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

**SEVENTY-EIGHTH SESSION**

***In re* TEJERA HERNANDEZ**

Judgment 1403

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ascensión Tejera Hernandez against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 March 1994, Eurcontrol's reply of 16 June, the complainant's rejoinder of 7 August and the Organisation's surrejoinder of 14 October 1994;

Considering Articles II, paragraph 5, and VII, para- graph 1, of the Statute of the Tribunal;

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. Rule No. 7, Section 2a, Article 4a of the Rules of Application of Eurocontrol's Staff Regulations says:

"An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance.

The amount of this allowance shall be fixed under the conditions laid down in Article 65 of the Staff Regulations.

The rates provided for in paragraph 1 of this Article shall be as follows:

- BF 3,710 per month for officials in grades C4 or C5;

- BF 5,687 per month for officials in grades C1, C2 or C3."

The "typist's allowance" may be granted also to grade C employees who are "clerical officers" and whose duties include the use of a typewriter for 60 per cent or of a computer keyboard for 50 per cent of working time.

The complainant, a Spanish citizen who was born in 1961, joined Eurocontrol on 1 December 1992 as an assistant clerical officer at grade C4 at the Agency's headquarters in Brussels. On 13 January 1993 she applied through her supervisor for the typist's allowance.

Having got no reply, she sent the Director General a memorandum of 11 August 1993 lodging an internal "complaint" under Article 92 of the Staff Regulations. In a letter of 13 August 1993 the Organisation sent her an "interim reply".

On 8 March 1994 she filed a complaint with the Tribunal against the implied decision to reject her internal appeal.

By a decision of 10 June 1994 the Director General granted her the allowance as from 1 December 1992.

B. Citing Judgment 265 of the Tribunal (in re Pessus), the complainant contends that since she spends 80 to 90 per cent of her working time in typing she qualifies for the allowance. The Organisation has therefore discriminated against her.

She has five pleas in support of her allegations. First, the Agency failed to apply the rules: the impugned decision offends against consistent practice and patere legem. Secondly, the Administration failed to observe the rule against retroactivity: it may terminate the allowance or alter the requirements for granting it only for the future; it may not apply a measure to some of its staff in anticipation of a decision not yet taken. Thirdly, it discriminated against the clerical officers who have already been granted the allowance and against secretaries and typists who receive it automatically; so the decision was the outcome of obvious misappraisal of the facts. Fourthly, the Agency misunderstood the purpose of the allowance, which is to compensate for hard or extra work. Lastly, by not replying

to her internal "complaint" the Organisation disregarded its obligation to account for administrative decisions.

She asks the Tribunal to quash the implied decision to reject her "complaint"; to order Eurocontrol to grant her the typist's allowance and to pay it to her as from 1 December 1992, plus interest at the rate of 10 per cent; and to award her damages for moral injury and 5,000 Belgian francs in costs.

C. In its reply Eurocontrol states that as from January 1992 the Director General suspended payment of the allowance to clerical officers who applied for it pending the results of a survey he had ordered. By a decision of 10 June 1994 taken in the light of the survey he granted the allowance to the complainant as from 1 December 1992. So she no longer has any cause of action.

The Agency's pleas about her other claims, which it says are irreceivable or devoid of merit, are subsidiary. Her claims to interest on arrears and to damages for moral injury are irreceivable because she did not make in her internal "complaint". Furthermore, she was not entitled before the decision of 10 June 1994 since neither the vacancy notice nor her letter of engagement mentioned the allowance; so she may not claim interest on arrears. In any case since Eurocontrol allowed her main claim and granted her the allowance as from 1 December 1992 she has suffered no moral injury.

D. In her rejoinder the complainant maintains that she suffered financial and moral injury. She contends that Eurocontrol has not fully compensated her for the discrimination she suffered since it has not paid interest on the arrears. She denies that she derived her entitlement allowance only from the decision of 10 June 1994: the grant of the allowance is determined by criteria that have arisen out of practice, so the fact that it was not mentioned in the notice of vacancy is immaterial.

The purpose of the Director General's survey was to determine the arrangements for granting the allowance in future, each case to be dealt with on its own merits. So there was no question of its leading to general suspension of the allowance, which was bound to be discriminatory.

E. In its surrejoinder Eurocontrol points out that by the time the complainant took up duty, in 1992, the Director General had stopped paying the allowance to new clerical officers. Since she became entitled to the allowance by the decision of 10 June 1994, she may not plead any acquired right or claim interest on arrears. She got the same treatment as all the other clerical officers it recruited at the time, and so the plea of discrimination is groundless.

CONSIDERATIONS:

1. The complainant joined the staff of Eurocontrol on 1 December 1992 as an assistant clerical officer. On 13 January 1993 she applied for the so-called "typist's allowance" under Article 4a, Section 2a, of Rule No. 7 concerning remuneration. Having got no answer, she filed a "complaint" on 11 August 1993 against the implied rejection of her request. Having still got no reply, she lodged this complaint on 8 March 1994 claiming payment of the allowance as from 1 December 1992 plus interest on the arrears. On 10 June 1994 the Director General decided to pay her the allowance as from 1 December 1992.

2. That decision prompted her to say in her rejoinder that she was withdrawing her claim to payment of the allowance but pressing her claims to interest and moral damages.

3. The Organisation retorts that her complaint is irreceivable, insofar as it concerns those two claims, since they were not part of her internal "complaint".

4. Eurocontrol is mistaken. The complaintant is attributing moral injury to its failure to answer her original claim of 13 January 1993 to the allowance or even the "complaint" she lodged on 11 August 1993. She was, she says, left with no explanation of its refusal and no idea about how to plead her case; she was helpless and disheartened. That being the nature of the moral injury she alleges, she obviously could not have claimed damages on that account in her internal "complaint".

5. As to her claim to payment of interest on arrears, the Tribunal cites the ruling it made on a similar issue in Judgment 1117 (in re Massie and others) under 15: according to Article 92 of the Staff Regulations the gist of the internal procedure is that before lodging an internal "complaint" the staff member shall submit his claims or grievances to the Administration to enable it to take a decision. Though the complainant did so, Eurocontrol did not see fit to declare its position in so many words. For the same reasons as those it gave in Judgment 1117 the

Tribunal holds that equal treatment requires that an organisation pay interest on any arrears of the allowance. So the complainant was right in believing that the appointing authority had "failed to adopt a measure prescribed by the Staff Regulations" - to quote 92(2) - and that she might appeal directly against the implied rejection of her appeal. She may accordingly be deemed to have met the requirement in Article VII(1) of the Tribunal's Statute that the available internal remedies be exhausted. On that score her complaint is receivable.

6. Eurocontrol objects to the merits of her claim to interest on the grounds that it has no rule requiring such payment.

7. The plea fails. As was said in 5 above, the payment of interest on arrears is due under the principle of equal treatment embodied in the Staff Regulations. What equal treatment means is that the Administration must treat in the same way staff who are in the same position in fact and in law, or, as Judgment 1194 (in re Vollering) put it: "like facts require like treatment in law and different facts allow of different treatment". Accordingly Eurocontrol must pay interest on the arrears so as to restore parity between those who got the allowance at the due dates and those who got it much later.

8. The legal basis for such payment confutes Eurocontrol's argument that it was not to blame for the delay in letting her have the allowance. That there was delay warrants payment of interest whether Eurocontrol was at fault or not.

9. Eurocontrol argues that since it recruited the complainant as a clerical officer she did not belong to the category of staff who automatically qualified for the allowance; only the decision of 10 June 1994 gave her entitlement; and in any event she had no right to a discretionary allowance which had been suspended when she took up duty, the less so since the offer of employment and the letter of appointment made no mention of it.

10. The argument cannot be sustained. For one thing, an entitlement that staff regulations or rules provide for need not be stated in the contract of employment. For another, though the complainant was not entitled to the allowance on recruitment because at the time Eurocontrol had provisionally stopped paying it to clerical officers, the status quo was restored as soon as the Organisation ended the suspension. Indeed it seems to have acknowledged as much by making its decision of 10 June 1994 retroactive to 1 December 1992, the date of the complainant's recruitment.

11. It is true that clerical officers do not belong to the staff in category C who qualify for the typist's allowance under Article 4a of section 2a of Rule No. 7 concerning remuneration. But Eurocontrol recognises that it granted the allowance also to clerical officers on their application, and taking each case on its merits, whenever they spent at least three-fifths of their working time typing or half of it using a computer keyboard. Such broad construction of the rule goes back - says the complainant - to 1965. On the strength of evidence that is not in dispute. The Tribunal is satisfied that Eurocontrol's practice regarding grant of the allowance to clerical officers depended on the fulfilment of objective criteria.

12. So the question at issue is whether Eurocontrol is bound in law by such long-standing practice. As was held in Judgment 421 (in re Haghgou) and again in Judgment 1053 (in re Beetle and others), an organisation may be so bound where the practice is one that the staff have come to rely on. The practice will be enforceable if it was intended to have a contractual effect, and that is an issue that turns on the circumstances of each case. By extending the allowance to clerical officers Eurocontrol put a certain construction on Article 4a. It did so in good faith, and its obvious intention was thereby to assume an obligation since any clerical officer on its staff who met the requisite criteria and applied for the allowance might get it. The practice became part of personnel policy and it is common ground that Eurocontrol followed it wherever a clerical officer put in a claim to the allowance.

13. The decision to suspend payment of the allowance in January 1992 did not affect the validity of the obligation that the practice of payment to clerical officers laid on the Organisation, there being no decision duly taken by the competent authority to extinguish that obligation. Besides, on the strength of the survey it made after the suspension of payment of the allowance Eurocontrol appears to have maintained in full the conditions and criteria for payment that it had been applying before. So the suspension may be deemed to have had no real effect on the prevailing practice. That is borne out by a point that the complainant cites and that the Agency does not deny: thirty cases affected by the suspension were sorted out at the same time as the complainant's.

14. The conclusion is that payment of the allowance to the complainant was a matter, not of discretion, but of obligation, and Eurocontrol's delay in discharging it entitles her to interest.

15. Since Eurocontrol paid her the allowance on 10 June 1994 her claim to an award of damages for moral injury is unsound. But since her main claim succeeds she is entitled to costs.

DECISION:

For the above reasons,

1. Eurocontrol shall pay the complainant interest at the rate of 10 per cent a year on the amounts of the allowance granted since 1 December 1992.

2. It shall pay her 5,000 Belgian francs in costs.

3. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner

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