

## **NINETY-FOURTH SESSION**

**Judgment No. 2209**

The Administrative Tribunal,

Considering the sixth complaint filed by Mr J.-C. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 28 February 2002, the Agency's reply of 31 May, the complainant's rejoinder of 17 June and the Eurocontrol's surrejoinder of 6 September 2002;

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

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

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

A. Facts relevant to this case are set out in Judgment 1814 delivered on 28 January 1999 on the complainant's second and third complaints, and in Judgment 1893 delivered on 3 February 2000 on his fifth complaint.

Article 2(4) of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency states that:

"Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child, by special reasoned decision of the Director General, based on supporting documents."

Since there were no objective criteria for determining the meaning of "heavy expenditure", Eurocontrol published office notice 15/97 on 15 September 1997 to establish a method of reckoning the expenditure borne by officials.

By an e-mail of 6 December 2000 the complainant requested once again that his mother, who had been admitted to hospital as a "long-term" patient since 1997, be treated in the same manner as a dependent child with effect from 1 April 2001, the date of his retirement. He considered that the aforementioned office notice, on which the rejection of his previous requests had been based, did not apply to retired officials. By a letter of 22 January 2001 he confirmed his request. In a memorandum of 6 February the Head of the Pensions and Termination of Service Section informed him that his request had been rejected on the basis of the provisions of office notice 15/97. In an e-mail of 16 February the complainant pointed out that the rejection had been based solely on the provisions of the aforementioned office notice, which he did not consider to be applicable to retired officials, and that he therefore reserved the right to lodge an internal complaint. On 26 February the Head of the above-mentioned Section wrote a letter to the complainant inviting him to disregard the memorandum of 6 February and to fill out a form which he enclosed. The complainant returned the form on 14 March. On 20 April he was informed that, in accordance with Article 81 of the Staff Regulations, office notice 15/97 was deemed to apply to categories other than working officials and that in the light of the calculations made on the basis of it, his request could not be granted.

Subsequently, several letters were exchanged between the complainant and the service concerned, the complainant disputing not only the factors used in the reckoning which resulted in the decision of 20 April, but also the legal basis of the decision, namely office notice 15/97. The Head of the Pensions and Termination of Service Section informed the complainant on 18 May, on the Director General's behalf, that his dependency request had been re-examined. He reminded the complainant that the cost of a person's maintenance is considered to be heavy if it amounts to 20 per cent or more of his taxable pension income. On the basis of the information in his possession,

the Head concluded that the complainant fulfilled that condition. The complainant's request was therefore accepted for a period of one year beginning on 1 April 2001, on condition that he submitted certain documents. By a letter of 16 July the Head of the above-mentioned Section informed the complainant that he had been told that the complainant's mother was receiving a benefit which had not been declared. The deduction of the undeclared amount reduced the cost of maintenance to a level below that which was considered to represent heavy expenditure and consequently the allowance could not be paid.

On 19 July the complainant submitted an internal complaint to the Director General. On 23 August the Director of Human Resources informed the complainant that office notice 15/97 was being republished with a view to extending its provisions officially to categories other than working officials. In the meantime, it had been decided that his mother was to be treated as a dependent child as from 1 April 2001. The complainant's situation would be re-examined once the revised office notice had been published. The Director suggested to the complainant that he withdraw his internal complaint. On 26 September 2001 Eurocontrol published office notice 18/01, which replaced office notice 15/97 and extended its provisions to categories other than working officials. On 7 November the complainant was informed that, having performed the necessary calculations, the Administration had concluded that the cost of maintenance he incurred amounted to less than 20 per cent of his taxable pension income and that he therefore did not fulfil the conditions enabling his mother to be treated as a dependent child. Consequently, his entitlement to the dependent's allowance would cease on 1 December 2001.

On 18 November the complainant submitted another internal complaint to the Director General. The matter was referred to the Joint Committee for Disputes, which concluded that the complainant did not fulfil the condition of "heavy expenditure". In its opinion dated 19 December 2001 it recommended that the internal complaint be rejected as unfounded in law. By a letter of 31 January 2002 the Director of Human Resources, acting on behalf of the Director General, informed the complainant that his internal complaint had been rejected. That is the impugned decision.

B. The complainant considers that the cost of maintenance that he bears is unquestionable and that the method of reckoning defined in office notice 15/97 is "arithmetically erroneous". He points out that in his case Eurocontrol had performed several calculations and had obtained a different result each time. According to the complainant, the decision of 23 August 2001 contravened office notice 41/72, because it was valid only for a limited undefined duration, rather than for a minimum duration of one year, which was the normal practice.

Referring to Judgment 1814, he invites the Agency to produce evidence that the list of the Joint Committee members was actually published at the beginning of 2001 and that the Committee did in fact meet on 5 December 2001 with a full quorum to examine his internal complaint. He points out that if the Committee did in fact meet he was not invited to attend. Furthermore, the file submitted to the Committee was not communicated to him which would thus invalidate its opinion of 19 December 2001. Lastly, he considers that the Committee had no authority to make a ruling in law.

The complainant asks the Tribunal to set aside the impugned decision and to invalidate by way of exception the method used to assess his maintenance costs. He claims 13,000 euros in damages, representing the maintenance costs he actually incurred in one year, and 1,000 euros in costs.

C. In its reply the defendant explains that in its decision of 23 August 2001 it did not acknowledge that the expenditure incurred by the complainant was "heavy" within the meaning of Article 2(4) of Rule of Application No. 7. It was simply an *ex gratia* and temporary measure pending the publication of office notice 18/01. Office notice 41/72, which provided that in principle a decision to treat a person as a dependent child was valid for a one-year period, was revoked by office notice 15/97.

According to Eurocontrol, the complainant has provided no information invalidating the reckoning that was performed. As in his previous complaints, he merely puts forward "petitions and systematic criticism" against the provisions of office notices 15/97 and 18/01, despite the fact that they had the advantage of replacing the Director General's discretion by an objective method of reckoning "heavy expenditure" enabling a person to be treated as a dependent child. It points out that in Judgment 1893 the Tribunal ruled on the legality of the method instituted by office notice 15/97 and concluded that Eurocontrol had "rightfully applied the method of reckoning defined in [that] notice". Since this method was retained in its entirety in office notice 18/01, the Tribunal's conclusion holds good.

The defendant indicates that the Committee did indeed meet on 5 December 2001, as stated in its opinion dated 19 December 2001. It points out that the Committee is not required to hear complainants and that its composition was published in all of Eurocontrol's duty stations.

D. In his rejoinder the complainant argues that the decision of 23 August 2001 was not an *ex gratia* measure but a normal, properly-executed decision to treat a person as a dependent child, except from the point of view of its duration. According to him, the composition of the Joint Committee for Disputes was never posted on an "ad hoc notice board", and Eurocontrol has not provided irrefutable proof that a meeting did in fact take place with a full quorum on 5 December 2001. He suspects that the various services concerned have hatched a "conspiracy of silence" against him.

E. In its surrejoinder the defendant explains that the decision of 7 November 2001 was taken on the basis of the objective method of reckoning contained in office notice 18/01. It repeats the calculations in order to prove that the complainant does not satisfy the conditions laid down in that notice. Eurocontrol also contends that the complainant cannot deny the existence of the decision of 9 March 2001 constituting the Joint Committee for Disputes. The Organisation attaches to its brief the agenda for the Committee's session of 5 December 2001 and points out that the Committee did in fact hear the complainant.

## CONSIDERATIONS

1. In a form dated 14 March 2001 the complainant, whose mother had been admitted to hospital as a "long-term" patient, requested once again that she be treated as a dependent child within the meaning of Article 2(4) of Rule of Application No. 7, with effect from the date on which his appointment ended.

2. By a decision of 20 April 2001 the Agency refused the request on the grounds that the dependency conditions defined in office notice 15/97 were not satisfied, the maintenance costs incurred by the complainant being well below 20 per cent of his net pension.

The complainant, considering that the aforementioned office notice only applied to working officials, challenged both the legal basis of the rejection of his request and the factors assessed in reaching this decision. Several e-mails were exchanged on this subject between the complainant and the relevant service in the Agency. On 18 May 2001 the Head of the Pensions and Termination of Service Section, acting on behalf of the Director General, informed the complainant that his request for dependency had been re-examined and accepted for a one-year period as from 1 April 2001, on condition that he submitted certain documents.

Having been informed that the complainant's mother was receiving a benefit which had not been declared, the defendant reconsidered its decision on 16 July 2001. The deduction of the undeclared benefit reduced the cost of maintenance incurred by the complainant to a level below that which was considered to be heavy expenditure.

In his internal complaint of 19 July against that decision the complainant argued that the method of reckoning which had been applied was that of office notice 15/97, which was not applicable to his case.

On 23 August 2001 the Director of Human Resources informed the complainant of the following:

"The provisions of office notice 15/97 of 15.9.97 are in the process of being republished with a view to extending them officially to categories other than working officials.

Pending the publication of the new text, it has been decided to treat your mother as a dependent child as from 1 April 2001, the date of your retirement.

Your situation will be reviewed as soon as the new office notice is published. In the meantime, we suggest that you withdraw your internal complaint of 19 July 2001, which is provisionally deprived of any basis."

3. On 26 September 2001 the defendant published office notice 18/01 which extended the provisions of office notice 15/97 to categories other than working officials.

The Agency wrote to the complainant on 7 November 2001 informing him that it had re-examined his situation in

the light of office notice 18/01 and concluded that the cost of maintenance he incurred amounted to less than 20 per cent of his taxable pension income. Consequently, he did not fulfil the conditions enabling his mother to be treated as a dependent child. The allowance that was being paid to him would therefore cease as from 1 December 2001.

On 18 November the complainant filed an internal complaint against this decision, asking that his mother be treated as a dependent child for a further renewable one-year period beginning on 1 December 2001.

The matter was referred to the Joint Committee for Disputes, which recommended in its opinion of 19 December 2001 that the internal complaint be rejected. By a letter of 31 January 2002 the Director of Human Resources, acting on behalf of the Director General, informed the complainant that his internal complaint had been rejected. That is the impugned decision.

4. The complainant asks the Tribunal to set aside the impugned decision and to invalidate the method used to assess his maintenance costs. He claims 13,000 euros in damages and 1,000 euros in costs.

He argues that by making the decision of 23 August 2001 the defendant implicitly acknowledged that all the conditions enabling his mother to be treated as a dependent child were satisfied, and that by deciding that it was valid not for a minimum duration of one-year, which was the normal practice of the Agency, but for an undefined and limited duration, the defendant omitted to take into account office notice 41/72, which stated that:

"The decision made by the authority [with regard to treating a person as a dependent child] shall in principle be valid for only one year. On expiry of its period of validity, a new examination shall be carried out on the basis of information to be provided by the applicants."

The complainant disputes the method of reckoning maintenance costs under office notices 15/97 and 18/01, which was used by the Administration.

He queries whether the meeting of the Joint Committee for Disputes of 5 December 2001, in which a unanimous opinion was reached concerning the rejection of his internal complaint of 18 November 2001, actually took place. He considers that if the Committee did in fact meet on that date, it did so without informing him, and that his internal complaint was not examined thoroughly.

5. The defendant asserts that in its decision of 23 August 2001 it did not acknowledge that the costs of maintenance of the complainant's mother amounted to "heavy expenditure" within the meaning of Article 2(4) of Rule of Application No. 7. It submits that, on the contrary, the decision to treat his mother as a dependent child was an *ex gratia* measure, since office notice 15/97 formally applied only to working officials. It also explains that this was merely a temporary measure pending the extension of the provisions of the aforementioned notice to categories other than working officials.

The Agency points out that office notice 41/72 has been revoked, but that even when it was still in force it was never envisaged that a person should be treated as a dependent child for irrevocable one-year periods, as the complainant wrongly asserts.

It adds that the Director General was under no obligation to make the decision of 23 August 2001 and had valid reasons to reject the request; the decision was therefore an *ex gratia* measure. The Agency considers that the decision of 7 November 2001, whereby the dependent child status conferred on the complainant's mother was withdrawn on the basis of the objective method of reckoning defined in office notice 18/01, was a correct decision.

6. Having examined the evidence on file, the Tribunal notes that the decision of 23 August 2001 did in fact constitute a decision to treat a person as a dependent child in accordance with Article 2(4) of Rule of Application No. 7 and not, as the defendant asserts, a mere "*ex gratia* measure". The Agency's argument that it had valid reasons to refuse the request for dependency status cannot retrospectively alter the nature of the decision, the dependency status having been requested and granted on the basis of the above-mentioned provision.

That the decision of 23 August 2001 was, in fact, a decision to treat a person as a dependent child under Article 2 is confirmed by the complainant's request of 14 March 2001, which referred expressly to that article. This request was rejected because, according to the defendant, the conditions provided for in office notice 15/97 were not fulfilled. Following the re-examination of the request, the defendant having realised that this office notice was not applicable to the complainant, it had taken the decision of 18 May 2001 accepting his request that his mother be

treated as a dependent child. It was because Eurocontrol had gone back on its decision in a letter of 16 July that the internal complaint had been submitted on 19 July 2001; this in turn had led to the decision of 23 August 2001. This decision enabling the complainant's mother to be treated as a dependent child could therefore only be the culmination of the procedure initiated by the request of 14 March 2001.

A question remains as to the duration for which the allowance was granted and as to whether the entitlement to that allowance could be withdrawn by the decision of 7 November 2001.

7. In view of its findings under 6, above, the Tribunal considers that the decision of 23 August 2001, which must be interpreted as restoring the complainant's rights pursuant to his request of 19 July 2001, cannot differ in scope from that of 18 May 2001. Consequently, the allowance granted by the decision of 23 August could not have been granted for less than one year.

Given that office notice 18/01, which was published on 26 September 2001, cannot retroactively call into question a decision taken prior to its publication, the decision of 7 November 2001 wrongly confined the duration of the allowance to a period of less than one year.

Therefore, without having to examine the other pleas, and particularly the plea concerning the illegality of the internal procedure, the impugned decision must be set aside insofar as it withdrew the dependent child status conferred on the complainant's mother for a one-year period which began on 1 April 2001.

8. The complainant asks the Tribunal to declare that the method used to assess his maintenance costs is invalid.

The Tribunal considers that under the present circumstances, and in view of the foregoing considerations, this request is now redundant.

9. The complainant claims 13,000 euros in damages.

The Tribunal considers that the complainant has suffered no material injury, as the decision to limit the duration of the allowance to a period of less than one year is to be set aside.

With regard to moral injury, the complainant has provided no evidence of the constant, deliberate and repeated unfair treatment of which he accuses the Organisation.

10. Since his pleas succeed in part, the complainant is entitled to 700 euros in costs.

## DECISION

For the above reasons,

1. The decision of 31 January 2002 is set aside insofar as it confirmed the decision of 7 November 2001 withdrawing the dependent child status conferred on the complainant's mother with effect from 1 December 2001.

2. That status shall be restored for the period from 1 April 2001 to 31 March 2002.

3. Eurocontrol shall pay the complainant 700 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.