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

EIGHTY-NINTH SESSION

***In re* Ferro** **Judgment No. 1989**

The Administrative Tribunal,

Considering the complaint filed by Mr Antonio Ferro against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 May 1999, Eurocontrol's reply of 20 August, the complainant's rejoinder of 29 October and the Agency's surrejoinder of 23 December 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. Articles 59 and 60 of the Staff Regulations governing officials of the Agency state:

" Article 59

1. An official who provides evidence of incapacity to perform his duties because of sickness or accident shall automatically be entitled to sick leave.

The official concerned shall notify the Agency of his incapacity, as soon as possible and at the same time state his present address. He shall produce a medical certificate if he is absent for more than three days. He may be required to undergo a medical examination arranged by the Agency.

...

4. Officials shall undergo any medical check-up required by the Agency, to be carried out either by a medical practitioner designated by the Agency or by a medical practitioner chosen by the official concerned."

" Article 60

Except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior. Without prejudice to any disciplinary measures that may apply, any unauthorized absence which is duly established shall be deducted from the annual leave of the official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period.

If an official wishes to spend sick leave elsewhere than at the place where he is employed he shall obtain prior permission from the Director General."

The complainant, a Portuguese citizen born in 1964, is employed as an administrative assistant 2nd class, at grade B5, at the Agency's Central Route Charges Office at Brussels.

On 6 May 1998 his doctor drew up a certificate stating that, owing to illness his patient was unfit for work for the period from 6 May to 12 June 1998. On 19 May the complainant's supervisor sent a memorandum to the Agency's medical adviser asking him to find out from the doctor who had issued the certificate whether the complainant's absence was likely to be prolonged. On 9 June the complainant's doctor issued a second medical certificate, similar to the first, for the period from 13 June to 2 August 1998. On 10 June the complainant went to Portugal without obtaining permission from of the Director General. On 23 June the medical adviser wrote to him in Lisbon saying

that he wished to see him "as soon as possible" and asking him to contact the Medical Service to arrange an appointment. The complainant says that he received the letter on 7 July and was unable to contact the Medical Service. In a letter of 23 July which he sent to Brussels and to Lisbon the Director of Human Resources explained to the complainant that because he had not undergone a medical examination and had left for Portugal without obtaining permission, his pay would be suspended as from August 1998 and until he clarified matters with the Agency. The postal services of both countries returned the letters as "not claimed".

On 3 August the complainant went back to work and saw the medical adviser. He offered to supply the medical adviser with a report on his state of health from his own doctor. On the same day he realised that he had not been paid for the month of August 1998. The following day he made enquiries at the Human Resources Department and was informed that the Director of that Department had decided to suspend his pay because he had not answered the Agency's letters. By a letter of 6 August the Director of Human Resources told him that, according to the medical adviser, it was impossible to take a decision about medical facts dating back to 10 June. He asked him to sign a "joint statement", appended to the letter, whereby he would acknowledge that he had been absent from 10 June to 2 August without leave and would accept the financial consequences. For its part the Agency would undertake to defer total recovery of the undue payments in respect of his salary for the period in question and would deduct an amount from his monthly salary as from 1 August 1998 until the debt was paid back. On 13 August the complainant's doctor sent the medical adviser a report on his patient's clinical status.

By a letter of 18 August the complainant asked the Director of Human Resources to reconsider his decision and order the payment of his salary for August 1998. In a letter of 20 August the Director upheld his decision to treat the absence as unauthorised, but only as from 8 July, the day after the complainant received the letter of 23 June 1998. A corresponding amount would be deducted from his remaining annual leave and his pay. He would receive his monthly salary minus 3,000 Belgian francs until the debt was discharged. On 20 November the complainant submitted an internal complaint to the Director General against the decision of 20 August 1998 of the Director of Human Resources. His appeal was referred to the Joint Committee for Disputes, which at its meeting of 22 January 1999 recommended rejecting it as devoid of merit. By a letter of 23 February 1999, the impugned decision, the Director of Human Resources informed the complainant that the Director General had rejected his appeal.

B. The complainant has but one plea: breach of Articles 59 and 60 of the Staff Regulations. Citing the case law of the Court of Justice of the European Communities and of the Tribunal, he submits that a medical certificate "is in theory worthy of credence and presumed to be lawful". The Administration may treat the absence of an official who has produced a medical certificate as unauthorised, if the official has made a medical examination impossible, for example by taking his sick leave outside his duty station without first seeking permission or indicating where he will be, or by ignoring a summons to undergo a medical examination. But the absence cannot be deemed unauthorised unless: the Administration actually intended to carry out an examination; the letter summoning the official was sufficiently clear; and the medical check-up could not be carried out at a later date.

The complainant contends that the purpose of the letter of 19 May 1998 was to determine whether his absence was likely to be prolonged and not whether his medical certificates were valid. He alleges an obvious error of fact: the letter of 23 June 1998 did not summon him to a medical check-up for the purpose of verifying the validity of the certificates. He submits that the Agency should have given him the opportunity to prove that he was ill by arranging a further examination. The defendant also drew obviously wrong conclusions from the examination of 3 August by stating that it was no longer possible to come to a decision about medical facts dating back to 10 June. Its decision was premature. It should have waited for the conclusions of the medical adviser, who, having asked for a clinical report from the complainant's doctor was therefore bound to take account of it in his decision.

Lastly, the decision of 6 August 1998 betrays "a blatant lack of care" towards him when he was in a "distressful" situation because three quarters of his pay had been withheld for several months.

He asks the Tribunal to quash the decisions of 20 August 1998 and 23 February 1999 and order the Agency to pay him the amounts withheld, or to be withheld, from his pay, plus interest at the rate of 8 per cent a year "as from the dates at which [his] salary was or will be due and until it has been paid to him in full". He claims 100,000 Belgian francs in provisional material and moral damages. He seeks an award of costs.

C. In its reply the Agency observes that the complainant admitted that his departure to Portugal, without leaving an address where he could be reached if necessary, precluded any medical examination and his absence may therefore be treated as unauthorised. That being so, the substance of his defence is that the Agency failed to demonstrate

clearly its intention to refer him for a medical examination within the meaning of Article 59 of the Regulations.

The letter of 19 May 1998 asked the medical adviser to get the complainant to undergo a medical examination. As for the letter of 23 June 1998, although it was not worded as a formal summons, it was nonetheless an "urgent and unambiguous invitation" to get in touch with the medical adviser to arrange an examination. Knowing that if he contacted the Medical Service he would be asked to return to Brussels immediately for an examination, he deliberately refrained from doing so. The Agency states that, in view of the nature of the illness he alleged, a later examination would afford no information allowing it to ascertain whether he was fit for work at the time when he was covered by a medical certificate.

The report by the complainant's doctor shows that the sick leave was above all a "social" measure for the purpose of letting him go to Portugal to settle some family matters, his annual leave for 1998 having been exhausted. The Agency denies that the medical adviser requested a report so that he could determine whether the absence was authorised.

It also denies failing in its duty of care towards him, pointing out that his misconduct could have earned him a disciplinary sanction.

D. In his rejoinder the complainant explains that he did not respond immediately to the medical adviser's letter of 23 June 1998 because it was not "peremptory". His departure for Portugal was prompted not by any improper intentions but by medical reasons in that he needed to settle his family problems which would help him to get cured.

He notes that there is no report by the medical adviser stating that a later examination would not afford any useful information as to his fitness for work. The Agency therefore carried out an evaluation of medical facts, which it has not the authority to do.

E. In its surrejoinder Eurocontrol presses its arguments and concludes that the decision of 20 August 1998 was "sound, lawful and disproportionate" given the complainant's attitude.

CONSIDERATIONS

1. The complainant, a Portuguese citizen, is employed by Eurocontrol as an administrative assistant 2nd class, at the Agency's Central Route Charges Office at Brussels.

