

SIXTY-FIFTH SESSION

***In re* BOLAND (No. 3)**

Judgment 924

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 March 1988 and corrected on 12 April, Eurocontrol's reply of 7 July, the complainant's rejoinder of 1 August and Eurocontrol's surrejoinder of 28 September 1988;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal, Articles 72 and 92 of the Staff Regulations governing officials of the Agency and Rule No. 10 concerning sickness and accident insurance;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. As is stated in Judgment 923 on the complainant's first complaint, under A, Eurocontrol staff and their dependants are covered under Article 72 of the Staff Regulations by a scheme of sickness insurance which is governed by Rule No. 10.

Article 2(2) of Rule No. 10 prescribes coverage of the official's spouse "provided that ..., if he or she is gainfully employed, he or she is covered by a public scheme of sickness insurance and his or her annual income from such employment does not exceed" a stated amount before tax. Article 3(1) stipulates that "Where a member or a person covered by his insurance may claim reimbursement of expenses incurred under any other compulsory sickness insurance, the member shall ... (b) in the first instance apply, or have the person concerned apply, for reimbursement under the other scheme". And according to 3(2) any sum paid by the other scheme will be subtracted from the amount to be paid by Eurocontrol.

The complainant's wife is covered by a public scheme of sickness insurance in Luxembourg and at the material time her earnings did not exceed the amount stated. From April to November 1985 she incurred expenses amounting to 11,376 Belgian francs for medical and dental treatment in Belgium. On 14 January 1986 the complainant claimed the full amount from Eurocontrol. In a minute of 10 March 1986 the Director of Personnel and Finance, who is in charge of its scheme, observed that Mrs. Boland had not complied with the rules of the Luxembourg scheme and that the Eurocontrol scheme would therefore not refund any amount that scheme would have paid. In a minute of 11 April to the Director the complainant denied that his wife had failed to comply with the rules of her scheme, which he said the Director had misconstrued: though she had applied to her scheme on 28 May 1985 for prior consent to the treatment she had been refused because she had chosen to be treated in another country, and in no circumstances could she have got payment from the Luxembourg scheme. In a letter of 17 October 1986 to Mrs. Boland the Luxembourg scheme confirmed refusal of her application of 28 May 1985 and explained the reasons. On 16 March 1987 the complainant submitted to the Director General what he termed a "request" under Article 92(1) of the Staff Regulations for a decision on his claim to the full costs of his wife's treatment. Having got no answer, he filed a "complaint" on 12 October 1987 with the Director General under 92(2) against the implied decision to reject that request. Having still got no answer, he is challenging the implied decision to reject the internal "complaint".

B. The complainant accuses the Eurocontrol scheme of obstructiveness and bad faith. That his wife had no hope of getting from the Luxembourg scheme any of the costs of her treatment in Belgium is borne out by a minute which the Eurocontrol scheme's officer in Luxembourg sent to the Brussels office on 27 October 1986 saying that the rules of the Luxembourg scheme had been complied with.

He asks the Tribunal to join his first and third complaints. He seeks full refund in accordance with the rules and at the rates in force and an award of costs.

C. Eurocontrol replies that the complaint is time-barred. According to Article 92(2) of the Staff Regulations a "complaint against an act adversely affecting" the employee must be lodged within three months. The "act adversely affecting" the complainant was the refusal to pay the share of the costs the Luxembourg scheme should have borne and it was conveyed to him in the minute of 10 March 1986 from the Director of Personnel and Finance. It was his own minute of 11 April 1986 to the Director that was the 92(2) "complaint". The Director General not having notified "his reasoned decision within four months" from that date, there was an implied decision by 12 August 1986 to reject it under 92(2), and he should have appealed to the Tribunal within the three-month time limit in Article VII(3) of its Statute. Neither his communication of 16 March 1987 to the Director General nor his alleged "complaint" of 12 October 1987 set off any new time limit.

Subsidiarily, Eurocontrol submits that the complaint is devoid of merit. In accordance with 3(1)(b) and (2) of Rule No. 10 it has agreed to pay the difference between the sum due under that Rule and the lesser sum the Luxembourg scheme would have paid had Mrs. Boland complied with the rules. Before the complainant claims for his wife from the Eurocontrol scheme he must get her to claim as much as she is entitled to from her own scheme or else show that she could not have claimed anything. Though it did refuse her claim, what matters is the reason for its refusal. In fact she failed to comply with the social insurance law of Luxembourg, which says that though treatment abroad requires prescription by a doctor and the scheme's prior consent Mrs. Boland did not submit such a prescription in support of the claim she put to the Luxembourg scheme.

Eurocontrol is opposed to joinder of this complaint with the first one.

D. In his rejoinder the complainant maintains that his complaint is receivable. His minute of 11 April 1986 was not described and is not to be treated, as a 92(2) "complaint". Such a "complaint" is supposed to be addressed to the appointing authority - the Director General - whereas he was writing to the Director of Personnel and Finance. It was plain from the Director's reaction that the matter might be reviewed. Moreover, had the minute of 11 April 1986 been treated at the time as a "complaint" the Director General would have consulted the Management Committee of the scheme about it in accordance with Article 25 ter of Rule No. 10. But he did not. Besides, the letter of 17 October 1986 from the Luxembourg scheme, which gave the reason for its refusal to pay, was a new fact warranting a new claim to Eurocontrol. His true 92(2) "complaint" was his letter of 12 October 1987 to the Director General.

As to the merits the complainant submits that the Luxembourg scheme will not pay where the claimant chooses to have treatment abroad. Being covered by the Eurocontrol scheme, his wife is free to choose where she wants to be treated, and her freedom cannot be restricted by limitations on her entitlements under another scheme. Eurocontrol's position makes for inequality between those covered by its scheme.

The complainant presses his claims and seeks 100,000 Luxembourg francs in costs.

E. In its surrejoinder Eurocontrol observes that the complainant has never told it how much his wife might have got from the Luxembourg scheme. Not until 28 May 1985 did Mrs. Boland apply to that scheme for permission to incur in Belgium the expense of medical treatment that began by 31 May.

The Organisation enlarges on its pleas on receivability and its subsidiary arguments on the merits.

CONSIDERATIONS:1. The complainant, a Belgian citizen holding a grade B1 post as assistant principal with the Eurocontrol Agency, works at its centre for air navigation in Luxembourg. This case is about his claim to refund by Eurocontrol's Sickness Insurance Scheme of the cost of medical treatment of his wife in Belgium.

The material rules

2. According to Article 72 of the Staff Regulations of Eurocontrol a staff member is insured against sickness in accordance with rules drawn up by the Director General. So is a spouse.

3. The implementing text is Rule No. 10 concerning sickness and accident insurance, which in Article 1 sets up the Sickness Insurance Scheme.

4. According to Article 2.2 of the Rule the spouse shall be covered if not independently a member of the scheme and not gainfully employed or, if so employed, covered by a public scheme of sickness insurance and having a

yearly income from the employment that does not exceed a stated amount (at the material time 933,032 Belgian francs).

5. Article 3 of Rule No. 10 says that where someone covered by the Eurocontrol scheme is also a member of some other compulsory sickness insurance scheme an application must in the first instance be made for reimbursement under the other scheme. In that event, by what is known as "supplementary coverage", Eurocontrol merely makes up any difference between benefits granted under the other scheme and benefits due under its own.⁶ Lastly, Article 5(1) of the Rule stipulates that "Persons covered by this Scheme shall be free to choose their practitioners and hospitals or clinics".

The material facts and the issue of receivability

7. The complainant's wife has gainful employment in Luxembourg and is required by law to be a member of the Private Employees' Sickness Insurance Scheme of that country. Since her earnings are below the maximum set in Eurocontrol's rules she qualifies for the supplementary coverage.

8. Wanting to be treated in Belgium, she wrote to the Luxembourg scheme on 28 May 1985 asking it to meet the cost. She was treated between 31 May and 26 November 1985 and then put to that scheme a claim to refund of the cost, which came to 11,376 Belgian francs. The scheme refused refund on the grounds that the cost had been incurred abroad. On 14 January 1986 the complainant claimed the amount from the Eurocontrol scheme. The answer, in a letter of 10 March 1986, was that it would not entertain the claim but would meet its obligation to provide supplementary coverage.

