Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S.

v.

Eurocontrol

120th Session **Judgment No. 3497**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 15 February 2013 and corrected on 17 April, Eurocontrol's reply of 9 August, the complainant's rejoinder of 17 October 2013 and Eurocontrol's surrejoinder of 23 January 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the refusal of her request that her mother's condition be recognized as a serious illness.

At the material time, the complainant was employed as a contractor and was based in France. On 28 October 2011, at her request, her parents were recognized as dependents because their maintenance involved heavy expenditure. On 15 March 2012 she requested the Director General, pursuant to Rule of Application No. 10 of the Staff Regulations of the Eurocontrol Agency, to allow her parents to be covered by the Eurocontrol Sickness Insurance Scheme (hereinafter the "Insurance Scheme"), alleging that her mother required medical

treatment that was not available in her country of origin. By a memorandum of 23 April, she was informed that her mother was covered by the Insurance Scheme from 5 March 2012, the date of the "first medical expenses in France", to the end of the period during which she would be considered as a dependant.

On 4 May the complainant filed a request for reimbursement at 100 per cent of her mother's medical expenses since 5 March 2012. The Medical Adviser attached to the request form a note recommending that the request be refused because the four elements for recognition of a serious illness had not been met. On 30 May the complainant was informed that her request had been refused because the Medical Adviser considered that there was no "shortened life expectancy".

On 12 July the complainant sent the Insurance Scheme a memorandum entitled "Request for recognition of a serious illness". Based on a hospitalization record for the period 12 to 27 June, she stated that her mother's illness was "potentially terminal" and therefore entailed a shortened life expectancy. On 28 August she received a reply stating that, after reviewing the file, the Medical Adviser had concluded that it did not justify recognition "of the status of serious illness with reimbursement at 100 per cent". He nevertheless requested her to submit "without delay" a report on her mother's home care as from 27 June so that he could "complete the initial opinion" of 30 May 2012. On 10 October the Insurance Scheme received a summary of treatment provided through home care dated 23 August 2012.

In the interim, on 17 August, the complainant submitted an internal complaint against the decision of 30 May 2012 under Article 92 of the Staff Regulations, requesting that her mother's condition be recognized as a serious illness within the meaning of Title III, Chapter 5, paragraph 1, of the Implementing Provisions for Rule of Application No. 10 on the reimbursement of medical expenses. Pursuant to Article 35 of this Rule, this internal complaint was forwarded to the Sickness Fund Management Committee (hereinafter "the Committee") on 15 October. In an opinion given on 5 November, the Committee concluded unanimously that the decision of 28 August 2012 had "introduced an inconsistency" by mentioning, on the one hand, that the Medical Adviser had reviewed

the file (and maintained his opinion of 30 May) and, on the other, that he needed additional information "in order to complete" that opinion. Several members of the Committee also expressed doubts regarding the relevance of the Medical Adviser's opinion; they considered that the decisions of 30 May and 28 August 2012 were not adequately substantiated and that the file sent to them was incomplete. The Committee recommended by a majority that the complainant's internal complaint be upheld.

On 9 January 2013 the Principal Director of Resources, acting on behalf of the Director General, informed the complainant that he could not accept the Committee's conclusions. He stressed that, given the medical records sent to him, the Medical Adviser had reached an appropriate conclusion that had been consistently based on the same grounds: the absence of a shortened life expectancy. He also stated that there was no evidence that the file sent to the Committee was incomplete and he challenged the statement that the decision of 28 August 2012 was inconsistent. That is the impugned decision.

The full costs of the complainant's mother's treatment were advanced by the Insurance Scheme and the complainant assumed the equivalent of 5 per cent of those costs, i.e. 2,149.10 euros, which Eurocontrol recovered through two successive salary deductions.

The complainant requests that the impugned decision be rescinded, that her mother's condition be recognized as a serious illness for a four-year period as from 4 May 2012, that her past and future medical costs be covered at 100 per cent, that she be paid interest on the medical costs that she assumed and that she be awarded moral damages and costs.

Eurocontrol requests the Tribunal to dismiss all the complainant's claims.

CONSIDERATIONS

1. The complainant, who requests that her mother's condition be recognized as a serious illness, first contends that Eurocontrol failed to respect the time limits for the internal appeal procedure. She submits

that it should have referred the case to the Committee "quickly", since the Committee was required to give its opinion within two months; that, having received the file late, the Committee was late in issuing its opinion; and that, "under the Tribunal's own statutes", the Director General should have replied to her internal complaint of 17 August 2012 by 15 October 2012, whereas she was not notified of the impugned decision until 9 January 2013.

2. Eurocontrol considers that it did not display bad faith and maintains that it respected the prescribed time limits.

3. Article 92 of the Staff Regulations relevantly states that:

"1. Any person to whom these Staff Regulations apply may submit to the Director General a request that he takes a decision relating to him. The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

2. Any person to whom these Staff Regulations apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where he has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. [...]

The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 93."

Article 35 of Rule of Application No. 10 relevantly provides:

"2. Before taking a decision regarding a complaint submitted under Article 92.2 of the Staff Regulations or Article 91.2 of the General Conditions of Employment, the Director General shall request the opinion of the Committee.

[…]

The Committee must give its opinion within two months of the request being received. The opinion shall be transmitted simultaneously to the Director General and to the person concerned."

4. The Tribunal notes that, according to the documents in the file, the complainant submitted her internal complaint on 17 August 2012, the Committee gave its opinion on 5 November 2012 and the Principal Director of Resources, on behalf of the Director General, took his decision on 9 January 2013.

It follows from the foregoing that the Committee, which received the internal complaint on 15 October 2012 and issued its opinion on 5 November 2012, acted within the prescribed two-month time period and the complainant was notified of the decision of 9 January 2013 within the four-month time period provided for in Article 92 of the Staff Regulations.

5. While the complainant invokes the provisions of Article VII, paragraph 3, of the Statute of the Tribunal in maintaining that she should have been notified of the Director General's decision "before 15 October 2012" – within 60 days from the notification of the internal complaint –, the Tribunal considers that this circumstance could only allow her to file a future complaint contesting an implicit decision to reject her internal complaint.

Therefore, the plea concerning delay in the internal appeal procedure must be rejected.

6. The complainant then pleads that insufficient reasons were given for the impugned decision, since she never received a reasoned opinion from the Medical Adviser, who did not dispute any of the medical records that she provided. She also submits that the decision of 28 August 2012 rejecting her request is inconsistent.

7. The relevant provisions in this case read as follows:

— Article 72, paragraph 1, of the Staff Regulations

> "An official [...] and other dependants within the meaning of Article 2 of Rule of Application No. 7, are insured against sickness up to 80% of the expenditure incurred, pursuant to the provisions of a Rule of Application of the Director General. This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalisation, pharmaceutical products, radiology, analyses, laboratory tests and prostheses on medical

prescription with the exception of dental prostheses. It shall be increased to 100% in cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the Director General as of comparable seriousness, and for early detection screening and in cases of confinement. […]"

— Article 20, paragraph 6, of Rule of Application No. 10

"In accordance with Article 72(1) of the Staff […], costs shall be reimbursed in full in the case of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the Director General as of comparable seriousness after consulting the Medical Adviser of the Settlements Office.

The Medical Adviser's opinion shall be delivered on the basis of general criteria laid down in the general implementing provisions after consultation of the Medical Council.

[…]"

— Title III, Chapter 5, paragraph 1, of the Implementing Provisions for Rule of Application No. 10 on the reimbursement of medical expenses

"Definition

Serious illnesses include tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the Director General as of comparable seriousness.

Such illnesses typically involve, to varying degrees, the following four elements:

- a shortened life expectancy
- an illness which is likely to be drawn-out
- the need for aggressive diagnostic and/or therapeutic procedures
- the presence or risk of a serious handicap."

— Title III, Chapter 5, paragraph 3

"Procedures

Applications for recognition of serious illness must be addressed to the Medical Adviser and be accompanied by a detailed medical report which may be submitted in a sealed envelope. For an initial application, the report must include:

- the date of the diagnosis
- the exact diagnosis
- what stage the illness is at, and any complications
- the treatment required.

> The 100% cover for expenditure related to serious illness is granted from a start date (the date of the medical certificate) to a date in the future, granting 100% cover for no more than 5 years. This period may be extended.
>
> […]"

8. In this case, the Tribunal notes that in justifying its recommendation, adopted by a majority, to uphold the complainant's internal complaint, the Committee first noted that "the administration's rejections, communicated to [the complainant] on 30 May and 28 August 2012, respectively, [were] based on the absence of one of the four elements for 'recognition of the status of serious illness' set out in Rule of Application No. 10 (Implementing Provisions, Title III, Chapter 5, paragraph 1), namely, according to the Medical Adviser, the absence of a shortened life expectancy, yet despite the detailed records provided by [the complainant] in requesting recognition of the status of 'serious illness' under the Staff Regulations, no further explanation [was] provided"; that "[s]ome members consider[ed] that the file sent to the Committee appear[ed] incomplete"; and that "the members of the Committee note[d] that the administration's memo[randum] of 28 August 2012 appear[ed] to have introduced an inconsistency by, on the one hand, mentioning that the [complainant's mother's] file had been reviewed by the Medical Adviser (who maintain[ed] his opinion) and, on the other, requesting the complainant to provide additional information so that 'the Medical Adviser could complete his initial opinion of 30 May 2012'"; and that, "[a]part from the apparent contradiction, the administration thereby open[ed] the way for a review of its initial refusal".

9. As justification for the refusal to follow the majority recommendation of the Committee, the Principal Director of Resources informed the complainant that:

> "The medical reports provided the Insurance Scheme's Medical Adviser with all the necessary evidence concerning the diagnosis, the progress of the condition and the outcome of the treatment followed. However, none of the practitioners consulted made specific recommendations with a view to official recognition of a serious illness within the meaning of Eurocontrol or national regulations. Therefore, contrary to the Committee's opinion, you did not

> provide 'detailed information' in support of that specific request. The Insurance Scheme's Medical Adviser drew the appropriate conclusions from the medical records that were sent. His conclusion was consistently reasoned and based on the absence of a shortened life expectancy. At no time was any scientific claim to the contrary made."

He concluded that "there [was] no flaw in the procedure of following the minority opinion of the Committee" and that, for this reason, "[t]he administration's decision to refuse recognition of a serious illness for purposes of the benefits in question [was] justified".

10. The Tribunal recalls that, according to its case law, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see Judgment 2781, under 15). If the ultimate decision-maker rejects the conclusions and recommendations of the internal appeal body, the decision-maker is obliged to provide adequate reasons (see Judgments 2278, 2355, 2699, 2807 and 3042). The value of the safeguard is significantly eroded if the ultimate decision-making authority can reject conclusions and recommendations of the internal appeal body without explaining why. If adequate reasons are not required, then room emerges for arbitrary, unprincipled or even irrational decisions. (See Judgment 3208, under 11.)

11. In this case, the Tribunal notes that, in her internal complaint of 17 August 2012, the complainant carefully emphasized that, in her view, some of the information in her mother's file had "not been fully understood or considered. Title III, Chapter 5, paragraph 1, of the Implementing Provisions for Rule of Application No. 10 states that four elements may be taken into account to varying degrees for recognition of a serious illness". She therefore "challenge[d] the decision received on 30 May 2012 since life expectancy could be considered to have been shortened although, fortunately, not completely".

12. An analysis of the Committee's opinion shows that, while not expressly stated, the majority of its members agreed with the complainant's arguments. Doubts were expressed as to the relevance of the Medical Adviser's opinion, and the administration's refusals of

30 May and 28 August 2012 were considered insufficiently reasoned insofar as only one of the four elements for "recognition of the status of serious illness" set out in Title III, Chapter 5, paragraph 1, of the Implementing Provisions for Rule of Application No. 10, namely the absence of a shortened life expectancy, had been taken into account.

13. The Tribunal considers that the arguments put forward first by the complainant and then by the Committee are well founded.

The Committee refers to a Judgment of the European Union Civil Service Tribunal regarding the interpretation of a European provision similar to the aforementioned Title III, Chapter 5, paragraph 1, of the Implementing Provisions for Rule of Application No. 10, which states that the intention of the authors of that provision, "as shown by the use of the words 'involve, to varying degrees, the following four elements', was to provide for interdependant indicators to be taken into account in relation to one another by the Medical Adviser or the medical committee, with the view to enabling a comprehensive assessment of the seriousness of the consequences of the illness in question and thereby investing the practitioners with considerable latitude in the medical evaluation of the particular situations they are called upon to assess". The Tribunal has no reason to arrive at a different conclusion.

14. It follows from the foregoing that by merely stating, in its refusal of 9 January 2013, that "the [Medical Adviser's] conclusion ha[d] been consistently based on the absence of a shortened life expectancy" and that "at no time [had] any scientific claim to the contrary [been] made", without taking the other three elements into account, the Principal Director of Resources did not provide adequate reasons for his rejection of the recommendation made by the majority of the members of the Committee.

15. The impugned decision must therefore be set aside.

16. The complainant requests that her mother's condition be recognized as serious within the meaning of the applicable provisions

and that her past and future medical costs be reimbursed at 100 per cent. She also claims interest on the unreimbursed medical costs.

17. The Tribunal considers that, under the present circumstances, it cannot rule on these claims.

Indeed, the question of whether the complainant's mother had a serious illness within the meaning of the applicable provisions remains unanswered.

18. Since, as the Tribunal has consistently held, it is not competent to rule on medical matters, the case must be remitted to the Organisation so that a new decision can be taken in light of an opinion given by the competent body with the safeguards of complete impartiality and transparency.

19. The complainant claims compensation for moral injury and costs.

20. The unlawfulness of the impugned decision caused the complainant moral injury for which fair redress may be given by awarding her compensation in the amount of 4,000 euros.

21. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is remitted to the Organisation in order that it may take action as indicated under 18, above.
3. The Organisation shall pay the complainant compensation for moral injury in the amount of 4,000 euros.

4. It shall also pay her costs in the amount of 1,500 euros.

5. All other claims are dismissed.

In witness of this judgment, adopted on 29 April 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Mr Seydou Ba, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

GIUSEPPE BARBAGALLO CLAUDE ROUILLER SEYDOU BA

DRAŽEN PETROVIĆ