

EIGHTY-FOURTH SESSION

In re Schwaller

Judgment 1695

The Administrative Tribunal,

Considering the complaint filed by Mr. Marcel Schwaller against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 November 1996, Eurocontrol's reply of 28 February 1997, the complainant's rejoinder of 1 May and the Organisation's surrejoinder of 11 July 1997;

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

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

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

A. Under Article 67(1)(c) of the Staff Regulations, which is about family allowances, Eurocontrol employees get an education allowance. Article 81 says that someone entitled to invalidity pension is eligible for family allowances too.

The criteria for granting the education allowance are set in Article 3 of Rule No. 7 on remuneration, which says in the third paragraph:

"The maximum prescribed in the first paragraph shall be doubled for:

- ...

- an official whose place of employment is at least 50 km from an establishment of higher education in the country of which he is a national or working in his language, provided that the child actually attends an establishment of higher education at least 50 km from the place of employment and the official is entitled to the expatriation allowance, the latter condition shall not apply if there is no such establishment in the country of which the official is a national."

Those provisions are reproduced and enlarged on in paragraph 3.2 of office notice 12/94 of 5 July 1994. Paragraph 6 of the notice says:

"The instructions specified above also apply to staff assigned to non-active status or pensioners insofar as they are entitled to family allowances."

The complainant, a citizen of Luxembourg who was born in 1940, is a former employee of Eurocontrol. The last post he held with the Organisation was as deputy assistant at grade B4 at Eurocontrol's Institute of Air Navigation Services in Luxembourg. He has been getting an invalidity pension since 1 December 1993 and lives in Luxembourg.

In September 1995 his son Laurent went to Brussels to study architecture, for which training is not to be had in Luxembourg. By a decision of 1 December 1995, for which the Director General had delegated authority, the head of the Pensions Section granted the complainant as from 1 September 1995 an education allowance for his son at the "U" rate, which is equivalent to the "normal ceiling" of the allowance.

Believing that he was entitled to the "F" rate, which is known as the "double ceiling", the complainant wrote to the Director of Human Resources on 13 December 1995 to ask why he had been granted only the "U" rate. On 11 January 1996 the acting head of the Pensions Section told him that, according to paragraph 3.2 of office notice 12/94, the allowance was paid only to serving staff and, being retired and having no place of employment, he was not entitled to the "double ceiling".

On 11 March he submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations asking him to reverse the decision of 1 December 1995 and withdraw office notice 12/94 on the grounds that they were unlawful. The Joint Committee for Disputes, to which the matter was referred, concluded in its report of 31 July that the "complaint" was without merit. In a letter of 21 August 1996 to the complainant the Director of Human Resources endorsed the Committee's conclusion on the Director General's behalf. That is the decision he is impugning.

B. The complainant submits that the purpose of office notice 12/94, particularly paragraph 6, was to broaden the ambit of Rule No. 7 to allow retired staff to benefit from the "F" rate. To apply that rate only to serving officials was therefore unlawful. The "place of employment" should, in the case of a retired staff member, be the last place of employment or the place of residence. Any other construction would make paragraph 6 pointless. So Eurocontrol broke the rules by refusing to pay the complainant the "F" rate on the pretext that he had no place of employment.

He asks the Tribunal to quash the decision of 21 August 1996, to rule that office notice 12/94 is unlawful and to award him costs.

C. In its reply Eurocontrol contends that office notice 12/94 does not extend the application of Rule No. 7 to retired officials and that paragraph 6 is not a rule. The conditions for granting the "F" rate are set out in Article 3 of Rule No. 7 and apply only to serving officials. Retired staff have no place of employment, which the Organisation defines as the place where a serving staff member carries out his duties and which the Director General determines at the time of appointment or after transfer. Retired staff have only a place of residence. So they are not entitled to the "F" rate.

The Organisation asks that costs be awarded against the complainant.

D. In his rejoinder the complainant asserts that the education allowance is a social benefit intended to pay for the studies of children of serving or former staff. The Staff Regulations draw no distinction between serving and retired staff as to entitlement to the allowance. On the contrary, the whole purpose of Article 81 is to ensure that both categories get the same treatment. An office notice may not restrict a right conferred by the Staff Regulations.

E. In its surrejoinder the Organisation observes that Article 3 of Rule No. 7 is quite unambiguous: only serving officials are entitled to the double maximum. The ranking of rules does not preclude doubling the maximum of the allowance to make up for the special burden laid on some staff because of their place of employment. Unlike them, retired officials are free to live where they want.

CONSIDERATIONS

1. The complainant, a citizen of Luxembourg, is a former official of Eurocontrol. He has been on an invalidity pension since 1 December 1993.

2. In September 1995 his son began studying architecture in Brussels, no course being available in Luxembourg.

3. On the Director General's behalf the head of the Pensions Section informed him by a decision dated 1 December 1995 that he would get the education allowance for his son's studies as from 1 September 1995 at the "normal ceiling", which is known as the "U" rate.

4. The complainant claimed the allowance at the "double-ceiling" rate known as "F". On 13 December 1995 he sent a request for review to the Director of Human Resources. The reply of 11 January 1996 was unfavourable. And on 11 March 1996 he lodged an internal "complaint" challenging the decision of 1 December 1995 and claiming the withdrawal of office notice 12/94 of 5 July 1994 on education allowance.

5. The Joint Committee for Disputes recommended rejecting his "complaint" on the merits, and the Director General did so by a decision of 21 August 1996.

That is the decision he is impugning, and his complaint is receivable.

6. The complainant wants the Tribunal to set aside the decision of 21 August 1996 "denying him the double ceiling for his son, Laurent"; to declare unlawful office notice 12/94 of 5 July 1994 on education allowance; and to award him costs.

7. It is common ground that the complainant is entitled to family allowances, and so to the education allowance, under Article 67 of the Staff Regulations. The only material issue is whether he qualifies for the allowance at the double-ceiling rate.

8. The provisions on education allowance are in Article 3 of Rule No. 7, and office notice 12/94 recapitulates them and carries them further. Paragraph 3.2 of the notice says:

"The flat-rate monthly allowance is 100% (rate U).

The flat-rate monthly allowance will be doubled (rate F) provided *all* the following conditions are satisfied:

a) the official or servant is in receipt of expatriation allowance;

b) the place of employment is at least 50 km from an establishment of higher education working in his language in the country of which he is a national;

c) the child actually attends an establishment of higher education at least 50 km from the place of employment.

The requirement under a) above will be waived if there is no such establishment in the country of which the staff member is a national."

9. The complainant submits that he qualifies for the double rate and Eurocontrol was wrong to refuse it on the grounds that rate F applies only to serving staff and he, a pensioner, has no "place of employment" and gets no expatriation allowance.

10. He relies on paragraph 6 of the notice, which says that "the instructions specified above also apply to staff assigned to non-active status or pensioners insofar as they are entitled to family allowances". That, he says, extends the application of the provisions to pensioners and makes it unlawful to "confine it to serving staff".

11. He maintains that "for the pensioner the 'place of employment' can mean only the last place of employment or the place of residence" and "any other construction of paragraph 3.2 b) would make the notice inconsistent and paragraph 6 inapplicable by setting conditions no one could meet".

12. The Tribunal is satisfied on the evidence that the purpose of office notice 12/94 was not to extend the coverage of certain provisions in Rule No. 7 to pensioners but to recapitulate and explain the rules on education allowance. Paragraph 6 merely serves to reaffirm that pensioners are entitled to the allowance.

13. To qualify for the double-ceiling rate the claimant must meet the conditions in 3.2.

14. As a former official the complainant has no duty station, i.e. "place of employment". The Director General determines that place on appointment or on transfer. So the complainant does not qualify for the double rate (F).

15. The argument that the pensioner's home should be assimilated to the place of employment is immaterial and must fail, the pensioner being free to live wherever he chooses.

16. None of the complainant's pleas warrants quashing the decision of 21 August 1996. Nor has he shown that office notice 12/94 is unlawful: as has been said, all it does is recapitulate and explain the material rules.

17. In his rejoinder the complainant submits that Articles 67 and 81 of the Staff Regulations show the intent to have been to put on a par the children of serving staff and those of retired staff; any other construction would, he says, unlawfully narrow the intended meaning and discriminate between the two groups. The answer to that is that the principle of equal treatment holds good only as between those who are in like case, and here the two groups obviously are not.

18. Although the complaint fails the Tribunal disallows Eurocontrol's counterclaim to costs.

DECISION

For the above reasons,

The complaint and the defendant's counter-claim to costs are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

**Michel Gentot
Julio Barberis
Seydou Ba**

A.B. Gardner