

EIGHTY-SECOND SESSION

***In re* Aelvoet (No. 5) and others**

Judgment 1601

The Administrative Tribunal,

Considering the complaints filed by Mr. Daniel Aelvoet -- his fifth -- Mrs. Geneviève Alberty, Mrs. Marianne Carpentiers, Mrs. Gráinne Cronin, Mrs. Danielle Delbrassinne, Mr. Paul-Henri Fastenaekens, Mrs. Françoise Goovaerts, Miss Marie-José Graas -- her second -- Mrs. Annyck Guillard, Mrs. Linda Lang, Mrs. Rosemarie Lesch, Mrs. Michelle Macharis, Mrs. Marie-Thérèse Meloni, Miss Valérie Meyer -- her second -- Miss Iris Neumann, Mrs. Jacqueline Niebel, Mrs. Violaine Renard, Mrs. Marie-Laurence Smulders, Mrs. Roberte Stroobants, Mrs. Suzanne Stroobants, Mrs. Viviane Tamboise, Mr. Georges Tsolos, Mr. Georges van Campenhout, Mrs. Joceline Vanelven, Mrs. Renée van Lierde and Mrs. Els Vanhoven against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 December 1995 and corrected on 10 January 1996, Eurocontrol's reply of 26 April, the complainant's rejoinder of 14 July and the Agency's surrejoinder of 18 October 1996;

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 none of the parties has applied for;

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

A. Judgments 1403 (*in re* Tejera Hernandez) and 1411 (*in re* Bidaud) explain under A how an employee of Eurocontrol at grade C may qualify for the grant of a "typist's allowance".

Office notice 2/95 of 11 January 1995 amended Article 4a, Section 2a, of Rule No. 7 of the Rules of Application of the Staff Regulations: the Director General thereby announced that as from 1 July 1995 the allowance would be payable only to someone who was doing secretarial work in an administrative unit. Office notice 7/95 of 1 March 1995 published a list of the posts conferring entitlement to the allowance.

On 16 March the Agency's Staff Association asked the Director General to hold the consultations provided for under the agreement on consultation, conciliation and arbitration which Eurocontrol had concluded on 9 January 1992 with the staff unions. The Director General refused in a letter of 19 April 1995 to the vice-chairman of the Association on the grounds that the agreement did not cover office notices issued by the Director General.

On 29 May the complainants lodged internal "complaints" with the Director General under Article 92(2) of the Staff Regulations against office notices 2 and 7. Their "complaints" went to a Joint Committee for Disputes that had been set up under office notice 6/95 of 1 March 1995.

By office notice 10/95 of 2 June 1995 the Director of Human Resources told the staff on the Director General's behalf that the measures announced in 2 and 7 were postponed *sine die* and that a final decision would be taken and announced as soon as possible.

The Joint Committee met on 11 July. It recommended rejecting the "complaints" on the grounds that they disclosed no cause of action and were therefore irreceivable. By letters of 5 September 1995, the impugned decisions, the Director informed the complainants of the Director General's endorsement of that recommendation.

By office notice 19/95 of 22 December 1995, which superseded 2, 7 and 10, the Director General summarily revoked Article 4a of Rule No. 7 and announced that anyone who was entitled to the allowance would be paid an equivalent amount until further notice.

B. The complainants contend that office notices 2/95 and 7/95 are unlawful. Citing Judgment 1148 (*in re Scheu* Nos. 1 and 2), they submit that the Director General may not treat 2/95 or any of his other notices as rules. It is not he who sets staff pay but the Committee of Management and the Permanent Commission of Eurocontrol. The Agency failed to consult the staff associations before adopting the two notices, and that was in breach of the agreement it concluded with them on 9 June 1992. There was also breach of their acquired rights in that the grant of the allowance may persuade someone to join, or to remain on, the staff of the Agency.

The complainants seek the quashing of the decisions of 5 September 1995 rejecting their internal appeals and of notices 2/95 and 7/95. Failing that, they ask the Tribunal to adjourn its ruling on the merits pending a final decision by the Director General to revoke the notices or, failing that again, to refer the matter to the Joint Committee for Disputes.

C. In its reply the Agency pleads that the complaints are irreceivable on several counts. First, the two office notices are general administrative decisions. They were not followed by individual implementing decisions and so are unassailable before the Tribunal. Besides, at the time of filing the complainants had no cause of action, the notices having been suspended *sine die*. In any event the complaints serve no purpose after the publication of office notice 19/95 of 22 December 1995.

Eurocontrol's pleas on the merits are subsidiary. It submits that the Director General's power under the Staff Regulations to make rules is not subject to prior approval by any other authority of the Agency. The Committee of Management exercises its supervisory authority only after the Director General has actually amended the Rules of Application. Besides, it is not the Regulations that determine the grant of the allowance. The authority to create and abolish allowances and to set the criteria for granting them lies with the Director General under Article 100. The agreement of 9 January 1992 with the staff unions lays down a special procedure for disputes about implementation. The challenged decisions have never affected the complainants as individual staff members.

D. In their rejoinder the complainants concede that, the Director General having adopted office notice 19/95, they no longer have any cause of action.

E. In its surrejoinder the defendant asks the Tribunal to hold that the case calls for no ruling, being "pointless and vexatious" and "pressed on no rational grounds", and to order the complainants to bear the costs in full, including those it is to be charged under Article IX(2) of the annex to the Tribunal's Statute.

CONSIDERATIONS

1. The complainants are staff members of Eurocontrol in category C. Article 4a, Section 2a, of Rule No. 7, which applies the Staff Regulations governing officials of the Agency, introduced what is called a "typist's allowance", and office notice 29/65 of 28 June 1965 is about how to qualify for it. The complainants are paid the allowance.
2. On 11 January 1995 the Director General issued office notice 2/95 to amend the conditions governing payment. An annex to the notice said that "officials in category C performing secretarial tasks in an administrative unit shall be paid a fixed allowance pursuant to the conditions set out in an office notice" and that "the list of posts giving entitlement to such an allowance shall be drawn up by the Director [of] Personnel". Paragraph 6 stated that the amendment and the implementing provisions would apply as from 1 July 1995.
3. The Director General issued office notice 7/95 of 1 March 1995 to give effect to 2/95. It provided for a "functional" allowance that was "linked to the performance of the specific tasks of a 'Head of Secretariat' post". It listed the posts that conferred entitlement to the allowance and the names of the staff on those posts.
4. In a letter of 16 March 1995 the Staff Association asked the Director General to hold the consultations provided for under the agreement of 9 January 1992 between the Agency and the staff unions. The Director General refused, and the Association thereupon asked the chairman of the Permanent Commission of Eurocontrol to order that the procedure for consultation be followed.
5. On 29 May 1995 the complainants lodged internal "complaints" under Article 92(2) of the Staff Regulations asking for the withdrawal of the two notices and for a declaration that the Director General had acted unlawfully in failing to suspend the effect of them pending a decision by the Permanent Commission.
6. On 2 June 1995 the Director General issued office notice 10/95, which reads as follows:

"The measures provided for in Office Notices No. 2/95, dated 11.1.95, and No. 7/95, dated 1.3.95, are deferred until further notice.

A final decision will be taken and staff notified accordingly at the earliest opportunity."

7. The "complaints" were referred to the Joint Committee for Disputes. It held that they showed no cause of action and were therefore irreceivable. In identical letters of 5 September 1995 the Director of Human Resources told each of the complainants that the Director General had endorsed the Committee's conclusion. Those are the decisions they are impugning.

8. Though filed separately on 4 December 1995, the complaints raise the same issues of fact and of law and may therefore be joined to form the subject of a single judgment.

9. Eurocontrol contends that the complaints are irreceivable. It says that notices 2/95 and 7/95, which the complainants challenged in their internal appeals, are general administrative decisions affecting a class of officials. So no appeal against them lies to the Tribunal, which rules only on individual disputes. It cites the list of names in 7/95 as evidence that the notice did not constitute a decision adversely affecting the complainants, the less so as it was not followed by any implementing provisions and the complainants continued to receive the allowance.

10. As the Tribunal has already held -- for example, in Judgment 1081 (*in re* Albertini and others) under 4 -- the mere fact that a decision affects a category of staff and is therefore a general one does not preclude challenge. To be challengeable a decision need not be an individual one but may be general. To quote Article VII(2), which is about the time limits, a complainant may challenge "a decision affecting a class of officials".

11. Yet not every complaint that challenges a general decision will be receivable. The complainant must comply with the requirement in Article VII(1) of the Tribunal's Statute that internal remedies be first exhausted. In keeping with that rule and with precedent -- for example Judgment 1134 (*in re* Ngoma) under 4 -- "a complaint will be irreceivable if it challenges a general decision that must ordinarily be put into effect by individual decisions against which internal appeal will lie".

12. In the light of the foregoing 2/95 and 7/95 are to be distinguished. By both its content and its context 2/95 is general enough to affect all the complainants together and so to require individual implementing decisions. It does, it is true, amend Article 4a of Rule No. 7 to read:

"Officials in category C performing secretarial tasks in an administrative unit shall be paid a fixed allowance pursuant to the conditions set out in an office notice."

Yet the draughtsman thought that text so general in scope as to warrant a further clause to say that "The list of posts giving entitlement to such an allowance shall be drawn up by the Director [of] Personnel". So the complainants obviously had to read the list to find out whether they were to get the allowance or not. Since 2/95 is undoubtedly a general decision the complaints are irreceivable insofar as they challenge it.

13. Notice 7/95 is another matter. It implements 2/95 by listing the posts that confer entitlement to the "functional" allowance that was to supersede the lump-sum one and by naming the staff on those posts. The omission of the complainants' names meant that they were no longer to get the lump-sum allowance that was to be replaced; so they did have a cause of action by 29 May 1995, the date at which they filed their internal appeals, and were entitled to seek the withdrawal of notice 7/95 of 1 March 1995.

14. But were the complaints to the Tribunal receivable at 4 December 1995, the date of filing? As Eurocontrol observes, notice 10/95 of 2 June 1995 announced that the measures provided for in 2/95 and 7/95 were held over *sine die* but that a final decision would be taken and issued as soon as possible. The Agency submits that the suspension of the impugned decisions means that they are no longer challengeable, the complainants having no cause of action.

15. The plea is mistaken. For one thing, 10/95 said nothing of the substance of the disputed measures but was about the date of their entry into force. So there was nothing to preclude their being put into effect fairly soon and the complainants still had reason to seek the outright withdrawal of provisions that might cause them injury even if, as Eurocontrol alleges, no actual injury was then ascertainable.

16. Indeed Eurocontrol realised as much itself since by notice 19/95 of 22 December 1995 it cancelled 2/95 and 7/95 in anticipation of a ruling by the Tribunal as to whether they were lawful. Only when 19/95 went out did the complainants, as indeed they admit, lose their cause of action.

17. Since the reversal of the disputed measures came only after the filing of the complaints and the complainants were therefore put to needless expense, their claim to costs succeeds. Eurocontrol's counterclaim to an award of costs against the complainants is dismissed.

DECISION

For the above reasons,

1. The Tribunal need not rule on the complaints.
2. Eurocontrol shall pay the complainants a total of 100,000 Belgian francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

Michel Gentot
E. Razafindralambo
Egli
A.B. Gardner