

The Administrative Tribunal,

Considering the complaint filed by Mr I. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 7 June 2002, Eurocontrol's reply of 13 September, the complainant's rejoinder of 25 October 2002, and the Agency's surrejoinder of 31 January 2003;

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

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

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

A. The complainant, a Danish national born in 1961, took up duties as a controller with Eurocontrol on 16 January 1998. He was assigned to the Maastricht Upper Airspace Control Centre.

On 5 March he applied to the Eurocontrol Sickness Insurance Scheme for the direct payment of costs that would be incurred in connection with the birth of his child later that month. On 13 March the Sickness Fund informed him that it had approved his request. By a memorandum from the Sickness Fund dated 14 May 1998 the complainant was informed that 9,813 Dutch guilders had been paid to the hospital on his behalf and that the "difference between the amount paid and the amount indicated on [his] account [would] be deducted without notice from subsequent payments made by the Agency, including salaries, pensions and allowances"; he was also asked to "check the bill(s)" and to inform the Fund immediately of any discrepancy. His Sickness Fund account statement No. 1998/6009 of 27 May 1998 showed an amount of 6,610.75 guilders (which would have been refunded to the complainant if there had been no direct payment of costs to the hospital), and 3,202.25 guilders which remained at his charge. It included an explanatory statement that said: "This amount will be paid to you subject to the condition that any outstanding advances or amounts due will be recouped. A negative balance may be recovered from your salary without further notice". In December 1998 the amount of 6,610.75 guilders was transferred to the complainant's bank account. On 27 January 1999 an additional 1,341.28 euros was paid to him.

In a memorandum of 8 November 2001 the Sickness Fund informed the complainant that his account showed a negative amount of 9,813.00 guilders (4,452.95 euros) and that this amount would be recovered from his salary in four monthly instalments. On 5 February 2002 the complainant lodged an internal complaint with the Director General against the recovery of overpayment. The Sickness Fund Management Committee examined that complaint; it concluded that the complainant should have informed the competent service of the overpayment of 6,610.75 guilders and it recommended rejecting the complaint. On 12 July 2002 the Director of Human Resources informed the complainant on the Director General's behalf that his internal complaint had been rejected. That is the impugned decision.

B. The complainant asserts that when he received his bank statement in early 1999 indicating a transfer of 6,610.75 guilders from the Sickness Fund, he believed it to be a special reimbursement for high medical expenses in accordance with Article 72(3) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. When he was notified, nearly three years later, in November 2001 that this amount was to be recovered, he did not recall having received it. It was only when checking his bank statement against the notification that he realised that the sum had been paid by mistake. He argues that under Article 86 of the General Conditions of Employment overpayments are recoverable only if the recipient was aware that there was no due reason for the overpayment; he believed at the time that the payment received in 1999 was a reimbursement for high medical expenses.

He adds that when he received the statement showing that 3,202.25 guilders would remain at his charge he

protested to the Sickness Fund on the ground that he had insurance coverage at 100 per cent.

He claims the "return of recovered amount", reimbursement of cash advance fees incurred by him so that he could "cover for the missing amount" from his salary, 500 euros in compensation for time spent on preparing his case, 316 euros in "actual costs", and estimated costs of "125 euros per additional month".

C. The Agency replies that under Article 86 it has the right to recover overpayments. The complainant was informed several times that Eurocontrol would recover the overpayments; this was expressly mentioned in the memorandum regarding the direct payment of costs for his wife's hospitalisation, sent to him on 14 May 1998. It adds that the complainant "must have been aware" that he had received amounts that he had never disbursed and that the balance of 3,202.25 guilders would be recovered from his salary.

Furthermore, while acknowledging that the amount transferred to his bank account at the end of December 1998 constitutes an overpayment, he does not accept that it be recovered. Eurocontrol rejects his argument that he received it in good faith because he considered it to be a special reimbursement in accordance with Article 72(3). However, he had not yet satisfied the conditions set out therein to qualify for a special reimbursement. It argues that "the quite important amount" of the payment was such that "he could not have been unaware" of the overpayment. He had a duty of care to check the amount against the referenced document. He should have known that it was not a special reimbursement, because he had not satisfied the conditions that must be met for such reimbursements.

D. The complainant maintains that he believed the first transferred amount to be a special reimbursement. In addition to his wife's confinement he had requested prior approval for an operation which took place in June 1998. Authorisation for the operation had been refused by the medical adviser. The cost for the operation was 7,236.40 guilders; when the complainant received a transfer of money from the Sickness Fund several months later he "was content" to see that special reimbursements happen automatically. He argues that the Sickness Fund should have exercised due diligence before making the payment to him.

As for the payment of 1,341.28 euros, he said it is only recently that he had become aware of it; he claims that he had not seen the reference document for that payment before the Agency had submitted it with its reply.

He believed that there "was due reason" for the payments, therefore, he says, the recovery was not justified.

He presses his claim for the return of the recovered amounts but he renounces his claim for costs in view of his discovery that, by mistake, there had been two payments made to his account.

E. The Agency maintains its pleas. There was nothing that could have led the complainant to believe that the refusal to cover the costs of the operation had been reversed. It considers "not credible" that he did not notice the second overpayment. That payment was transferred to his bank account along with his salary, thus showing an amount 30 per cent higher than his average monthly remuneration; even if he had not received the reference documents at the same time, the higher amount should have triggered some suspicion. The facts surrounding the overpayments were patently such that the complainant could not have been unaware of them, and thus the recovery of undue sums was justified under Article 86.

## CONSIDERATIONS

1. The complainant contests Eurocontrol's decision to recover from his salary some overpaid amounts. On 13 March 1998 the Sickness Fund had approved his request for the direct payment of hospitalisation and medical costs to be incurred in connection with the birth of his child.

2. His internal complaint to the Director General and, indeed, his complaint to the Tribunal were based on the assumption that the claim for recoupment by the Sickness Fund was for a total amount of 9,813.00 Dutch guilders (4,452.95 euros) comprising an overpayment of 6,610.75 guilders (the first overpayment) and the amount of 3,202.25 guilders which was to be at his own charge for his wife's confinement. According to his rejoinder, it was only when he received Eurocontrol's reply in these proceedings, that the complainant became aware that 1,341.28 euros had been paid by mistake into his bank account at the end of January 1999 with his salary. The mistake apparently occurred when the Fund accepted that, save for a small amount, it should bear all the costs

associated with his wife's confinement. Instead of offsetting the amount of 1,341.28 euros, which was the balance in favour of the complainant, against the amount shown to be payable by him, the Agency paid him that amount.

3. Article 86 of the General Conditions of Employment provides that:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it".

4. In his internal complaint the complainant had objected to the recovery of the 4,452.95 euros overpayment in only four instalments, considering that his basic salary is 4,783.93 euros. An agreement should have been reached with him beforehand on the manner in which the amounts would be deducted from his salary.

5. He asked the Director General to stop the recovery of the overpayment and to order the immediate return of the amounts already recovered.

6. In his complaint filed with the Tribunal, he seeks the return of the recovered amount of 4,452.95 euros and costs. He withdrew his claim for costs in his rejoinder in view of his discovery that, by mistake, there had been two payments made to his account.

7. The Agency justifies the recovery of the undue payments by citing Article 86 of the General Conditions of Employment; that is, that in the case of both payments, the complainant was either aware that there was no due reason for the payment, or at least, that he could not have been unaware of the overpayment.

8. As for the payment of the first amount in issue, namely 6,610.75 guilders, it was clear that it related to the settlement of the hospital and medical costs. While the complainant acknowledges that it constitutes an overpayment which he received by mistake, he pleads good faith inasmuch as he believed it to be a special reimbursement in accordance with Article 72(3) of the General Conditions of Employment.