On 6 May 1998 he obtained from his doctor a medical certificate putting him on sick leave until 12 June 1998.

On receiving the certificate his supervisor sent a memorandum on 19 May 1998 to the Agency's medical adviser so as to determine what consequences the complainant's absence might have on the proper running of the service.

On 25 May 1998 the medical adviser wrote to the complainant asking him to make an appointment and to bring all the medical documents in his possession. He sent the letter to the complainant's home but got no reply.

On 9 June 1998 the complainant's doctor issued a new medical certificate putting him on sick leave up to and including 2 August 1998. On 15 June 1998 the complainant's supervisor again sent a memorandum to the medical adviser.

On 23 June the medical adviser wrote to the complainant at an address in Lisbon which he had got from one of the complainant's colleagues. The complainant got the letter on 7 July 1998 and he asserts that he tried once to contact the Medical Service on the same day but his single telephone call went unanswered.

Having received no response from the complainant, on 23 July 1998 the Director of Human Resources wrote him a letter which he sent both to Brussels and to Lisbon. It said that the Agency was treating his absence as unauthorised because he had failed to undergo a medical check up and was suspending payment of his salary until he explained himself. The Belgian and Portuguese postal services returned the letters as "not claimed".

On 3 August 1998 the complainant went back to work and contacted the medical adviser. On 4 August 1998 he was informed that the Agency considered that he had failed to undergo the medical examination prescribed in Article 59(1) of the Staff Regulations and that his sick leave was unauthorised because he had spent it outside his

duty station without prior permission.

2. On 6 August 1998 the Director of Human Resources wrote to the complainant confirming that his absence during the period from 10 June 1998, the date on which he left for Portugal without prior permission, to 2 August 1998 was being treated as unauthorised absence. It would consequently be deducted from his remaining annual leave and when that had been exhausted, "the remaining amount of overpaid salary [would] be calculated ... and deducted each month from the fraction of [his] remuneration not under distraint". The arrangements for the repayment were specified in an annex which the complainant was to sign.

3. On 18 August 1998 the complainant asked the Director of Human Resources to reconsider his decision to treat his absence of 10 June to 2 August 1998 as unauthorised and recalling the duty of care that an organisation owes to its staff, asked him to order payment of his salary for August 1998.

By a letter of 20 August 1998 the Agency agreed to treat his absence as unauthorised only from 8 July 1998, the day after the complainant had received the medical adviser's letter, and to pay him his salary for August 1998 minus the amounts deducted in respect of his creditors. From August onwards, the sum of 3,000 Belgian francs was to be deducted monthly from the fraction of his salary that was not under distraint.

4. Dissatisfied with this arrangement, on 20 November 1998 the complainant filed an internal complaint against the decision of 20 August 1998. On the unanimous recommendation of the Joint Committee for Disputes, the Director General rejected the appeal by a decision of 23 February 1999, which the complainant is now challenging before the Tribunal.

5. He asks the Tribunal to quash the decisions of 20 August 1998 and 23 February 1999 and to order the Agency to repay him the amounts deducted or to be deducted from his salary, plus interest at the rate of 8 per cent a year "as from the dates at which [his] salary was due or will be due and until it has been paid [to him] in full". He claims 100,000 Belgian francs in provisional material and moral damages. He also seeks an award of costs.

He pleads breach of Articles 59 and 60 of the Staff Regulations and submits that the Agency made an obvious mistake of fact in that the purpose of the letter of 23 June 1998 was not to verify the validity of the medical certificates; that the decisions in question disregarded the conclusions of a medical examination and that the Agency took them prematurely, without giving him the opportunity to prove that he was ill.

6. It is clear from Articles 59 and 60 of the Staff Regulations, reproduced under A, that an official of Eurocontrol cannot be treated as being on unauthorised leave when he proves that his absence was caused by sickness or accident. However, mere production of a medical certificate does not constitute irrefutable proof that the official is unable to work because of illness. The Administration is free to demand that he undergo a medical examination in order to ascertain that he is indeed ill. And for the Agency to be able to arrange a medical examination, the official claiming incapacity for work must so inform the Administration notifying it of his whereabouts, and must obtain prior permission from the Director General if he wishes to spend sick leave elsewhere than at the place of his employment.

7. It is common ground that the complainant, who produced a medical certificate as evidence of incapacity due to sickness, left his place of employment - Brussels - to go to Portugal without obtaining prior permission from the Director General and failed to provide his address in Portugal so that he could be reached in good time should a medical examination prove necessary.

It is also common ground that: when the complainant received the medical adviser's letter of 23 June 1998 asking him to get in touch with the Medical Service in order to arrange an appointment to which he was to bring all the medical documents in his possession, he made one unsuccessful phone call and then waited until the end of his sick leave before contacting the medical adviser; and that by such behaviour he prevented the Agency from arranging a medical examination before the end of his sick leave.

8. The complainant acknowledges that an official who prevents the Administration from arranging a medical examination to ascertain incapacity for work may be regarded as having taken unauthorised leave. But he considers that that was not his case. He contends that the letter of 23 June 1998 was not intended as a summons to a medical check up; and that even if he did fail to respond to it properly, that was not sufficient ground for treating his absence as unauthorised. In his submission, the letter was a follow-up to the internal memorandum of 19 May 1998

from his supervisor and was bound to have had the same purpose, namely to inquire whether a prolonged absence was to be expected.

9. The Tribunal observes that, regardless of the content of the memorandum of 19 May 1998, the evidence indicates that the Agency - through its medical adviser, though that is immaterial - informed the complainant in unambiguous terms that it intended to use its authority under Article 59 of the Staff Regulations to require him to undergo a medical examination.

By leaving his duty station without prior permission - in breach of Article 60 of the Staff Regulations - by failing to indicate his whereabouts - as Article 59 requires - and by failing to respond properly to the letter of 23 June 1998 - which reached him on 7 July 1998 and which asked him to make an appointment with the medical adviser - the complainant prevented the Agency from arranging a timely medical examination. The Agency therefore deemed that it was entitled to treat the complainant's absence during the period from 8 July to 3 August 1998 as unauthorised absence.

The reference to Judgment 652 (*in re* Toti) is irrelevant. In the present case the Agency decided to require a medical visit during the complainant's sick leave, whereas in the case ruled on in Judgment 652 the Tribunal made the point that the defendant organisation "did not refer the matter to its medical adviser until ... the last day of the leave period ... [and that] it was not the complainant who prevented the medical adviser from forming an opinion".

10. The complainant submits that, even if he failed to respond to the summons to a medical check-up, his absence could not be treated as unauthorised unless a further medical visit concluded that it was not possible to ascertain *ex post facto* whether he was indeed unfit for work. Furthermore, by considering that his infringement - actual or alleged - of the Staff Regulations constituted adequate ground for such a conclusion, the Agency made a mistake of law.

The Tribunal finds no mistake on the Agency's part. It is plain on the evidence that the complainant did not see the medical adviser until 3 August 1998. Eurocontrol quite properly decided to require the complainant to undergo a medical examination during his sick leave. As from 25 May 1998 it did its utmost - as the evidence shows - to arrange an examination, but was prevented from doing so by the complainant in breach of the Staff Regulations. It was therefore entitled to consider the medical certificate relied on by the complainant as inconclusive and to treat the complainant as having been on unauthorised leave from the date on which the medical adviser's letter reached him.

11. The fact that the medical adviser agreed to receive a report from the complainant's doctor without having requested it and that he gave his opinion without waiting for the report affords no grounds for finding the impugned decision unlawful. That decision was based on the provisions of the Staff Regulations and on the case law.

12. The conclusion is that the Agency properly applied Article 60 of the Staff Regulations to the complainant. Consequently, the Tribunal can allow none of the complainant's claims. Nor does it find any breach of the Agency's duty of care towards the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

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

Updated by PFR. Approved by CC. Last update: 25 July 2000.