

## THIRTY-NINTH ORDINARY SESSION

*Registry's translation, the French text alone being authoritative.*

***In re* BREUCKMANN (No. 2)**

**Judgment No. 322**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol) by Mr. Elmar Breuckmann on 5 August 1976, the Eurocontrol Agency's reply of 11 October, the complainant's rejoinder of 9 November, the Agency's surrejoinder of 13 January 1977, the complainant's further memorandum of 24 March and the Agency's reply thereto of 14 June 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the relevant provisions of the Staff Regulations and Staff Rules, particularly Articles 11, 26, 62, 64, 66, 67, 74, 85, 92, 93, 100 and 102 of the Eurocontrol Staff Regulations;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

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

A. The complainant was appointed chief of division in the Eurocontrol Agency by a decision of 4 December 1969 which took effect on 15 April 1969. He had a wife and one child by the

marriage and lived with his family in Brussels. On 23 January 1975 he and his wife obtained a decree of divorce. By letter of 26 September he told the Agency that by an act registered on 13 October 1969 he had recognised paternity of an illegitimate child, G. S., born on 1 August 1969 at Essen in the Federal Republic of Germany. He asked the Agency to pay him the birth allowance, the allowance for a dependent child from the date of the child's birth, and education allowance from 1 August 1975. On 28 January 1976 the Director-General decided that the complainant should receive for the child the dependent child allowance and the education allowance, but only from 1 September 1975. On 11 February 1976 the complainant appealed against the decision on the grounds that he had not been granted retroactive payment of the allowances. The Director-General dismissed his appeal on 24 May and upheld his decision of 28 January. That is the decision now impugned.

B. The complainant asks the Tribunal to order the Agency to pay him the dependent child allowance for the period from 1 August 1969 to 31 August 1975, the education allowance for August 1975, costs and "all damages incurred since 28 January 1976". In his further memorandum the complainant sets the amount of such damages at 25 per cent of his total claim "assuming that the Tribunal decides the case before the end of 1977". The complainant does not press his original claim for the birth allowance.

C. The Agency argues, among other things, that in the absence of an express provision there is no presumption of retroactive effect and that there is indeed a general principle of law whereby an administrative act, such as the grant of a family allowance, should not have retroactive effect. In accordance with the rules of application of the Staff Regulations the complainant ought to have notified as promptly as possible any change in his family situation likely to alter his pay. Yet it was not until 26 September 1975 that he told the Agency of the existence of a child who had been born on 1 August 1969 and of whom he had recognised paternity on 13 October 1969. In his letter of 26 September 1975 the complainant explained this delay on the grounds that "indiscreet acquaintances would have had no qualms about letting his former wife know and the divorce proceedings would have become bogged down". He therefore took the view that he had acted under duress and that his application for retroactive payment of family allowances was warranted. The Agency demurs: the grounds put forward by the complainant did not constitute duress and his interest in not declaring recognition of paternity of the child is none of the Agency's concern.

D. The Agency asks the Tribunal to dismiss the claims in their entirety as unfounded, to refuse damages for the delay in payment and to award costs against the complainant.

## CONSIDERATIONS:

As to the Tribunal's competence:

1. Although the complainant has himself come before the Tribunal, he challenges its competence by reference to Article 5 of the Protocol of Signature of the "Eurocontrol" International Convention relating to Co-operation for the Safety of Air Navigation. That article reads: "Nothing in the Convention or Statute annexed thereto shall be deemed to restrict the jurisdiction of national courts in respect of disputes between the Organisation and the personnel of the Agency." After the signature of the Protocol, however, and with the approval of all the representatives of member States, the Agency conferred on the Administrative Tribunal of the International Labour Organisation under Article 93 of the Eurocontrol Staff Regulations competence to hear disputes relating to non-observance, in substance or in form, of those Staff Regulations. The International Labour Organisation accepted that recognition of competence in accordance with the prescribed procedure. Hence the Tribunal's competence derives from an international agreement which takes precedence over rules unilaterally adopted earlier by one of the parties to this case. There is no need to consider whether, as the Agency maintains, the Convention which established it creates rights and duties only between member States, or whether, bound as it is to define its own competence, the Tribunal should take account of a provision on which the complainant may not rely.

As to the proper law:

2. In accordance with Article II of its Statute the Tribunal hears complaints of breach of terms of appointment or of Staff Regulations and Staff Rules. In reaching its decisions it construes such texts by the accepted methods of legal interpretation. It also draws upon general principles of law in so far as they may apply to the international civil service. It takes no account of municipal law, however, except in so far as such law embodies those principles. As to the matters raised in this case the provisions of municipal laws differ and do not apply outside the municipal context. The municipal laws cited by the parties are therefore immaterial. In particular the complainant's citizenship of the Federal Republic of Germany is no reason for applying the law of that country.

As to the rules on entitlements:

3. According to Article 62 of the Eurocontrol Staff Regulations an official shall be entitled to remuneration, which, according to clause (2) of the third paragraph, shall include family allowances. The second paragraph of the article says that he may not waive his entitlement. According to Article 67, family allowances shall comprise household allowance (section I(a)), dependent child allowance (I(b)) and education allowance (I(c)).

Since the Agency cannot itself keep track of the private lives of its staff members, an official may not claim the family allowances provided for in Article 67, I(b) and (c), unless he notifies the birth of any child or children for whom he is entitled. No time limit is set in the Staff Regulations for such a notification. In particular, entitlement is not subject to a rule of limitation and so does not lapse if birth is not notified within a given period. But according to a service ruling made by the Director-General under Article 100 of the Staff Regulations "the Organisation reserves the right to take any suitable action where staff members fail to supply the above information [viz. on changes in their family situation] or are late in doing so"<sup>(1)</sup>.

This ruling is not at odds with the Staff Regulations; indeed it sets a reasonable limit on their scope. As appears below, an official may not at will put off notifying the birth of a child. Should he fail to act within a reasonable period he loses his right to retroactive payment of family allowances. He may claim them only for the future. Whether delay is reasonable depends on the circumstances of each case. As a rule a birth will be notified within a few weeks or at most a few months. It is nevertheless conceivable that for special reasons, such as illness or serious doubts about fatherhood, a staff member may claim allowances at a later date.

Such an interpretation of the rules is warranted on grounds of principle. The purpose of the family allowance is to help parents to provide for the maintenance of a dependent child. That purpose is met only if the allowance is paid regularly - generally every month - at the same time as the remuneration of which it forms part. Hence, if he is to put the family allowance to its intended use, an official should notify the birth of the child as soon as possible. If he waits for several years before doing so and then claims a lump-sum payment, he is disregarding the whole purpose of the provisions on family allowances.

There are practical grounds as well as grounds of principle for the interpretation. If there is a delay in notifying

birth, the Agency may suffer inconvenience which its staff has a duty to prevent. For one thing, it may be unable to check whether the staff member has really supported the child and is therefore entitled to the allowance provided for in Article 67,1( b). Secondly, if the Agency had to pay several officials lump sums equivalent to the amount of family allowances spread over several years, its budget estimates would be upset. Thirdly, after a long delay the Agency would often find it difficult or even impossible, because of the various measures taken to offset an official's tax liability, to determine the exact amount of his financial entitlements.

It is immaterial that according to the second paragraph of Article 62 of the Staff Regulations an official may not waive his right to remuneration. As appears from the foregoing, it is through his own delay that he may lose his right to a family allowance, and not because of any express or implied waiver on his part.

As to the application of the principle:

4. The child for whom the complainant is claiming retroactive payment of a family allowance was born out of wedlock on 1 August 1969 and the complainant recognised paternity on 13 October of that year. He waited until 26 September 1975, or about six years, before revealing the child's existence. He explains that had he notified the child's birth at once his former wife, from whom he was divorced on 23 January 1975, might have learnt of the birth earlier from some indiscreet third party and used the fact against him. There is not a shred of evidence in the dossier, however, to suggest this. True, the Director-General and his wife had met the complainant's former wife; but there is no reason to believe that either of them would have committed a breach of a basic duty inherent in their position or an impropriety and revealed the birth of the child born out of wedlock - a matter which in the particular circumstances of the case was plainly confidential. Hence by not revealing the birth of the child until 26 September 1975 the complainant failed to act within a reasonable period and the Agency was right to pay him the family allowance only from 1 September 1975.

As to the claim for damages:

5. The complainant asks the Tribunal to order not only retroactive payment of the family allowances but also payment of costs and damages since 28 January 1976. In his third memorandum he relies partly upon facts previous to that date and assesses damages at 25 per cent of the lump sum, provided that the Tribunal passes judgment by the end of 1977. In so far as these new claims go beyond those contained in the complaint they are irreceivable. They are in any case unfounded since the Agency infringed neither the terms of his appointment nor the Staff Regulations and Staff Rules.

DECISION:

For the above reasons,

The complaint is dismissed.

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 21 November 1977.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

1. Registry translation.