

SEVENTY-FIRST SESSION

***In re* MASSIE, MEYENBERG,
MOLLOY (No. 2) and STEINER**

Judgment 1117

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Charles Massie, Mr. Eike Meyenberg and Mr. Walter Steiner against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 June 1990, the Agency's replies of 27 September, the complainants' rejoinders of 11 December 1990 and the Agency's surrejoinders of 7 March 1991;

Considering the second complaint filed by Mr. Brian Molloy against Eurocontrol on 13 June 1990 and corrected on 16 July, the Agency's reply of 19 October, the complainant's rejoinder of 27 December 1990 and the Agency's surrejoinder of 20 March 1991;

Considering the applications to intervene in Mr. Massie's, Mr. Meyenberg's and Mr. Steiner's complaints by:

K. Alford

M. Alix

H. Ansorge

C. Ayrault

B. Bedetti

V. Begault

D. Bell

B. Berecq

G. Bernard

J-P. Berthommier

M. Biardeau

F. Bidaud

M. Bisiaux

B. Bocquillon

M. Borsu

M. Bory

J. Bralet

R. Braun

M-N. Brun
A. Bulfon
F. Caloo
F. Carrara
M. Chauvet
N. Chichizola
P. Chudant
L. Clarke
N. Clarke
G. Coatleven
C. Collignon
J. Collignon
P. Crick
H. Czech
M. Dalichampt
C. Dagneau
D. Danaux
H. David
V. Day
A. De Monte
J. De Poorter
J-M. Dechelle
J. Degrand
J. Delwarte
F. Devillières
J-C. Domez
D. Doyle
S. Dubuisson
F. Dufier
M. Durasse
H. Englmeier

Y. Fauchot
F. Faurens
J-P. Florent
B. Flynn
G. Fortin
J. Fortin
J-P. Francois
Y. François
C. Fuchter
G. Gabas
M-T. Garzend-Fiquet
G. Gaveau
A. Geirnaert
M. Gérard
Y. Giusti
W. Göttlinger
M-T. Guérin
A. Guyot
J. Handschuh
C. Hantz
G. Harel
G. Heinz
G. Hembise
J. Hougardy
P. Humphreys
P. Hunt
A. Jourdain
G. Klawitter
F. Krella
L. Kroll

R. Le Bihan
M-C. Leduc
P. Lefebvre
F. Legrand
W. Lembach
P. Lenoir
Y. Leroux
R. Lucas
D. Maillet
J. Martin
D. Mauge
J. Mercier
R. Nesse
H. Neumann
M. Oliva
H. Parvais
P. Peeters
M-M. Pesty
E. Petit
A. Peyrat
A. Philippart
M-T. Picard
C. Poinot
M. Pommez
J-P. Prochasson
C. Prosser
M. Prosser
C. Pusch
B. Puthiers
J. Raes
M-C. Ragot

J-J. Richer
G. Riu
J. Roelofsen
F. Roth
J-M. Rousot
J-C. Salard
J-Y. Schaack
M. Severac
L. Sillard
G. Sizun
P. Slingerland
A. Studer
N. Szewczuk
J-P. Thiel
G. Thorel
C. Tovy
J-C. Tumelin
M. Turcan
A. van der Welle
J-P. Vanderspikken
D. Vanderstraeten
F. Vergne
M. Verschaffel
J-C. Vollant
E. Watkins
H. Weis
R. Williams
J. Wolynski
D. Young
J-P. Zabka

A. Zieger

W. Zieger

R. Zöllner

Considering Eurocontrol's observations of 13 May 1991 on the application by Mrs. Christelle Prosser;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 62, 64 and 92 of the Staff Regulations governing officials of the Agency and Article 5 of Rule No. 7 concerning remuneration;

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. In determining staff pay Eurocontrol takes account, for the sake of convenience, of figures worked out by the European Communities.

Article 64 of the Staff Regulations governing officials of the Agency reads:

"An official's remuneration expressed in the currency of the country where the Agency has its headquarters shall, after the compulsory deductions set out in these Staff Regulations or in any implementing provision, be subject to adjustment to take account of the taxation system applicable and of the living conditions in the relevant country of posting.

The weightings reflecting living conditions in the various countries of posting shall be fixed by the Committee of Management on the proposal of the Director General. The procedure governing the aforesaid adjustment shall be prescribed in a rule laid down by the Director General."

On 15 December 1981 the Council of Ministers of the European Communities approved a method of adjusting pay over the next ten years. The method provides for yearly review and five-yearly revision of the geographical weightings, which are calculated to give all staff pay the same purchasing power wherever the duty station may be.

Regulation 3619/86, which the Council adopted on 26 November 1986, was about the first five-yearly revision under the 1981 procedure. At its 150th Session, in February 1987, the Committee of Management of Eurocontrol approved the revised weightings in that regulation.

The Court of Justice of the Communities set aside Regulation 3619/86 by a judgment of 28 June 1988 and on 24 October 1988 the Council of Ministers of the Communities adopted another two regulations, 3294/88 and 3295/88, revising the weightings. At its 158th Session, on 14 February 1989, Eurocontrol's Committee of Management approved the revised weightings in 3294/88 as from 1 January 1981 and in 3295/88 as from 1 January 1986.

The complainants are officials of Eurocontrol and assigned to its Experimental Centre at Brétigny-sur-Orge, in France.

From pay slips dated from 8 to 11 September 1989 reporting arrears of pay for the period 1 January 1981 to 30 September 1989 they learned how much they were being paid on the strength of the revised weightings.

In November 1989 they lodged internal "complaints" under Article 92(2) of the Staff Regulations against the Administration's failure to revise the amount of the arrears as from 1981.

By letters dated 9 March 1990 and received on 15 March, the decisions they impugn, the Director of Personnel and Finance rejected their "complaints" on the Director General's behalf.

B. Mr. Massie, Mr. Meyenberg and Mr. Steiner submit that their complaints are receivable: they filed within ninety days of the date at which they had got notice of the impugned decisions, and they have exhausted the internal means of redress.

They put forward two pleas on the merits.

The first is breach of equal treatment. It is implicit in the Communities' revision of the weightings as from 1 January 1981 that the principle has not been complied with since that date. Eurocontrol is therefore under a duty to "up-date" the amounts of arrears due by paying interest thereon "by way of compensation" and "from the due date".

The complainants' second plea is that Eurocontrol was in breach of Article 62 of the Staff Regulations, under which the official is entitled to "the remuneration carried by his grade and step", and of Article 5 of Rule No. 7 concerning remuneration, which says that salary shall be paid on the first working day of each month. Eurocontrol acted improperly by failing to pay the complainants the full amounts they were entitled to and it therefore owes them redress. In keeping with a principle of law generally acknowledged in all member States on the compensation of victims of criminal offences, the material date for determining the extent of injury is the date of the offence. Eurocontrol is therefore liable for interest on all sums overdue, both by way of compensation and from the due date up to that of actual payment.

The complainants are nevertheless claiming no more than the benefit of a settlement which the European Communities reached on the matter with members of their own staff who had appeals like the complainants'.

They claim the quashing of the impugned decisions, payment of interest at the rate of 8 per cent a year on the arrears by way of compensation and from the due dates, and of costs.

C. Mr. Molloy also has two pleas.

His main one is that Eurocontrol has failed to restore fully the parity of the purchasing power of staff pay at its various duty stations, because it has taken proper account neither of the decline in the value of money nor of the delay in paying the arrears.

His subsidiary plea is that the practice in Eurocontrol is to adjust staff pay in the same way as the Communities do. That practice, he argues, is a fundamental term of his contract and entitles him at the very least to benefit from the settlement the Communities concluded with their staff members.

He asks the Tribunal to set aside his pay slips notifying arrears due for the period from 1 January 1981 to 30 June 1988 insofar as they pay no interest by way of compensation or from the due date; to quash the decision of 9 March 1990; and to order payment of 25,000 French francs in compensatory interest on the arrears and payment of interest on the arrears at 10 per cent a year from the due dates, and, subsidiarily, payment of interest at 8 per cent a year from the due dates as provided for in the above-mentioned settlement. He seeks costs.

D. In its replies to Mr. Massie's, Mr. Meyenberg's and Mr. Steiner's complaints Eurocontrol submits that they are irreceivable because the complainants have failed to follow the procedure in Article 92 of the Staff Regulations. Before lodging an internal "complaint" they ought to have submitted "requests" under 92(1): only the rejection of such a request may give rise to a "complaint".

The Organisation's pleas on the merits are subsidiary.

There was no breach of equal treatment. The purpose of the weightings is to give the pay of staff at the different duty stations purchasing power that is comparable, not identical. The five-yearly review carried out under the 1981 procedure is supposed to ensure proper respect for Article 64 of the Staff Regulations over the medium-term, but requires the payment neither of interest nor of compensation if any arrears fall due. Nor does the law of the international civil service make provision for any such payments.

Eurocontrol acted in compliance with Articles 62 of the Staff Regulations and 5 of Rule No 7. Pay in the European civil service is not just consideration for each day's work but is mainly intended to provide a decent livelihood. The method of adjusting pay presupposes some lapse of time between the material period and the date of payment of any arrears. The yearly reckoning of new weightings is based on statistics from earlier dates. The weightings for the period from 1 July 1989 to 30 June 1990, for example, are not determined until the end of 1990 and any arrears are paid later, with retroactive effect from 1 July 1990, but with no interest to make up for the lapse of time.

The complainants have to found their claim to interest on some provision in the Staff Regulations. The criminal

law they cite is immaterial. Eurocontrol was not at fault; once it had the Communities' updated figures it acted to restore the purchasing power of staff pay by retroactively applying the new weightings. Until those figures were issued it was not even aware that there were grounds for revision. So setting a date from which interest might run would be meaningless.

As for the complainants' restricting their claims to the terms of the alleged settlement between the Commission of the Communities and a group of officials, they offer no evidence of any such settlement. Even supposing there was one, it would not be binding on Eurocontrol, a legal entity quite independent of the Communities.

At all events Eurocontrol could not have acted until the Communities had approved the new figures. So if the complainants did suffer any injury, blame for the delay lies elsewhere. And consistent precedent has it that interest will fall due only when the amount of the principal has been determined and is payable.

E. In its reply to Mr. Molloy's complaint Eurocontrol puts forward most of the same pleas as in its replies to the other complaints, again objecting to receivability and submitting that it abided by the principle of equal treatment and by the Staff Regulations. On the last issue it further observes that Article 64 of the Staff Regulations does not prescribe the automatic adjustment of pay to the cost of living at any particular duty station. Nor, unlike the Communities' rules, do Articles 64 and 65 of Eurocontrol's Regulations say how often pay has to be reviewed.

The Organisation says that there is no binding practice of matching pay at Eurocontrol to pay in the Communities, alignment having never been more than approximate. It has the same line of argument as is summed up under D above about the settlement the complainant alleges in the European Communities. It again cites the case law about the date at which any liability for payment of interest may arise.

F. In their rejoinders Mr. Massie, Mr. Meyenberg and Mr. Steiner submit that Eurocontrol's objections to receivability in its replies are typical of its bad faith: there is no question but that their internal "complaints" challenged decisions adversely affecting them within the meaning of Article 92(3) of the Staff Regulations.

On the merits they submit that the general principles of law they are relying on are part and parcel of the applicable law. They seek to show that pay at Eurocontrol and pay in the European Communities have invariably kept in step and they maintain that that is why the settlement reached in March 1989 in the Communities is crucial to their case. They express surprise at Eurocontrol's questioning the very existence of that settlement and they supply by way of evidence texts of correspondence between the Commission of the European Communities, the Council of Ministers and their own counsel. They point out that officials at the Eurocontrol centres at Maastricht and Karlsruhe are getting compensation for a sizeable drop in pay attributable to the revised weightings; yet there is no express provision for such compensation in the Staff Regulations.

G. In his rejoinder Mr. Molloy submits that his complaint is receivable under Article 92(2), which allowed him to "submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations". Such indeed, he maintains, was his own case.

He also seeks to refute Eurocontrol's pleas on the merits. He contends that since its method of adjusting pay makes delay unavoidable it is under a duty to pay interest and compensation for any inflation there may have been. Making the decision retroactive implies that the arrears were due and Eurocontrol was therefore liable for payment at each of the due dates from January 1981 on. The complainant enlarges on his point that the material rules at Eurocontrol and in the Communities are similar, asserts an acquired right to the practice of aligning pay, and maintains that he is therefore entitled to benefit by the settlement.

H. In its surrejoinders on the complaints of Mr. Massie, Mr. Meyenberger and Mr. Steiner, Eurocontrol presses its objections to receivability. On the merits it develops its contention that there is no general and continuous practice of ensuring parity in net pay between Eurocontrol and the Communities and that it is under no duty in law to align. Since the complainants' reasoning is fundamentally unsound they may not rely on the settlement in the Communities.

I. In its surrejoinder on Mr. Molloy's complaint Eurocontrol also presses its objections to receivability. On the merits it again maintains that the method of adjusting pay confers right to interest neither "by way of compensation" nor "from the due date". Giving retroactive effect to the five-year review of the weightings was in

itself enough to put all its staff again on a par. As in its other surrejoinders it contends that there was never absolute concordance with pay in the Communities, that there is no acquired right, and that the settlement in the Communities is of no concern to Eurocontrol.

CONSIDERATIONS:

1. Eurocontrol employs the complainants at its centre at Brétigny-sur-Orge, in France. By a decision of 14 February 1989, and acting under Article 64 of the Staff Regulations, the Organisation's Committee of Management corrected with retroactive effect the "weighting" factors to be applied to staff pay. The complainants thereby became entitled to arrears of pay for the period from 1 January 1981 to September 1989. They then claimed payment of interest on those sums "by way of compensation" and "from the due date", Eurocontrol refused their claims, and they want the Tribunal to quash its decisions.
2. Article 64 of the Staff Regulations says that pay expressed in the currency of the country where Eurocontrol has its headquarters - Belgian francs - shall be "subject to adjustment to take account of the taxation system applicable and of the living conditions in the relevant country of posting". The second paragraph reads: "The weightings reflecting living conditions in the various countries of posting shall be fixed by the Committee of Management on the proposal of the Director General". The purpose of such weightings is to give staff pay the same purchasing power wherever the duty station may be.
3. Eurocontrol's custom is to keep in line with the weighting factors applied in the European Communities. It does so for practical reasons though it takes account of its own requirements as well.
4. The European Communities set the weightings for five years at a time. By Regulation 3619/86 of 26 November 1986 the Council of the Communities set the weightings for 1981-85, but it refused to apply them with retroactive effect, as the Commission had proposed, and there was a dispute that went to the Court of Justice of the Communities. In its judgment of 28 June 1988 (Case 7/87, Commission v. Council, ECR p. 3401) the Court set aside the regulation.
5. The Council adopted two new regulations on 24 October 1988, No. 3294/88, which amended the weightings for 1981-85 as from 1 January 1981, and No. 3295/88, which amended them as from 1 January 1986 for the next five-year period.
6. Eurocontrol's Committee of Management thereupon decided, on 14 February 1989, to amend the weightings with retroactive effect from the same dates for staff at Eurocontrol duty stations. That meant an appreciable increase for staff in France and the United Kingdom. It also meant a drop for staff in the Federal Republic of Germany and the Netherlands, but the Organisation decided, instead of reducing their pay, to wait until cost-of-living adjustments brought it in line with the new weightings anyway.
7. The staff were paid any arrears due from September 1989 on. The complainants put to the Director General identical claims to payment of interest on the arrears to make good the loss of purchasing power in their pay since 1981. In support they cited statistics published by the European Communities on the cost of living in France from 1981 to 1989.
8. On 9 March 1990 the Director of Personnel and Finance replied on the Director General's behalf rejecting the claims for reasons he set out at length, and those are the decisions the complainants are impugning. There are 143 applications to intervene in Mr. Massie's, Mr. Meyenberg's and Mr. Steiner's complaints.
9. Since the four complaints raise the same issues they are joined to form the subject of a single ruling.
10. The complainants have two main pleas. One is that the retroactive increase in the weightings acknowledges the steady erosion of the purchasing power of their pay since 1981. There has been breach of the rule that staff should have equal pay whatever their duty station, and the complainants want their loss to be offset by the payment of interest at a suitable rate. Their other plea is a subsidiary one: the European Communities have conceded that compensation is due because they agreed to pay interest in a settlement with staff who had filed claims to such compensation. They submit items of correspondence between representatives of the Council or the Commission and the agents of those staff which show that they were paid some 8 per cent interest in settlement.
11. The complainants are not forthcoming about the exact amount they claim. It is not clear whether they want both

interest "by way of compensation" and interest "from the due date" or that is just two ways of saying the same thing. Be that as it may, they give to understand that they would be satisfied with interest at 8 per cent, along the lines of the settlement in the Communities.

12. Eurocontrol's preliminary retort is that the complaints are irreceivable because the complainants have failed to exhaust the internal means of redress. In its submission they should have begun by putting claims to the Director General under Article 92(1) of the Staff Regulations and only when they had a decision on those claims would they have been free to lodge internal "complaints" and, later, go to the Tribunal.

13. On the merits the Organisation argues that Articles 64 and 65 of the Staff Regulations do not require it to link pay to the cost of living. The arrangements made under those articles allow it discretion over the size and frequency of adjustments and over the relevant factors. For one thing, the text of Article 64 implies that allowance shall be made for taxation, a factor that is irrelevant in the Communities. Until the new rates of pay had been worked out there was no knowing what further amounts would be due to staff; so there was no ascertainable cash debt and no specific sum on which any interest was due by reason of non-payment. In Eurocontrol's submission that is what the European Court held in a judgment of 30 September 1986 (Case 174/83, Ammann and others v. Council of the European Communities, ECR p. 2647).

14. As for the settlement the Communities reached with some staff members, Eurocontrol points out that its purpose and content are unknown and that it was a matter of policy, not of law.

Receivability

15. The objection to receivability fails. According to Article 92 of the Staff Regulations the gist of the internal appeal procedure is that before lodging an internal complaint the staff member shall submit his grievances or claims to the Administration to enable it to take a decision. That is what the complainants did since Eurocontrol had the opportunity of stating its position.

16. The complainants took the view that according to the principle of equal treatment embodied in the Staff Regulations they were entitled not only to arrears of pay but also to interest thereon. They were free to conclude that the competent authority had, to quote Article 92(2), "failed to adopt a measure prescribed by the Staff Regulations" and that they therefore had the right to appeal directly to the Tribunal against the refusal of their claims. The conclusion is that they did exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires and that their complaints are receivable.

The merits

17. Eurocontrol's pleas on the merits are sustained.

18. The system of periodic adjustment according to criteria applied a posteriori means that any action taken will perforce be retroactive. So such action is not tantamount to acknowledgement by Eurocontrol of an obligation to make decisions reached at the end of some period retroactive to the start of it. Adjustment is a continuous process over any given period, and it is reasonable to regard the figures that are taken at the end of that period as properly applying to the whole of it.

19. Secondly, Article 64 confers wide discretion on the Administration in determining whether there is good reason to adjust pay and what factors to bear in mind for the purpose. It has to make comparative assessments in working out the weightings, and so the figures it arrives at are bound to be lump-sum approximations.

20. So there can be no specific amount due, and yielding interest, until the competent authority has reached its decision. In this case it did not do so until 1989 for the years that included the period 1981-85. If the staff thought it necessary to alter the weightings by the end of that period they could have submitted claims to the competent authority under Article 92(1) of the Staff Regulations and thereby safeguarded their entitlements for the period.

21. Lastly, the settlement the European Communities reached in a dispute with their staff lays no obligation on Eurocontrol, the less so since the reasons for the settlement and the terms of it are largely unknown.

22. The conclusion is that the complaints are devoid of merit and must fail. So do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, 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
Mohamed Suffian
P. Pescatore
A.B. Gardner