

**SEVENTY-FIFTH SESSION**

***In re AELVOET (Nos. 3 and 4)***

**Judgment 1287**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Daniel Aelvoet on 13 April 1992 and corrected on 29 April, Eurocontrol's reply of 16 July, the complainant's rejoinder of 21 October 1992 and Eurocontrol's surrejoinder of 21 January 1993;

Considering the fourth complaint filed by Mr. Aelvoet against Eurocontrol on 10 August 1992, Eurocontrol's reply of 12 October 1992, the complainant's rejoinder of 22 March 1993 and Eurocontrol's surrejoinder of 28 April 1993;

Considering the application to intervene filed by Mr. Lucien Petit on 12 May 1993 in both complaints;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article 17(4) of the Rules of Court, Articles 67 and 92 and Annex IV of the Staff Regulations governing officials of the Agency, and Rule No. 7 concerning remuneration;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Belgian citizen, is a clerical officer employed at grade C2 in the Personnel Division of the Directorate of Personnel and Finance at Eurocontrol's headquarters in Brussels. He used to be paid dependent child allowance for his son, Stéphane, who was born on 1 July 1965 and suffers from a serious illness.

Dependent child allowance is governed by Article 67 of the Staff Regulations and Article 2 of Rule No. 7 concerning remuneration.

In 1985, when his son left school, the complainant applied under Article 2(5) of Rule No. 7 for an extension of the dependent child allowance on the grounds that he was handicapped. His application was accepted and he continued to receive the allowance until 31 July 1991, when his son was 26. According to the Organisation that is the maximum age for entitlement to the allowance.

Wishing nonetheless to check whether there might be any medical or financial grounds for extending entitlement, the Head of Personnel wrote to Eurocontrol's medical officer on 30 July 1991 to ask whether the complainant's son still suffered from a serious illness or any disability that prevented him from earning a living. The medical officer replied on 29 August that the medical records confirmed a continuing serious illness.

In a minute of 3 October 1991 the Head of Personnel asked the complainant to declare the benefits, pensions and allowances he was being paid for his son and the amount of his son's own income, if any. The complainant answered in a minute of 28 October that the Belgian social security scheme paid his son an "income replacement benefit for a handicapped person belonging to the household" of 12,242 Belgian francs a month and "a group IV integration benefit" of 19,982 francs a month.

On 29 October 1991 he submitted a "complaint" to the Director General against what he called the "decision" of 1 August 1991 to cancel the dependent child allowance. In a minute of 14 January 1992 the Director of Personnel and Finance rejected the "complaint" on the Director General's behalf on the grounds that at 1 August 1991 there had been "no final decision" not to continue payment of the allowance for his son. But he added that the complainant was no longer entitled to the allowance because, according to his minute of 28 October 1991 and what he said in his "complaint", his son had since August 1991 been receiving 32,224 Belgian francs a month in disability benefits from the Belgian social security scheme.

On 13 April 1992 the complainant filed his third complaint challenging the decision of 1 August 1991.

On 10 April he had lodged an internal "complaint" against the decision of 14 January 1992 and the Director of Personnel and Finance rejected it in a letter of 12 May 1992. He filed his fourth complaint on 10 August 1992 challenging that decision.

B. In his third complaint the complainant submits that by stopping the dependent child allowance for his son on 1 August 1991 the Organisation took a decision which affected him adversely, that he had grounds for his internal appeal against that decision and that he may therefore challenge the rejection of his appeal.

On the merits he points out that his son has a permanent disability that precludes earning a living and is therefore his dependant. The Agency acknowledged as much in 1985 when it agreed to go on paying the allowance, and it had no reason to stop.

The impugned decision took effect before Eurocontrol had ascertained that the conditions for continuing the allowance were no longer met. It thereby acted in breach of the duty of care it owes staff and its belated request for information shows how arbitrary and vexatious its decision is. What is more, it obviously misunderstood what the integration benefit was and wrongly treated the amount as part of his son's own income.

Lastly, he expresses surprise that in its reply of 14 January 1992 Eurocontrol seems to base its decision on rules of the European Communities though it has always maintained before the Tribunal that such rules do not apply to its own staff.