9. Eurocontrol asserts that this provision foresees a special reimbursement when the non-reimbursed portion of the expenses incurred exceeds, during any twelve-month period, half the average basic monthly salary plus the functional allowances. However, at the time the complainant's account was credited with the amount of 6,610.75 guilders on 1 January 1999, he had not yet been twelve months in service. Secondly, he had never requested a special reimbursement and accordingly there was no decision or any request as required under Article 8(5) of Rule of Application No. 10. Lastly, the balance left at his own charge for the year 1998 did not amount to half his basic monthly salary plus allowances, because nearly all costs related to the confinement of his spouse were, in the end, covered by the Sickness Fund at the rate of 100 per cent.

10. The circumstances surrounding the overpayment of 6,610.75 guilders were such that he could not have been unaware of it had he checked the amount against the referenced documents.

11. He was repeatedly notified that the difference between the amount paid by the Sickness Fund as an advance directly to the hospital and the amount regarded as his actual entitlement would be deducted from subsequent payments made by the Agency and that a negative balance might be recovered from his salary without further notice. He was therefore made aware that the amount paid directly to the hospital did not correspond to his entitlement to a reimbursement and that the balance on his account of 3,202.25 guilders would be recovered from his salary at a later stage.

12. The Tribunal comes to the conclusion that the complainant could not have been unaware of the first overpayment of 6,610.75 guilders. In fact, he acknowledges in his submissions that the payment was made to him by mistake, but argues that it should not have been recovered from him three years later. In other words, he pleads extinctive prescription on the grounds that the period within which the overpaid amount can be recovered has expired.

13. While it is a general principle of law that lapse of time may extinguish an obligation, the complainant has not cited any provision relative to recovery of overpayments in Article 86 establishing a prescriptive period beyond which the undue payments may no longer be recovered.

14. The circumstances regarding the erroneous payment of 1,341.28 euros require separate consideration. A Sickness Fund account statement of 6 January 1999 showed that it accepted full responsibility for all but a small

part of the costs of the confinement of the complainant's wife. It also showed that it would reimburse him the sum of 1,341.28 euros. However, the complainant claims not to have received that statement. Moreover, he argues that he was not aware that monies paid to him at the end of January 1999 comprised any amount other than salary and allowances then owed to him. That he was unaware of the erroneous payment is borne out by the terms of his subsequent internal complaint to the Director General and his brief in his complaint to the Tribunal. Moreover, the complainant contends that his failure to realise that the Sickness Fund had made undue payment to him in January 1999 is explicable because that was the first time his salary was paid in euros.

15. It should be accepted that the complainant was not aware, at any time prior to the receipt of Eurocontrol's reply in these proceedings, that the amount of 1,341.28 euros was mistakenly paid to him. However, Article 86, upon which he relies, does not preclude recovery on the basis that the recipient is not aware that an overpayment has been made. The relevant question is whether he is aware that "there was no due reason for the payment".

16. Once the fact of the payment of 1,341.28 euros became known to the complainant, he realised that it had been made by mistake, as he concedes in his rejoinder, and became aware that "there was no due reason" for it. Thus, it is recoverable by the Sickness Fund.

17. It cannot be denied that there was some degree of negligence on the part of both the Agency and the complainant. However, in all the documents, including a form signed by the latter, he could not have failed to read the caveat that discrepancies may lead to deductions from salary without notice. It therefore behoved him to take extra care and be vigilant in reviewing statements of account from the hospital, the Sickness Fund and his bank.

18. The Tribunal takes into account that the execution of the recovery of the undue payments implemented by Eurocontrol was over a period of four months so as not to impose a heavy burden on the complainant.

19. The Agency was justified in recovering the payments which had been made to the complainant erroneously upon proof that the conditions laid down in the General Conditions of Employment had been met.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mrs Florida Ruth P. Romero, Judge, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

Florida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet