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

SEVENTIETH SESSION

In re GILLES

Judgment 1095

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Marie-Thérèse Raymonde Gilles against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 7 June 1989, Eurocontrol's reply of 25 July 1989, the complainant's rejoinder of 6 October, the Agency's surrejoinder of 16 November 1989, the complainant's further submissions of 11 January 1990 and Eurocontrol's comments thereon dated 15 March 1990;

Considering the application to intervene filed by Miss Geneviève Hody;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Articles 72, 92 and 93 of the Staff Regulations governing officials of the Agency and Rule No. 10 concerning sickness and accident insurance;

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

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

A. At its 73rd Session, on 5 July 1988, the Permanent Commission of Eurocontrol adopted an amendment to Article 72 of the Staff Regulations governing officials of the Agency and of the General Conditions of Employment to take effect retroactively from 12 November 1987.

By office notice 20/88 of 27 July 1988 the Director General so informed staff and announced amendments to Rule No. 10 concerning sickness and accident insurance: in Articles 10, 11, 12, 13, 14, 16 and 21 the figure 80 was replaced by 85 per cent, and in Article 17 the figure 80 was replaced by 100 per cent.

The complainant is an official of the Agency. On 15 October 1988 she had what is called a "difficult confinement" and incurred expenses of which she claimed refund from the Sickness Insurance Scheme of Eurocontrol.

She received statements of account dated 13 December 1988 and 26 January 1989 which showed that "confinement fees" and "hospital treatment for confinement" were refunded at the full rate - 100 per cent - and the "lump-sum costs of stay in hospital for confinement", "medical treatment", "sundry tests" and "pharmaceutical products" were refunded at 85 per cent. Her "fees for difficult confinement" were refunded at the full rate up to a maximum limit of 30,800 Belgian francs.

Believing the refund to be not in line with the amended text of Article 72, she submitted a "complaint" to the Director General on 8 March 1989 under Article 92(2) of the Staff Regulations. Having got no reply within the prescribed time limit, she filed this complaint on 7 June againt the implied rejection of her claim. In a letter of 18 July the Director General said in answer to her internal "complaint" that the statement of account would be corrected, that the maximum limit applied to all fees she had incurred for confinement, and that he agreed to refund at the full rate the costs of the medical treatment, tests and pharmaceutical products.

B. What the complainant is challenging is the decision, notified in the statement of account, to refund some costs of her treatment between 15 and 24 October 1988 at less than the full rate.

She observes that according to Article 72(1) as amended the rate is "increased to 100% ... in cases of confinement". The reference to "cases of confinement" being unqualified, the text covers any sort of confinement, whether normal or "difficult", in hospital or at home. Article 17 of Rule No. 10 is now at odds with Articles 11, on surgical operations, and 12, on hospitalisation, inasmuch as 17 provides for refund at the rate of 100 per cent and 11 and 12 at the rate of only 85. There is also incompatibility with Article 72(1) of the Staff Regulations. In point of fact the

amendments to the Staff Regulations have therefore made the text of the Rule quite wrong. That is no valid reason for Eurocontrol's failure to apply the Staff Regulations. For all the other direct costs of her confinement, says the complainant, the Scheme simply disregarded the explicit wording of the second clause of Article 17: "the fees for a labour room ... and all other expenses relating to services directly connected with the confinement shall be reimbursed ... at the rate of 100%".

The changes in the rate of refund should have led to changes in the maximum limits on the refundable costs of some kinds of treatment. Besides, the maximum limit of 30,800 Belgian francs quoted in the statement of account is nowhere to be found in the list of maximum limits appended to the Rule. Since no maximum is set on "fees for difficult confinement", the maximum must be sought among the next higher limits, the ones that apply to surgical operations, and the relevant figure must be the maximum for category C operations, namely 75,616 Belgian francs, since the maximum for B operations would be less than the one for normal confinements.

The complainant claims from the Scheme the refund of all her confinement expenses at the rate of 100 per cent, in keeping with Article 72 of the Staff Regulations and subject, where applicable, only to such maximum limits as the Rule prescribes. She also seeks costs.

C. In its reply Eurocontrol objects to the receivability of the complaint on the grounds that the only relevant time limits are the ones in Articles 92 and 93 of the Staff Regulations - which are the same as those in force in the European Communities - and so it had the four months allowed in 92 to answer the internal "complaint".

On the merits it contends that since its decision of 18 July 1989 meets the complainant's other claims the only matters still at issue are the rate of refund of the costs of her stay in hospital for confinement and the maximum limit on the refundable costs of a difficult confinement.

It alleges that the complainant has mistaken the meaning and scope of Article 72 of the Regulations. That is the article that empowers the Director General to make rules on the subject, the authority so vested in him allows him to determine the general arrangements for sickness insurance and they include the conditions for the refund of costs. One feature of those conditions is that a stay in hospital for the purpose of confinement is brought under the broader head of hospitalisation for a surgical operation and so under Article 12 of Rule No. 10. So no distinction is made between a stay in hospital for confinement and a stay in hospital for any other purpose, whereas the Scheme does distinguish between the costs of treatment of the actual confinement and the costs of the stay as such, which are like hotel expenses. The proper rate of refund of the costs of the actual stay in hospital is therefore 85 per cent.

As to the maximum limit on the costs of a difficult confinement, Eurocontrol observes that in the European Communities' list of surgical operations, which its own Scheme also uses, such confinement falls in category B. The costs of operations in that category are ordinarily refunded at the 85 per cent rate up to a maximum of 26,180 Belgian francs. Like the European Communities, however, Eurocontrol's Scheme applies a special maximum of 30,800 Belgian francs for difficult confinement, of which 26,180 constitutes 85 per cent.

D. In her rejoinder the complainant argues that according to the case law the relevant time limits are the ones in Article VII of the Tribunal's own Statute. She was therefore free to infer the rejection of her claim by the date of filing her complaint.

On the merits she objects to the decision of 18 July 1989, which changes some features of the dispute. Though the Director General does have authority to determine the terms of refund under the Scheme, the rules he makes must not be in breach of the Staff Regulations, and the Agency may not act as if those rules and the Regulations are on a par. For the purpose of applying Article 17 there is an obvious connection between a stay in hospital for confinement and the actual confinement. What the article says is that "in the case of a difficult confinement ... the costs referred to above shall be reimbursed ... at up to 100% subject to the maximum amounts for surgical operations, hospital medical treatment and special treatment". If, as Eurocontrol makes out, there were no difference between hospitalisation for confinement and hospitalisation for other reasons there would be no point in applying different maximum limits.

As for the conditions of refund, Article 12 of Rule No. 10 expressly provides for lump-sum billing for a stay in hospital and there is no maximum limit. The amount the Scheme put under the head "lump-sum costs of a stay in hospital for confinement" was therefore correct. The complainant enlarges on her pleas in support of her claim to refund at the 100 per cent rate and in full of fees incurred for her difficult confinement, observing that the rules of

the European Communities on the matter do not apply to Eurocontrol. She challenges the correction in the decision of 18 July 1989, which has the effect of reducing the rate of refund of the fees for confinement.

She presses her original claims and further asks the Tribunal to set aside the Director General's express decision of 18 July 1989.

E. Eurocontrol maintains in its surrejoinder that the complainant acted prematurely in filing her complaint on 7 June 1989 against implied rejection of her internal appeal. Eurocontrol acknowledged receipt of it on 16 May 1989 and answered on 18 July 1989.

On the merits it repeats its contention that Rule No. 10 is not at variance with Article 72 of the Staff Regulations, which it merely complements. Article 72 is in general terms and may be put into effect only under the conditions the Director General lays down in further rules. There is no objective reason to apply different rates of refund for stays in hospital according to whether or not the purpose is confinement. A limit is set only if the costs come up to the relevant maximum in Rule No. 10. Only when the hospital fails to distinguish the costs of the actual stay from other costs is payment made for the full daily lump-sum costs of the stay. The correction the Agency said it would make in the complainant's confinement fees was due to the vagueness of the invoices she submitted.

F. In her further submissions the complainant contends that the Agency's belated allegation of irreceivability is groundless because the Director General's express decision was out of time. What she now wants is the quashing of the decision not to refund the costs of her stay in hospital for confinement at the full rate and, as to lump-sum costs, without limit. She also wants to have quashed the decision to apply a maximum limit - which is not in the Rule - to the fees for her difficult confinement, which she says were wrongly reckoned anyway. As to the alleged vagueness of the invoices, she points out that the hospital sent them straight to the Scheme without her knowledge. Included in the expenses, the amount of which the Director General wrongly "corrected", were the fees of a paediatrician and a midwife which should have been refunded at the full rate.

G. In its further comments Eurocontrol insists that the complaint is premature. It sees nothing wrong with the corrections made by the Director General in the sums refunded for confinement fees as well as the fees of the paediatrician and midwife since they were reimbursed at the full rate subject to the maximum limit.

CONSIDERATIONS:

1. The complainant is a staff member of Eurocontrol at headquarters in Brussels. She is in dispute with the Organisation over the refund by its Sickness Insurance Scheme of the costs of her confinement, which the Staff Regulations and Rule No. 10 concerning sickness and accident insurance, as amended in 1988, say should be paid back at the rate of 100 per cent.

2. Miss Hody, whom Eurocontrol also employs in Brussels, is in some respects in like case and has applied to intervene. Her application is receivable and will fare as does the complaint itself.

3. The complaint has much in common with others on which the Tribunal rules on this day in Judgment 1094 (in re Gérard and others) and indeed on both sides all the cases have proceeded in unison. Although this one raises different issues as to receivability and the merits and is therefore distinguished, the other judgment deals with the issues common to all.

4. Like the intervener, the complainant had what is termed a "difficult confinement". In refunding her costs Eurocontrol applied the fourth clause of Article 17 of Rule No. 10 in the following version:

"In the case of a difficult confinement requiring special obstetrical treatment or surgical operation or prolonged stay in hospital for postpartum ailments, the costs referred to above shall be reimbursed, after the Medical Officer has been consulted, where necessary, at up to 80% subject to the maximum amounts for surgical operations, hospital medical treatment and special treatment."

The complainant having raised the point, the Organisation acknowledged that the figure 100 should replace 80 in that text.

5. The "maximum amounts for surgical operations" are determined under Article 11 of the Rule. That article prescribes refund of the costs of such operations at the rate of 85 per cent "up to the maximum amounts specified"

in head 2 of the Annex. Under that head the costs are put in five categories - AA, AB, B, C and D - and each has its own maximum.

6. Not until her confinement was over did the complainant apply for the consent the fourth clause of Article 17 requires, but Eurocontrol readily gave it because the matter was urgent. The Scheme issued a statement of account on 13 December 1988 but altered it in another dated 26 February 1989 because the hospital that had treated the complainant supplied an invoice belatedly. The decision at issue is in the two statements taken together.

7. The complainant believed that they were at odds with the material provisions of the Staff Regulations and the Rule and filed an internal "complaint" on 8 March 1989. She was sent no more than a formal acknowledgement dated 16 May 1989.

8. Having got no substantive reply, she filed her complaint on 7 June 1989, and she seeks the quashing of the statements of account and the full refund of her expenses. She claims costs.

9. On 18 July 1989 Eurocontrol sent her an express answer to her protest. That answer was on the same lines as the replies it sent at the same date to the complainants whose cases Judgment 1094 rules on. Though it gave a breakdown corresponding to heads of the billed costs it omitted to give precise figures, let alone explain how it had reached them. As to the particular provisions of the Rule on "difficult confinement", it left unclear how it had applied the maximum limits since it referred both to the one for normal confinement and to the one for surgical operations. It assimilated the complainant's treatment to a surgical operation in category B.

10. The complainant points out in her rejoinder that Eurocontrol's approach made the refund less to her advantage for her difficult confinement than it would have been for a normal one. She objects to its assimilating her difficult confinement to a surgical operation in category B and submits that head 5 of the Annex, which sets maximum limits on the refundable costs of confinement, sets none on the costs of difficult confinement.

11. Eurocontrol answers in its surrejoinder that because the invoices were vague it had to break the figures down. It cites Judgment 925 of 8 December 1988 (in re Boland) as establishing that it is up to the claimant to provide a health insurance scheme with items of evidence clear enough to let it assess the sort of treatment provided. Eurocontrol says that in breaking down the complainant's costs it followed a decision by its medical officer and likened the difficult confinement to a surgical operation in category B, but raised the maximum of 26,180 Belgian francs under head 2 of the Annex to 30,800, the same proportionate increase as the one in the rate of reimbursement from the 85 per cent for surgical operations to the 100 per cent for confinement.

12. In the further submissions which, for the reasons it explains in Judgment 1094, the Tribunal has invited from the complainant, she objects to the Organisation's charge of failure to give all the information needed for proper breakdown of her costs. She points out that the Scheme agreed to meet the costs of her confinement and settled directly with the hospital and that she did not herself know what the bills came to until the dispute had arisen.

13. Her brief shows that the matter of refund of the fees of a paediatrician and a midwife who attended the obstetrician is still at issue.

14. She also submits that it was arbitrary to liken her difficult confinement to a surgical operation in category B for the purpose of determining the maximum limit on her refundable costs and to make the arithmetical reckoning that raised the sum to 30,800 francs. In her submission it would have been fairer to liken her confinement to a surgical operation in category C, for which there is a much higher maximum.

