SEVENTY-THIRD SESSION

In re DE POORTER (Nos. 1, 2 and 3), DOERR, ENRIGHT, GUYOT (Nos. 1, 2 and 3) and LEISTICO

Judgment 1202

THE ADMINISTRATIVE TRIBUNAL,

Considering the first, second and third complaints filed jointly by Mr. Jacques De Poorter and Mr. André Guyot against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 December 1990 and corrected on 21 February 1991, the Agency's replies of 6 June, the complainants' single rejoinder of 4 September and the Organisation's rejoinder of 14 November 1991;

Considering the joint complaint filed by Mr. Dietmar Dörr, Mr. Charles Adrian Enright and Mr. Wolfgang Leistico against Eurocontrol on 14 December 1990 and corrected on 21 February 1991, the Agency's reply of 6 June, the complainants' rejoinder of 4 September and the Organisation's surrejoinder of 14 November 1991;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 64 and 92(2) of the Staff Regulations governing officials of the Agency;

Having examined the written evidence and decided not to order oral proceedings, 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. At its 62nd Session, on 7 July 1983, the Permanent Commission of the European Organisation for the Safety of Air Navigation decided to bring in by stages a 5 per cent differential between net pay at Eurocontrol and net pay in the European Communities. The Protocol that amended the 1960 International Convention on Co-operation for the Safety of Air Navigation came into force on 1 January 1986.

At its 71st Session, on 7 July 1987, the Commission decided to make the first reduction by 0.7 per cent as from 1 July 1986. It gave that decision its final approval on 12 November 1987. The application of that measure gave rise to complaints on which the Tribunal ruled in Judgment 1012 (in re Aelvoet No. 2 and others) of 23 January 1990. The ruling set aside the "pay slips issued by Eurocontrol before the Permanent Commission's decision of 12 November 1987 took effect ... insofar as they reduce pay by 0.7 per cent".

On 30 March 1988 the Commission decided to raise the differential by 0.15 per cent, bringing it to 0.85 per cent, again as from 1 July 1986, and to add 0.4 per cent, making a total of 1.25 per cent, as from 1 July 1987. On 22 November 1988, at its 74th Session, the Commission increased the differential by another 0.28 to 1.53 per cent as from 1 July 1987. At the same session it decided to hold the differential at 1.53 per cent as from 1 July 1988 until further adjustment of cost-of-living weightings offered scope for another increase in the differential, since such increases were applied at the same time as pay rises.

The complainants are officials of Eurocontrol. On 24 July 1990 Mr. De Poorter and Mr. Guyot filed internal "complaints" under Article 92(2) of the Staff Regulations seeking "the quashing of the 1.53% reduction applied to their pay" for the months of May, June and July 1990. On 8 August 1990 Mr. Dörr, Mr. Enright and Mr. Leistico filed complaints requesting "the cancellation of the 1.53% reduction made on back-pay for the period July 1989 to May 1990". Having got no answer they filed the present complaints on 14 December 1991 against the implied decisions to reject their claims.

B. The complainants submit that their complaints are receivable under Article VII(3) of the Statute of the Tribunal.

They plead as follows on the merits.

(a) The Commission's decision of 22 November 1988 to increase the rate of reduction to 1.53 per cent with retroactive effect from 1 July 1987 did not become final until 4 July 1989. It was therefore unlawful to apply the 1.53 per cent reduction before that date. Being retroactive, the general decision was unlawful, as the Tribunal held, for example, in Judgments 963 of 27 June 1989 (in re Niesing, Peeters and Roussot) and 1012, and so the individual decisions giving it effect are unlawful as well. The Organisation knew by 27 June 1989, the date of Judgment 963, that the Commission's decision to reduce pay by 0.7 per cent was unlawful because it was retroactive; and it knew a fortiori by 23 January 1990, the date of Judgment 1012, that all later reductions were unlawful for the same reason. So the Tribunal's order in Judgment 1012 not only covers the period up to 12 November 1987 but the later period as well because the Commission's decision continued to be unlawful after confirmation. The 1.53 per cent rate is in itself unlawful because it is the sum of the successive retroactive and therefore unlawful reductions.

(b) Sparing some officials at grade C5 the Eurocontrol reduction was a glaring breach of the principle of equal treatment.

(c) The reckoning of the rate of reduction is tainted with an obvious mistake of fact. The retroactive revision as from 1981 of the cost-of-living weightings ought to have cancelled the reductions, which were based on the wrong figures. As was explained in Judgment 1081 (in re Albertini and others) under B, if the weightings had been known in July 1987 there would have been no scope for applying the first stage of the reduction from 1 July 1986. Some of the weightings had gone down so far that in the Netherlands, for example, pay should have been frozen at the July 1985 level. And there is still no room for reduction.

(d) The Director General has broken the res judicata rule by failing to give proper effect to the Tribunal's rulings. Instead of treating with utter silence every single internal "complaint" against an individual decision, he should have taken all the action that Judgments 963 and 1012, whether directly or indirectly, required of him.

(e) The whole policy of reducing pay is unlawful because no valid reasons have been stated for it and because it is in breach of the rules on pay-setting at Eurocontrol and of the staff's trust and of their acquired rights.

The complainants ask the Tribunal to quash the Director General's decisions to reduce their pay by 1.53 per cent for the months of May, June and July 1990 in the cases of Mr. De Poorter and Mr. Guyot and from July 1989 to May 1990 in the case of Mr. Dörr, Mr. Enright and Mr. Leistico, and to order the refund with interest of all sums unlawfully withheld. They claim costs.

C. In its replies Eurocontrol gives its own version of the facts. It says that it is wrong to speak of a "reduction" since pay at Eurocontrol has steadily increased. In any event Eurocontrol is under no obligation to align its rates of pay with those of the European Communities. What is more, there has never been a "retroactive reduction" in pay. When the European Communities decided on a pay rise of 5.7 per cent the Permanent Commission voted on 12 November 1987 to grant 5 per cent at Eurocontrol. Successive rises have followed a similar pattern. The rate of 1.53 per cent has held good since the last "adjustment" of 0.28 per cent.

The complaints are time-barred and therefore irreceivable. The latest decision to "adjust" goes back to 22 November 1988 at the Commission's 74th Session and was put into effect in December 1988 with a reference to the 1.53 per cent rate on pay slips. The contested pay slips merely confirm the adjustment in pay and so set off no new time limit for appeal: the complainants should have challenged the first pay slip to mention the 1.53 per cent rate. In any case the complainants cannot expect a refund of any amounts relating to periods prior to those covered by the pay slips they are challenging.

Eurocontrol's replies to the complainants' pleas on the merits are subsidiary.

(a) Since the decision to increase the rate from 1.25 to l.53 per cent became final on 4 July l989, the pay slips issued for the material periods were not retroactive and did have a sound basis in law. The so-called "reductions" were ruled unlawful by the Tribunal in Judgment 1012 only insofar as they were retroactive. Besides, not all of them have been retroactive in effect. The Organisation rejects the complainants' interpretation of what that judgment said about breach of the rule against retroactivity and cites a ruling by the Court of Justice of the European Communities (in re Amman and others), that adjustments of pay are necessarily retroactive. Contrary to

what the complainants make out, Judgment 1096 (in re Niesing No. 2 and others) did not declare unlawful any sort of retroactivity but just observed that the adjustments had been applied retroactively.

(b) Though there was indeed no restraint on the pay of some officials at grades C4 and C5, that was because Eurocontrol was complying with the principle, provided for in the Staff Regulations, that their minimum livelihood must be safeguarded.

(c) The complainants are mistaken in their belief that the revision of the weightings should do away with the adjustments retroactively. What matters is not the weightings but the actual increase in net pay. The differentials have always been so determined as to prevent net pay from falling even in the Netherlands and the Federal Republic of Germany, where the increases were smaller. Pay has steadily risen since the system was brought in on 1 January 1986.

(d) The res judicata rule is irrelevant because Eurocontrol has paid not just the complainants and interveners but all members of staff the amounts ruled on in Judgment 1012. Moreover, since the publication of that judgment in January 1990 the Organisation has altered the Permanent Commission's procedures for approving "reductions", so that they now have immediate and not retroactive effect.

(e) The decision to check the rise in pay is not unlawful: it was amply warranted by changes in Eurocontrol's functions, by the policy of having more frequent exchanges of staff with national administrations and by the need to cut the costs of services to States and others; it was not in breach of any legal rule; the case is about adjusting pay, not about an acquired right to pay; and the notion of trust is immaterial.

D. In their rejoinders the complainants press their claims. They point out that unlike the complaints the Tribunal ruled on in Judgment 1118 (in re Niesing No. 2 and others) theirs contain a new plea: that the Agency committed a mistake of fact by basing the reduction on wrong figures. They agree in full with the dissenting opinion in that judgment.

E. In its surrejoinders Eurocontrol develops its earlier pleas and cites the judgments in which the Tribunal dismissed the same pleas as the complainants', including Judgments 1119, 1120 and 1121 in which it held that the Agency had "committed no mistake of fact in applying the adjustment". The complainants' reference to the dissenting opinion in Judgment 1118 shows that what they are really seeking is review of complaints already ruled on. But what matters is the judgment delivered by the Tribunal, not the dissenting opinion.

CONSIDERATIONS:

1. Mr. de Poorter and Mr. Guyot have each filed three complaints objecting to the application of a 1.53 per cent "reduction" to their salaries as shown on their pay slips for May, June and July 1990. Mr. Dörr, Mr. Enright and Mr. Leistico have each filed a single complaint challenging the application of the 1.53 per cent "reduction" to their back-pay for the period from July 1989 to May 1990 as shown on the pay slips they received on 15 May 1990. All the complaints are impugning under Article VII(3) of the Tribunal's Statute the rejection which they infer from the Director General's failure to answer their internal appeals. Their claims and pleas are as set out in B above.

2. Since the date of filing of the complaints - 14 December 1990 - all the material issues they raise have been dealt with, in Judgments 1118 to 1123 of 3 July 1991.

3. The complainants plead breach of the principle of equal treatment on the grounds that the "Eurocontrol reduction" was not applied to staff in grade C5.

In Judgment 1119 (in re Cuveliers and others), under 6, the Tribunal rejected the plea on the grounds that it was "only reasonable for the Organisation to have waived the adjustment [in the case of such staff] so as to safeguard minimum livelihood".

4. The complainants allege an obvious mistake in reckoning the rate of adjustment in that the retroactive revision of the cost-of-living weightings provided for in Article 64 of the Staff Regulations ought to have cancelled the reductions.

The answer to that was also in Judgment 1119, under 5:

"... the Tribunal is satisfied on the evidence that Eurocontrol took proper account of the various circumstances prevailing at each duty station and committed no mistake of fact in applying the adjustment at issue."

5. The complainants plead misinterpretation of Judgment 1012 (in re Aelvoet No. 2 and others).

The plea was rejected in Judgment 1123 (in re Purnelle No. 3), under 9 to 12. The Tribunal did not declare the "reduction" to be unlawful in itself. It held:

"9. ... the thrust of Judgment 1012, stated in 7, is that 'Having been issued before the Commission's decision setting the new pay scales and making the reduction took effect, the pay slips have no basis in law and must be set aside insofar as they cause the complainants injury'.

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

11. The arrears which the complainant was paid for the periods from July to December 1988 and from January to December 1989 corresponded to a rise in pay. His pay slips for January, February and March 1990 reflected his then level of pay, which took account of the adjustments then being applied. He is not entitled to the higher levels of pay in the European Communities because since departing from those scales Eurocontrol has never kept in line with them.

12. The conclusion is that even though the adjustments were made retroactive the staff did not suffer. Setting aside a pay slip showing a rise in pay on the grounds of breach of the rule against retroactivity would mean that the staff member would forfeit the rise in the form of arrears."

6. The complainants further challenge the lawfulness of applying the 1.53 per cent "reduction" to their salaries and back-pay.

The judgments referred to above rejected objections to the lawfulness of applying the "reduction" or, more properly, the "differential" in staff pay between Eurocontrol and the European Communities. More particularly -

(a) The Tribunal rejected the plea that no reasons had been stated. In Judgment 1123, under 7, it concluded:

"... 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 not of the sort that could be substantiated."

(b) It found no breach of the rules for adjusting staff pay. In Judgment 1123, under 6, it said:

"... the rule on the adjustment of base salary is Article 65 of the Staff Regulations. Taking account of Article 65 and relevant data, the Committee of Management came to the conclusion that the proper way of adjusting salary and allowances was to bring in by stages a differential between the Communities and Eurocontrol. The Permanent Commission approved, and so the decision came about in keeping with Article 65."

(c) It held that there had been no acquired right to parity or alignment of pay with the European Communities. Again in Judgment 1123 it ruled under 5:

"... 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 continuance of parity. There is no question of any breach of acquired rights."

(d) Lastly, it found no breach of trust. In Judgment 1123 it declared under 13:

"... the Tribunal points out that, as it said in Judgment 986 (in re Ayoub No. 2 and others), in the fourth paragraph of 13, it 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 complainants' appointment'. Those principles include that of trust, and were complied with in this case."

7. Since the Tribunal has already dismissed all the above pleas and since the present complaints raise no other material issues they cannot but fail.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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