

*In re Berger*

Judgment 1903

The Administrative Tribunal,

Considering the complaint filed by Mr Bert Louis Maria Berger against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 January 1999, Eurocontrol's reply of 1 April, the complainant's rejoinder of 26 April and the Organisation's surrejoinder of 18 June 1999;

Considering Article II, paragraph 5, 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. The complainant, a Belgian who was born in 1971, joined Eurocontrol as a trainee controller. In February 1995 he was appointed as an air traffic "controller 2nd class" at grade B4 and became established in that position on 1 November 1995 at Eurocontrol's Upper Area Control Centre at Maastricht in the Netherlands. He was subsequently promoted to "controller 1st class" at grade B3 also with effect from 1 November 1995. He lives in the Belgian town of Diepenbeek, which is approximately 35 kilometres from Maastricht, where he was recruited.

He received an expatriation allowance, but not an installation allowance. Article 1 of Rule No. 8 of the Rules of Application of the Staff Regulations provides that:

"An installation allowance ... shall be paid to an established official who qualifies for expatriation allowance or who furnished evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."

Article 20 provides:

"A servant shall reside either in the place where he is employed or at no greater distance therefrom as is compatible with the proper performance of his duties."

On 12 November 1997 he applied for payment of the installation allowance with effect from 1 November 1995 and claimed interest. In a memorandum dated 28 April 1998, the Human Resources Directorate refused him the installation allowance because an official recruited at or near his or her place of employment is not entitled to this allowance. The complainant lodged an internal complaint against this decision on 8 July 1998. Having received no response from the Director General the complainant filed this complaint with the Tribunal on 21 January 1999.

On 26 January the Director of Human Resources wrote to him on behalf of the Director General endorsing the favourable opinion of the Joint Committee for Disputes dated 23 November 1998 and informed him that the installation allowance would be paid to him with effect from the date of his establishment. By a memorandum of 26 February 1999 the head of the Legal Service wrote to the complainant stating: "I understand that as soon as you receive the payment of the installation allowance together with interest, you will withdraw your complaint".

On 27 February 1999 the allowance was paid to the complainant. He was then also paid simple interest at a rate of 8 per cent per annum as from 1 November 1995 plus a mutually agreed sum of 50 euros to cover his costs. By a memorandum of 9 March 1999 he requested clarification from the Legal Service as to the amount of the installation allowance and the way the interest would be calculated, and stated that when an acceptable offer was made to him, he would withdraw his complaint. By a memorandum dated 15 March 1999 the complainant was told that the amounts had been calculated correctly.

In his complaint to the Tribunal he impugns the implied rejection of his internal complaint of 8 July 1998.

**B. The complainant, interpreting Rule No. 8, contends that an established official like himself who qualifies for expatriation allowance is automatically entitled to an installation allowance. The Agency's view that the receipt of the expatriation allowance does not automatically entitle him to such payment is "in direct contradiction" with that Rule.**

**He seeks the quashing of the decision of 28 April 1998 refusing to grant him installation allowance; the payment of the allowance and "legal interest on the amount due"; and costs.**

**C. In its reply the Organisation does not contest the receivability of the complaint. It submits that since it has now paid the allowance to the complainant as well as interest and costs, the latter has obtained satisfaction. If the complainant fails to withdraw his complaint, he should be ordered to bear all the costs, since his action would now only be "vexatious".**

**On the merits, it replies in summary form. It states that benefiting from a "literal interpretation" of the texts, the complainant was granted the installation allowance solely because he receives the expatriation allowance.**

**D. In his rejoinder the complainant rebuts the arguments put forward in the reply. He has not "obtained satisfaction" through the payments made to him because both the allowance and interest amounts have been incorrectly calculated.**

**The Agency's calculation of the allowance was based on the B4 grade he held as a "controller 2nd class" at the time of his establishment. He was promoted to grade B3 as "controller 1st class" with effect from 1 November 1995. As he became an established staff member on the same date, his allowance should be based on grade B3. Further, the interest should be calculated as compound interest and not as simple interest.**

**E. In its surrejoinder the Agency presses its arguments. It submits that an official may receive the installation allowance once he has been established and the calculation is based on the grade upon establishment. The complainant's conclusion that the installation allowance paid to him should be calculated on the basis of grade B3 is not justified under the applicable regulations and is "unacceptable" given the clarifications that he has already received on this matter. The decision to promote him does not modify the decision concerning his establishment as they are "two separate decisions which have separate legal effects". It rejects his claim for compound interest as "inadmissible and improper".**

## **CONSIDERATIONS**

**1. The complainant was appointed as an air traffic controller at grade B4, step 2, on 1 February 1995. He was established in his position at that grade and step on 1 November 1995 at the end of his probationary period.**

**2. By a decision of 21 December 1995 he was promoted to "controller 1st class" at grade B3, step 1, with effect from 1 November 1995, the date of his establishment.**

**3. On 12 November 1997 the complainant requested the installation allowance provided for under Article 1 of Rule No. 8. That Article provides:**

**"An installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established official who qualifies for expatriation allowance or who furnished evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."**

**4. The Organisation rejected his claim on 28 April 1998 on the grounds that receipt of an expatriation allowance did not automatically entitle a staff member to payment of an installation allowance. In his case, he was recruited at approximately 35 kilometres from his place of employment.**

**5. The complainant lodged an internal complaint on 8 July 1998 against that decision and not having received a reply within the time limit allowed in Article 91(2) of the General Conditions of Employment governing staff at the Maastricht Centre, lodged a complaint with the Tribunal on 21 January 1999 against the implied rejection of his appeal, claiming payment of the installation allowance, interest and costs. The**

**Organisation does not contest the receivability of his complaint.**

**6. On 26 January 1999 the Director General endorsed the opinion of the Joint Committee for Disputes which had recommended that the complainant be given the installation allowance with effect from the date he became an established member of staff as well as "customary legal interest".**

**7. The installation allowance was calculated on the basis of grade B4, step 2, with 8 per cent interest from 1 November 1995, and it was agreed that a sum of 50 euros for costs incurred in lodging the present complaint would be paid to the complainant.**

**8. The complainant claims the allowance should be calculated by reference to grade B3, step 1, by reason of his promotion which took effect on 1 November 1995, the date of his establishment.**

**9. Article 1(3) of Rule No. 8 provides:**

**"The installation allowance shall be calculated by reference to the official's marital status and salary either on the effective date of his establishment or on the date of his transfer to a new place of employment."**

**10. The Organisation argues that the complainant was paid on the basis of his grade upon establishment. The establishment decision was different to the promotion decision and had different legal consequences.**

**11. According to Rule No. 8 the allowance is calculated by reference to the salary on the date of establishment. The complainant's salary was increased retroactively by the Organisation in respect of that date. Therefore, it is the increased salary that must be taken into consideration when calculating the installation allowance.**

**12. There is no basis on which the complainant is entitled to compound interest. He is, however, entitled to simple interest at 8 per cent per annum on the sum due.**

**13. He has already been paid 50 euros for costs incurred in bringing this complaint; however, he is entitled to a further sum for pursuing it to judgment which the Tribunal fixes at 500 euros.**

## **DECISION**

**For the above reasons,**

**1. The implied decision is set aside.**

**2. The complainant is entitled to have the installation allowance calculated on the basis of grade B3, step 1.**

**3. The complainant is entitled to simple interest at 8 per cent per annum on unpaid sums as from 1 November 1995.**

**4. The complainant is entitled to a further sum of 500 euros for costs.**

**In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 3 February 2000.**

**Michel Gentot  
Mella Carroll  
James K. Hugessen**

**Catherine Comtet**

