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

SEVENTY-FIRST SESSION

In re NIESING (No. 2), PEETERS (No. 2) and ROUSSOT (No. 2)

Judgment 1118

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr. Cornélis Niesing, Mr. Patrick Peeters and Mr. Jean-Marc Roussot against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 11 May 1990;

Considering the interlocutory order in Judgment 1096 of 29 January 1991;

Considering the Organisation's submissions of 7 March 1991 in answer to the questions the Tribunal put to it in that judgment, the complainants' comments of 10 April on those submissions and Eurocontrol's further submissions of 2 May 1991:

Having examined the written evidence;

A. In Judgment 1096, which it delivered at its 70th Session, the Tribunal ordered further submissions from the parties in answer to specific questions set out in 18 and 19.

B. In those submissions the Organisation traces the background of the cases and recalls its earlier pleas. It explains the changes in its mandate and their effect on the Agency, and discusses a link between secondment and pay reductions. It describes the services it offers and aspects of its pricing policy, stressing the effect of minimal "restraint" in pay on the cost of those services.

C. In their comments the complainants confine themselves to Eurocontrol's answers to the questions in Judgment 1096. They dispute the qualitative effects which the Agency alleges the 1981 Protocol had on its operations and find no merit in its reasoning on the connection between pay reductions and the promotion of staff exchanges with national administrations. As to the services offered by the Organisation and their costs, the complainants address several points which they say the defendant has failed to deal with.

D. In its final brief Eurocontrol chides the complainants for avoiding the basic issues. It sees nothing in their comments to cast doubt on the validity of the answers it gave the Tribunal and enlarges thereon.

CONSIDERATIONS:

1. As early as 1982 Eurocontrol had it in mind to adjust the pay of its staff and it started doing so from 1 January 1986, when the Protocol amending the Eurocontrol Convention came into force. Disputes over the adjustments have already been put to the Tribunal.The present complaints are about the effects of the adjustments on the sums refunded to staff against education expenses for the period from 1 July 1988 to 30 June 1989. Although that is just a minor feature of the dispute the lasting effect of the adjustments is for the first time plainly at issue and the lawfulness of the actual adjustments under challenge. Finding that, though it had made preliminary rulings on earlier disputes, it did not yet have full information on the merits of the case, the Tribunal made the interlocutory order in Judgment 1096 of 29 January 1991 putting to the defendant questions about the principles at issue. It needed fuller information on the process of adjustment and the reasons underlying it.

3. Eurocontrol supplied the information in its brief of 7 March 1991, to which it appended many items of evidence, and the complainants commented in a brief of 10 April 1991, which also comprised several items. The Organisation filed further observations on 2 May 1991.

4. Those submissions put the adjustments for the first time in proper chronological perspective. The Committee of Management of Eurocontrol drafted the texts, the Permanent Commission adopted them, either in session or by

correspondence, and the Director General announced them to the staff. They were eventually reflected in staff pay slips and, since the Organisation failed to answer the internal appeals within the time limit set in the Tribunal's Statute the challengeable decisions are implied ones and the only express individual decisions are the pay slips.

5. By the process summed up above the following action was taken.

On 23 November 1982 the Permanent Commission instructed the Committee of Management to consider applying adjustments to pay on the strength of a differential of 5, 10 or 15 per cent between the European Communities and Eurocontrol.

On 7 July 1983 the Permanent Commission opted for the 5 per cent differential, its application to be staggered over three years starting at the date of entry into force of the Protocol amending the Eurocontrol Convention, which was being ratified at the time.

On 15 November 1983 the Commission confirmed that decision and asked the Committee of Management to look at the effect the reduction would have on pensions.

On 9 July 1985 the Commission drew up a programme in five stages for putting the reduction into effect.

The Protocol took effect on 1 January 1986 and the Commission decided on 25 November 1986 to apply the reduction to pensions as well.

On 7 July 1987 it decided to apply an initial 0.7 per cent reduction to pay as from 1 July 1986 and office notice 22/87 of 23 July 1987 so informed the staff.

Though the office notice had given to understand that the decision was final, the Commission confirmed it yet again at a meeting on 12 November 1987 by approving the minutes of its previous session.

On 30 March 1988 the Commission decided by correspondence to increase the rate from 0.7 to 0.85 per cent, again as from 1 July 1986, and to apply another 0.4 per cent reduction, bringing the total to 1.25 per cent, as from 1 July 1987. The decisions were conveyed to the staff in office notice 11/88 of 8 April 1988.

On 22 November 1988 the Commission increased the rate by another 0.28 to 1.53 per cent as from 1 July 1987. It confirmed that new rate in three more decisions, on 4 July 1989, 28 November 1989 and 12 March 1990, announced in office notices 28/88 of 8 December 1988, 14/89 of 23 August 1989 and 5/90 of 7 May 1990.

6. Before going into the merits the Tribunal observes that in its final brief Eurocontrol repeats a fundamental objection to the Tribunal's competence which it raised in the context of the earlier complaints.

7. Eurocontrol submits that the Tribunal may not review the pay adjustments because in approving them the Permanent Commission was exercising law-making authority vested in it by sovereign States. So the individual decisions by the Director General are challengeable only insofar as they are a odds with the Commission's decisions, but the Tribunal may not, even incidentally, review policy decisions by the Commission or the Committee of Management. In support of its plea the Organisation cites the "agreement" which it says it concluded with the International Labour Office and vests jurisdiction in the Tribunal only over disputes about the observance of its Staff Regulations, not about the lawfulness of the Regulations themselves.

8. The answer to that is that according to ILO records that agreement is just Eurocontrol's declaration of recognition of the Tribunal's competence under Article II(5) of the Statute. The Director General wrote a letter on 20 March 1964 declaring such recognition and the Governing Body of the International Labour Office accepted the declaration at a sitting it held on 13 June 1964. So Eurocontrol's preliminary objection turns, not on the text of its own rules, but on the construction to be put on the Tribunal's Statute. That interpretation must be the same for all organisations that have recognised its jurisdiction.

9. Though the Tribunal's main task is to enforce the written rules in disputes between organisation and staff member, clear and consistent precedent makes dealings between the two sides subject, not just to the material provisions of the Staff Regulations and the contract of employment, but also to a set of general principles that form part of the law of the international civil service.

10. An organisation may of course freely decide what its staff regulations are to say and what the structure of its secretariat is to be. But once it has laid those administrative foundations the political and administrative bodies that frame personnel policy must at all times, and more particularly when amending conditions of service, abide by those general principles.

11. As it stated in Judgment 986 (in re Ayoub No. 2 and others), under 2, the Tribunal is fully competent when the relationship between the Organisation and its staff is at issue, subject only to Article XII of its Statute.

12. Eurocontrol's preliminary object therefore fails.

13. As the above narrative shows, periodic adjustments in pay were used to bring in the differential between the European Communities and Eurocontrol. Such adjustments are provided for in Articles 64 and 65 of the Staff Regulations.

Article 64 says that remuneration shall be subject to adjustment "to take account of the taxation system applicable and of the living conditions in the relevant country of posting", and the adjustment depends on several weighting factors.

Article 65 empowers the Permanent Commission, on proposals from the Director General and after discussion by the Committee of Management, to make the adjustments it deems necessary. In doing so it shall "take particular account of any variations in public service salaries in the different member countries and of the recruitment needs of the Agency". The adjustments are made by amending the basic salary scales in Annex III and they also affect the incidental items of pay set out in Article 62, including education expenses. They require endorsement by the Permanent Commission.

14. The adjustments the complainants are objecting to were made under the Article 65 procedure for adjusting salary scales, although none of the impugned decisions actually mentions that article.

15. In their complaints the complainants put forward the following pleas.

First, the Director General decided on 25 August 1989 to apply - and in December 1989 there was applied - a 1.25 per cent reduction in the repayment of education expenses incurred in the period from 1 July 1988 to 30 June 1989. That was in breach of the rule against retroactivity.

Secondly, the Permanent Commission decided by correspondence to set the rate of reduction at 1.25 per cent as from 1 July 1987, and office note 11/88 of 8 April 1988 so informed the staff. That was another breach of the same rule.

Thirdly, Eurocontrol has put a wrong and wrongful construction on Judgment 963 and disregarded the res judicata rule by failing to comply with it.

Fourthly, even supposing that the reduction was lawful it ought not to have been applied to education expenses, which are refunded only on the strength of supporting evidence and are not part of pay.

Fifthly, there is breach of equal treatment because the reduction falls more heavily on staff members who have higher education expenses.

Lastly, the reduction in pay and allowances is unlawful: no reasons have been given for it, it is against Eurocontrol's rules on pay-setting and it is in breach of trust and of acquired rights.

16. The plea fails. The adjustments at issue were not retroactive: Eurocontrol applied the 1.25 per cent rate, which the Commission finally approved on 30 March 1988, to entitlements for the period from 1 July 1988 to 30 June 1989.

17. The individual decisions impugned are based on decisions of the only competent authority, the Permanent Commission. The objection that there has been no statement of the reasons is unsound: the staff have known all along the reasons for the adjustments, which have been fully discussed in the context of all the cases. There was therefore no need to state reasons for the individual decisions, which were implied ones anyway and therefore not of the sort that could be substantiated.

18. As for the plea that the staff have an acquired right to alignment of pay with the scales of the European Communities, the Organisation states, and the pleadings bear out, that there has never been anything but de facto alignment, and it has never been absolute anyway. Besides, even if it had been, the Organisation made no express or implied commitment to continuing it. The practice has conferred no right on the staff to the continuity of the parity of pay that existed at the outset. There is no question of any breach of acquired rights.

Besides, never since the differential was brought in has pay actually fallen; in fact it has gone up. With every upward adjustment and every widening of the differential between Eurocontrol and the Communities the staff have been paid arrears reflecting the new adjustments.

19. The Tribunal may neither review the reasons of policy underlying the general decision nor say what rates of pay ought to be. The decision was taken under Article 65, which merely cites examples of circumstances warranting adjustment in pay and is not exhaustive. There may be adjustment for other reasons, whether they be peculiar to the Organisation or attributable to outside factors. The Organisation speaks of work requirements that call for structural reform, comparison of staff pay with pay in member States and in other international organisations, and a need for lower service costs. Those reasons are not factually incorrect and they come within the ambit of Article 65.

20. As Judgment 986 (in re Ayoub No. 2 and others) said in the fourth paragraph of 13, the Tribunal "has only a limited power of review in such matters and will declare whether the impugned decisions square with general principles, with the Staff Regulations and with the terms of the complainant's appointment". Those principles, including the rule against breach of trust, have been observed in this instance.

21. The complainants have another plea: that the Organisation's failure to abide by Judgment 986 is in breach of res judicata; that Eurocontrol is overlooking the special nature of education expenses which are paid on the strength of supporting evidence and are therefore not an item of pay; and that it has discriminated between staff members.

22. Those pleas also fail.

There will be no breach of res judicata unless the cause of action and the claims - among other things - are the same. In this case they are not.

According to Articles 62 and 67 of the Staff Regulations one item of pay is the education allowance, education expenses form part of it, and, contrary to what the complainants make out, the fact that such expenses are paid on the strength of supporting evidence does not make the allowance as a whole any less an item of pay.

There is no breach of equal treatment because the same maximum limit on refund applies to everyone.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

DISSENTING OPINION BY MR. PIERRE PESCATORE

I am afraid I cannot agree with the other members of the Tribunal on the merits of this case. In my view the Tribunal ought to have set aside the salary reduction at issue and ordered the return of the amounts wrongfully withheld from the staff's pay. I state my reasons briefly below.

1. The law-making process which Eurocontrol followed for the purpose of applying the reduction is objectionable on many counts.

The successive reductions are utterly inconsistent both in amount and in date of application. The typical course of events was as follows. First Eurocontrol made a provisional announcement of the reduction, but applied it forthwith without awaiting confirmation. Such confirmation, which was retroactive, took fairly long: it came about whenever the Permanent Commission happened to be meeting, or even by correspondence, that is to say, without any proper debate by its membership.

Any staff who objected at once to that process were told that it was too soon; any who awaited confirmation were told that it was too late and they ought to have challenged the provisional decision. For one of those two reasons Eurocontrol has objected to receivability in every single case since the start of these disputes. Its tactics are in blatant breach of the good faith that should govern relations with staff and offends against the canons of responsible management.

The Tribunal has time and again declared the reductions to be in breach of the rule against retroactivity. Such breach will ordinarily make the decision invalid only insofar as it is retroactive. But here it amounts to a radical defect making the reductions invalid not just as in the past but for the future as well. That is because, when combined with the practice of making decisions provisional, the process undermines the staff's right to defend their interests: one need only look at the dragging on of the dispute in case after case from Judgments 902, 961, 963, 1012 and 1096 to the other ones delivered this day.

All these things seem to me quite striking. So I need not dwell on the oddity of Eurocontrol's falling in line with the Communities' practices in the matter of pay yet strongly protesting - though the thesis is one I can readily accept - that it is not bound by them. Its seeming distaste for commitment has not precluded strong reliance on those very practices when there is a need for some yardstick to reduce staff pay. That is not only inconsistent but morally offensive to its staff. What makes the whole process especially unwarranted and vexatious is that the reductions are in net salary, i.e. in salaries under Eurocontrol's own scales, not under the Communities'. The complaints and applications to intervene are legion, and it is little wonder that the staff have risen up in protest at such arbitrariness.

2. One thrust of the complainants' argument is that there has been no statement of the reasons for the reductions: see the summary in Judgment 1123 on a case (in re Purnelle) in which the plea is especially well put. The Organisation's retort is that according to its Convention and Staff Regulations no reasons have to be given for decisions by what it calls its "supreme and sovereign" body, the Permanent Commission.

That is no answer at all. The duty to substantiate a decision is a general principle that governs all proper administration which is subject to judicial review. It is also the duty of any governing body in taking decisions that may be adverse to staff interests. At the very least the individual decisions notified to staff members ought to have been accompanied by a written explanation of the kind Article 92 of the Staff Regulations explicitly requires.

At no point did Eurocontrol even say what afforded the basis in law for reduction. Nor has it given its staff any coherent statement of the reasons: there is no explanation in the Permanent Commission's decisions nor in the office notices the Director General addressed to the staff, nor with the pay slips showing the effect of reduction, nor in answer to the countless appeals which the staff have filed over the years, and which the Organisation has treated with such sovereign disdain that all the complainants have had to infer rejection.

In its interlocutory judgment, No. 1096, the Tribunal sought further information on the reasons for the impugned measures. The Organisation has failed to supply the only records that might have shed some light on the matter, namely the minutes of the Permanent Commission and the Committee of Management. So it will not do just to affirm that in any event the staff must have known what the reasons were. There is a formal duty to state them, and in terms both understandable to the staff and reviewable in law. What is more, the Staff Regulations require that the statement be given at the same time as the decision "adversely affecting" the staff is taken. So the Administration may not shirk its duty to provide one by refusing to answer the internal complaints and leaving the staff with no choice but to appeal against the rejection they must infer from its silence. Although the Organisation has offered various explanations and the complainants contest them, the Tribunal has failed to review them.

To sum up, the Organisation's constant evasiveness throughout years of dispute suggests, for want of proof to the contrary, that no rational idea prompted the reduction, but just a desire to save money at the staff's expense. That is the sort of motive the Tribunal rejected in Judgment 990 (in re Cuvillier No. 3).

3. That brings me to my last point. The sparse information Eurocontrol has vouchsafed about what underlies the reduction - they are not so much reasons as pretexts - when seen in the context of the decision-making process described above, shows that the Organisation may have encroached on one of the staff's essential rights, their right to a stable income that is not questioned save for sound and compelling reasons.

Article 65 of the Staff Regulations does allow adjustment in pay and indeed sets some criteria for the purpose. The

Organisation has taken no account of them. As a rule the staff may not quarrel with adjustments that reflect broad economic trends. But a flat-rate reduction of the kind at issue here is a serious matter, and the Organisation may inflict it only if it shows cogent reasons that the staff can understand and the Tribunal review.

The Organisation pleads that the reductions were so paltry that there was no breach of acquired rights. The plea is unsound: in Judgment 986 (in re Ayoub No. 2 and others) the Tribunal pointed out how a run of small changes may affect pay levels, and that every reduction, however small, inevitably raises the issue of principle.

The conclusion is that the reduction was in breach of rudimentary standards of proper law-making; there was no statement of the reasons for it; it was in breach of the good faith that should govern relations between Organisation and staff; and there may have been breach of acquired rights. The whole process ought to have been declared null and void ab initio. The Organisation would have been free to revise its pay scale according to its own criteria and needs and with due regard to the Staff Regulations and general principles of international public service.

I am sorry that, though the Tribunal has declared itself under 11 above to be fully competent, the majority have abstained, in 19, from exercising that competence by going into the merits of the Organisation' salary practices. In its advisory opinion of 12 July 1973 (Application for review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973, pp. 166, 210 and following) the International Court of Justice declared that a tribunal has the minimum obligation of explaining its decisions. It is questionable whether this judgment and the others on the Eurocontrol reduction discharge that obligation.

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

Delivered in public in Geneva on 3 July 1991.

(Signed)

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

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