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

EIGHTY-FOURTH SESSION

In re Aelvoet (No. 6) and others

Judgment 1712

The Administrative Tribunal,

Considering the sixth complaint filed by Mr. Daniel Aelvoet, the second complaints filed by Mrs. Danielle Delbrassinne, Mr. Paul-Henri Fastenaekens and Mrs. Françoise Goovaerts, the third from Miss Marie-José Graas, the second from Mrs. Linda Lang, the third from Miss Valérie Meyer and the second complaints filed by Mrs. Marie-Laurence Smulders, Mrs. Roberte Stroobants, Mrs. Suzanne Stroobants and Mrs. Els Vanhoven against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 19 November 1996, all corrected on 11 December 1996, Eurocontrol's reply of 21 March 1997, the complainants' rejoinder of 1 July and the Agency's surrejoinder of 8 October 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Staff of Eurocontrol in category C used to qualify for the payment of a fixed "typing allowance". Judgments 1403 (*in re* Tejera Hernandez), 1411 (*in re* Bidaud), 1461 (*in re* Borrello and Chant) and 1601 (*in re* Aelvoet No. 5 and others) explain on what terms such staff might qualify for the allowance and set out the background to the present case.

By office notice 19/95 of 22 December 1995 the Director General of Eurocontrol cancelled forthwith Article 4a of Rule of Application No. 7, which laid down the conditions for the grant of the allowance. The notice said: "An amount equivalent to the current allowance will continue to be paid until further notice". The first payslips to give effect to that decision went out on 27 February 1996 and covered the month of March 1996. They showed the docking of sums equivalent to the amounts paid in January and February 1996 by way of typing allowance and the repayment of those sums in the form of "compensatory amounts". A note appended to the payslips drew attention to that repayment.

At dates ranging from 1 until 24 April 1996 the complainants lodged internal "complaints" with the Director General against their payslips for March. In a report dated 2 August 1996 the Joint Committee for Disputes declared their "complaints" devoid of merit. By identical minutes dated 21 and 23 August 1996 the Director of Human Resources told the complain-ants on the Director General's behalf and in the exercise of authority delegated to him that their "complaints" were rejected. Those are the decisions they are impugning.

B. The complainants' first plea is that by making rules in office notices the Director General offended against the stability of the law and against Article 100 of the Staff Regulations governing officials of the Agency, which distinguishes between such notices and implementing rules. Only the latter, they point out, need go to the Committee of Management for approval.

Secondly, they plead breach of the agreement of 9 January 1992 between Eurocontrol and the staff unions on consultation, conciliation and arbitration. That agreement says that where any general measure is taken to give effect to the Staff Regulations there must be consultation. Cancelling the allowance was such a measure; yet there was no consultation.

Thirdly, they say there was breach of their acquired rights. Citing precedent, they argue that the typing allowance was a fundamental term of employment in consideration of which they accepted Eurocontrol's offers of appointment. Indeed, like the European Communities, the Agency introduced the allowance in 1965

so as to make it easier to attract highly qualified recruits. The reasons given for dropping it are spurious because the demands made of typists were not the only justification for it. Forfeiting it will eventually cost them anything from 3.11 to 6.8 per cent of pay, according to grade. The compensatory amount comes to less anyway because it is not periodically adjusted, and it makes no difference because the grant of it is merely a transitional measure.

The complainants ask the Tribunal to "declare unlawful" office notice 19/95 of 22 December 1995, "or set it aside, or both"; quash the decisions of 21 and 23 August 1996 rejecting their "complaints"; set aside the decisions to grant them the compensatory amounts for January, February and March 1996; and order Eurocontrol to pay them the allowance as from January 1996 together with interest at the rate of 10 per cent a year on the sums due by way of allowance as from April 1996. They claim costs.

C. Eurocontrol replies that the complaints are irreceivable because they disclose no cause of action. It points out that the complainants are still getting compensatory amounts equal in value to the old allowance and the payment of them is not "transitional". Since the transitional measures it has announced have yet to be put into effect it is too soon to plead injury on that account.

In subsidiary argument on the merits Eurocontrol rejects each of the complainants' pleas. It accuses them of failing to distinguish between the nature of the Director General's decision, which was a rule, and the form of announcement, which was an office notice. Office notices are the only way of giving the staff notice of official decisions: they state the effective date of the decision and make it challengeable. In any event the Agency did put the new rule to the Committee of Management, which saw no reason to amend it.

Eurocontrol denies breach of its agreement with the staff unions. A conciliation board has settled a dispute over the scope of the agreement by approving the Agency's position, which is to exclude consultation on the contents of service rulings and office notices. Besides, the measures under challenge in this case were not general ones.

In the Agency's submission there was no breach of acquired rights: only the terms of the contract of service may confer such a right. The grant of the allowance was prescribed under the rules, and only three of the eleven complainants got letters of appointment that referred to it, one of them actually saying it was "provisional". It is because technical progress has removed the stress from typing that it was right to drop the allowance. According to Judgment 1403 the Agency was free, by means of a decision of the Director General's, to extinguish an obligation born of a broad construction of policy. The decision has caused the complainants no loss of income since they are still getting the compensatory amounts.

The Agency asks the Tribunal to award full costs against the complainants.

D. In their rejoinder the complainants say that they do have a cause of action inasmuch as the payment of the compensatory amounts is merely transitional. Besides, not being linked to the cost of living, and owing to other transitional measures already announced, it is bound to depreciate.

On the merits they observe that it would offend against Article 100 to issue a rule by means of an office notice, the status of the two not being the same in law. Besides, the way in which Rule No. 7 was put to the Committee of Management did not allow it to amend the provision.

It is not true that the conciliation board upheld the Administration's position. In fact it acknowledged that some service rulings and office notices might come under the agreement with the staff unions. The allowance was part and parcel of pay and that made it an obvious topic of consultation with the staff unions. Cancelling it was a measure taken under the Staff Regulations.

E. The Agency presses its pleas in its surrejoinder. It maintains that the office notice is the only legal instrument the Director General uses to issue a rule, of whatever sort. It was by office notice that the staff were told in 1965 that Article 4a, which brought in the allowance, was added to Rule No. 7 in the first place. Issuing an office notice did not bar the Committee of Management from reviewing the new rule.

As to the dispute over the meaning of the agreement, the conciliation board was empowered "to the exclusion of any other jurisdiction" to settle the point.

Even if the compensatory amounts were cancelled, and they are not, that would not amount to breach of a fundamental term of the complainants' employment.

CONSIDERATIONS

1. The complainants were all parties to a case - *in re* Aelvoet No. 5 and others - on which the Tribunal ruled in Judgment 1601 of 30 January 1997. Eurocontrol used to pay them a fixed allowance under Article 4a of Rule of Application No. 7 of the Staff Regulations.

2. From office notice 19/95 of 22 December 1995 they learned that Article 4a had been cancelled with immediate effect, that transitional measures for staff members who had been getting the allowance at the date of publication of the notice would be announced later, and that they would be paid equivalent amounts until further notice.

3. Late in February 1996 they got payslips for the month of March which referred, not to the allowance, but to the compensatory amounts.

Appended was a note pointing out the change. The payslips showed both as "payments" and "deductions" sums equivalent to those paid in typing allowances for January and February.

4. The complainants lodged internal "complaints" against their payslips for March 1996 and office notice 19/95.

5. The case went to the Joint Committee for Disputes. In its report of 2 August 1996 the Committee declared it to be receivable but devoid of merit.

6. Identical minutes of 21 and 23 August 1996 signed by the Director of Human Resources on the Director General's behalf and in the exercise of authority delegated to him told them that the Director General had endorsed the Committee's report, apart from some incidental comment by the Staff Committee, and was rejecting their "complaints" as devoid of merit for the reasons stated therein.

7. The present complaints, filed on 19 November 1996, raise the same issues of fact and of law and so may be joined to form the subject of a single judgment.

Receivability

8. Eurocontrol submits that the complaints show no cause of action and are therefore irreceivable. The cause of action must, it says, be real, and not just hypothetical. The payslips dated 27 February 1996 for March 1996 which the complainants are challenging have caused them no injury whatever, but made it plain that in keeping with office notice 19/95 they would still get equivalent amounts, and by way of compensation, not, as they make out, under any "transitional measure".

9. The complainants retort that they do have a cause of action. To their mind, payment of the compensatory amount is just a transitional measure, and it affects them adversely not only because it is sure in time to depreciate as against what they would have earned in typing allowance, but also because the other transitional measures announced in the office notice are bound to cause them injury in the future.

10. The payslips for March reflect the Agency's decision to pay the compensatory amounts announced in office notice 19/95 instead of the allowance for January, February and March 1996. That decision did cause the complainants injury. It applied to each of them the office notice that extinguished their right to the allowance provided for in Article 4a of Rule No. 7. And it granted them instead compensatory amounts to which - said the notice - "no annual adjustment will be made in connection with the annual remuneration adjustment". As the Tribunal has said before, there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position. And in this case it does.

The conclusion is that the complaints are receivable insofar as they challenge the individual decisions in the payslips that the complainants got for January, February and March 1996.

The merits

11. There being no need to take up any of the complainants' other pleas, the Tribunal will take up only the complainants' plea of breach of the Agreement on consultation, conciliation and arbitration procedures that Eurocontrol and "the Trade Union Organisations" signed in Brussels on 9 January 1992. The plea is that there was no prior consultation with the staff unions on office notice 19/95, even though it was a matter relating to the general application of the Staff Regulations; it is therefore unlawful; and the impugned individual decisions based on it are unlawful too.

12. The agreement of 9 January 1992 provides for consultation and for conciliation and arbitration. It says:

"These procedures shall apply only to proposals relating to the amendment of the Staff Regulations of Officials and/or the General Conditions of Employment of Servants of the Agency or relating to the general application of the provisions of the Staff Regulations or the General Conditions of Employment. In addition, under Part I only of the procedures, other matters of general interest may be discussed when:

- these matters do not come within the competence of the Staff Committee and/or the Staff Committee Agents; or

- the Staff Committee or the Staff Committee Agents so request."

13. It is common ground that the decision announced in the office notice was taken without prior consultation of the staff unions. So the material issue is whether the agreement of 9 January 1992 required it.

14. On that score Eurocontrol is mistaken. Dispute arose as to whether office notices and "service rulings" issued by the Director General under Article 100 of the Staff Regulations fell within the ambit of the agreement, and the conciliation board's report of 16 April 1996 did not put paid to the matter.

15. The report said:

"Since the agreement does not expressly cover rules, service rulings and office notices, each of them must be looked at to see whether it amounts to general application of general provisions of the Staff Regulations or the General Conditions of Employment."

The Board then observed how hard it was to say on which sort of decisions about rules there should be consultation.

16. Article 4a of Rule No. 7 was cancelled. Thus Eurocontrol did away with the allowance which it had brought in under Article 62 of the Staff Regulations. It was the Permanent Commission that set the amount of the allowance, as it did other items of pay, under Article 64 of the Staff Regulations. The decision was therefore a general measure applying provisions of the Staff Regulations and as such covered by the agreement of 9 January 1992.

17. Since there was no consultation the measure under challenge was in breach of the agreement and the impugned individual decisions based thereon are therefore unlawful. Though any decisions taken after 1 April 1996 on the strength of the same measure would likewise be unlawful, the only decisions duly impugned are those in the payslips for January to March 1996.

DECISION

For the above reasons,

1. The Tribunal sets aside the decisions, notified in payslips dated 27 February 1996 for March 1996, to pay the complainants "compensatory amounts" for January, February and March 1996 instead of the typing allowance provided for in Article 4a of Rule No. 7 of the Staff Regulations.

2. Eurocontrol shall pay them in typing allowance for January, February and March 1996 the same sums as those it paid them in "compensatory amounts".

3. It shall pay them a total of 100,000 Belgian francs in costs.

4. Their other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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