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

**NINETY-SECOND SESSION**

**Judgment No. 2094**

**(Interlocutory Order)**

The Administrative Tribunal,

Considering the second complaint filed by Mr V. L. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 1 September 2000 and corrected on 30 November 2000, Eurocontrol's reply of 9 March 2000, the complainant's rejoinder of 15 May and the Agency's surrejoinder of 24 August 2001;

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. Facts relevant to this case are to be found in Judgment 1880 delivered on 8 July 1999. On the advice of his daughter's doctor, the complainant had her hospitalised in the United States for a serious illness. Eurocontrol's Sickness Fund repaid at the full rate (100 per cent) the costs of her operation and of the treatment that preceded it, except for the costs of the hospital stay which it limited to 20,000 Belgian francs a day. As from June 1997, however, the maximum limits set out in Rule of Application No. 10 of the Staff Regulations concerning sickness and accident insurance cover were strictly applied to all costs incurred after the operation.

On 9 December 1999 the complainant filed an internal complaint challenging three statements of account from the Sickness Fund concerning post-operative medical costs. On 3 March 2000 he filed an internal complaint against the implied rejection of a request for special reimbursement that he had submitted on 6 September 1999 for the period from 8 September 1997 to 7 September 1998. The Sickness Insurance Scheme Management Committee met on 23 March 2000. In its report to the Director General, which was forwarded to the complainant on 6 April, it pointed out that the Sickness Fund had already paid out "a large amount by way of an exception", and recommended rejecting the complainant's claims "in view of its previous decision (strict application of the rules as from June 1997 of which the claimant was given prior notice)". By a memorandum of 5 June 2000 the Director of Human Resources rejected the complainant's internal complaints on the Director General's behalf. That is the impugned decision.

B. The complainant's first point is that Article 72 of the Staff Regulations governing officials of the Eurocontrol Agency guarantees reimbursement in full of all costs incurred in the event of serious illness. Although in Judgment 1880 the Tribunal allowed reimbursement to be restricted "notwithstanding the express terms" of this article, the share to be borne by the insured person should not be "financially crippling". He takes the Agency to task for treating the medical costs incurred in the United States as excessive, and alleges that it set the maximum limits arbitrarily: it took Belgium as the basis for a cost comparison although there was no question of treatment in Belgium and his daughter's condition demanded follow up by the same team after her operation as before it. The rules require the Agency to state the reasons for every item it deems excessive, which it has not done.

Secondly, the Sickness Fund denied him special reimbursement although no weighting had been set to take account of the difference in the cost of care between the United States and Belgium. That was in breach of Article 8 of Rule No. 10, the provisions on the interpretation of Rule No. 10 and several basic principles including the freedom to choose one's physician. The complainant submits that the rules allow reimbursement of up to 300 per cent of costs deemed to be reasonable (i.e. non-excessive). The rejection of his request for special reimbursement is also in

breach of Article 72 of the Staff Regulations and Article 8(2) of Rule No. 10 since in a twelve month period he incurred medical costs amounting to more than his average basic monthly salary.

He seeks the quashing of the impugned decision and costs.

C. Citing Judgments 1094 (*in re* Gérard and others) and 1880, Eurocontrol points out in its reply the Tribunal's finding that reimbursement at the full rate does not preclude the application of maximum limits. It observes that, in the opinion of four doctors, the surgery and, *a fortiori*, the post-operative treatment could have been carried out in Europe. The complainant's initial decision to have the operation done in the United States was taken for reasons of expediency and he may not rely on it to obtain special reimbursement from the Sickness Fund of all the treatment that ensued. According to the Agency, the purpose of setting ceilings beyond which costs are treated as excessive is to keep the Sickness Insurance Scheme on a sound financial footing. It points out that the maximum limits it applied to the complainant are two to three times higher than those of the Belgian National Sickness and Invalidity Insurance Institute.

Eurocontrol denies ever challenging the complainant's freedom to choose a physician. It points out that Article 72(3) of the Staff Regulations and Article 8(2) of Rule No. 10 apply only to the non-reimbursed part (15 or 20 per cent according to the case) of refundable medical expenses, not to non-reimbursed expenses in general (excessive costs or non-medical expenses).

D. In his rejoinder the complainant maintains that the United States was the only place where his daughter could be treated, including after her operation. The reimbursements were based on medical costs in Belgium which were grossly under-estimated, which shows how arbitrary the method of calculation is. Besides, it is discriminatory in that similar medical care costing the same amount may or may not be refunded, depending on where it was provided. He submits that, contrary to the Agency's interpretation, Article 72(3) of the Regulations and Article 8(2) of Rule No. 10 do cover excessive costs. The whole purpose of the mechanism is to determine what should be done with the non-reimbursed portion of medical expenses where the financial burden on the insured person would be abnormally heavy. The Tribunal acknowledged as much in Judgment 1880, under 13, when it advised the Agency to ensure "that the interpretation does not rob the original rule - especially Article 72(3) - of its meaning".

E. In its surrejoinder the Agency denies setting limits arbitrarily: it either applies the statutory maximum limits or takes average costs in the member State as a reference. Nor did it underestimate the tariffs applied in Belgium: the complainant overlooked the fact that Eurocontrol has financial agreements with numerous medical establishments. Furthermore, in comparing hospital costs he omitted to specify that in Europe prices are "all-inclusive" whereas in the United States all manner of costs and fees have to be added. Lastly, there would be no safeguarding the finances of the Sickness Insurance if its members were able to claim excessive medical expenses by way of special reimbursement.

## CONSIDERATIONS

1. The facts that prompted this dispute are set out in Judgment 1880.

The gist of the case is as follows. The complainant's daughter was treated in 1996 for what turned out to be a serious illness requiring special treatment. On the advice of her doctor, the complainant sent her on 5 February 1997 to the United States for hospital treatment at the Memorial Sloan-Kettering Center. Eurocontrol's Sickness Fund, which had agreed on 11 November 1996 to reimburse medical costs for serious illness at the rate of 100 per cent until 11 September 1997, undertook on 15 September 1997 to extend that coverage until 11 September 1998.

A first dispute, about the coverage of medical costs pertaining to the period from 5 February to 3 March 1997, gave rise to Judgment 1880.

2. In this dispute the complainant is challenging a decision of 5 June 2000 to reject his internal complaint lodged on 9 December 1999 against three statements of account from the Sickness Fund dated 10 September 1999 limiting reimbursement of his daughter's post-operative medical costs to which he claimed entitlement under Eurocontrol's Sickness Insurance Scheme, and his internal complaint of 3 March 2000 against the implied rejection of a claim to special reimbursement submitted to the Sickness Fund on 6 September 1999 pursuant to Article 72(3) of the Staff Regulations and Article 8(2) of Rule of Application No. 10.

3. In the complainant's submission the impugned decision is in breach of Article 72(1) of the Staff Regulations, Section XV, paragraph 3, of Annex I to Rule No. 10 and of the decisions on his case taken on 11 November 1996 (guaranteeing the reimbursement at 100 per cent for a one-year period) and 15 September 1997 (extending this period for another year). He pleads obvious misappraisal of the facts: under the three statements of account dated 10 September 1999 he was granted only a partial refund of the medical costs incurred by his daughter for surgery undergone in December 1998 and the postoperative treatment. Depending on the type of treatment he had been refunded only 27.04 per cent, 32.22 per cent and 41.01 per cent of the real cost of the care, whereas Article 72 of the Staff Regulations expressly states that staff members and their dependants are covered against the risks of sickness, ordinarily within the limit of 80 per cent of costs incurred. But, in the event of serious sickness, as was his daughter's case, the rate is increased to 100 per cent. This rule is reflected in Section IV, paragraph 1, of Annex I to Rule No. 10.

The complainant asserts that these are the rules on which the Agency based its decisions of 11 November 1996 and 15 September 1997 to refund to him in full the medical costs arising from his daughter's illness.

He recognizes that in Judgment 1880 the Tribunal ruled that, although Article 72 of the Staff Regulations ensures that reimbursement will ordinarily be at the rate of 100 per cent, it does not preclude limiting reimbursement in the interests of safeguarding Eurocontrol's social security scheme. But any such limitation must, he says, be reasonable particularly when the illness is so serious that treatment must be sought abroad, as in his daughter's case.

He pleads breach of Article 72 in that the Sickness Fund's method of reckoning reimbursement makes his share of the medical costs "financially crippling".

In his submission it is plain from the three statements of account of 10 September 1999 that, for most of the medical items, the provisions of Section XV, paragraph 2, of Annex I to Rule No. 10 which in some cases allow setting "maximum limits", do not apply. He observes that "maximum limits" were applied for only three minor medical expenses. Consequently, he considers that the Fund is relying on paragraph 3 of the above referenced provision to substantially reduce the reimbursements, deemed wrongly to be excessive. He adds that implementation of paragraph 3 implies that a specific reason must be given for each item generating excessive costs, which was not the case here. A specific and detailed explanation was the more necessary as it was the seriousness of his daughter's illness that required her emergency hospitalisation in the United States. He asserts that an enquiry or expert medical opinion could confirm that there was no alternative.

4. Eurocontrol denies that hospitalisation in the United States was imperative. It asserts that "even supposing ... that the operation itself and the prior treatment were possible only in the United States, the same ... is certainly not true of the post-operative care and treatment". Having been consulted by the complainant, the Robert Debré Hospital in Paris certified on 25 July 1997 that the post-operative treatment could be carried out in Paris and elsewhere in Europe.

5. The Tribunal considers that, before it rules on the case a number of questions need to be answered by means of a medical enquiry to be entrusted to an expert, appointed by the President of the Tribunal, whose terms of reference will be set out in the decision below.

## DECISION

For the above reasons,

1. A medical expert shall be appointed by order of the President of the Tribunal for the purpose of determining whether, and to what extent, the special care required by the illness of the complainant's daughter was obtainable only at the Memorial Sloan-Kettering Center in the United States, and whether it was necessary for her to remain there until completion of all the treatment required by the evolution of her illness.

2. The expert shall take into consideration all the evidence submitted to the Tribunal and may seek from the parties any relevant information, abiding by the rule that proceedings must be adversarial.

3. The expert shall submit seven copies of his or her report to the Registrar of the Tribunal by 1 April 2002.

4. Copies of the report shall be sent to the two parties, who shall have fifteen days within which to submit comments.

5. The expert's fees and costs shall be borne by Eurocontrol; the amount shall be approved by the President of the Tribunal.

6. Costs are reserved.

In witness of this judgment, adopted on 2 November 2001, 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 30 January 2002.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by SD. Approved by CC. Last update: 5 March 2008.