SEVENTY-THIRD SESSION

In re KUNICKE

Judgment 1180

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hermann Gerhard Kunicke against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 March 1991 and corrected on 13 June, the Agency's reply of 5 September, the complainant's rejoinder of 23 November 1991 and Eurocontrol's surrejoinder of 27 February 1992;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, Articles 7, paragraph 4, and 18 of the Rules of Court, Article 91(2) of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre and Articles 6, 12 and 20 of Rule No. 10 concerning sickness and accident insurance;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a German who joined the staff of Eurocontrol in October 1969, is employed at its control centre at Maastricht. On 16 February 1990 his doctor informed the medical adviser of Eurocontrol's Sickness Insurance Scheme that a back ailment required treating him at a clinic at Bad Aibling, in Bavaria, and applied for prior authorisation under Article 6 of Rule No. 10 concerning sickness and accident insurance. On 2 March 1990 the medical officer approved the prescribed treatment for 21 days in keeping with the terms of office notice 4/89 on health-resort "cures". The Director of Personnel and Finance confirmed that authorisation by a note of 21 March, and on the same day the complainant applied for a guarantee of payment of "hospitalisation" costs he expected to be incurring from 26 March.

On 23 March the complainant's doctor sought prior authorisation of hospital treatment at the clinic at Bad Aibling. The complainant was at the clinic from 27 March to 27 April 1990. In the period from 12 to 16 April he was operated on and received consequent medical treatment. By authorisation 584/90 of 4 May the Scheme agreed to meet the costs of the operation, medical treatment and five days' hospitalisation.

On 11 May the complainant claimed the refund of the sum of 9,091.25 Deutschmarks he had paid at the end of his stay in the clinic. In a letter of 21 May 1990 the officer-in-charge said that the costs of the operation, including hospitalisation from 12 to 16 April, would be refunded under authorisation 584/90, but that the rest of his stay came under the authorisation of 2 March for 21 days' hydrotherapy and the cost of it could not be met until the Scheme got a terminal medical report from the doctor who had treated him. In the ensuing correspondence the parties discussed whether such a report was called for. Eurocontrol demanded it under Article 20 of Rule No. 10, which says:

"Applications for reimbursement of the costs of residence, treatment and medical supervision incurred on a cure at a watering-place must be supported by a medical report, giving details of the treatments followed and the results observed, drawn up at the end of the cure for the Medical Officer."

The complainant's case was that the material provision of Rule No. 10 was Article 12, on hospitalisation, which does not make refund subject to the production of a medical report.

On 22 August 1990 he lodged an internal "complaint" under Article 91(2) of the General Conditions of Employment against the decision of 21 May.

By a letter of 28 August the medical officer asked the clinic to supply the medical report he had failed to get from the complainant. The clinic did so. In a minute of 14 September to the Head of Personnel the medical officer confirmed his view that the treatment had been hydrotherapy. On 25 September the complainant's doctor sent the medical officer the doctor's report he had obtained from the clinic.

By a decision dated 19 December 1990, the one under challenge, the Director General rejected the internal "complaint" on the grounds that the treatment had not required a stay in hospital "as a full-time in-patient".

B. The complainant submits that his stay at Bad Aibling qualified him both on medical and on administrative grounds for reimbursement by the Scheme at the "hospitalisation" rate under Article 12 of Rule No. 10. The Director General's decision to regard all but five days of that stay as relating to "a cure at a watering place" rather than a stay in hospital is unlawful on several counts.

The Director General drew mistaken conclusions from the facts. The doctor who prescribed the treatment and signed the form applying for authorisation of treatment gave detailed medical information. But the officer-in-charge took no account of it and merely replied that "for the purposes of our Sickness Insurance Scheme" the stay was to be regarded as a "cure".

Though it disagreed with the complainant's doctor Eurocontrol failed to seek an "objective and independent" opinion of his condition. It directed neither its own medical officer nor any outside expert to examine him, and its medical officer refused discussion with his doctor.

Eurocontrol determined his treatment in authorisation 304/90 to be "Cure B by assimilation". Rule No. 10 makes no provision for determining the nature of treatment by assimilation.

The Director General stated in his letter of 7 January 1991 that "the rate applicable to treatment and medical care is the same, regardless of whether hospitalisation or a cure is involved". It was therefore wrong to treat 3,763 Deutschmarks of the sum he was charged at the end of his stay as "nonrefundable expenses". Besides, the bill did not identify any such amount.

He asks the Tribunal to set aside the Director General's decision of 19 December 1990 and order Eurocontrol to refund the costs of his stay at the clinic from 27 March to 27 April 1990 as "hospitalisation" within the meaning of Article 12 of Rule No. 10. He claims interest on the amount due and an award of costs.

C. In its reply Eurocontrol contends that the complaint, having been filed on 26 March 1991, is time-barred. To meet the ninety-day time limit in Article VII(2) of the Tribunal's Statute the complainant would have had to get the decision of 19 December 1990 after 25 December. That is improbable. In any event he gives no evidence of having received it on 7 January 1991, the date he gives in the complaint form.

The Agency's pleas on the merits are subsidiary.

Because doctors' reports are confidential Eurocontrol was not free to disclose statements submitted to it by the complainant's doctor without leave from his patient. What his doctor took issue with in his letter of 8 March 1990 was whether the stay at the clinic should last more than 21 days, not the nature of the treatment, which it was agreed was "similar to therapeutic treatment ... given at a watering place".

As the treatment the complainant received was of a type not expressly covered by the Scheme's rules, the Scheme chose to assimilate it to a recognised category, in keeping with practice, rather than refuse coverage outright.

The Director General is not bound when refunding the costs of treatment to adopt categories established under national health schemes or to consult national medical staff. The only advice he may properly rely on is the medical officer's.

The bill of 27 April 1990 not being detailed, the Scheme obtained a breakdown of charges before reckoning how much to refund under its rules. It gave the complainant full information on how it had reckoned the final amount due to him.

D. In his rejoinder the complainant corrects what he sees as mistakes of fact in the Agency's reply, answers its pleas and develops his own.

The burden of proof is on the sender to establish the date of receipt, Eurocontrol has failed to disprove that he got the final decision on 7 January 1991, and his complaint was therefore in time.

As for the merits he submits that the medical officer took no account of his doctor's "orders" or of the information

submitted on the state of his health. Moreover, the medical officer's position was at odds with precedent.

He presses his claims.

E. In its surrejoinder Eurocontrol seeks to shed light on several issues of fact, waives its objections to receivability and enlarges on its pleas on the merits. It submits in particular that the only material issue is whether the prescribed treatment required "hospitalisation" within the meaning of Article 12 of Rule No. 10 and that it acted properly in determining the matter.

CONSIDERATIONS:

Receivability

1. The text of the decision by the Director General which the complainant is impugning is dated 19 December 1990. The complainant alleges that he did not have notice of it until 7 January 1991 and submits that since he filed his complaint on 26 March 1991 he complied with the time-limit of ninety days in Article VII(2) of the Tribunal's Statute.

In its reply Eurocontrol argues that for his complaint to be receivable the impugned decision would have had to reach him after 25 December 1990 and it believes that to be improbable. In its surrejoinder, however, it waives its objections to receivability. It is right to do so: the burden of proof is on the Organisation as the sender of the letter of 19 December 1990 to show that the complainant had notice of it by 25 December. It has not discharged that burden.

The complaint is therefore receivable.

The merits

2. The complainant received treatment for a back ailment at the clinic at Bad Aibling from 27 March to 27 April 1990. In the course of that period he underwent an operation and on that account spent five days in the department of surgery of the clinic from 12 to 16 April. The final decision by the Director General of Eurocontrol was to grant him under Article 12 of Rule No. 10 the costs of the operation and related medical treatment, including the five days' stay in hospital; it refused to regard the rest of the period as "hospitalisation" and treated it instead as a "cure at a watering place" and therefore coming under Article 20 of Rule No. 10.

The material issue is whether that decision was lawful. It was based on documents supplied by the complainant's own doctor and on further information from the clinic. Eurocontrol maintains that none of the services provided made it necessary, except during the five days, to keep the complainant in the section of the clinic that operates as a hospital for a stay as a full-time in-patient. It concludes that it was right for the Sickness Insurance Scheme to meet the costs of his subsistence and treatment for all but the five days' stay at the rate applicable to a B cure.

3. The Tribunal is satisfied that the Director General was right to decide that the complainant's stay at the clinic did not warrant the refund of his costs at the "hospitalisation" rate under Article 12 of Rule No. 10 and that to regard all but five days of that stay as "a cure at a watering place" rather than hospitalisation for medical treatment was in line with the material rules.

First, the Director General drew no mistaken conclusions from the facts. The doctor who prescribed the treatment and signed the form applying to Eurocontrol for approval of the treatment gave detailed information on the complainant's condition, and it is not true that the officer-in-charge discounted it.

Secondly, there was nothing contrary to Article 20 of Rule No. 10 about demanding a medical report from the clinic before deciding on the complainant's claim to the refund of his full costs.

4. The complainant argues that the Agency ought to have consulted an independent doctor. But there was no requirement in the rules that it refer the complainant's case to outside doctors; indeed the Director General was right to rely on Eurocontrol's own medical officer, who was authorised to assess the position both by his own lights and in view of the opinion expressed by the complainant's own doctor.

The complainant has not adduced any evidence to suggest that the Agency's medical officer made an improper

assessment either of the state of the complainant's health or of the nature of the treatment he received at the clinic. There is therefore no reason for the Tribunal to seek further expert advice on issues that the Director General appears to have properly decided on the advice of the Agency's medical officer.

5. Authorisation 304/90 put the complainant's treatment in the category of "Cure B by assimilation", and he submits that Rule No. 10 makes no provision for making any such determination by assimilation.

There is no merit in the plea. The point on which his doctor took issue with the Sickness Insurance Scheme in his letter of 8 March 1990 was about the length of his stay at the clinic, which in his view should not be less than 21 days, not the nature of the actual treatment, which it was agreed should be "similar to therapeutic treatment ... given at a watering place".

Since the treatment was of a kind not expressly provided for in the Scheme's rules, the Scheme chose to put his treatment into a category that it did recognise, in keeping with practice. There was nothing improper or unreasonable about that. Moreover, as Eurocontrol observes, in refunding the costs of treatment the only advice the Director General may properly rely on is its medical officer's.

DECISION:

For the above reasons,

The complaint is dismissed.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.

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

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