

NINETY-THIRD SESSION

Judgment No. 2149

The Administrative Tribunal,

Considering the complaints filed by Mrs S. A., Mr R. B., Mr J. B., Mr J. C. O., Mr C. D., Mr F. D., Mr D. D., Mr M. D. K., Mr H. D. S., Mr M. D., Mr J. H., Mr L. H., Mr M. H., Miss S. H., Mr J. J., Mr R. J., Mr P. L., Mrs L. M., Mr F. M., Mr S. N., Mr P. O, Mrs J. R., Mr D., Mrs J. R.-Z., Mr D. R., Mr J.-P. S., Mr H. T., Mr M. v. B., Mr B. v. d. B., Miss M. v. W., Mr C. V., Mr R. V. (his third complaint), Mr F. V., Miss S. W. and Mr R. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 17 October 2001;

Considering Eurocontrol's reply of 1 February 2002, the complainants' rejoinder of 19 March and the Agency's surrejoinder of 26 April 2002;

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

Having examined the written submissions;

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

A. Facts relevant to this case are to be found under A in Judgments 1712 and 1959, delivered on 29 January 1998 and 12 July 2000 respectively.

Article 4a of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency says, in part, that:

"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."

Until 1995, this allowance, known as the "typing allowance", could also be granted, by analogy, to staff in category C who were "clerical officers" and who spent at least 60 per cent of their time using a typewriter or 50 per cent of their time using a computer keyboard.

By office notice 19/95 of 22 December 1995, the Director General repealed Article 4a of Rule of Application No. 7. By office notice 8/98 of 14 May 1998, he re-established the provision with retroactive effect as from 1 January 1996 in order to give effect to Judgment 1712. He indicated that employees who had entered the service of the Agency since 1 January 1996 would benefit from the application of this provision by analogy from the date on which they met the qualifying conditions but that, from the date of publication of office notice 8/98, Article 4a of Rule No. 7 would be applied *stricto sensu* and the practice of awarding the allowance by analogy would be brought to an end, except for employees who met the qualifying conditions prior to the date of publication of the notice.

In Judgment 1959 the Tribunal found that:

"... by dismissing the complainants' internal complaints on the grounds that, because they were not discharging secretarial or administrative support tasks they were not entitled to the fixed allowance, Eurocontrol breached the rule which it had itself imposed when setting the objective qualifying criteria for the fixed allowance. It also acted in a discriminatory manner towards the complainants.

The impugned decisions must therefore be set aside and the fixed allowance granted to the complainants from the date on which they made their respective applications, in the case of those who have entered the service of the Agency since 1 January 1996 - date on which Article 4a of Rule No. 7 was re-established - and as from 1 January 1996, in the case of those who were in its service before that date."

Pursuant to that judgment, on 9 August 2000 the Director General issued office notice 00/21. It said that clerical staff who had applied for the allowance previously would be awarded it on the same terms as the complainants and intervenors covered by Judgment 1959; and that those who had not applied but who qualified for award by analogy could submit applications before 20 September 2000 and would be paid the allowance as from 1 July 2000.

The complainants all serve as clerical staff at the Agency's Central Flow Management Unit (CFMU). In September 2000 they applied for payment of the typing allowance as from 1 January 1996. By decisions of 20 December 2000 it was granted to them as from 1 July 2000. At dates ranging from 8 January to 2 March 2001 they filed internal complaints against those decisions. On 27 April their counsel sent a reminder to the Director General. By memoranda of 20 July 2001, the impugned decisions, the Director of Human Resources rejected the internal complaints on the Director General's behalf, based on a unanimous recommendation of the Joint Committee for Disputes issued on 18 June.

B. The complainants contend that the Director General misread Judgment 1959. They plead discrimination: they were not treated on a par with others despite fulfilling the same objective criteria for the grant of the allowance. There was no justification for the fact that staff who applied in 1998 got the allowance from 1 January 1996 while others, though on the staff of Eurocontrol since before 1 January 1996, became eligible only from the date on which they applied. In their submission, there was an unwillingness on the part of the Agency to keep staff properly informed.

They each seek the quashing of the impugned decisions, payment of the typing allowance as from 1 January 1996, plus interest at the rate of 8 per cent a year, moral damages in an amount of 2,478.94 euros, and costs.

C. In its reply Eurocontrol submits that their claim for interest on any amounts due is irreceivable because it was not made in the internal complaint. It adds, in subsidiary argument, that the claim is unjustified because it would imply more favourable treatment for the complainants than for staff who took the trouble to apply for the allowance before 1996 or in 1998. The same is true of their claim for moral damages.

On the merits Eurocontrol asserts that applications have always been necessary for the grant of the fixed allowance by analogy. To apply different treatment to staff who are not in the same position does not constitute discrimination. None of the complainants had filed such an application before the delivery of Judgment 1959, the criterion set by the Director General.

D. In their rejoinder the complainants point out that their counsel did mention their claim for interest in the reminder addressed to the Director General on 27 April 2001. The Director General was therefore aware of the claim before the Joint Committee for Disputes reported and before taking his final decision.

On the merits they contend that Eurocontrol is wrong in its assertion that the allowance cannot be granted unless an application has been submitted. In Judgment 1959 the Tribunal's criterion for distinguishing between staff was not whether they had submitted an application but whether they had joined the Agency before or after 1 January 1996. Consequently, the grant of the allowance is not subject to submission of an application and they are entitled to it as from 1 January 1996. They observe that Eurocontrol's attitude shows scant regard for its staff and bad faith and that, as the Joint Committee for Disputes noted, the Agency is partly responsible for the matter having dragged on.

