

SEVENTY-NINTH SESSION

***In re* DROGOUL,
ROELOFSEN No. 2
and SHEEHAN**

Judgment 1462

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Joyce Roelofsen against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 October 1994, Eurocontrol's reply of 8 December 1994, the complainant's rejoinder of 11 January 1995 and the Organisation's surrejoinder of 31 March 1995;

Considering the complaint filed against Eurocontrol by Miss Carol Sheehan on 5 October 1994, Eurocontrol's reply of 15 December 1994, the complainant's rejoinder of 27 January 1995 and the Organisation's surrejoinder of 7 April 1995;

Considering the complaint filed against the Organisation by Mr. Fabrice Drogoul on 5 October 1994 and corrected on 21 October 1994, Eurocontrol's reply of 12 January 1995, the complainant's rejoinder of 30 January and the Organisation's surrejoinder of 7 April 1995;

Considering the application filed by Mrs. Marie-Thérèse Guérin on 30 March 1995 to intervene in Mrs. Roelofsen's and Miss Sheehan's complaints and in "any case about the grant of the typist's allowance" and Eurocontrol's comments of 3 May 1995 on that application;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 13, paragraph 1, of its Rules;

Having examined the written submissions and decided not to order hearings, 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. As was said under A in Judgments 1403 (in re Tejera Hernandez) and 1411 (in re Bidaud), Rule No. 7 of the Rules of Application of the Staff Regulations provides in Article 4a of Section 2a:

"An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance.

The amount of this allowance shall be fixed under the conditions laid down in Article 65 of the Staff Regulations.

The rates provided for in paragraph 1 of this Article shall be as follows:

- BF 3,710 per month for officials in grades C4 or C5;
- BF 5,687 per month for officials in grades C1, C2 or C3."

The complainants are all clerical staff in category C at Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. Mrs. Roelofsen joined the Agency in 1973 and holds a grade C2 appointment as a clerical officer. Miss Sheehan and Mr. Drogoul, who joined in 1991, are clerical assistants at grade C5.

In a letter of 14 May 1992 the Director of Personnel and Finance of Eurocontrol informed the Director of the Centre that "a survey [would be] conducted concerning the grant of the allowance to certain grade C officials whose duties involved not only typing or secretarial work". For such staff to qualify for the allowance their duties

must include the use of a typewriter for three-fifths or of a computer keyboard for half of their working time.

On 7 July 1992 Mrs. Roelofsen's first-level supervisor wrote a minute stating that she spent over four-fifths of her working time using a computer. On the same day Mrs. Roelofsen applied for the allowance through official channels. Miss Sheehan applied for it on 20 July and Mr. Drogoul on 3 November 1992.

On 31 July 1992 the Director of the Centre sent the Director General of Eurocontrol a "list of the staff at the Centre entitled to the allowance". Mrs. Roelofsen and Miss Sheehan were on the list.

On 7 February 1994 the Director of Personnel saw several staff members who were not to get the allowance, and they included the complainants. On 10 February they each sent in a new application for the allowance under Article 92 of the Staff Regulations. Mr. Drogoul wanted payment as from 16 October 1991, the date at which he had joined the Agency, Miss Sheehan as from 4 November 1991 and Mrs. Roelofsen as from 7 July 1992.

In a "summary table" of 6 May 1994 the Director of the Centre advised against granting the allowance to the complainants on the grounds that they did not qualify.

Having got no reply to their applications within the time limit of four months prescribed in Article 92 of the Staff Regulations, the complainants wrote to the Director General on 13 and 22 June lodging internal "complaints". By letters of 11 July 1994 the Director of Personnel rejected their "complaints" on the Director General's behalf. Those are the decisions they are challenging.

B. The complainants distinguish between their applications of July and November 1992, which they made in the context of the general survey on the grant of the allowance, and those of February 1994, which they filed under Article 92 of the Staff Regulations.

They have three pleas. They submit first that since 1965 the Agency's constant practice has been to grant the allowance to clerical staff meeting the requirements set out in A above; by excluding them it is in breach of *patere legem quam ipse fecisti*. Secondly, Eurocontrol had a duty to reply to their first applications. Thirdly, they plead breach of equal treatment: colleagues in a position akin to theirs have been granted the allowance.

They ask the Tribunal to quash the decision of 11 July 1994; to order the Agency to pay them the allowance as from the date of their first applications, with interest on arrears at a rate to be fixed. They seek costs.

C. In its replies the Agency submits that the complaints are irreceivable. The complainants failed to appeal against the implied rejection of their applications of July 1992. They are out of time, and their attempt to get round the time limit by applying again in February 1994 is to no avail because their claims are the same.

The Agency's arguments on the merits are subsidiary. It submits that the complainants misunderstood the purpose of the survey announced in the letter of 14 May 1992, which "was not to elicit new applications for the allowance". It points out that under the rules it has no obligation to grant the allowance to clerical staff but may do so exceptionally. There is, it says, no established practice in the matter.

Besides, the complainants did not qualify for the allowance when they joined the Agency. Nor do they now, since their duties have not changed. They do mainly technical work and spend precious little time on typing. On 6 May 1994 the Director of the Centre declared that none of them qualified; so their plea of discrimination is mistaken.

D. In their rejoinders the complainants maintain that their complaints are receivable, since their applications of July and November 1992 did not come under Article 92 of the Staff Regulations. They contend that the purpose of the survey announced in the letter of 14 May 1992 was to determine how many of those who had not yet had the allowance were "likely" to get it. The Agency did have an established practice of granting the allowance to clerical staff, and that they do spend much time either typing or on a computer terminal. They press their plea of discrimination.

E. In its surrejoinders the Agency maintains all its arguments: the complaints are irreceivable and it has never granted the allowance to clerical staff like the complainants, whose duties are technical and operational.

CONSIDERATIONS:

1. Mrs. Roelofsen joined Eurocontrol on 1 July 1973, Mr. Drogoul on 16 October 1991 and Miss Sheehan on 1 November 1991. They are employed in category C at its Experimental Centre at Brétigny-sur-Orge. On 14 May 1992 the Director of Personnel told the Director of the Centre that there was to be a review of the grant of the "typist's allowance", a fixed allowance provided for in Article 4a of Section 2a of Rule No. 7 of the Rules of Application of the Staff Regulations. It is paid to certain officials in category C who do not perform only the duties of a typist or secretary. By letters dated 7 and 20 July and 3 November 1992 the complainants each applied for the allowance. Having got no answer, they made new "requests" on 10 February 1994 for the same purpose. After waiting four months for a reply they lodged "complaints", on 13 and 22 June 1994, under Article 92(2) of the Staff Regulations. The Director General rejected them in three identical letters of 11 July 1994. Those are the decisions under challenge.

2. Though the complaints are distinct, they raise the same issues of fact and of law and seek the same redress and may therefore be joined to form the subject of a single judgment.

3. The Organisation submits that the complaints are irreceivable on the grounds of failure to exhaust the internal means of redress. It observes that Mrs. Roelofsen and Miss Sheehan submitted to the Administration letters claiming the allowance in July 1992, and Mr. Drogoul did so in November 1992, their purpose being to get decisions from the Director General. Eurocontrol argues that those letters were "requests" within the meaning of Article 92(1) of the Staff Regulations. The Director General had four months in which to reply, and after that period the absence of replies implied decisions to reject their claims. Eurocontrol submits that under 92(2) the complainants then had three months in which to appeal, starting at the end of the four months. So they had to act no more than seven months after they had first claimed the allowance, i.e. by February 1993 in the case of Mrs. Roelofsen and Miss Sheehan and by June 1993 in that of Mr. Drogoul. But, the Agency points out, they took no action at all until 10 February 1994, when they lodged "complaints" with the Director General on the grounds that he had failed to provide a "specific reply" to their earlier claims.

4. Eurocontrol's plea is sound. As was held in Judgment 398 (in re Mager) under 1 and 2:

"1. Article 92.1 of the Staff Regulations provides that any person to whom the Staff Regulations apply may submit to the Director General what is termed a 'request' that he take a decision. The Director General shall give reasons for his decision and notify it to the official within four months from the date on which the 'request' was made. If by the end of that period no reply to the 'request' has been received, that shall be deemed to constitute an implied decision to reject it.

Article 92.2 further provides that any person to whom the Staff Regulations apply may submit to the Director General what is termed 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, starting on the date of publication of the act if it is of a general nature or on the date of notification of the decision to the person concerned or the date on which it comes to that person's attention, or, where the 'complaint' concerns an implied decision to reject a 'request', on the date of expiry of the period prescribed for reply. The Director General shall again give reasons for his decision and notify it to the official within four months from the date on which the 'complaint' was lodged. Failure to reply within that period shall be deemed to constitute an implied decision to reject the 'complaint'.

2. The scope of Article 92.1 is limited by that of Article 92.2: a 'request' may be made only where a 'complaint' may not. Any other construction would make it pointless to lodge a 'complaint'. More particularly, the three-month time limit for lodging a 'complaint' set in Article 92.2, would serve no purpose if at any time a 'request' might be submitted to the Director General instead."

So any letter asking the Director General to take a decision must be treated as a "request". Any decision of the Director General's, be it implied or not, to reject that request must be challenged in a "complaint" within the prescribed period. No later 92(1) request whose purpose is the same may be allowed.

5. The conclusion is that the complainants, who lodged no timely "complaint" against the implied rejection of their "request", may not put their case directly to the Tribunal because they thereby failed to exhaust the internal remedies available to them.

6. The further requests they put to the Director General on 10 February 1994 were intended, like those they had

made in 1992, to get decisions from him on the grant of the allowance. So what they were trying to do was to set off a new time limit after they had let the one for filing internal "complaints" expire. Those requests and the ensuing action, including the present complaints, are therefore irreceivable.

7. Mrs. Guérin, an official who also belongs to category C, has applied to intervene in Mrs. Roelofsen's and Miss Sheehan's complaints and, more generally, in "any case about the grant of the typist's allowance". Since the complaints she identifies by name are irreceivable so is her application to intervene in them.

8. She gives no particulars of any other "case about the grant of the typist's allowance", and the Organisation contends that on that score her application is "inapposite". In its submission the allowance is an exceptional payment and Article 4a of Section 2a of Rule 7 applies by analogy and on the merits of each case.

9. Mrs. Guérin has indeed offered no factual evidence to show that her duties entitled her to the allowance. She merely says that she is in the same position as Mrs. Roelofsen and Miss Sheehan. She neither shows nor even seeks to show that she is in the same position in fact and in law as others who are claiming the allowance in complaints to the Tribunal. So her application is again irreceivable.

DECISION:

For the above reasons,

The complaints and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner