

EIGHTY-NINTH SESSION

In re Aarsman and others

Judgment No. 1959

The Administrative Tribunal,

Considering the complaints filed by Mr Johannes Aarsman, Mrs Meabh Mary Allen, Miss Karin Birgitta Andersson, Mr Philip James Bradbury, Mr Jeremy John Collins, Mrs Jane Elizabeth Cook, Mr Fabrice Olivier Marius Drogoul - his second - Mr Stéphane Gouraud, Mrs Marie-Thérèse Guerin, Mr Gabor Hajdufi, Mr Benoît Houot, Mr Zoltán Péter Kozma, Mr Philippe Ledru, Mr Paul Francis Lynch, Mr Tommy Mallet, Mr Miguel Angel Muñoz, Mr James Richard Parry, Mr Neale Pickerell, Mr Dominic Neville Pinson, Miss Anja Elisabeth Schott, Mr George Graham Scott, Miss Tiina Marianne Seppälä, Mr Peter Gerald Tatchell, Miss Beatriz Valverde Asensio, Mr Willem van Leeuwen and Miss Eva Zenteg against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 July 1999, Eurocontrol's reply of 22 October, the complainants' rejoinder of 20 December 1999 and the Agency's surrejoinder of 25 February 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications to intervene filed by Mr Marc Durasse and Mr Tome Saiote;

Considering that the Agency did not wish to submit observations on these applications;

Having examined the written submissions and decided not to order hearings, 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. The background to the case and the qualifying conditions for the fixed allowance known as the "typing allowance" for grade C employees of the Agency are described in Judgments 1403 (*in re* Tejera Hernandez), 1411 (*in re* Bidaud), 1461 (*in re* Borrello and Chant), 1601 (*in re* Aelvoet No. 5 and others) and 1712 (*in re* Aelvoet No. 6 and others).

Article 4a of Rule of Application No. 7 of Eurocontrol's Staff Regulations provides, in part, that:

"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."

Until 1995, this allowance could also be granted, by analogy, to grade C employees who were "clerical officers" and who spent at least 60 per cent of their time using typewriters or 50 per cent of their time using a computer keyboard.

By office notice 19/95 of 22 December 1995, the Director General repealed Article 4a of Rule of Application No. 7. By office notice 8/98 of 14 May 1998, he re-established the provision with retroactive effect as from 1 January 1996 in order to give effect to Judgment 1712. He indicated that employees who had entered the service of the Agency since 1 January 1996 would benefit from the application of this provision by analogy from the date on which they met the qualifying conditions but that, from the date of publication of office notice 8/98, Article 4a of Rule No. 7 would be applied *stricto sensu* and the practice of awarding the allowance by analogy would be brought to an end, except for employees who met the qualifying conditions prior to the date of publication of the notice.

The complainants are, or have been, employees of Eurocontrol working as clerical officers or as operators.

Between March and June 1998, they applied to the Director General for the fixed typing allowance. Their applications were rejected either explicitly by letters of 14 September 1998 or implicitly. The complainants appealed against these decisions. In its report dated 10 February 1999, the Joint Committee for Disputes recommended that the Director General grant their claims as they met the criteria of the time worked on a typewriter or computer keyboard which had been recalled by the Tribunal in Judgments 1403 and 1461. In letters of 27 April 1999, the Director General rejected the internal complaints on the grounds that, based on constant practice, the allowance had been awarded by analogy only to clerical officers assigned to jobs of an administrative nature, which was not the case of the complainants, who were assigned to operational, technical or computer-related work. Those are the impugned decisions.

B. The complainants plead breach of the rule *patere legem quam ipse fecisti* and contend that they met the "objective criteria" specified by the Tribunal in Judgment 1403 for the award of the allowance by analogy. They submit that the Tribunal has already dismissed the plea that only employees carrying out secretarial or typing functions may be awarded the allowance. They argue that the Agency, by retroactively modifying a recognised practice, is acting unlawfully. In their view, the impugned decisions constitute discrimination between employees on the basis of the service to which they are assigned.

The complainants seek the quashing of the impugned decisions; the payment of the typing allowance, plus 10 per cent interest a year as from 1 January 1995, the date when they say it was no longer possible to apply for the allowance which was being abolished by the Agency, or the date of their entry into its service, whichever is later; and 10,000 French francs for each complainant in moral damages and costs.

C. In its reply Eurocontrol contends that the case law of the Tribunal leaves open the possibility to add criteria to the granting by analogy of the typing allowance. There is a constant practice of not awarding the allowance to employees who, such as the complainants, discharge technical or operational functions. These are clear and objective criteria which were known to the staff, since several complainants entered the service of the Agency at a time when the allowance was commonly awarded. However, they had not applied for the allowance or had already been refused it. Moreover, in accordance with office notice 8/98, the allowance could not be awarded prior to 1 January 1996. The Agency denies that the impugned decisions are in any way retroactive. It also denies any discrimination, since the complainants are in a specific factual situation justifying different treatment. It calls for the complainants to be ordered to pay the full costs and, subsidiarily, opposes the award of moral damages and interest, since it maintains that it acted in good faith.

D. The complainants rejoin that the restrictions on the granting of the allowance date from before 1 January 1996 and they seek the award of the fixed allowance as from 7 April 1994, or the date of their entry into the Agency's service, whichever is later. They cast doubt on Eurocontrol's good faith and press their claims for damages and interest.

E. In its surrejoinder the Agency observes that the restrictions prior to 1 January 1996 had been suspended and that Article 4a of Rule No. 7 remained in force until it was repealed in office notice 19/95 of 22 December 1995. It submits that a practice based on objective criteria cannot be qualified as discriminatory and denies bad faith.

CONSIDERATIONS

1. The complainants, all employees or former employees of Eurocontrol, worked or have worked as clerical officers or operators.

Considering that they met the qualifying conditions for the fixed allowance known as the "typing allowance" provided for in Article 4a of Rule of Application No. 7 of Eurocontrol's Staff Regulations, they applied for the grant of the allowance.

They appealed against the explicit rejection, or what they consider to have been an implicit rejection, of their applications by the Administration. In its report of 10 February 1999 the Joint Committee for Disputes unanimously concluded that the complainants met the formal qualifying conditions for the fixed allowance.

Disregarding the opinion of the Committee, the Director General dismissed all the internal complaints in decisions dated 27 April 1999, which are challenged in the present complaints.

2. Since the complaints raise the same issues of fact and law and seek the same redress, they are therefore joined to

form the subject of a single judgment.

3. The complainants request the Tribunal to (1) set aside the decisions of the Director General of 27 April 1999; (2) order the payment of the typing allowance from 1 January 1995 or from the date of their entry into the service of Eurocontrol, whichever is later; (3) order the payment of interest at the rate of 10 per cent per annum from that date until the payment of the allowance; (4) order the payment of 10,000 French francs in moral damages to each complainant; and (5) order the reimbursement of their costs.

In support of their complaints, they have three pleas: breach of the rule *patere legem quam ipse fecisti*; the unlawfulness of the retroactivity of the Agency's decision; and discrimination between employees.

4. In its reply Eurocontrol objects to the receivability of the complaints filed by Mrs Allen, Mr Lynch and Mr Mallet for failure to exhaust the internal remedies. These complainants have subsequently withdrawn suit and, in its surrejoinder, Eurocontrol requests the Tribunal to record this.

5. The issue of granting the typing allowance to officials in category C provided for by Article 4a of Rule of Application No. 7, quoted under A above, has already been referred to the Tribunal. It found in Judgment 1403 that Eurocontrol had granted the allowance by analogy to clerical officers on their application, by taking each case on its merits, whenever they spent at least 60 per cent of their time using typewriters or 50 per cent of their time using a computer keyboard. The Tribunal inferred that Eurocontrol had placed a certain construction on Article 4a of Rule No. 7 in good faith and that 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 be granted it.

6. In support of its refusal to grant the typing allowance to the complainants, Eurocontrol says that there exists a constant practice, based on objective criteria known to the staff, not to grant the allowance to employees working as Flight Data Operators (FDO) or to clerical officers discharging technical or operational functions. It adds that these criteria were applied in good faith.

7. The Tribunal recalls that in a similar case, which gave rise to Judgment 1461, it found that "none of the criteria Eurocontrol applied in earlier cases required that clerical staff claiming the grant should be performing tasks akin, either mostly or incidentally, to those of a secretary or typist".

In the present case it may be added that, notwithstanding Eurocontrol's arguments, none of the criteria applied earlier contrasted administrative support duties with functions of a technical and/or operational nature.

8. Consequently, by dismissing the complainants' internal complaints on the grounds that, because they were not discharging secretarial or administrative support tasks they were not entitled to the fixed allowance, Eurocontrol breached the rule which it had itself imposed when setting the objective qualifying criteria for the fixed allowance. It also acted in a discriminatory manner towards the complainants.

The impugned decisions must therefore be set aside and the fixed allowance granted to the complainants from the date on which they made their respective applications, in the case of those who have entered the service of the Agency since 1 January 1996 - date on which Article 4a of Rule No. 7 was re-established - and as from 1 January 1996, in the case of those who were in its service before that date.

9. For the reasons set out in Judgment 1461 under 7, to which reference is made, the complainants are entitled to interest on the arrears. However, in view of the circumstances, the Tribunal does not find it necessary to grant compensation for the moral damages which the complainants say they suffered.

10. Their plea succeeds and the complainants are entitled to costs.

DECISION

For the above reasons,

1. The withdrawal of suit by Mrs Allen, Mr Lynch and Mr Mallet is recorded.

2. The decisions of the Director General of 27 April 1999 are set aside.

3. Eurocontrol shall pay the fixed allowance known as the "typing allowance" to the complainants as set out under 8 above, as well as interest on the arrears at the rate of 8 per cent per annum.

4. It shall pay the total sum of 20,000 French francs in costs.

5. The applications to intervene are upheld provided that the interveners are in the same situation of law and of fact as the complainants.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet