

## NINETIETH SESSION

***In re Bals and others***  
***In re Pelsmaekers***

**Judgment No. 2003**

The Administrative Tribunal,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 November 1999 by Mr Steven Pelsmaekers and on 28 November 1999 by Mr Peter Bals, Mr Jan Bellen, Mr Patrick Bout, Mr Dirk Ceyskens, Mr Frédéric Deleau, Mr Ralf Erdmann, Mr Dietmar Gorny, Mr Francis Loyens, Mr Jean Mangelschots, Mrs Raymonde Massa, Mr Peter Matern, Mrs Josette Noelmans, Mr Etienne Poelmans, Mr Michael Ramus, Mr Silvio Scharte, Mr Hubert Verheyen, Mr Bert Verstappen and Mrs Renilde Wijnants, Eurocontrol's replies of 10 March 2000, the complainants' rejoinders of 19 May and the Agency's surrejoinders of 25 August 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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. Article 70, "Expenses", of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre says:

"A servant shall be entitled, as provided in a ruling of the Director General, to reimbursement of expenses incurred by him on taking up appointment, transfer, or leaving the service, and also to reimbursement of expenses incurred by him in the course of, or in connection with the performance of his duties."

Rule of Application No. 8 of the Staff Regulations, which is about reimbursement of expenses, provided in the version of Article 1(1) which applied at the material time that:

"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."

Under Article 20 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre:

"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."

The complainants joined Eurocontrol at various dates between 1971 and 1994 and serve at Maastricht. They submit that, shortly after becoming permanent staff members, they asked the Administration for application forms for the installation allowance but were told that they were not eligible for the allowance.

They subsequently received the appropriate forms and in February and early March 1999 they each sent in an application to the Administration with a formal request for the allowance. Having received no reply they submitted identical internal complaints in July 1999 to the Director General. The matter was referred to the Joint Committee

for Disputes. In its single report of 5 August 1999 the Committee recommended rejection on the grounds that both the complainants' formal requests and internal complaints were filed too long after their establishment as permanent staff to be receivable. It added that, legally speaking, their formal requests and internal complaints together constituted a "complaint" against the Administration's earlier rejection of their requests for the allowance, implicit in its refusal to send them the necessary application forms. By letters of 19 August 1999, the Director of Human Resources told each of the complainants that the Director General had endorsed the Committee's recommendation. In the Director General's view, the complainants' action was not a "request" within the meaning of Article 91(1) of the General Conditions of Employment but an internal complaint under Article 91(2), which as such was out of time. He further considered that the internal complaint was unfounded in law because the complainants had incurred no actual installation expenses. That is the decision they are impugning.

B. The complainants submit that the rules establish no time limit for the filing of a request. Since the existence of a time bar may not be presumed, the Joint Committee for Disputes had no basis in law for its finding that their requests were irreceivable because they were out of time. What is more, another staff member, Mr C., applied for the installation allowance six years after becoming established and was granted it.

Not until February and March 1999, after they had received the application forms from the Administration, did they apply formally for the allowance. Consequently, those formal requests they made may not now be dubbed "complaints against the Administration's refusal to send them the application forms ... at the time of their establishment as permanent officials".

The complainants have three pleas on the merits. The first is breach of Article 1 of Rule of Application No. 8. Under Article 1 as amended by Office Notice No. 11/99 issued on 17 August 1999, the installation allowance is no longer payable to officials who qualify for the expatriation allowance but only to those who furnish evidence of having been obliged to change their place of residence in order to comply with Article 20 of the Staff Regulations. The complainants, however, filed their requests well before 17 August 1999 and so fall under the old Article 1, which grants the allowance either to established officials who qualify for the expatriation allowance or to those who provide evidence of having had to change their place of residence. Being entitled to the expatriation allowance, the complainants also qualify for the installation allowance and need not show that they had to change residence or incurred expenses.

Secondly, the Agency disregarded the principle of equal treatment. Another official, Mr Berger, was not required to change his place of residence on joining Eurocontrol and did not apply for the installation allowance until two years after his recruitment. Yet the Agency granted him the allowance even though he had incurred no expenses. (See Judgment 1903 *in re* Berger.)

Thirdly, there were no valid grounds for the decision of 19 August 1999.

The complainants ask the Tribunal to quash the impugned decision; order Eurocontrol to pay them the installation allowance plus interest at the rate of 10 per cent a year as from the date each formally requested the allowance; and award costs in an amount of 100,000 Belgian francs for Mr Pelsmaekers and 150,000 francs for each of the other complainants.

C. In its replies Eurocontrol submits that the complaints are irreceivable. Either the complainants had their requests for the installation grant rejected "shortly after becoming permanent staff members" (as they contend), or they applied for the allowance for the first time in February or March 1999. In the first hypothesis, they failed to file internal complaints against the rejections within the three months prescribed in Article 91(2) of the General Conditions of Employment; in the second, their applications were out of time.

The Agency argues that even though Mr Berger did not apply for the installation allowance until two years after becoming a permanent staff member, his case was different: since he constantly followed up his request to the Administration, the Joint Committee for Disputes considered that he should be given the benefit of the doubt as to receivability; the complainants, on the other hand, did nothing for several years.