15. In comments on her further brief the Organisation acknowledges the accuracy of her account of the facts. It explains that it has not overlooked the additional fees of the paediatrician and the midwife which, though refundable at the rate of 100 per cent, are subject in the event of a difficult confinement to the maximum limits for surgical operations. Since the obstetrician's fees had already put the costs above the maximum, the additional fees, which were covered in the first statement of account, were docked in the second one. Eurocontrol concedes that the Rule does not liken a difficult confinement to a surgical operation but says that it drew on rules in the European Communities which expressly treat a Caesarean section and a difficult confinement as surgical operations in category B.

Receivability

16. In its reply to the complaint the Organisation does not plead that it is irreceivable. But since the complainant has filed suit under Article VII of the Tribunal's Statute it observes that the time limit the article sets for inferring rejection of the claim from the Administration's silence is too short for it to draft a proper reply to an internal appeal. It says that the rules of the European Communities allow four months and so do its own, and that would be a more suitable time limit.

17. The complainant challenges that point of view in her rejoinder, citing Judgment 532 of 18 November 1982 (in re Devisme), and in its surrejoinder Eurocontrol enters a formal plea of irreceivability, arguing that by filing on 7 June 1989 the complainant acted before she had exhausted her internal remedies and so prematurely. The Organisation presses the plea in its further submissions.

18. Though raised belatedly, the objection calls for a ruling since the complaint was filed after the 60-day deadline in VII(3) but within the four months prescribed in Articles 92 and 93 of the Staff Regulations. Actually the Tribunal will consider such matters on its own motion because the purpose of the time limit for inferring rejection is to bar filing before the internal remedies are exhausted, whereas the purpose of the time limit for filing is to make an administrative decision unchallengeable and therefore final.

19. A complaint is receivable under VII(3) where the Administration fails to take any decision upon the claim within sixty days of the date of notification of it. Once an organisation has accepted the Tribunal's Statute it may not derogate from VII(3) by dint of internal rules of its own. The only difference Eurocontrol's own Staff Regulations may make is that it is estopped from objecting to receivability when, in reliance on its own time limit, a staff member has filed a complaint that would be receivable under its Staff Regulations but out of time under VII.

20. Since the complaint meets the requirements of Article VII and the time limits therein the plea of irreceivability fails.

The merits

21. What follows is the Tribunal's ruling on the issues still in dispute between the parties after their further submissions.

22. For the reasons stated in Judgment 1094 (in re Gérard and others) the complainant's case succeeds insofar as it relates to refund of the costs of her stay in hospital. Her objections to the processing of the costs of her difficult confinement are also sound.

23. Although there is nothing wrong in principle with setting maximum limits, even when the 100 per cent rate of reimbursement applies, there is still much room for doubt about the way Eurocontrol has applied them in this case. Its position is still unclear, even after the further pleadings, in that there is no telling what principles have governed the successive statements of account. It has given the complainant and the Tribunal no aggregate figure of the costs of the confinement and no proper breakdown giving the figure taken under each head of cost, the rate of refund, any maximum limit and references to the rules applying to each item. The decision of 18 July 1989 shows the costs of the difficult confinement rather as an addition to those of normal confinement, although in its further brief Eurocontrol contends that "the complainant cannot have had both a difficult confinement and a normal one".

24. The reason why things are unclear is that the Rule does not spell out properly just what is meant by applying the 100 per cent rate of reimbursement to the costs of a difficult confinement. Though the provisions are plainly wanting, it was not the medical officer who was competent to afford a remedy by likening a difficult confinement to a surgical operation in category B. In any event there is something odd about drawing that analogy when the Scheme has different rules and different rates of refund for the two sorts of treatment. What is more, an arithmetical reckoning based on the proportionate difference between the two rates of refund is not a proper way of taking account of the costs of obstetric treatment. Both under the Staff Regulations and under the Rule such treatment is governed by special provisions and indeed there are social and family considerations that prompted the 1988 amendments thereto. The conclusion on this issue is that at the material time there was no valid maximum limit on refund of the costs of medical treatment of a difficult confinement.

25. As for Eurocontrol's reliance on what is done in the European Communities, it must put on its own Staff Regulations and Rule No. 10 the construction they are designed and intended to bear and it may not borrow rules

from other organisations.

26. For the foregoing reasons the decisions relating to the complainant and to the intervener must be set aside. The complainant must get full reimbursement of the costs of her confinement.

27. Since the complainant has won her case she is entitled to an award of 50,000 Belgian francs in costs.

DECISION:

For the above reasons,

1. The decision impugned by the complainant is set aside.

2. The case is sent back to Eurocontrol for a new decision in accordance with the principles set forth in this judgment and in Judgment 1094 delivered on this day.

3. Eurocontrol shall pay the complainant 50,000 Belgian francs in costs.

4. The application to intervene is allowed.

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

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

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

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