Registry's translation, the French text alone being authoritative.

EIGHTY-SIXTH SESSION

In re Salard (Nos. 2 and 3)

Judgment 1814

The Administrative Tribunal,

Considering the second complaint filed by Mr. Jean-Claude Salard against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 25 October 1997, Eurocontrol's reply of 6 February 1998, the complainant's rejoinder of 24 February and the Organisation's surrejoinder of 29 May 1998;

Considering the third complaint filed by Mr. Salard against the Organisation on 18 December 1997 and corrected on 5 January 1998, the Organisation's reply of 9 April, the complainant's rejoinder of 5 May and the Organisation's surrejoinder of 21 August 1998;

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 two complaints raise the same issues and should therefore be joined to form the subject of a single judgment;

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

A. The complainant, a Frenchman who was born in 1940, joined the staff of Eurocontrol in 1965. At the material time he was an expert at grade A5 at its Experimental Centre at Brétigny-sur-Orge in France.

In December 1996 his mother went into a geriatric hospital and in February 1997 she was to become a "long-term" patient there. Some of the costs were to be met by French social security, but about 15,000 French francs a month were not. Towards that amount would go his mother's pension, but as the only other person sharing liability the complainant still had to pay the balance of 7,000 francs a month. He applied in vain to French social security for help. His mother's admission as a long-term patient was held over to November 1997.

On 7 February 1997 he wrote a letter to a member of section 2.1 of the Human Resources Directorate of Eurocontrol. He said he wanted to "know what steps to take" to have his mother treated as a dependent child. By a memorandum of 10 March the head of the section answered that for him to qualify the cost of his mother's upkeep must be "more than one-fifth of the figure of [his] pay that was subject to the internal levy of the European Union"; and on the strength of the figures he had given he did not qualify for the dependant's allowance for his mother. He objected in electronic-mail messages, but the Director of Human Resources confirmed the refusal in a memorandum of 27 May 1997.

By a minute of 3 June 1997 he filed a "complaint" with the Director General asking to have his mother treated as a dependent child. The case went to the Joint Committee for Disputes. The Committee never met but dealt with it by correspondence. In a report dated 23 October 1997 which bore only its chairman's signature it unanimously recommended rejection. On 25 October the complainant filed the earlier of the present two suits - his second - challenging what he took to be the rejection of his claims. By a letter of 30 October 1997, the decision impugned in his other complaint - his third - the Director of Human Resources rejected his appeal on the Director General's behalf.

B. In his second complaint Mr. Salard contends that the refusal of 10 March 1997 should have come from the Director General, not from a head of section. He sees the reckoning by the head of section 2.1 as a "travesty". It enlisted a method not prescribed in any official Eurocontrol document. He says that in making the calculations the head of section should not have set a ceiling at 15,995 Belgian francs a month: the actual costs came to some 15,000 French francs, the equivalent of 90,000 Belgian francs. The material text was office notice 41/72 of 31

October 1972 - and he did not see it until September 1997 - not the "trumped-up" one, No. 15/97, of 15 September 1997.

He asks the Tribunal "to determine whether or not the claim he put to Eurocontrol is sound" and "since allowing it would hold good for only one year ... what should happen thereafter".

Citing precedent, he objects in his third complaint to the failure of the Joint Committee for Disputes to meet. Only by correspondence did its members take up his case and, in breach of the rules, it neither met nor deliberated. The Committee's report was a text that the Director of Human Resources "drafted beforehand". It was for the Director General, not the Director, to sign the final decision. Eurocontrol got the reckoning wrong. The ceiling it set on the refundable amount was arbitrary.

The complainant seeks the quashing of the decision of 30 October 1997, an order that his mother be treated as a dependent child, the rejection of Eurocontrol's mode of reckoning and an award of 35,000 Belgian francs in costs.

C. In its replies Eurocontrol submits that the second complaint is irreceivable: it "fails to meet rudimentary formal requirements" because the brief is just a "catalogue of general strictures and grievances". Also irreceivable are the claims to the continuance of derogation from the rules and to rejection of the mode of reckoning. Such decisions are general measures of a kind that is at the Director General's sole discretion and would mean ruling on how to handle the case henceforth.

On the merits the Organisation points out that the answer to the complainant's inquiry, though it came from someone competent to give it, was no decision. Though the circular of 1972 did apply to his case, in its method of reckoning Eurocontrol followed the analogy of rules in the European Union. No right may he assert to have his mother treated as a dependent child, that being allowed only "exceptionally". The precedents he is relying on are irrelevant. It is hard to get the Joint Committee for Disputes to meet but there was nothing wrong with its disposing of the case by correspondence. The Director General had empowered the Director of Human Resources to sign the decision. The complainant's innuendo about the Director is inadmissible.

D. In his rejoinders the complainant contends that his letter of 7 February 1997 was not just an inquiry but, as Eurocontrol has acknowledged more than once, a request that it treat his mother as his dependant. Citing Judgment 1095 (*in re* Gilles), he maintains that it was not free to rely on rules of another organisation that it had never itself published. It took a fictitious rate of exchange so as to deny his claim. The method of reckoning it has advocated before the Tribunal is not at all the one it actually followed in his case. It should have taken the figure of actual costs in making its calculation and asked him to fill up the questionnaire in the schedule to the office notice of 1972. It was not in earnest over getting the Joint Committee to meet. It refused to let him see his personal file. Having the Director of Human Resources sign the decision made him "both party and judge" and deprived the complainant of his right of appeal to the Director General.