On the merits, the Agency asserts that ever since it has existed it has always refused to pay the installation allowance to staff who receive the expatriation allowance but have not changed their place of residence. It interpreted the rules in their context and according to their intent and concluded that only staff members who actually incurred installation expenses were entitled to claim their reimbursement. That was also the practice in the

European Communities. In over thirty-five years no one had challenged the practice until, in the context of Mr Berger's complaint, a recent precedent was found in the case law of the Court of First Instance of the European Communities (*Lozano Palacios v Commission*) and the Court of Justice of the European Communities (*Commission v Lozano Palacios*). According to that precedent, under the provisions in force in the European Communities (the wording of which is identical to that of Article 1 of Rule of Application No. 8), the installation allowance is payable to a beneficiary of an expatriation allowance, there being no need for the beneficiary to show the existence of actual expenses. Admittedly those rulings are based on a literal interpretation of Article 1(1) of Rule of Application No. 8 which, if applied to the complainants, would mean granting them the allowance because they receive the expatriation allowance without actually having changed residence. However, says the Agency, that literal interpretation does not reflect the rule's intent.

Eurocontrol rebuts the allegation that it failed to give reasons in its replies of 19 August to the requests of February and March 1999 and the internal complaints of July 1999. It had every reason to view their formal requests for the allowance as internal complaints since the complainants themselves said that the Administration had originally refused to pay them the installation allowance. Furthermore, the letters of 19 August 1999 expressly refer to the reasoned opinion issued on 5 August 1999 by the Joint Committee for Disputes which the Director General endorsed.

D. In their rejoinders the complainants submit that, in Mr Berger's case, the Committee's opinion and the Director General's decision were based on the precedent set in the *Lozano Palacios v Commission* case, so Eurocontrol recognises that it endorsed that ruling.

They note that the Agency has not replied to the plea concerning Mr C.'s case.

The time limit for internal complaints being mandatory, they fail to see how it could have been extended on the grounds that Mr Berger "constantly followed up his request to the Administration".

E. In its surrejoinders Eurocontrol denies endorsing the precedent on which it granted Mr Berger the installation allowance.

It explains that its main reason for refusing the allowance to the complainants was that they were out of time. It adduced the absence of actual installation expenses only as a subsidiary plea.

It was as a result of an administrative mistake that Mr C. got the installation allowance six years after his establishment, and besides, unlike the complainants, he did have to change his place of residence.

## CONSIDERATIONS

1. The complainants are all employees of Eurocontrol and serve at Maastricht. In February and March 1999 they requested payment of the installation allowance provided for under Article 70 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre and in the version then in force of Article 1(1) of Rule No. 8 concerning reimbursement of expenses. Having learned that a colleague in like case had been granted the allowance, they considered that they too were entitled to apply for it. Having received no reply to their requests for the allowance, they lodged internal complaints under Article 91 of the General Conditions of Employment. Their cases were referred to the Joint Committee for Disputes, which, in its report of 5 August 1999, found their internal complaints to be out of time because they had filed them many years after being made permanent staff members. According to the Committee, their position was different from that of the staff member who had been granted the allowance, as their requests were "very late given the length of time they had been established - which in some cases [was] as long as twenty-seven years", and that their internal complaints were therefore irreceivable. The Committee added that "the stability in law which must govern relations between an organisation and its staff precludes exempting the persons concerned from the time bar, which the Tribunal is in any event bound to apply in the general interest".

2. The Director of Human Resources informed the complainants by decisions of 19 August 1999 that, pursuant to the Committee's recommendation, the Director General had rejected their internal complaints as time barred and hence irreceivable. Nineteen staff members of Eurocontrol are now impugning those decisions. The Tribunal will join their complaints.

3. The main issue of the cases is the receivability of internal complaints against a refusal to grant an allowance pertaining to their installation filed by officials many years after they became established staff members.

4. The complainants recall that, according to a long line of precedent, the time bar extinguishes obligations, so its existence may not be presumed. They add that, in their case, the time limit started to run only from the date on which the Administration first sent them the application forms for the installation allowance. They further argue that since two of their colleagues in like case obtained the allowance, the principle of equal treatment requires that they be granted the same benefit.

5. In rebuttal, Eurocontrol argues that the principle of legal certainty precludes the acceptance of applications that the complainants submitted between two years and four months and twenty-seven years and six months after their establishment, which is when they became eligible to apply for the allowance provided they met the requirements. And had their application met with a refusal, it would have been up to them to file an internal complaint within the three months specified in Article 91(2) of the General Conditions of Employment.

6. The complainants themselves admit that when they requested application forms for the allowance shortly after becoming permanent, the Administration replied that they were not entitled to the allowance insofar as they had incurred no installation expenses on taking up their appointments. Whether or not the Administration was right, its replies to the complainants' initial requests - which were made within a reasonable period of their establishment - constituted decisions which they could have challenged within the three months laid down in Article 91(2) of the General Conditions of employment, under which:

"Any person to whom these provisions apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where it has failed to adopt a measure prescribed by the staff regulations. The complaint must be lodged within three months. The period shall start to run:

- on the date of publication of the act if it is a measure of a general nature;

- on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if however an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;

- on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request in [Article 91(1)].

The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 92."

Since they were not challenged in time, those decisions became final and the complainants were barred from challenging them by filling up application forms years later and claiming the quashing of the decisions refusing them by implication the allowance for which their assignment to Maastricht made them eligible.

The Joint Committee for Disputes was right to cite the "principle of legal certainty which must govern relations between an organisation and its staff" and to note that it was not possible to "[exempt] the persons concerned from the time bar, which the Tribunal is in any event bound to apply since it is mandatory". The fact that Eurocontrol granted the allowance to one staff member *ex gratia* and to another by mistake is not in itself enough to warrant waiver of the time bar on the complainants' requests.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet