

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

## FIFTY-SIXTH ORDINARY SESSION

In re DE LOUW (No. 2)

Judgment No. 660

### THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mrs. Catharina Adriana de Louw on 27 August 1984 and corrected on 6 September, Eurocontrol's reply of 19 November 1984, the complainant's rejoinder of 7 February 1985 and Eurocontrol's surrejoinder of 12 April 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 72, 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 held a fixed-term appointment with the Agency which expired on 31 December 1983. At that date she ceased to be covered by the Eurocontrol sickness insurance scheme. On 23 January 1984 she addressed to the Director General a request that he authorise extension of her membership of the scheme. On 7 February she was granted a six-month extension under Article 72 of the General Conditions of Employment. On 9 February she filed an appeal against that decision asking that she benefit under the clause in Article 72 allowing extension of sickness insurance coverage without limit of time. On 2 March the Director of Personnel and Administration confirmed that she was covered by the Agency scheme only for the six-month period from 1 January to 1 July 1984, pending coverage under a public scheme; her request for extension beyond 1 July was refused. The complainant protested in letters of 24 April and 5 June. On 2 August the Agency finally rejected her claim, and that is the decision now impugned.

B. The nub of the complainant's case is that the rejection of her claim constituted unwarranted refusal to apply to her the second clause of paragraph 1a (recte 1 bis) of Article 72, which covers the particular case of officials suffering from a serious or protracted illness. Since suffering injury in a motor accident in 1975 on her way home from work she has been receiving regular medical treatment, and the state of her health grew even worse during the last few months of her employment with the Agency. Because of the serious and chronic nature of her ailments she cannot obtain coverage for hospital treatment under the national insurance scheme. She invites the Tribunal to quash the Agency's decision to refuse her continued membership of the sickness scheme, order the Agency to apply the material provisions of the General Conditions of Employment and grant her any further redress it sees fit.

C. In its reply Eurocontrol contends that the complainant's letter of 23 January 1984 was a "request" within the meaning of Article 92.1 of the General Conditions of Employment. It was based on Article 72, and she was told in reply that she was granted a six-month extension by virtue of the first clause of paragraph 1 bis of that article. The complainant's letter of 9 February challenging that decision was a "complaint" under Article 92.2 and was rejected on 2 March 1984. She failed to submit a complaint challenging that decision within the 90-day time limit and was time-barred from 2 June 1984. Her letters of 24 April and 5 June 1984, which were answered on 2 August, merely confirmed the decision of 2 March and did not set new time limits. The Agency submits subsidiary arguments on the merits. As a member of the Belgian sickness insurance scheme the complainant is covered by a "public scheme of sickness insurance" and fails to satisfy one of the conditions laid down in Article 72, paragraph 1 bis.

D. In her rejoinder the complainant maintains, as to receivability, that it was Eurocontrol's letter of 2 March 1984 that amounted to rejection within the meaning of Article 92.1. Accordingly, on 24 April 1984 she submitted a "complaint" under Article 92.2. The letter of 2 August was a response to that "complaint". The time limit of three months for filing the complaint therefore began on 2 August and she respected it since she filed her present complaint on 24 August. As to the merits, the complainant discusses Article 72 and maintains that Eurocontrol

misapplied it.

E. In its surrejoinder the Agency retorts, on the question of receivability, that the wording of its reply to the complainant's letters of 24 April and 5 June 1984 leaves no doubt: the letter of 2 August was mere confirmation of the earlier decision and could not reopen a time limit which had expired two months earlier. The Agency enlarges on its pleas on the merits.

## CONSIDERATIONS:

### Receivability

1. 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 it is the decision on a "complaint" that 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.

2. On 23 January 1984 the complainant asked the Director General, in accordance with Article 72 of the General Conditions of Employment to continue her membership of the Euro control sickness fund. That was a "request" under Article 92.1.

In his reply of 7 February 1984 the Director of Personnel and Administration agreed to extend her membership, in accordance with Article 72.1a (recte 1 bis), first paragraph, by up to six months provided that she certified that she did not benefit under any other sickness insurance scheme.

On 9 February 1984 the complainant submitted several certificates and asked the Organisation to grant her the benefits of membership under Article 72.1a (recte 1 bis), second paragraph. In other words, she submitted a "complaint" challenging the decision of 7 February 1984.

On 2 March 1984 the Organisation rejected her "complaint" and thereby confirmed the decision of 7 February 1984.

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 2 March 1984. Not having been filed until 27 August 1984, it is time-barred and irreceivable.

3. On 24 April 1984 the complainant repeated her claim of 9 February 1984 under Article 72.1 bis, second paragraph. On 16 May the Organisation replied that it was looking into the matter and on 2 August it rejected her claim. But that decision would have had the effect of setting a new time limit for filing a complaint only if it had altered the decision of 2 March 1984 or at least provided further justification for it. Since it amounted to mere confirmation what is said in 2 above holds good: the complaint is irreceivable.

4. 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 2 March 1984 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.

### Merits

5. 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