He asks the Tribunal to set aside the decision not to go on paying the allowance for his dependent son from 1 August 1991, order the Organisation to pay the arrears due since that date plus interest at the rate of 8 per cent a year, grant him one ECU in token damages and award him costs.

C. In its replies Eurocontrol submits that the third complaint is irreceivable. On 1 July 1991, when his son reached the age of 26, the complainant's entitlement to the dependent child allowance stopped ipso facto. On realising that the allowance had not been paid in August 1991 and that he had received no notice of any decision to stop it, he should have applied for extension of entitlement under Article 92 of the Staff Regulations before filing his internal "complaint" of 29 October 1991. That "complaint" was irreceivable because he had not exhausted the prior means of redress and his complaint should fail too for the same reasons.

The Organisation's pleas on the merits are subsidiary.

It does not deny that the complainant's son has a serious illness or disability. Indeed that is why the Belgian Ministry of Social Affairs decided on 13 June 1990 to pay his son two State benefits, for the period from 1 December 1989 to 31 March 1995.

There was nothing arbitrary or vexatious about the way in which the Organisation acted. What can be unreasonable about checking that payment of an allowance for an official's disabled dependant is warranted on medical and financial grounds? In this case the check proved worthwhile because it brought to light that the complainant's son had income of his own. The Administration showed the complainant considerateness even though he had failed to report his son's two disability allowances from the Belgian State.

The Organisation has two reasons for refusing the allowance the complainant wants.

(1) His son is no longer his financial dependant within the meaning of Article 2(2) of Rule No. 7 concerning remuneration. The cost of maintaining a child who lives under the same roof as the official is set at 40 per cent of the minimum subsistence figure defined in Article 6 of Annex IV of the Staff Regulations and is 26,067 Belgian francs a month. If the child has income in excess of that amount, as does the complainant's son with his monthly income of 32,224 Belgian francs, he is no longer deemed to be the official's financial dependant.

(2) The allowance paid by Eurocontrol and the benefits from the Belgian social security scheme may not be granted together because they are of the same type and have the same purpose.

Eurocontrol challenges the complainant's assertion that the decision of 14 January 1992 relies on rules of the European Communities. It is based on the clear wording of Article 67(1) and (2) of the Staff Regulations and

Article 2(1), (2) and (5) of Rule No. 7. There was no misappraisal of the facts.

D. In his rejoinders the complainant rejects Eurocontrol's assertion that entitlement to the dependent child allowance ceases ipso facto when the dependant reaches the age of 26. He contends that when the disability precludes earning a livelihood payment of the allowance goes on until the disability ceases.

On the merits he denies that Eurocontrol had to ascertain whether the conditions for granting the allowance were still fulfilled when his son reached the age of 26. Eurocontrol discriminated against him by asking for proof that he was supporting his son because his son was too ill to earn a living: it requires no such proof from someone whose dependent child is hale. Lastly, he denies that the Belgian "income replacement" and "integration" benefits are of the same kind as the dependent child allowance paid by Eurocontrol.

E. In its surrejoinders the Agency maintains that the third complaint is irreceivable. The complainant acknowledges as much because he reproduces the same claims in his fourth complaint.

Eurocontrol enlarges on its pleas on the merits. For a disabled child the payment of the dependent child allowance may, it concedes, be extended beyond the age of 26 and for as long as the disability continues, but the circumstances in which payment has continued must remain unchanged and the Administration must be able at any time to check that they do. The complainant's suggestion that it may not carry out such checks is unacceptable and shows that he wished to elude them because he knew he would be caught out. Contrary to what he says, Eurocontrol applies the concept of dependent child to all its employees' offspring alike. It does not discriminate in its treatment of disabled children. Its allowance for the complainant's son is the same type of allowance as the "income replacement" and "integration" benefits provided for in Belgian law for the handicapped. Lastly, the two Belgian benefits paid to the son do constitute "income". So when they exceed a given amount he may no longer be deemed to be dependent.

#### CONSIDERATIONS:

1. The complainant, who is Belgian, is an official of Eurocontrol and works in Personnel at headquarters in Brussels. This dispute is over the payment of a child allowance he is claiming for his handicapped son.
2. Another staff member, Mr. Lucien Petit, filed on 12 May 1993 an application to intervene in the complaint on the grounds that he is in like case. But he filed his application after the Tribunal's session had started. It is declared irreceivable under Article 17(4) of the Rules of Court.
3. In accordance with Article 67 of the Eurocontrol Staff Regulations and Article 2 of Rule No. 7 concerning remuneration the complainant used to be paid a child allowance for his son, who is suffering from a grave and chronic handicap. As reckoned according to the Organisation's rules the amount came to 7,368 Belgian francs a month.
4. Eurocontrol made a routine check in July 1991, when the complainant's son reached the age of 26, beyond which qualification for family allowances ordinarily ceases. It then discovered that since at least August 1990 he had been receiving payments in Belgium under the Disability Benefits Act of 27 February 1987. It at once cancelled the allowance as from 1 August 1991, although by what it calls indulgence it refrained from reclaiming sums already paid.
5. On 3 October 1991 the Head of Personnel asked the complainant for an explanation. In a letter of 28 October 1991 he declared the amounts of the benefits from the Belgian State, namely 12,242 Belgian francs a month in "income replacement benefit for a handicapped person belonging to the household" and 19,982 a month in "group IV integration benefit", or a total of 32,224.
6. On 29 October 1991 the complainant submitted an internal "complaint" to the appointing authority and on 13 April 1992 his third complaint to the Tribunal, which arises therefrom. The Organisation having replied that the third complaint was premature, he filed the fourth one on 10 August 1992. Eurocontrol does not plead that that one is irreceivable.
7. The complaints being identical, the Tribunal joins them for the purpose of delivering judgment and need not rule on the receivability of the third one.

8. The gist of the complainant's claims is that he wants (a) the quashing of the decision to discontinue the dependent child allowance and (b) over and above costs, an award of one ECU in token moral damages for the arbitrary and vexatious treatment of him.

9. The Organisation explains that it had two reasons for cancelling the allowance. First, it observes that Article 2 of Rule No. 7 requires that payment be made for a "dependant" and that the condition is no longer met when a State body takes on the liability. Secondly, it relies on Article 67 of the Staff Regulations, which is about family allowances and which says in paragraph 2:

"Officials in receipt of family allowances specified in this Article shall declare allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid under the provisions of these Regulations."

In Eurocontrol's submission he is disqualified for the entitlement by the payment of the Belgian benefits and it is therefore relieved of any obligation towards him.

10. The Organisation further pleads that the complainant failed to discharge his duty under Article 67 to declare the payment of benefits by the Belgian State for his son. He gave information only when it called upon him to do so, and even then it was incomplete since he omitted to say for how long his son had been getting the State benefits.

11. The complainant retorts that there was no duplication of payments. The benefits paid under Belgian law were "utterly different in kind" from Eurocontrol's dependent child allowance: the former are paid directly to someone who is handicapped and the latter to the official.

12. The complainant further argues that before the Belgian legislation came into force he was regularly getting the Belgian State benefits over and above the allowance from Eurocontrol; yet Eurocontrol, though aware of that, raised no objection. The Organisation rejects that assertion: it says that he never declared the Belgian benefits, though he was under a duty to do so, and may not properly advance such a plea in answer.

13. As to his claim to the quashing of the decision to cancel payment of the allowance, the Tribunal holds that Eurocontrol acted correctly. Whatever the name of the benefits the complainant was getting from two different sources, and whatever arrangements may have been made for paying them, the reason for payment and their purpose were indisputably the same. So the condition of "dependency" that is fundamental to Article 2 of Rule No. 7 is not satisfied and the rule in Article 67(2) of the Staff Regulations against duplication of payments must apply.

14. The further claim to one ECU in token damages for arbitrary and vexatious treatment by Eurocontrol also fails. All that need be said on that score is that the complainant's having to look after his handicapped son does not relieve him of the duty he owes his employer to abide by the basic rules of fair dealing. He failed to discharge that duty because for long he concealed the fact that he was getting State benefits that obviously duplicated the allowance of like nature from Eurocontrol.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice- President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
William Douglas  
P. Pescatore  
A.B. Gardner