***In re* MOLLOY**

Judgment No. 292

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Organisation for the Safety of Air Navigation (Eurocontrol) drawn up by Mr. Brian Michael Molloy on 28 November 1975 the Eurocontrol Agency's reply of 16 February 1976, the complainant's rejoinder of 29 April 1976 and the Agency's surrejoinder of 24 June 1976;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, Articles 62, 67, 92, 93 and 100 of the Eurocontrol Staff Regulations, Rule No. 7, Article 3(4), of the Rules of Application of the Staff Regulations, Annex 2 to Office Notice No. 43/70 of 18 September 1970 and Office Notices Nos. 41/71, 46/72 and 47/74;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. By decision of 9 October 1968 the Director-General of the Eurocontrol Agency appointed the complainant, who is a British subject, as a first-grade deputy assistant with effect from 1 April 1968 and assigned him to the Eurocontrol Centre at Brétigny-sur-Orge, in France. Five of his six children are of school age.

B. In accordance with Article 3 of Rule No. 7 of the Rules of Application of the Eurocontrol Staff Regulations, and the terms of a letter sent to him on 30 January 1968, i.e. before his appointment, by the Head of the Administration and Finance Bureau, from the date of his appointment and for each of his children of`school age he received the special rate of education allowance payable to an official of British or Irish nationality who shows that it is impossible for his dependent children to receive, reasonably near his place of residence, primary or secondary education "in accordance with the standards obtaining in the education institutions of his country of origin". According to Annex 2 to Office Notice No. 43/70 of 18 September 1970, however, the official must annually furnish proof that he is paying excessively high school fees. The Agency held that the complainant had failed to furnish such proof. He thereupon lost the special flat rate of 1,550 Belgian francs - which was later increased to 2,067 - and was paid only at the ordinary rates, namely 954, 1,060 and 1,325 Belgian francs, payable according to whether the child was aged between 6 and 11, or over 11, or attending a university or similar establishment.

C. By letter of 7 March 1972 to the Head of the Personnel Division the complainant protested on the grounds that no school had been opened in the area of his residence and annual fees at the English school at Croissy-sur-Seine far exceeded the sum of twelve special monthly allowances. By letter of 25 May 1972 the Director of Personnel and Administration replied that "when an official is assigned to an area in which his children may within a radius of 50 kilometres receive schooling up to English standards of education the special flat rate is payable provided the official proves that school fees, excluding travelling expenses, come to twelve time 2,225 Belgian francs, i.e. 26,700 Belgian francs, a year". (The special flat rate had by then been raised to 2,225 Belgian francs a month.) By minute of 30 January 1973 the complainant asked the Head of the Personnel Division to reconsider the application in his letter of 7 March 1972, but on 20 February 1973 this was refused. On 20 January 1975 he challenged the Agency's decision, mainly on the grounds that the private English school at Croissy-sur-Seine, being 77 kilometres from his home by the shortest route, could not be regarded as reasonably near his place of residence. In his reply of 24 April 1975 the Director of Personnel and Administration said that the distance should be calculated from the official's duty station, not his place of residence. A claim the complainant submitted to the Director-General on 27 May 1975 remained unanswered and in view of the Administration's silence he appealed to the Tribunal.

D. The complainant believes that neither the instructions of 1970 concerning the school fees allowance nor their application is in keeping with the text of the staff rules and that he cannot be deprived of any right he required on appointment by the change in the application of Article 3(4) of Rule No. 7. He asks the Tribunal to order that Article 3(4) be correctly interpreted and to award him damages for the withholding of part of the school fees allowance since the date in 1970 on which the misinterpretation of the rules was made.

E. The Agency contends that the complaint is irreceivable, in particular on the grounds that the appeal of 27 May 1975 against the decision impugned was not lodged within the time limit of three months laid down in the second

paragraph of Article 92 of the Eurocontrol Staff Regulations. As to the merits the Agency points out that its officials are subject to staff rules and the competent authority is clearly empowered to amend the rules unilaterally. The amendment led to a reduction in the complainant's remuneration, but does not radically alter such terms of employment as determined his acceptance of the Staff Regulations. The Agency asks the Tribunal to declare the complaint irreceivable and, should the need arise, to dismiss the complaint as unfounded, and to award costs against the complainant.

CONSIDERATIONS:

As to receivability:

1. The complainant, who is a British national, was with effect from 1 April 1968 appointed to a post in the Organisation, his duty station being Brétigny-sur-Orge in France. He has five children of school age. It seems that at all material times they were being educated at a French school where education is free.

2. Rule No. 7 of the Rules of Application of the Staff Regulations of the Organisation concerns remuneration and section 1 thereof is entitled "Family Allowances". Article 3 of this section provides that an official shall receive an education allowance for each dependent child, who is in regular full-time attendance at an educational establishment. The article fixes the monthly educational allowance at various rates according to age, etc., and fixes also "a special rate" to be "allowed to officials of British or Irish nationality, provided always that they are able to show that it is impossible for their dependent children to receive" within the agglomeration of their residence "primary or secondary education in accordance with the standards obtaining in the educational institution of his country of origin".

3. The complainant before he accepted his appointment wrote to the Organisation to enquire about accommodation and schools. In reply he was told on 30 January 1968 of English schools in the area to which some of the British staff sent their children while others, the letter said, sent their children to French schools in the locality. The letter continued: "You will be entitled to an educational allowance of 1,550 Belgian francs per month" (this was the amount then fixed as the special rate). "This is a flat rate irrespective of the arrangements you make for the children."

4. The complainant received the special rate until the events now to be mentioned. On 18 September 1970 there was issued Office Notice No. 43/70, which purported to be retroactive to 1 September 1970. There was attached to this Notice an Instruction signed by the P. and A. (Personnel and Administration) Director of the Organisation. The purpose of the Instruction was described in the french version of its opening paragraph as fixer les modalités d'application of the provisions relating to school fees allowances as provided for in Article 3.

The Instruction purported to attach certain conditions to the payment of the special rate. One of them was that the official should furnish annually proof of payment of excessively high school fees. By a decision made on behalf of the Director-General on 22 December 1970 the educational allowance payable to the complainant was with effect from 1 December 1970 reduced from 2,067 to 954 Belgian francs, i.e. the normal rate was substituted for the special.

5. On 4 August 1971 an Instruction attached to Office Notice No. 41/71 prescribed further conditions, i.e. that there should be no suitable school within a radius (subsequently applied as being from the duty station and not from the residence of 50 kilometres and that fees proved to be paid, excluding cost of transport, should exceed the special rate. Further Instructions were issued attached to Office Notices Nos. 46/72 and 47/74 in which these conditions were repeated, but the Instructions do not appear to have introduced any new measure affecting the complainant.

6. It is to be observed that Article 3 provides for an allowance and not for a reimbursement of fees; it does not require proof of the amount actually spent. Although the complainant never paid any fees at all, it has not been suggested that he was not entitled at least to the normal allowance. The substantial question in the case is therefore whether a document which has as its object fixer les modalités d'application of the provisions in Article 3 can impose conditions not contained in the article. The first condition changed the character of the payment from an allowance of a fixed sum, arising from the fact that a child was actually being educated and made irrespective of cost, into a reimbursement of costs incurred. The second condition interpreted dans l'agglomération as meaning within a radius of 50 kilometres.

7. However, when the change was first made in September 1970, the fundamental question was not discussed. The complainant indeed made no personal complaint about the reduction in his educational allowances until 1972. The consequences of Office Notice No. 43/70 were taken up at the time by the Staff Committee, but on the footing that the Instruction governed the situation. The Committee concerned itself with the hardship involved and in particular with the retroactive effect of the Instruction and the demand for repayment of the September allowance. The Committee adopted towards subsequent Instructions the same attitude of seeking concessions and an agreed solution.

8. On 7 March 1972 the complainant himself wrote to complain about the stoppage of the special rate and to demand the reimbursement of sums underpaid. He quoted the passage set out above from the Organisation's letter of 30 January 1968. In reply the Director of P. and A. referred the complainant to Office Notice No. 41/71 and said that by his letter of appointment he was bound by amendments to the Rules of Application; he added that the problem of education allowances was being studied. On 30 January 1973 the complainant inquired about the results of the study and asked that his application should be reconsidered; he said that his complaint was not made because of amendments to the Regulations but because of a change in their interpretation. In reply the Director said in effect that the Administration was still studying the problem.

9. On 20 January 1975 the complainant applied again for restoration of the special rate in accordance with Article 3 of Rule No. 7 of the Rules of Application; he pointed out that the English school at Croissy-sur-Seine was 77 kilometres away by the direct route from the nearest station to his home. In his reply on 24 April 1975 the Director refused the application on the grounds, first, that the 50 kilometres specified in Officer Notice No. 47/74 was a radius and not a distance, and secondly, that the complainant had not proved that the school fees exceeded the amount of the allowance. From this decision the complainant on 27 May 1975 appealed to the Director-General. He repeated his claim as made in his letter of 20 January 1975, but his main point was that he had received no satisfactory explanation of the discrepancy between Article 3 and Office Notice No. 47/74.

10. The complainant received no reply from the Director-General and accordingly he filed on 28 November 1975 a complaint to the Tribunal in which he asked, first, for a correct and reasonable interpretation of Rule No. 7, and secondly, for compensation for the loss of the education allowance since the misinterpretation of the rule in 1970. The Organisation objects that the complaint is irreceivable as time-barred. The objection is put on two grounds. The first is that the complainant did not appeal within the prescribed time limit from Office Notices Nos. 43/70 and 41/71, nor from the specific measures of application dated 22 December 1970. The second ground is that the letter of 24 April 1975, from which the complainant appealed to the Director-General, merely confirms previous decisions and cannot be the subject of a complaint.

11. Article 92 of the Staff Regulations governs the procedure relating to appeals.

Paragraph 1 provides in effect that a staff member may submit to the Director-General a request that he takes a decision relating to him. If after four months no reply is received, the request is deemed to have been rejected and a complaint may be lodged.

Under paragraph 2 a staff member may submit to the Director-General 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. A complaint must be lodged within three months.

12. The first head of the complaint falls within paragraph l of Article 92 mentioned above. The complainant's request for an interpretation of Article 3 of Rule No. 7 is a request for a decision relating to him; it may be made at any time and is not subject to any time limit. Whether such a decision, when given, has any effect upon past claims is of course a different matter. Moreover, contrary to the Organisation's contention, no decision as requested in the appeal of 27 May l975 had previously been given. In their previous letters rejecting the complaint the Administration never gave any decision upon the interpretation of Article 3 or upon the relationship to it of the Office Notice; this, as noted in paragraph 6 above, is the substantial question in the case. The Administration never answered it because, on the view that the Office Notices were amendments of the Article, it did not arise. As to the first head of the complaint the Organisation's objection fails.

l3. The second head of complaint is governed by paragraph 2 of Article 92 mentioned above. The educational allowance was payable to the complainant on the first day of every month; see Rule No. 7, Article 5. The complaint is that on each such day from l September 1970 onwards the complainant was underpaid, since he was given only

the normal rate and not the special rate. On each such day the Organisation, if the complainant is right, acted adversely towards him by failing to adopt the measure prescribed by Rule No. 7. However, the time limit of three months, running backwards from the application of 20 January 1975, means that claims in respect of payments made on or before 1 October l974 are time-barred; and to this extent the objection succeeds.

As to the substance:

14. The Organisation does not, except to the small extent noted in paragraph 26 below, dispute that, if Article 3 is applicable, the claim must succeed. The main defence is a reliance upon the Instructions attached to the Office Notices, the contention being that these constituted valid amendments to Article 3. The point is crystallised in the following sentence in Article 4.5 of the reply:

"Since Eurocontrol Staff are subject to service regulations, it is obviously at the discretion of the competent authority to alter unilaterally the provisions of the regulations."

This defence fails for one or more of the reasons given below.

15. The Organisation does not state who for this purpose the competent authority is or whence he derives his power to amend the Rules of Application. The Tribunal has observed that Article 62 of the Staff Regulations provides that an official has a right to remuneration (which includes family allowances, of which the education allowance is one; see Article 67) under conditions fixed by a rule made by the Director-General. This is manifestly Rule No. 7 of the Rules of Application. If it be granted that the power to make a rule must embrace a power to amend it, then the Director-General could unilaterally amend Rule No. 7, but only by the exercise of his rule-making power. There is no document in the dossier in which in terms he exercises such a power.

16. The Tribunal has also observed that by virtue of Article 100 of the Staff Regulations general provisions for giving effect to the Regulations are to be settled by rules, instructions and office notes made by the Director-General; rules so made are to be communicated to the Committee of Management which has the power to revise them if necessary. The effect of this article is not at all clear. The Rules of Application constitute a formal and coherent document from which a staff member can ascertain his rights. Is it the intention of Article 100 to put on a par with the Rules of Application a miscellaneous collection of Office Notices? If they are contradictory of the Rules, which are to prevail? If Rules and Office Notices are indistinguishable in effect, why do the Rules have to go to the Committee of Management for possible revision while Office Notices do not? Can provisions affecting remuneration be made by Office Notice notwithstanding that Article 62 requires the conditions of remuneration to be fixed by rule?

17. The Tribunal will not attempt to answer all these questions nor to determine the proper scope of Article 100 nor to decide to what extent, if at all, a Rule of Application can be amended by an Office Notice. It will assume for the purposes of this case that a valid amendment can be made by Office Notice, provided that:

(a) the document containing the amendment is made by the Director-General himself;

(b) the intention to amend is made clear in the document;

(c) the amendment is clear in its effect;

(d) the amendment is not deemed effective to deprive an official of essential acquired rights.

In the following paragraphs the Tribunal will examine these provisos, consider the justification for them and determine to what extent they are fulfilled in the circumstances of the present case.

18. A change in the conditions of remuneration is not an ordinary administrative matter; it is something which the Director-General is to be expected to consider and decide himself. In the absence of express words it is not therefore to be supposed that the power to amend Rule No. 7 is one which the Director-General can delegate. So far from there being express words in this case, the contrary is indicated in the terms of Article 100. This Article specifies that in individual cases the application of the Staff Regulations may be delegated, but there is no similar provision in respect of the making of general rules.

19. Office Notices and the Instructions attached to them are issued in French and in English. Only the English

version of 43/70 is in the dossier; the Notice is signed by the Director-General and the Instruction by the Director P. and A. There are also in the dossier the French and English versions of 41/71 and 47/74. In none of these is the Instruction separately signed. In 41/71 the Notice in French is signed by the Director P. and A. and in English by the Director-General. In 47/74 the Notice in both languages is signed by the Director P. and A. Where the Director P. and A. signs, he signs in his own name as such and not on behalf of the Director-General.

20. An Office Notice is the instrument by which the Administration communicates in general terms with the staff membership. It may be used for many purposes besides the amendment of the Rules of Application. In order to be effective as an amendment it must therefore be made clear on the document itself that amendment is its purpose. Each of the three Instructions which the Tribunal has examined states its purpose in the opening paragraph in what are (disregarding some variations in translation) identical terms as follows: "The purpose of this Instruction is to determine the means of application of the provisions relating to school fees allowances as provided for in Article 3 of the Regulation concerning remuneration." This language appears to the Tribunal to be inconsistent with an intention to amend the provisions of Article 3; the stated object is to fill in the details of their application.

21. An amendment of a text requires that specified words should be deleted from the text, or added to the text at a specified place, or substituted for other specified words in the text. Since the text as amended becomes part of the contract of employment and since a staff member must be able to ascertain clearly the terms of the contract by which he is bound, the power of unilateral amendment must be exercised in a way which makes its effect upon the contract quite clear. The Instructions in this case take the form of a new and contradictory text; they do not make it clear what part of the old text is superseded and what part retained.

22. The considerations set out in the four preceding paragraphs should not be examined separately, for they all bear upon one another. The central point is that the Instructions do not purport to be making amendments. As to the point on relation, whether or not it is conclusive in itself, the fact, as shown in paragraph 19 above, that documents were being signed indiscriminately by the Director-General and the Director P. and A. strongly suggests that the formality appropriate to an amendment was not being contemplated at all. The fact that language appropriate to amendment was not being used suggests the same thing. Accordingly, the Tribunal concludes that the effect of the Instructions is not to amend Article 3 but to apply its provisions. The measures imposed by the Instructions must therefore be within the scope of the article. The two measures relied upon by the Organisation are:

(1) the requirement that the official must furnish annually proof of payment of excessively high school fees; and

(2) the fixing of a radius of 50 kilometres as defining for the purposes of the provisio to Article 3 the boundaries of the agglomeration.

The Tribunal will now consider whether these measures are within the scope of Article 3.

23. As to the first of them, it has not been contended that this can be justified otherwise than as an amendment. Rule No. 7 is entitled «Concerning Remuneration» and is to be contrasted with Rule No. 8 which is entitled «Reimbursement of Expenses». As pointed out in paragraph 5 above, the Instruction purported to change the character of the payment from an allowance into a reimbursement. Under Article 3 the complainant acquired a right to an allowance; the characteristic that distinguishes an allowance from a reimbursement is that the recipient of an allowance cannot, provided that the conditions for its receipt are fulfilled, be made to account for what he does with the money. It is in his discretion to spend it as he likes. It does not follow that in the present case the allowance is to be regarded simply as an addition to the complainant's remuneration; a pupil prepared in a French school for higher education in France will probably need different and extra tuition before he is as well equipped for higher education in Britain. However this may be, the complainant had, under Article 3, the right to be paid the allowance without any conditions as to how he spent it, and this right was explicitly recognised to exist in his case by the letter of 30 January 1968. It may be that it could be treated as an essential acquired right and thus a term of the complainant's contract of employment which could not be adversely affected by an amendment of the Rules of Application. But since the Tribunal has already concluded that Office Notice No. 43/70 was not valid as an amendment of Article 3, it is unnecessary for it to consider this point.

24. As to the second measure, it is necessary to examine more carefully than hitherto the meaning and effect of the proviso to Article 3. Under this proviso the British official, in order to obtain the special rate, must be able to show that his children could not obtain what may be broadly described as a British education at a school within the agglomeration in which he lives. There is no evidence in the dossier, except the address given in the complaint, of

where the complainant lived at the material time or of what in relation to his residence constituted the agglomeration. It may be assumed that within an agglomeration there is an accessible French school. If there is likewise an accessible British school, it is not the intention of Article 3 that the special rate should be paid. The English translation of Article 3 supplied by the Organisation renders "dans l'agglomération de leur résidence" as "reasonably near their places of residence". While this is not an exact translation of the French text, it does in the opinion of the Tribunal express adequately the sense of the proviso.

25. The Tribunal will assume that it is within the power of the Director-General to lay down by means of an Instruction criteria for determining what is or is not "reasonably near" provided that in doing so he has proper regard to the nature and purpose of the Article. This means that he must be guided by accessibility for school children, which must vary according to the conditions in each locality and depend upon distance and means of transport. To lay down in effect that for every official, whatever the situation of his residence, every school within a radius of 50 kilometres (whether from the duty station or from the residence) is to be deemed accessible is not a proper exercise of the power. Accordingly the provision to this effect in Office Notice No. 41/71 and subsequent Instructions is not binding upon the complainant.

26. On the footing that Article 3 is unamended the Organisation argues that under the terms of the proviso it is for the complainant to show that there is no school of the sort described reasonably near to his residence and that he has failed to establish it. But at the beginning of his engagement it must have been accepted by the Organisation that there was no such school, since otherwise the special rate would not have been applicable to him. There is nothing in the dossier to show that the situation has since changed.

DECISION:

For the above reasons,

The appeal is allowed, and it is declared:

1. that Article 3 of Rule No. 7 of the Rules of Application of the Staff Regulations has not been amended by Office Notices Nos. 43/70, 41/71 or 47/74; and

2. that the complainant is entitled to recover from the Organisation the sums underpaid to him as educational allowance for his children on and after, but not before, 1 October 1974.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 6 June 1977.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

Updated by PFR. Approved by CC. Last update: 7 July 2000.