E. The Organisation presses its pleas in its surrejoinders. It contends that Judgment 1095 is irrelevant because the Director General has discretion in treating someone as a dependant. The rate of exchange it applied was in the complainant's favour, and it has not advocated more than one method of reckoning. Keeping its social security scheme healthy requires limits on payments. What it refused the complainant was, not access to his personal file, but the right to attend the Committee's discussions, which are privileged. It was in order for the Committee to deal with his case by electronic-mail messages.

CONSIDERATIONS

1. The complainant is an expert at Eurocontrol's Experimental Centre at Brétigny-sur-Orge in France. His mother went into a geriatric hospital near Paris as a "medium-term" patient. When she was to become a "long-term" one the hospital told him that he must discharge his statutory duty as her descendant to pay towards her upkeep. He put at some 7,000 French francs a month the amount he himself would thus be liable for. On 7 February 1997 he wrote asking a member of section 2.1 of the Human Resources Directorate to let him "know what steps to take" to benefit under Article 2.4 of what he called the "rule of application about recognised dependants". The article so numbered of Eurocontrol's Rule No. 7 concerning remuneration reads:

"Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child, by special reasoned decision of the

Director General, based on supporting documents."

2. The head of section 2.1 of the Directorate took the complainant's letter to be an application for having his mother treated as a dependent child. She answered in a memorandum of 10 March 1997 that he was not entitled to payment of the dependant's allowance: to qualify for payment he must be paying towards the cost of his mother's upkeep the equivalent of "more than one-fifth of the taxable earnings of an official of the European Union at the same grade and with the same family responsibilities"; and he was not.

3. In a memorandum of 27 May 1997 to the complainant the Director of Human Resources confirmed that refusal. On 3 June he appealed to the Director General; his case went to the Joint Committee for Disputes; and on 30 October 1997 the Director conveyed to him on the Director General's behalf the rejection of his appeal.

4. He lodged the first of the present two complaints on 25 October 1997 against the rejection he had inferred of his appeal of 3 June 1997; and the other one on 18 December 1997 against the express refusal of 30 October 1997, seeking rejection of Eurocontrol's mode of reckoning the sort of "heavy expenditure" that warranted grant of the dependent's allowance under Article 2.4. He claims costs.

5. Eurocontrol argues that the first of the complaints is irreceivable for not even challenging rejection of what was anyway just an enquiry. But the objection fails because Eurocontrol did reject the complainant's internal appeal after referral to the Joint Committee for Disputes. The Organisation is again wrong in contending that the complainant failed to cast his claims in clear enough terms or to offer a proper account of the facts or proper pleadings. Lastly, he may challenge not so much the text of the office notice that Eurocontrol applied to his case as the lawfulness of it and the mode of reckoning, even though, as the defendant contends, the Tribunal will utter no injunction.

6. Besides being receivable the complaints succeed on the merits. To be sure, there is no substance to the complainant's plea that the signatories of the letters of rejection were acting *ultra vires*: the Director General had duly empowered them to impart the final decision. But that decision does suffer from two obvious fatal flaws.

7. It was on the Joint Committee's unanimous recommendation that the Director General rejected the appeal of 3 June 1997. The Organisation says that, though the members of the Committee never forgathered, they conferred by correspondence and managed to go into the case by dint of "a multiplication of messages that was tantamount to deliberations". It points out that the Committee's standing orders - office notice 6/95 of 1 March 1995 - do not stipulate that its members must all meet at once; "it is not always easy" - it makes out - "to bring together half-a-dozen people from different units" and "a structural overhaul of the Organisation in 1997, at its height in June", accounts for the Committee's not actually meeting.

8. The Organization's plea is wrong: article 3 of the schedule to office notice 6/95 does say that the Committee "shall meet", and it meets only if "all the full members, or in their absence the alternate members, are present". On that score alone there was breach of due process and the impugned decision cannot stand.

9. But it is flawed on the merits too. The Organisation acknowledges that at the material time the texts to be applied were Article 2.4 of Rule No. 7 and office notice 41/72. According to the office notice a staff member who is incurring heavy expenditure on someone's upkeep may apply for the dependant's allowance on that account, and in entertaining the application Eurocontrol will pay due heed to such things as the presumed and actual cost of "maintenance". But no more is said as to how the competent authority must exercise discretion in the matter. It is plain on the evidence that in this and in all earlier such cases Eurocontrol simply borrowed the European Union's mode of reckoning. Though the Director General does have discretion, the staff member must be made aware of any criteria he is applying: see Judgment 1204 (*in re* Andersson and others). Here Eurocontrol had never told its staff that its abiding policy was to follow the rules of the European Union. It did put out office notice 15/97, which vouchsafed that that was what it was doing, but it explained that it was applying the Union's rules "by analogy". That is an approach the Tribunal condemned in Judgment 1095 (*in re* Gilles): an organisation must put on its own Staff Regulations and Rules "the construction they are designed and intended to bear and it may not borrow rules from other organisations".

10. The upshot is that the impugned decision must be set aside and the case go back to Eurocontrol for a new decision on the complainant's claims. He is awarded 35,000 Belgian francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 30 October 1997 is set aside.

2. The case is sent back to Eurocontrol for a new decision on the complainant's claims.

3. Eurocontrol shall pay him 35,000 Belgian francs in costs.

4. His other claims are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

A.B. Gardner

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