

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

## FIFTY-SEVENTH ORDINARY SESSION

In re VAZQUEZ VENTURA

Judgment No. 698

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Manuel Vázquez Ventura on 8 February 1985, Eurocontrol's reply of 18 April, the complainant's rejoinder of 14 May and Eurocontrol's surrejoinder of 18 July 1985;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles 1, 3, 48 and 92 of the Staff Regulations governing officials of the Eurocontrol Agency, Article 8 of the Association Agreement concluded between Eurocontrol and the Government of Spain on 17 December 1971, Article 4 of the Co-operation Agreement concluded between Eurocontrol and the former Spanish Civil Aviation Department on 21 August 1974, and Articles 1, 2, 4 and 6 of the Bilateral Agreement concluded between Eurocontrol and the Department, also on 21 August 1974;

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

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

A. The complainant was assigned to the Agency on 2 April 1973 as a grade B1 air traffic controller in accordance with an association agreement which the Spanish Government and Eurocontrol had concluded in 1971. His status was that of a Spanish civil servant on "leave on secondment". A co-operation agreement replacing the association agreement was concluded on 21 August 1974 between Eurocontrol and the Spanish Civil Aviation Department ("the Department"). On the same day Eurocontrol and the Department concluded a bilateral agreement on the status and duties of the Spanish citizens in the Agency's employ. By a decision of 25 September 1974 the complainant had his appointment confirmed for the duration of the co-operation agreement as from 1 January 1974.

On 10 April 1984 the Director of Personnel and Administration wrote to the complainant to say that the Spanish Civil Aviation Authority ("the Authority") had asked the Director General in a communication of 24 February 1984 to arrange for the termination of his appointment as from 1 June. On 25 April the complainant protested against his recall to Spain and the termination, but on 17 and 24 May the Agency confirmed that his appointment would end automatically on 1 June. In fact he was later given a short extension to 30 June so as to let his children finish the school year. Meanwhile, on 16 May, he had applied to the Spanish Minister of Transport, whom the Authority comes under, for conversion of his position from "leave on secondment" to Eurocontrol to "leave on request", and the change was made on 14 June as from 1 July 1984. By a minute of 4 July he asked Eurocontrol to take the view that, being no longer on secondment, he still held a valid appointment, but the Director General confirmed on 25 July that his appointment had ended on 30 June. On 20 September he submitted a "complaint" against the decision of 25 July. The Director General dismissed his complaint on 22 January 1985 on the grounds that it was irreceivable and in any case devoid of merit.

B. The complainant submits that the final decision was that of 25 July 1984 and that his internal "complaint", submitted on 20 September, was therefore filed within the three-month time limit in Article 92(2) of the Eurocontrol Staff Regulations. His position being altered from "leave on secondment" to "leave on request" on 14 June, the decision of 25 July was taken in a new context and was therefore the one that was challengeable under Article 92(2).

As to the merits, he observes that his appointment was stated to be for the duration of the co-operation agreement, and since the agreement is still in force he is entitled to be kept on. To Eurocontrol's argument that it could not keep a Spanish civil servant whose secondment the Authority had refused to extend, he submits that the Authority may not abolish a post at Eurocontrol, that the termination of secondment need not entail the termination of an appointment in an international organisation, and that in any event, being on "leave on request", he could not be

recalled to Spain.

He invites the Tribunal to declare that he still holds an appointment with Eurocontrol, that of 25 September 1974 being still in force; to quash the impugned decision; and to award him remuneration and any other moneys due as from 1 July 1984 plus interest at 12 per cent a year, damages amounting to 500,000 Belgian francs for moral injury, and costs.

C. Eurocontrol replies, as to receivability, that since the complainant's position in law is defined by an international agreement he is not a Eurocontrol official within the meaning of Article 1 of the Staff Regulations. Moreover, the Director General's minute of 24 May 1984 telling him the Authority had cancelled his appointment and he was deemed to have resigned constituted the decision that had to be challenged within the three months. Since his "complaint" was not lodged until 20 September it was time-barred under Article 92(2) of the Staff Regulations. The complaint is therefore irreceivable on the grounds of failure to exhaust the internal means of redress.

As to the merits, Eurocontrol gives an account of the provisions of the relevant agreements and maintains that it cannot keep on someone whose secondment has been ended. It observes that he was not appointed on the terms prescribed in the Staff Regulations, but under the bilateral agreement, and he was not appointed to any permanent post, but seconded by the Authority. It was only for reasons of sound administration that he was assimilated to a staff member. The notion that termination of secondment does not necessarily terminate an appointment within an international organisation does not apply in this case because Spain is not a member State and because the complainant was not a staff member of the Organisation.

Eurocontrol concludes that the complaint is irreceivable and in any case devoid of merit.

D. The complainant maintains in his rejoinder that his complaint is receivable: the minute of 24 May 1984, which said his appointment would end on 1 June, was not the final decision since he remained at Eurocontrol after that date. As to the merits, he enlarges on the arguments submitted in his complaint, seeking to show that Eurocontrol did treat him as a staff member and that the termination of his appointment was therefore unlawful. He presses his claims.

E. In its surrejoinder Eurocontrol develops its submissions on receivability. As to the merits, it goes further into details of fact and observes in particular that there are two categories of Spanish citizens employed in the Agency: those recruited in accordance with the Staff Regulations, who are Eurocontrol staff members; and those who are seconded under the bilateral agreement, and who are governed only subsidiarily by the Staff Regulations.

## CONSIDERATIONS:

### The complainant's Position in Eurocontrol

1. Though not a member of Eurocontrol, Spain concluded an association agreement with it on 17 December 1971. Article 8(1) of the agreement stated that Eurocontrol might recruit Spanish citizens to its staff, Article 8(2) that the Spanish Government might second to the Agency's headquarters officials whose employment it would finance and who would be in charge of giving effect to the agreement.

It was in accordance with Article 8(2) that the complainant was assigned to Eurocontrol headquarters, being appointed on 2 April 1973 to grade B.1, step 1, as from 1 April. His position was that of a Spanish civil servant on "leave on secondment".

2. The association agreement expired on 31 December 1973 and was replaced on 21 August 1974 by a co-operation agreement, which came into effect as from 1 January 1974 for an indefinite period.

Unlike the association agreement the co-operation agreement does not expressly distinguish between Spanish civil servants who are recruited and those who are seconded. Article 4(2) provides that the arrangements for assignment, the number and the status of Spanish staff shall be determined by a further agreement between Eurocontrol and the Spanish Civil Aviation Department ("the Department"). Under Article 6(1) the Department undertakes to pay the Organisation a yearly contribution of 8,750,000 Belgian francs.

3. The agreement provided for in Article 4(2) of the co-operation agreement (known as the "Bilateral Agreement") was concluded on the same date, 21 August 1974, between the Department and Eurocontrol and relates to the

"status and duties of Spanish citizens on the staff of the Organisation".

Under Article 1 of the bilateral agreement the Department shall second six Spanish civil servants to Eurocontrol headquarters for the duration of the co-operation agreement. According to Article 2 their duties include "(a) participation, within their special areas, in current and future research and other joint activities of Eurocontrol and the Department: ... (c) representation of the Department on Eurocontrol working parties to whose work it wishes to contribute; (d) co-ordination and supervision of the training programme established by the Department and INSTILUX...".

Article 4(2) provides that any appointment conferred on a Spanish civil servant under the association agreement shall be extended for as long as necessary and for the duration of the co-operation agreement.

4. Despite these changes in the relationship between the Spanish Government and the Organisation the complainant kept his status as a Spanish civil servant on "leave on secondment". On 25 September 1974 his appointment was confirmed for the duration of the co-operation agreement as from 1 January 1974.

On 24 February 1984 the Spanish Civil Aviation Authority ("the Authority") informed Eurocontrol that it required the services of the seconded Spanish civil servants and it asked that the complainant's appointment terminate on 1 June.

Eurocontrol informed the complainant of that instruction, which the Authority confirmed on 9 April. The Organisation asked the complainant what he intended to do, and he replied that it should make up its own mind. By a minute of 24 May Eurocontrol told him he must go back to Spain after 1 June 1984 and was deemed to have resigned under Article 48(2) of the Staff Regulations governing officials of the Eurocontrol Agency. In a minute of 30 May he replied that he interpreted the minute of 24 May to mean that the "appointing authority" had accepted his so-called "resignation". On 5 June Eurocontrol sent him a telegram saying that his return to Spain would be not later than 30 June and that he would be paid no salary for July. On 6 June he reaffirmed his position: he refused to leave.

5. Meanwhile, on 16 May, he had asked the Spanish Government to alter his status from "leave on secondment" to "leave on request". On 14 June the Authority informed him that if he did not take up duty in Spain within one month he would be declared to be on "leave on request". He answered on 6 July that since the time limit had expired he was now on "leave on request".

Two days earlier he had informed Eurocontrol of his view that, being on "leave on request", he could no longer be deemed to have resigned and that his Eurocontrol appointment of 25 September 1974 was still in force. On 25 July the Organisation retorted that notwithstanding his "leave on request" he was no longer on secondment from the Authority and as from 1 July 1984 the earlier decisions had ceased to apply to him. By telexes of 16 and 23 July 1984 the Authority had already confirmed that his appointment with Eurocontrol had ended by 1 July 1984.

The complainant's internal appeal of 20 September 1984 was rejected on 22 January 1985 by a decision which is impugned in the present complaint.

### Receivability

6. According to Article VII(1) of the Statute of the Tribunal a complaint shall not be receivable unless the person concerned has exhausted such other means of resisting it as are open to him under the applicable staff regulations. Moreover, under Article 92(2) of the Eurocontrol Staff Regulations anyone to whom the article applies must lodge within three

months his internal "complaint" against an act adversely affecting him, where the Director General has either taken an express decision or failed to do so. For his complaint to the Tribunal to be receivable the staff member must first respect the three-month time limit, and the Tribunal will determine whether the complainant did so in this case.

7. Eurocontrol's decision of 24 May 1984 to treat the complainant as having resigned was explicit enough. As he acknowledged in his letter of 30 May 1984, the purport of it was that the appointing authority had accepted his alleged resignation. That being an "act adversely affecting him" within the meaning of Article 92(2), he was required to challenge it, if he wished to do so, within three months. In fact he did not lodge his appeal until 20

September 1984, and by then it was no longer open to him to contest any issue covered by the decision of 24 May. In respect of any such issue the complaint is irreceivable on account of his failure to exhaust the internal means of redress.

It is immaterial that there was correspondence after the decision of 24 May. Insofar as that correspondence related to the issues decided on 24 May it merely confirmed the decision and set off no new time limit for lodging an internal appeal.

Nor may the complainant derive from the principle of good faith support for his contention that the time limit ought to have been extended. In the letters it wrote after 24 May Eurocontrol never gave any hint that it would consider reviewing its decision of that date. It merely spoke of the steps it had taken to secure the Authority's consent to extension of the complainant's secondment.

8. After the decision of 24 May 1984 the complainant's position altered from "leave on secondment" to "leave on request". Accordingly, the decision of 24 May 1984 did not determine any rights he might have as an official on "leave on request". That was a new issue and one on which the Organisation gave no decision until 25 July 1984, less than three months before the lodging of the internal complaint. The present complaint is therefore receivable insofar as it relates to the complainant's position on "leave on request".

#### Merits

9. For the foregoing reasons, although the Tribunal need not take up the issues decided on 24 May 1984, it will rule on the complainant's status as an official on "leave on request".

Although the Authority was not opposed to his being on "leave on request", it refused to extend his secondment beyond 30 June 1984. Eurocontrol maintained the same stand after he obtained "leave on request", i.e. it continued to take the view that his appointment had terminated on 30 June 1984. To be more specific, it refused to confirm his appointment either by maintaining him in his former post or by granting him a new one. Accordingly, his new status as an official on "leave on request" did not confer on him any right that was enforceable against the Organisation. No claim against the Organisation will succeed on that account, neither a claim to reinstatement nor a claim to damages, and the Tribunal concludes that insofar as it is receivable the complaint is devoid of merit.

10. In any event, even if the complaint were receivable insofar as it challenges the decision of 24 May 1984, it would again be devoid of merit.

The complainant held a double status. On the one hand he had an appointment with Eurocontrol and appeared on its staff list. On the other, as an official on "leave on secondment" he was responsible for matters relating to civil aviation in Spain, and it was the Spanish Government that met the cost of his secondment. Thus, although the agreements do not actually say so, his position at Eurocontrol depended on the Authority's consent, and on the termination of his secondment he ceased to be in the Organisation's employ. That is clear from the reference in the terms of his appointment of 25 September 1974 to Article 3(2) of the Staff Regulations, which limits the duration of the appointment of seconded staff to the period of secondment. Eurocontrol therefore acted correctly in terminating the complainant's appointment on 24 May 1984 in accordance with the Authority's instruction of 24 February. Even if the decision were challengeable, the Tribunal would hold that it complied with the agreements.

Lastly, the complainant submits that according to the Tribunal's case law the termination of secondment need not entail the termination of appointment in an international organisation. The plea is mistaken. Whatever the rule may be, it cannot apply to relations between Eurocontrol and Spain, which is not a member State.

#### DECISION:

For the above reasons,

The case is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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