

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

## FIFTY-SIXTH ORDINARY SESSION

In re DE LOUW

Judgment No. 659

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mrs. Catharina Adriana de Louw on 19 July 1984 and corrected on 11 September, Eurocontrol's reply of 13 December, the complainant's rejoinder of 31 March 1985 and Eurocontrol's surrejoinder of 14 May 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 59, 78, 92 and 93 of the General Conditions of Employment of officials of the Eurocontrol Agency;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant joined the staff of the Agency in September 1974. On 10 January 1975 as she was going home from work she sustained injury in a motor accident. On 8 November 1983 she submitted to the Director General a request for an invalidity pension. After consulting Eurocontrol's medical officer the Director General answered on 17 November that there were no grounds for convening an invalidity committee. On 22 November the complainant wrote to the Director General asking that the invalidity committee be convened. The Director General dismissed her request on 20 December 1983. On 25 December the complainant sent the Director General a further letter which she described as a "complaint" against the decision of 17 November. She received no answer. Her post having been abolished, she left the Agency on 31 December 1985 on the expiry of her fixed-term appointment. Several letters were exchanged in the first few months of 1984 about the complainant's position between her doctor, the medical officer, the European Public Service Union and the Administration. On 25 June 1984 the complainant asked the Agency to supply information on the procedure for filing a complaint with the Tribunal, and she received the information on 17 July. On 19 July she filed her complaint, which challenges the implied decision to reject her claim of 25 December 1983.

B. The complainant states in her complaint that she has suffered continued ailments since her motor accident. Her health having steadily worsened, she asked to be examined by the invalidity committee so as to establish her pension entitlements. The Director General refused and she challenged his decision under the General Conditions of Employment. By a letter of 17 May 1984 the Administration informed the chairman of the European Public Service Union that her case was still under review. The complainant took that to mean that the refusal would be reconsidered. She eventually received a copy of a letter to the chairman of the Union from the Director of Personnel and Administration confirming the Director General's decision of 17 November 1983. She invites the Tribunal (a) to declare her right to have the invalidity committee convened; (b) to declare her invalidity; (c) to order the Organisation to award her an invalidity pension and continue her membership of the sickness insurance fund under the General Conditions of Employment; and (d) to order any further redress it sees fit.

C. The Organisation's principal plea in its reply is that the complaint is time-barred and irreceivable: the complainant's request of 8 November 1983 was rejected on 17 November; her "complaint" submitted on 22 November was rejected by a decision of 20 December. This decision should have been challenged before the Tribunal not later than 20 March 1984. Her letter of 25 December 1983, which she also described as a "complaint", merely repeated her earlier arguments. Besides, her "complaint" of 22 November 1983 related only to the convocation of the invalidity committee, and the complainant's other claims for relief are irreceivable because she has failed to exhaust the internal means of redress. The Agency puts forward subsidiary arguments on the merits, contending that the Director General did not abuse his discretion.

D. The complainant recounts various facts of the case in her rejoinder. As to receivability, she contends that her claim of 22 November 1983 was not a "complaint" within the meaning of the General Conditions of Employment.

It was only after discussing the medical officer's function with the Administration that she submitted her formal "complaint", on 25 December 1983. The Agency ought to have replied by 25 April, and she was therefore entitled to submit her complaint to the Tribunal at any date up to and including 25 July. The reason why she waited until almost the end of that period was that she believed that review of her case would lead Eurocontrol to fulfil its obligations. As to the merits, she discusses at length the question of competence to convene the invalidity committee. She concludes by inviting the Tribunal to order Eurocontrol to convene the committee forthwith so that it may grant claims (c) and (d) of her complaint. Since the award of a pension does not have retroactive effect she asks for reinstatement as from 1 January 1984 up to the date of the meeting of the committee, or else an award of damages. She also seeks costs.

E. In its surrejoinder Eurocontrol develops its pleas on receivability. The complainant's letter of 22 November 1983 did amount to a "complaint" within the meaning of the rules: since it was rejected on 20 December 1983 her present complaint, which she did not file until 19 July 1984, is time-barred. Claims (b), (c) and (d) are in any event irreceivable on the grounds of her failure to exhaust the internal means of redress. Eurocontrol also briefly discusses the merits. The Agency again invites the Tribunal to dismiss the complaint.

## CONSIDERATIONS:

### Receivability of claim (a)

1. Under claim (a) the complainant asserts her right to have the invalidity committee convened. The Tribunal will rule first on the receivability of the claim.

2. Under Article VII(1) of the Statute of the Tribunal a complaint shall not be receivable unless the complainant has exhausted such means of resisting it as are open to him under

the applicable Staff Regulations.

The General Conditions of Employment of Eurocontrol provide two internal means of redress. One is a "request" -- under Article 92.1 -- that the Director General take a decision; the other is a "complaint" under Article 92.2 against an act adversely affecting the staff member. As the Tribunal held in Judgment 398, any application challenging a decision must be treated as an Article 92.2 "complaint".

According to Article 93.2 the decision on a "complaint" may be challenged before the Tribunal. Article 93.3 confirms Article VII(2) of the Statute of the Tribunal and sets a time limit of three months for filing a complaint.

3. On 8 November 1983 the complainant wrote to the Director General claiming an invalidity pension under Articles 59 and 78 of the General Conditions of Employment and producing a certificate from her doctor. That was a "request" under Article 92.1.

By a letter of 17 November 1983 the Director General informed the complainant that after consulting the Organisation's medical officer he had decided not to convene the invalidity committee.

The complainant received that letter on 22 November. Maintaining that the medical officer was unable to form an opinion, she challenged the decision and invited the Director General to convene the invalidity committee. She was thereby challenging a decision and submitting a "complaint" under Article 92.2.

On 14 December she wrote again to ask for an early reply.

On 20 December the Director General gave her further information intended to remove any misunderstanding, particularly about the function of the medical officer. By implication but quite plainly he thereby confirmed his decision of 17 November, as the complainant herself acknowledged in a letter of 25 December.

Accordingly, for her present complaint to be receivable the complainant ought to have filed it not later than ninety days from the date on which she received the decision of 20 December. Not having been filed until 19 July 1984, it is time-barred and irreceivable.

4. On 25 December 1983 the complainant repeated her claim of 22 November. After further communications from her, from her doctor and from the European Public Service Union, the Director of Personnel and Administration

wrote her a letter dated 19 July 1984 confirming the Director General's decision of 17 November 1983. But that letter would have had the effect of setting a new time limit for filing a complaint only if it had altered the decision of 17 November 1983 or at least provided further justification for it. Since it amounted to mere confirmation what is said in 3 above holds good: the complaint is irreceivable.

5. In the absence of a provision which says that any decision should mention the procedure for challenging it, the Organisation was not bound to indicate in its decision of 20 December 1983 on the internal "complaint" the possibility of challenging it before the Tribunal. Such information would, however, have been desirable since the distinction between a "request" and a "complaint" under Article 92 of the General Conditions of Employment is not obvious. In giving such information the Organisation would indeed have been following the practice in other organisations.

Receivability of claims (b), (c) and (d)

6. Besides asserting her right to have the invalidity committee convened the complainant invites the Tribunal, under (b), to declare her invalidity, under (c), to order the award of an invalidity pension and the continuance of sickness insurance in accordance with the General Conditions of Employment and, under (d), to order any further redress it sees fit.

The Tribunal cannot rule on those claims until the invalidity committee has reported on the state of the complainant's health in accordance with claim (a). Since (a) is irreceivable, so are the subordinate claims (b), (c) and (d).

Merits

7. The complaint being irreceivable, the Tribunal will not rule on the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable the Lord Devlin, Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner