauss

J. Koch

H. Koot

F. Krella

L. Kroll

J. Kuijper

H. Kunicke

M. Laine

G. Lambert

L. Lambrechts

L. Lang

P. Lascar

D. Laurent

G. Lauter

C. Leclerc

J. Leclère

M-C. Leduc

Y. Lefèbvre

F. Legrand

W. Leistico

E. Lejeune-Dirichlet

L. Lelarge

W. Lembach

M. Lenaerts

M. Lenglez

J. Lenzi

Y. Leroux

C. Licker

D. Liesert

A. Liewen

H. Liss

W. Lockner

L. Loeser

R. Lucas

W. Lumpe

J. Maes

P. Maes

J. Mager

S. Mahony
D. Maillet
J-P. Majerus
R. Maloney
B. Marschner
C. Martens-Servaes
J. Martin
J. Martins dos Santos
C. Massie
C. Massinon
G. Mathieu
M. Mathieu
D. Mauge
P. Maurus
E. McCluskey
J. McNeill
P. Meenhorst
N. Mehrtens
C. Meier
A. Meloen
J. Meredith
E. Merklinger
W. Mesman
E. Meyenberg
B. Meyer
B. Michaux
M. Minner
M. Mommers
P. Montenez
A. More

R. Mühlstroh
B. Neher
C. Nelissen
H. Neumann
M. Nicolay
C. Niesing
A-M. Nieuweling
J. Nuyt
L. Olivier
G. Ostertag
J. Oury
H. Parvais
K-U. Pawlicz
G. Peerbooms
B. Peeters
P. Peeters
R. Peiffer
R. Perry
M. Pesty
C. Petit
E. Petit
P. Petitfils
W. Petter
A. Peyrat
V. Pfeiffer
P. Philips
E. Phillips
M. Picard
J-F. Pieri
R. Pierrard
C. Poinot

J-M. Pomeret

M. Pommez

P. Praet

V. Priplata

J. Prochasson

C. Prosser

M. Prosser

B. Puthiers

L. Putz

L. Rabozée

J. Raes

M-C. Ragot

H. Rakete

M. Reck

J-L. Renteux

J-J. Richer

A. Ritchie

G. Riu

C. Robijns

M. Roebroeck

J. Roelofsen

J. Ronk

G. Rossignol

F. Roth

J. Roulleaux

G. Roumajon

E. Rousée

J-M. Roussot

J-P. Rue

B. Runacres

Alain Rutherford

Alexander Rutherford

J-C. Salard

R. Sampoux

P. Sargent

J-J. Sauvage

J. Sawtell

G. Scheltien

J. Scheu

J. Schiettekatte

P. Schmutz

G. Schneider

H. Schneider

U. Schoeke

G. Schoeling

M. Schoeling-Veys

K. Scholts

J. Schraa

H. Schroeter

A. Schuh

M. Schwaller

K. Seipke

A. Sena

M. Severac

K. Seybold

W. Sieg

L. Sillard

W. Sillevis

G. Sizun

F. Skerhut

P. Slingerland

P. Smith
L. Smulders
M. Sneyers
E. Soehnle
J. Sondt
D. Spragg
S. Starlander
B. Stefens
F. Steijns
E. Steiner
W. Steiner
A. Stickland
J. Storms
E. Stuhlsatz
A. Sunnen
B. Swinnen-Stappaerts
A. Talboom
E. Talboom
E. Tant
E. Taylor
R. Thacker
J. Thiecke
J-P. Thiel
A. Thill
R. Tielemans
H. Tielker
J. Timmermans
C. Tovy
J-C. Tumelin
M. Turcan

R. Ueberhofen
J. Uhl
A. Urlings
V. Vachiery
B. Valdenaire
J. van Belle
G. van Campenhout
R. van Cauwelaert
H. van De Vorst
A. van Den Broeck
E. van Den Heuvel
C. van Der Flier
M. van Der Sluis
G. van Dijk
A. van Dooren
S. van Dronkelaar
J. van Eck
E. van Eupen
T. van Hal
M. van Hemelrijck
F. van Landuyt
A. van Loveren
J. van Raayen
J. van Riemsdijk
T. Vandamme
H. Vanden Bosch
C. Vandenbergh
B. Vandenbergh-Vaury
J-P. Vanderspikken
D. Vanderstraeten
E. Vanschönwinkel

M. Vatinel
K. Vent
P. Vercruijsse
P. Vergauts
F. Vergne
J. Verlinden
H. Vermaesen
F. Vermoesen
M. Verschelden
L. Verwilt
W. Viertelhauzen
Y. Viroux
P. Visser
C. Vodak
J-C. Vollant
N. Vrancken
E. Vreede
F. Wagner
W. Warner
E. Watkins
J. Watson
H. Weis
G. Wendling
F. Werthmann
P. Wildey
M. Wildner
R. Wilkening
J-P. Willox
D. Winkler
F. Wissink

J. Wolynski

P. Wood

M. Woods

R. Xhrouet

D. Young

J. Zabka

H. Zandvliet

W. Zieger

J. Zipp

R. Zöllner

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 92 and 93 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. At its 62nd Session, on 7 July 1983, the Permanent Commission of the European Organisation for the Safety of Air Navigation decided to bring in by stages a 5 per cent differential between net pay at Eurocontrol and net pay in the European Communities.

At its 71st Session, on 7 July 1987, the Commission decided to make the first reduction by 0.7 per cent from 1 July 1986. It gave the decision its final approval on 12 November 1987. The application of that measure gave rise to complaints on which the Tribunal ruled in Judgment 1012 (in re Aelvoet No. 2 and others) of 23 January 1990. The ruling set aside "The pay slips issued by Eurocontrol before the Permanent Commission's decision of 12 November 1987 took effect ... insofar as they reduce staff pay by 0.7 per cent".

On 30 March 1988 the differential was raised to 0.85 and 1.25 per cent and again on 22 November 1988, at the Commission's 74th Session, to 1.53 per cent as from 1 July 1987. The Commission confirmed the increase to 1.53 at its 75th Session, on 4 July 1989. At the same session it decided to hold the differential at 1.53 per cent as from 1 July 1988 until fresh adjustment of cost-of-living weightings offered scope for a further increase in the differential.

The complainants are officials of Eurocontrol. On 6 April 1990 they filed internal "complaints" seeking the "quashing of cuts in their pay from 13 November 1987 to September 1989". Having got no answer from the Administration they filed the present complaints on 27 August 1990 against the implied decisions to reject their claims.

B. The complainants submit that even though they are challenging reductions in salary from 13 November 1987 to 30 September 1989 their complaints are receivable because Judgment 1012 is a new fact.

They could not in good faith have foreseen that the Tribunal would not rule on the claim in their earlier complaints to a declaration that any reduction was inherently unlawful. The breach of trust was therefore the greater in that when rejecting their internal "complaints" of September 1987 Eurocontrol never contended that the reduction lacked a basis in law because the Commission's decision was still provisional. Not until June 1989, when filing further submissions on those cases at the Tribunal's request, did the Organisation first put forward that plea.

The complainants put forward several pleas on the merits.

Eurocontrol has offended against the res judicata rule by not applying Judgment 1012 properly. After that judgment

it should have paid back not only the sums withheld between 1 July 1986 and 12 November 1987 on account of the 0.7 per cent reduction but also those withheld at higher rates of reduction. By going ahead with deductions from pay in circumstances like those in which it had made them from 1 July 1986 to 12 November 1987 Eurocontrol committed the same unlawful act the Tribunal had declared it guilty of in Judgment 1012. Every single decision on the different stages of the reduction was retroactive and so every reduction based on one of those decisions is unlawful.

Since some officials, for example at grade C5, were unaffected by the reduction, the breach of equal treatment is blatant.

The reductions were flawed in other ways as well: they were not substantiated; they were in breach of the rules on the reckoning of pay at Eurocontrol; they impaired acquired rights; and they were in breach of the trust the staff reasonably put in the Organisation.

The complainants believe that they are entitled to damages for the moral injury Eurocontrol's attitude caused them; the Organisation's policy of not answering their internal "complaints" offended against the spirit of adversarial procedure and set off a spate of litigation.

They ask the Tribunal to quash all the Director General's decisions applying the "Eurocontrol reductions" to pay from 13 November 1987 to September 1989, to order the refund with interest of all sums unlawfully withheld and to award them one franc in token damages for moral injury. They claim costs.

C. In its reply Eurocontrol objects that the complaints are time-barred and therefore irreceivable. Judgment 1012 is not a new fact that removes the bar. There was no excuse for not anticipating that the Tribunal might endorse the defendant's plea of irreceivability in its replies of 29 June 1988 to the complaints that Judgment 1012 ruled on. A judgment will set off a new time limit only where it brings to light some new fact unforeseeable at the time of filing the original case, not where, as in this instance, it rests on general principles of law.

Besides, if Judgment 1012 were treated as a new fact, so must be Judgment 963 of 27 June 1989, in which the Tribunal set aside the decision to "restrain" education expenses retroactively and in which Mr. Boland was an intervener. On that assumption the complainants should have filed their internal "complaints" within three months of 28 June 1989.

The Organisation's replies to the complainants' pleas on the merits are subsidiary.

It maintains that it did not offend against *res judicata* but executed Judgment 1012 in good faith; indeed it went further and granted the whole staff the sums the Tribunal had ordered it to pay for the period from 1 July 1986 to 30 November 1987.

Contrary to what the complainants allege, the "reductions" were set aside, not as such, but only insofar as they were retroactive.

The case law of the Court of Justice of the European Communities applies *mutatis mutandis* to Eurocontrol. In a judgment of 30 September 1986 (in *re Ammann and others*) the Court held that the method of adjusting pay retroactively was necessary and therefore lawful and that staff had no right to any rise in pay until the competent bodies had approved it and determined the amount. In this case retroactivity is the inevitable outcome of taking account of fluctuations in national pay and prices over a past period of time. Besides, pay at Eurocontrol has never actually fallen but has consistently risen: the rate of increase has just been lower than in the European Communities. But a decision to adjust pay in the Communities has no effect in Eurocontrol: its staff will be entitled to higher rates of pay only when the Permanent Commission has agreed and determined the amount.

Though there was indeed no restraint on the pay of some officials at grade C5, that was because Eurocontrol was complying with the principle, provided for in the Staff Regulations, of protection of their minimum livelihood. But that is of no help to the complainants' case since they are paid three or four times more than C5 staff.

Their other allegations of flaws are also unsound. The reduction was warranted by changes in Eurocontrol's functions, by the policy of having more frequent exchanges of staff with national administrations and by the need to cut the costs of services to States and others; it was not in breach of any legal rule; the case is about adjusting pay, not an acquired right to pay; and the notion of trust is immaterial.

It is not the complainants but the Organisation that has suffered both moral and indeed material injury because of the volume of litigation.

D. In their rejoinder the complainants maintain that not until 13 June 1989 did Eurocontrol first object to the receivability of the cases ruled on in Judgment 1012 on the grounds that the Commission's decision was provisional. So the complaints they filed against the implied decisions to reject their claims are receivable. They point out that the Organisation has yet again failed to explain to staff what means of redress were available.

They answer each of the defendant's pleas on the merits. In particular they observe that since the very beginning it has been Eurocontrol's practice to maintain parity in net pay with the European Communities. Most of the staff are performing the same duties as before and the Organisation's budget is on the increase. They also take up a plea advanced in several other complaints, namely that the retroactive revision as from 1981 of the cost-of-living weightings ought to have cancelled the reductions.

E. In its surrejoinder the Organisation maintains its earlier objections to the receivability of the complaints. It contends that the complainants may not plead ignorance of the internal means of redress available to them, since Articles 92 and 93 of the Staff Regulations - a copy of which is given to everyone on recruitment - are quite explicit on the subject.

Eurocontrol enlarges on its arguments on the merits.

CONSIDERATIONS:

1. The complainants, who are on the staff of Eurocontrol, seek the quashing of all the decisions which the Director General took to apply the so-called "Eurocontrol reduction" to their pay after 12 November 1987: see Judgment 1012 (in re Aelvoet No. 2 and others). They want repayment of the sums wrongfully withheld up to September 1989, plus interest, and awards of moral damages and costs.
2. They observe that in that earlier case, which they were party to, the Tribunal declined to rule on the lawfulness of the reductions, as they had asked; instead of entertaining their main claims it ruled only on the provisional and retroactive force of the impugned decisions in the light of a plea the Organisation had not entered until filing its surrejoinder.
3. They therefore submit that Judgment 1012 is of relevance to their case in two ways. First, its authority as *res judicata* applies to all later increases in the rate of reduction which were put into effect in the circumstances set out in the judgment, under 7. Secondly, the time limits for filing a complaint were suspended throughout the proceedings that culminated in that judgment. The judgment is a "new fact" which, in the complainants' submission, enables them to raise again the issues which the Tribunal declined their former invitation to rule on.
4. Judgment 1012, which was published on 23 January 1990, prompted the complainants to lodge new internal appeals on 6 April 1990 for the purpose of obtaining the reversal of decisions to withhold sums from their pay after 12 November 1987 at successive rates of 0.7, 0.85, 1.25 and 1.53 per cent. Having got no answer, they filed the present complaints on 27 August 1990. There are 516 applications to intervene.
5. Eurocontrol submits that the complaints are not receivable.

The complaints are challenging pay slips, of which the latest date back to September 1989, and they were filed on 27 August 1990, long after the time limits had expired.

Judgment 1012, which the complainants cite, ruled on the lawfulness of pay slips issued to several staff members before the Permanent Commission took its decision of 12 November 1987.

That judgment is final and has the authority of *res judicata*, including the ruling in it that certain claims are irreceivable. On no account may it be treated as a new fact setting off a new time limit for filing a complaint.

The complaints are therefore irreceivable.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

DISSENTING OPINION BY MR. PIERRE PESCATORE

I am sorry that for the reasons I give in my dissenting opinion in Judgment 1118 (in re Niesing No. 2 and others), also delivered this day, I disagree with the other members of the Tribunal. I have a further comment on this judgment.

The case is a very striking illustration of the untoward effects Eurocontrol's law-making process may have. In the cases on which the Tribunal has ruled in turn in Judgments 902, 961, 963 and 1012 the complainants have all along been holding to the same line of argument in support of their challenge to the reduction in their pay.

The Organisation's law-making process being such as it is, the Tribunal has never been able to go into the merits. I believe that in all fairness we ought to have disallowed the defendant's objections to receivability. Throughout the dispute it has acted in constant breach of good faith and of the duty of considerateness it owes its staff. As I see it we ought at some point to have gone into the pleas the complainants have been putting forward for years - to no avail - instead of just rejecting them for lack of competence. The tribunals of the international civil service must be especially mindful of the need to protect legitimate staff interests from cavalier treatment at the hands of intergovernmental authorities like Eurocontrol which imagine they are immune to judicial review.

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

Delivered in public in Geneva on 3 July 1991.

(Signed)

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