E. In its surrejoinder Eurocontrol submits that appellants ought not to be allowed to introduce new claims while their internal complaints are being considered. Interest would be due only if they had some "established claim" on the Agency as from 1 January 1996; but in the case of the allowance by analogy, the staff member becomes a claimant only upon submitting an application. Besides, to allow the claim would contravene what precedent has consistently said about the relative effect of *res judicata*, since Eurocontrol would have to apply Judgment 1959 in full to staff who were neither parties to, nor intervenors in, the case. That would be in breach of the principle of protection under the law.

Eurocontrol maintains that grant of the fixed allowance by analogy has always been subject to an application being

filed. It points out that the Director General's arrangements published in office notice 00/21 of 9 August 2000 constituted an *ex gratia* measure. The Director General took the view that the position of staff, who had not taken steps to obtain the allowance before 1996 or in 1998, was different from that of staff whose applications had been rejected, and so warranted different treatment.

Lastly, Eurocontrol contests the claim for moral damages both as to grounds and to the amount. It points out that the Tribunal disallowed a similar claim in Judgment 1959.

CONSIDERATIONS

1. The complainants are challenging decisions of 20 July 2001 taken by the Director of Human Resources on behalf of the Director General of Eurocontrol rejecting the internal complaints they had filed against the decisions of 20 December 2000 to award them only as from 1 July 2000 the typing allowance provided for in Article 4a of Rule of Application No. 7 of the Staff Regulations.

They seek the quashing of those decisions, the grant of the typing allowance as from 1 January 1996 plus interest at the rate of 8 per cent a year, an award of moral damages, and costs.

2. In their rejoinder the complainants apply for hearings in order to deal with certain aspects of the case which, they say, are not easily explained in a written submission.

The Tribunal is of the view that it has enough evidence to rule on the case without having to authorise hearings.

3. The complainants contend that the Director General has misinterpreted Judgment 1959 and has discriminated for no objective reason between staff members who fulfil the same objective criteria for the grant of the fixed allowance. They consider that no argument can justify granting the indemnity as from 1 January 1996 to those who applied in 1998 while granting it to the complainants only from the date of their applications, despite their having joined Eurocontrol before 1 January 1996.

In their submission, "in the case of staff who were in service before 1 January 1996 and who met the requirements at that date, payment of the allowance did not become due upon the submission of an application, and in any event they had become eligible for the allowance on 1 January 1996".

4. Eurocontrol argues that their claim for interest on any amounts due is irreceivable because it is new.

5. In rebuttal of the complainants' arguments the Agency asserts that applications have always been required in order for the allowance to be granted by analogy to clerical staff performing duties other than those listed specifically in Article 4a of Rule of Application No. 7. The Director General was therefore right to conclude that the complainants, like all others receiving the allowance by analogy, must first apply for it and would become eligible for it only at the date of their application.

Eurocontrol refutes their accusation of discrimination, noting that "it would have been unfair vis-à-vis those who had obtained the fixed allowance by analogy only from the date of applying for it, to award what might be construed as a kind of bonus to clerical officers who did not file the requisite application until the [office notice of 9 August 2000] all but ordered them to do so".

6. The Tribunal confirms that the grant of the typing allowance by analogy is subject to a prior application. Judgment 1959 leaves no doubt on that score.

Citing the fact that, in Judgment 1959, some of those who did not claim it until March-June 1998 got the allowance from 1 January 1996, the complainants argue that the principle of equal treatment requires that they too should have the allowance backdated to 1 January 1996.

But the principle of equal treatment applies only where staff are in like case. Different treatment of staff members who are in different positions does not constitute discrimination.

The complainants are not in the same position as those who benefited from Judgment 1959. While it is true that

those benefitting from that judgment did not apply until 1998, it must be borne in mind that Article 4a of Rule of Application No. 7 was repealed on 22 December 1995 to be reintroduced, with retroactive effect from 1 January 1996, only on 14 May 1998 following the delivery of Judgment 1712 on 29 January 1998. These were the circumstances in which the Tribunal found that, between the repeal and reintroduction of the rule establishing the allowance, staff had been unjustly denied their right to claim it, and were therefore right to apply for it as soon as they were able, with retroactive effect from the date on which the rule was to take effect. But the circumstances here are different: before applying for the allowance the complainants awaited the Tribunal's decision of 12 July 2000 and the Director General's office notice of 9 August 2000 laying down the conditions of eligibility.

Their explanation of why they did not apply before is that the Agency's office notices in general, and office notice 8/98 of 14 May 1998 in particular, did not state that the allowance had to be claimed. They see that as unwillingness on the Agency's part to keep staff properly informed. They add that a substantial number of applications from members of one section of Eurocontrol were neither placed in the staff members' personal files nor considered by the Director General.

The Tribunal observes that these are bald assertions, which it will not entertain for lack of any evidence to bear them out. They are in any case contradicted by documents that the Agency submitted.

Nor will it entertain the sworn statements by some complainants to the effect that they did file applications in 1998.

7. The conclusion is that the complainants' main claims must fail, and so too must their incidental claims.

8. The complaints must accordingly be dismissed, there being no need to rule on receivability.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet