

SEVENTY-THIRD SESSION

***In re* DOS SANTOS (Nos. 1 and 2)**

Judgment 1176

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. José Manuel Dos Santos against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 September 1991 and corrected on 11 October 1991, Eurocontrol's reply of 30 January 1992, the complainant's rejoinder of 26 March and the Organisation's surrejoinder of 30 April 1992;

Considering the second complaint filed by Mr. Dos Santos on 11 October 1991 and corrected on 29 October 1991, the Agency's reply of 30 January 1992, the complainant's rejoinder of 26 March and Eurocontrol's surrejoinder of 30 April 1992;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Article 2 of Rule No. 7 concerning remuneration and Article 2 of Rule No. 10 concerning sickness and accident insurance of the Rules of Application of the Staff Regulations governing officials of the Agency;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a Portuguese citizen, is an established Eurocontrol official assigned to the Agency's headquarters in Brussels as an expert at grade A5. He lives there with his wife, their three children and his mother-in-law. On 7 September 1989 he applied to have his mother-in-law treated as a dependant under Article 2(4) of Rule No. 7 concerning remuneration. On 18 June 1990 the Director General agreed to this from 1 September 1989 to 31 December 1990; on 17 January 1991 he extended the benefit to the end of 1991.

On 3 September and 9 November 1990 the complainant submitted two claims to the refund of his mother-in-law's medical expenses and Eurocontrol's Sickness Fund accepted them. On 28 December 1990 he applied for prior consent from the Fund to dental treatment for her. By a note of 10 January 1991 the Fund refused on the grounds that she was not entitled to coverage. On 22 January the Fund rejected for the same reasons the claims he had submitted on 2 and 7 January to refund of the costs of her consulting an ophthalmologist and of a pair of spectacles prescribed for her.

On 12 April 1991 he submitted an internal "complaint" saying that since Eurocontrol had treated her as his dependant she was entitled to sickness and accident insurance under Article 2(2) of Rule No. 10, which deals with that subject. The Agency rejected his "complaint" on 12 July 1991.

Having filed his first complaint against the implied rejection of his internal "complaint", he received the Director General's decision of 12 July on returning from leave on 9 September 1991. That is the decision he challenges in his second complaint.

B. The complainant relies on Article 2(4) of Rule No. 7, which says that anyone whom an official "has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child ...". Eurocontrol twice decided to treat his mother-in-law as a dependent child. Article 2(2) of Rule No. 10 provides for persons treated as dependent children to be covered by a staff member's insurance when they are ineligible for coverage under any other public health scheme.

When the complainant applied on 7 September 1989 for treatment of his mother-in-law as his dependant he submitted a certificate from a social security centre in Lisbon dated 20 April 1988 stating that Portuguese State

insurance could not cover the costs of health care she received in Belgium. The Belgian public health scheme would not cover her either since she did not work in the country and was not a member of the family of a beneficiary of the scheme.

He asks the Tribunal to quash the decisions denying the refund of the costs of treating his mother-in-law and the decision of 12 July 1991. He seeks an award of compensatory interest at the rate of 8 per cent a year from the date of submission of his claims.

C. In its replies to the complaints Eurocontrol observes that the Sickness Fund was mistaken in refunding the costs of treating his mother-in-law. Since he failed to make it clear that the treatment had been for a dependant the Fund took it to have been for his wife, who has the same surname. The advice of payment, which bore the code letter for a spouse, showed that the Fund never realised that the beneficiary was his mother-in-law. The mistake came to light on 28 December 1990 when he applied for prior consent to dental treatment and entered her name and marital status and the year of her birth. By a minute of 10 January 1991 the Fund told him that she was not covered. The claims he submitted on 2 and 7 January 1991 did not say who the beneficiary was, and the Fund rejected them when it had established they were for her.

In his letter of 12 July 1991 the Director General informed him that for the Fund to cover his mother-in-law he had to give evidence, as Article 2(2) of Rule No. 10 required, that no other public scheme would do so; the national public health scheme - said the letter - insured residents in Belgium at small cost and there was no evidence to suggest that she could not get coverage under that scheme.

Eurocontrol submits that Article 2(2) of Rule No. 10 makes no reference to automatic affiliation to compulsory insurance but sets a further condition: a staff member must show that his dependant cannot obtain coverage under any other public health insurance scheme. Voluntary health coverage is available, also at a small cost, from mutual health funds in Belgium: the complainant has failed to show, as he must, that his mother-in-law may not get such coverage either.

D. In his rejoinders the complainant enlarges on his pleas and presses his claims.

According to a letter of 6 November 1991 from the general director of the Belgian National Institute for Sickness and Disability Insurance (INAMI) the royal decree of 28 June 1969 concerning persons not yet covered under a compulsory Belgian or foreign health insurance scheme does not apply to his mother-in-law.

He objects to the Agency's reading of Article 2(2) of Rule No. 10. He cites a service notice to Eurocontrol staff on the submission of claims to the Sickness Fund and rules on interpreting the regulations on health insurance for officials of the European Communities, which in his submission show that the hallmark of public schemes is compulsory coverage. So the term "public scheme" in Rule No. 10 must mean compulsory insurance covering an official's spouse in gainful employment.

He argues subsidiarily that even if someone the Agency treats as a dependent child did have coverage under the Belgian national scheme for uninsured persons the monthly premium would take up much of the net allowance the official is granted towards meeting the heavy cost of maintenance, and that is at odds with the whole purpose of Article 2(4) of Rule No. 7.

E. In its surrejoinders Eurocontrol seeks to refute the complainant's arguments in his rejoinders and produces a letter from the general director of INAMI dated 16 April 1992 expressing a view different to the one in the letter of 6 November 1991 which the complainant relies on. What INAMI now says is that insofar as someone Eurocontrol treats as a dependent child does not benefit from the Agency's health insurance he or she would not be excluded under the royal decree. The complainant's mother-in-law does therefore qualify for admission to the Belgian scheme.

Eurocontrol submits that in any event consistent precedent has it that unambiguous provisions do not call for interpretation.

The monthly contribution to a public scheme for someone with no income is 1,860 Belgian francs or just 15.6 per cent of the allowance payable for someone treated as a dependent child. So there is no merit in the complainant's charge of breach of the spirit of Article 2(4) of Rule No. 7.

CONSIDERATIONS:

1. Eurocontrol employs the complainant, a Portuguese citizen, at its headquarters in Brussels. His household consists of his wife, three children and mother-in-law, Mrs. Francisca Do Carmo Correia Lilaia.
2. His mother-in-law having no means of support, the complainant secured the Organisation's consent to treating her in accordance with Article 2(4) of Rule No. 7 as a dependent child for the purpose of payment of the dependant's allowance. Article 2(4) reads:

"Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child, by special reasoned decision of the Director General, based on supporting documents."

3. On the strength of that provision Eurocontrol took two decisions treating the complainant's mother-in-law as his dependant, and they covered the last four months of 1989, 1990 and 1991. In the course of that period he submitted to the Sickness Fund of Eurocontrol several claims to the refund of medical expenses his mother-in-law had incurred, and the Fund accepted them. Later the Fund refused to reimburse the fee for an appointment she had had with an eye specialist and to grant an application for prior consent to refund the cost of dental care.
4. It was the latter claim that prompted the Director of of the Fund to inform the complainant by a minute of 10 January 1991 that it could not meet his mother-in-law's medical expenses on the grounds that "for want of a special decision she does not come under your own coverage".
5. On 12 April 1991 the complainant submitted an appeal to the appointing authority, but by a minute of 12 July 1991 the Administration confirmed the Fund's refusal and gave the reasons for it.

Joinder

6. The complainant has brought two similar complaints challenging that decision. He filed the first on 6 September and the second on 11 October 1991. He explains that since the time limit for answering his internal appeal ran out on 12 June 1991 he inferred rejection and filed a complaint. He then left on holiday and not until he got back - by which time his first complaint had already been filed - did he receive the letter of rejection. So it was only by way of precaution that he filed the second complaint, within the time limit, against that express decision.
7. In the circumstances the two complaints are receivable and may be joined.

The parties' pleas

8. In the light of the parties' submissions in the administrative and adversarial proceedings their pleas may be summed up as follows.
9. The complainant argues that, being treated as a dependent child for the purpose of payment of the dependant's allowance, his mother-in-law is fully entitled to health insurance coverage under Article 2 of Rule No. 10, which says that persons covered by the insurance of a Fund member include "persons treated as dependent children". Since Article 2 excludes anyone who is covered by "any other public scheme of sickness insurance", the complainant points out that his mother-in-law has kept no connection with the health insurance scheme of her home country and does not qualify for coverage by any public scheme in her country of residence. He submits several attestations and other items of evidence to bear out his contention, including a letter of 6 November 1991 from the Belgian National Institute for Sickness and Disability Insurance (INAMI) saying that it could not admit her.
10. The Organisation has two pleas.

(a) Contrary to what the complainant contends, treating his mother-in-law as a dependent child under Article 2(4) of Rule No. 7 does not ipso facto entitle her to coverage by the Fund. Rule No. 10 sets a further condition by requiring proof that the dependant does not qualify for coverage by any other public scheme. Eurocontrol therefore requires a decision to give the dependant coverage under its own scheme, quite apart from the decision under Rule No. 7 to treat someone as a dependent child. Allowing a few claims by the complainant is not tantamount to grant of membership; he failed to identify properly the person who had received care, and the Fund mistakenly believed

that it was his wife.

(b) As to the condition in Rule No. 10, Eurocontrol submits that the term "any other public scheme" means not just compulsory insurance but also a voluntary scheme of the kind that anyone may subscribe to in Belgium "at fairly low cost". Moreover, the complainant is under a duty to show that the condition is met, and he has failed to discharge it.

The Tribunal's ruling

11. Article 2(2) of Rule No. 10 reads:

"The following persons shall be covered by a member's insurance: ... persons treated as dependent children of the member pursuant to Article 2(4) of Rule No. 7, provided that such persons cannot obtain cover under any other public scheme of sickness insurance."

12. It is clear from this text that treating a person as a dependent child of the staff member in accordance with Rule No. 7 confers health insurance coverage ipso facto on that person. That is the consequence of the explicit reference in Rule No. 10 to Rule No. 7: in determining whether or not to treat someone as a dependent child under Rule No. 7 Eurocontrol must consider the consequences its decision will have for insurance coverage.

13. That is the point at which Eurocontrol may seek the insured member's co-operation in determining whether the further condition in Article 2(2) of Rule No. 10 is met. But since what is required is disproof - viz. proof that there is no coverage under this or that scheme - Eurocontrol may not consistently lay the burden on the insured member. If it did so, there would be a danger of making the rule unworkable. A fortiori it may not, after duly determining on all the material evidence at its disposal that someone may be treated as a dependent child, raise the question of possible coverage by another public scheme whenever the insured member happens to claim refund or to seek prior authorisation of expenditure.

14. With its surrejoinder the defendant has filed the text of a letter INAMI wrote it on 16 April 1992 which says, contrary to what it said in its letter of 6 November 1991, that it would be possible for the complainant's mother-in-law herself to obtain "health-care" insurance. The Institute points out, however, that she could not get it with retroactive effect and that there would therefore be no question of her recovering costs already incurred. Its letter speaks of prior telephone calls between Eurocontrol staff and its own but not of their content.

15. Although INAMI's letter of 16 April 1992 is a new material fact, the Tribunal will discount it because Eurocontrol has supplied it too late for the complainant to be able to comment. Moreover, it followed telephone conversations that the complainant had no part in. In any event, because of the reservation the Institute states, the fact that the complainant's mother-in-law may, as it now appears, obtain coverage cannot affect the position in the past: Eurocontrol was under a duty to sort out, with help from him, his mother-in-law's social security status before agreeing to treat her as a dependent child.

16. At the present stage in the proceedings, therefore, the Tribunal declares the complainant to be entitled to refund of the expenses at issue and, for the rest, sends the case back to Eurocontrol so that it may sort out the status of his mother-in-law by granting her coverage up to the date at which her eligibility for coverage by a public insurance scheme has been determined in accordance with Article 2(2) of Rule No. 10.

17. Since the complainant has succeeded at this stage he is entitled to interest on the sums due, at the rate of 8 per cent a year from 10 January 1991, and to 50,000 Belgian francs in costs.

DECISION:

For the above reasons,

1. The impugned decisions refusing the complainant health insurance coverage for his mother-in-law are set aside.
2. The case is sent back to Eurocontrol so that it may determine, in co-operation with the complainant, whether his mother-in-law may obtain coverage under a public scheme within the meaning of Article 2(2) of Rule No. 10 concerning sickness and accident insurance.

3. Eurocontrol shall pay the complainant interest on the sums due at the rate of 8 per cent a year from 10 January 1991.

4. It shall pay him 50,000 Belgian francs in costs. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
P. Pescatore
A.B. Gardner

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