9. Having got a refusal from both schemes the complainant embarked on lengthy correspondence with each of them. Neither was inclined to act, and matters did not become clear until 17 October 1986, when the Luxembourg scheme gave Mrs. Boland its final decision with a statement of the reasons for it. The complainant thereupon asked the Eurocontrol scheme, by a letter of 27 October, to review his claim.

10. Getting no answer, he wrote to the Director General on 16 March 1987 making a "request" for a decision in accordance with Article 92(1) of the Staff Regulations, affirming the principle of freedom to choose a practitioner and applying for refund of the costs.

11. Again he received no answer, and on 12 October 1987 he wrote a letter lodging an internal "complaint" under Article 92(2) of the Staff Regulations. Having got no reply to that either, he lodged this complaint with the Tribunal on 8 March 1988.

12. Eurocontrol's main plea is that the complaint is irreceivable because it is time-barred. It argues that its letter of 10 March 1986 was the only decision it took before the dispute arose and was an "act adversely affecting" the complainant within the meaning of Article 92. It reckons from that date the time limits for filing the internal appeal and then the complaint to the Tribunal and contends that the time limit for the latter ran out on 13 November 1986.

13. The plea fails. Since the obligations of the Eurocontrol scheme turned on what the Luxembourg scheme had decided, the time limits could not start until it had, and it did not take its final decision until 17 October 1986. Eurocontrol was refusing at the time to give the complainant any answer whatever, whereas he was doing everything that might be reasonably expected of him to get it to respond. The Organisation may not therefore properly plead irreceivability.

The merits

14. The gist of the complainant's case in his internal appeals and in his pleadings to the Tribunal is that his wife did her utmost to get the costs of her treatment refunded by the Luxembourg scheme but inevitably failed because its rules preclude the freedom to choose a practitioner outside Luxembourg, particularly because of the requirement of a prescription from a Luxembourg doctor. The scheme upheld that position in its final substantiated decision, and the complainant is asking the Eurocontrol scheme to refund the cost under its own rules, thereby respecting the freedom of choice prescribed in Article 5 of Rule No. 10.

15. He is asking the Tribunal (a) to order the Eurocontrol scheme to entertain his claim to his wife's expenses and refund them in keeping with its rules and at the prevailing rates, and (b) to order the Organisation to pay him 100,000 Luxembourg francs in costs.

16. The Organisation's retort is that Article 3 of Rule No. 10 requires the spouse in the first instance to exhaust the entitlements due under the other insurance scheme; that the complainant's wife failed to follow the procedure prescribed by the Luxembourg scheme rules because she did not support her application for prior consent to her being treated abroad with a recommendation from a practitioner in Luxembourg; and that freedom to choose a practitioner is immaterial.

17. According to Article 3(1)(b) of Rule No. 10 someone who is covered by the Eurocontrol scheme and who may claim reimbursement under any other compulsory sickness insurance scheme shall "in the first instance apply ... for reimbursement under the other scheme". That is what Mrs. Boland did, but the Luxembourg scheme refused her claim, its reason for doing so being that it lays down conditions that do not allow freedom to choose the practitioner. Such freedom is a right that Article 5 of Rule No. 10 confers on "persons covered" by the Eurocontrol scheme, and under Article 2 they include, besides "members", "persons covered by their insurance" and, in particular, according to 2(2), the spouse.

18. Since it has a duty to provide supplementary coverage the Organisation was bound, under its own rules, to refund the full cost of Mrs. Boland's treatment in Belgium.

19. The implied final decision must therefore be set aside and the case sent back to Eurocontrol for a new decision on the refund of the costs incurred by Mrs. Boland, with due regard to the freedom of choice guaranteed in Rule No. 10.

20. Since the complainant succeeds he is entitled to the award of 100,000 Luxembourg francs in costs which he seeks.

DECISION:

For the above reasons,

1. The Tribunal sets aside the implied decision by the Eurocontrol Sickness Insurance Scheme to refuse to entertain the claim to refund of the expenses incurred by the complainant's wife for treatment in Belgium and to refund them according to the Organisation's rules.
2. The case is sent back to Eurocontrol for a new decision.
3. Eurocontrol shall pay the complainant 100,000 Luxembourg francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner