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

NINETY-THIRD SESSION

Judgment No. 2153

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 2001, the complainant's rejoinder of 15 May and the Agency's surrejoinder of 24 August 2001;

Considering the medical expert's report dated 26 March 2002 and received by the Registry of the Tribunal on 8 April, which was prepared by Dr. M. A, expert appointed by order of the President of the Tribunal on 30 January 2002, in accordance with Judgment 2094 delivered on that date;

Considering Eurocontrol's observations on the report, dated 25 April 2002, the complainant having refrained from providing comments;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts and pleadings leading up to the interlocutory order are set out in Judgment 2094, in which the Tribunal decided that:

"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."

B. In reply to the question of 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, the expert replies that he himself has provided this type of treatment "to patients suffering the same type of illness, in the same area of the body". He states that, while the expertise of the above American hospital is undeniable, "this type of treatment could be provided other than in the United States".

With regard to the necessity for the complainant's daughter to remain in that institution until completion of all the treatment required by the evolution of her illness, he says that once a treatment of the complexity of that provided to the complainant's daughter has been commenced in a given institution "it is generally preferable to continue with the treatment in the same establishment". He adds:

"It is however possible to transfer care to another specialised centre, if the medical situation is not too complex.

It appears from the documents made available to the expert that the ... post-operative evolution of the patient was complex and required further surgery in August 1997.

It is normal in medical practice and ethically correct to provide all the treatment for a patient and not to entrust it to another team unless the situation is without complications. According to all the evidence, this was not the case and the expert understands the preference expressed by Dr. [B] to the continuation of the treatment by his team and that of Dr. [M].

In other words, if the treatment had been provided from the outset in a medical establishment other than [the American hospital], there would have been no reason to turn to [the latter].

Nevertheless, once such complex treatment had been commenced [in that hospital], considering the complications which arose, it was preferable to complete the treatment with the expert team, rather than transferring a complex situation to a team that had not known the patient from the outset."

C. In its observations, Eurocontrol recalls that the only point at issue is whether the costs incurred were correctly reimbursed under Article 72 of the Staff Regulations governing officials of the Eurocontrol Agency and Rule of Application No. 10. It emphasises that it has always recognised the complainant's right to the free choice of practitioner and health-care institution.

In its view, the medical expert's report confirms its own position. The complainant's daughter could have been treated elsewhere than in the United States, including Europe. While it was preferable to keep her with the same medical team once the treatment had commenced, it "was not absolutely necessary".

CONSIDERATIONS

1. The facts of this dispute are set out in Judgments 1880 and 2094, to which reference is made.

In the case at bar, the complainant challenges the decision by Eurocontrol dated 5 June 2000 dismissing: first, his internal complaint filed on 9 December 1999 concerning three statements of account by the Sickness Fund, dated 10 September 1999, which limited the reimbursement of post-operative medical expenses incurred for his daughter who was hospitalised in the United States for a serious illness; and secondly, his internal complaint filed on 3 March 2000 against the implicit decision to reject his claim for special reimbursement submitted to the Sickness Fund on 6 September 1999 under Article 72(3) of the Staff Regulations and Article 8(2), of Rule of Application No. 10.

In support of his claims for reimbursement under Article 72 of the Staff Regulations, the complainant places particular emphasis on the vital necessity of his daughter receiving urgent hospital treatment in the United States.

2. Taking into account Eurocontrol's contention that the complainant's decision to send his daughter to a hospital in the United States was taken for reasons of expediency and that he cannot rely on it to obtain special reimbursement from the Sickness Fund of all the treatment that ensued, the Tribunal decided in Judgment No. 2094 to issue an interlocutory order calling for a report by a medical expert.

3. In his report dated 26 March 2002, the expert appointed on 30 January 2002 by the President of the Tribunal concluded that the "type of treatment [necessitated by the state of health of the complainant's daughter] could be provided other than in the United States" and that:

" ... if the treatment had been provided from the outset in a medical establishment other than [the American hospital], there would have been no reason to turn to [the latter].

Nevertheless, once such complex treatment had been commenced [in that hospital], considering the complications which arose, it was preferable to complete the treatment with the expert team, rather than transferring a complex situation to a team that had not known the patient from the outset."

The upshot is that the complainant was not obliged to send his daughter to a hospital in the United States and it is as a result of his initial choice of the place of treatment that it became necessary to keep the patient in the United States for post-operative care and treatment. It is accordingly reasonable, as found by the Tribunal in Judgment 1880 (under 10), to let the complainant bear any additional costs incurred by treatment in the United States, a non-member State of Eurocontrol.

Reimbursement under Article 72(1) of the Staff Regulations

4. The complainant contends firstly that Eurocontrol is in breach of Article 72(1) of the Staff Regulations, Section XV, paragraph 3, of Annex I to Rule of Application No. 10, and the decisions of 11 November 1996 and 15 September 1997; and secondly, that it has made a clear misappraisal of facts in according him, in the three statements of account of 10 September 1999, only a partial reimbursement of the medical costs incurred for his daughter in relation to her operation in December 1998, namely, depending on the types of medical care concerned, 27.04 per cent, 32.22 per cent and 41.01 per cent of their real cost, respectively.

5. The Tribunal clearly indicated in Judgments 1094 and 1880 that coverage at the rate of 100 per cent, as envisaged under Article 72(1) of the Staff Regulations, does not mean that in all circumstances an insured person is entitled to full repayment of the expenses incurred. Article 72 provides for insurance coverage only up to a percentage of the expenditures incurred and pursuant to the provisions of a rule of the Director General. The reimbursement of expenses can be restricted by setting maximum limits (or ceilings) for certain types of expenditure or by reckoning limits for each case on the basis of costs incurred, without any breach of the rules in force.

In view of the choice made by the complainant to send his daughter to the United States for treatment, where the costs are much higher, it cannot be claimed that Article 72 of the Staff Regulations was breached merely because the reimbursement of medical expenses as reckoned by the Sickness Fund left the complainant to pay costs which he deems excessive and financially crippling.

6. The complainant submits that 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 of Application No. 10, (which in some cases allow the setting of "maximum limits"), are not applicable in his case. He adds that "maximum limits" were applied for only three minor medical expenses.

He contends that the Fund is relying on paragraph 3 of the above-mentioned provision to reduce substantially the reimbursements granted, which are wrongly considered excessive. In his submission, the Fund appears in general to consider all medical expenses incurred in the United States as being excessive where they exceed the estimated cost of medical care of the same type in Belgium.

Eurocontrol retorts that the setting of ceilings beyond which costs are treated as excessive is indispensable to keep the Sickness Insurance Scheme on a sound financial footing, as already admitted by the Tribunal in Judgments 1094 and 1880.

It should be noted that the reference made by the Agency to the cost of treatment in Belgium - for which the equality coefficient is always set at 100 - is justified by the fact that where expenditure is incurred in a State for which no coefficient has been set, as in the present case, the coefficient is also 100. However, contrary to the complainant's submission, this is not the same as setting maximum limits for reimbursement pursuant to Section XV, paragraph 2, of Annex I to Rule of Application No. 10. These provisions only apply to expenses in respect of items not mentioned in the Annexes to the rules. But the bills received by the Sickness Fund, and covered by the statements of account that are being challenged, relate to items envisaged in the Annexes.

The complainant contests the practice of considering excessive all medical expenses incurred in the United States where they exceed the estimated cost of equivalent treatment provided in Belgium. He argues that this is contrary to the Tribunal's finding in Judgment 1880, when applied to patients who have no alternative but to seek treatment

abroad, as in the present case.

However, as indicated above, the expert's report concluded that the complainant was not obliged to send his daughter to the United States for treatment. It was therefore possible to apply in his case the practice that he is challenging.

7. The Tribunal finds that all the complainant's pleadings, which are essentially based on the alleged impossibility of obtaining the same care for his daughter in Europe as that provided in the United States, must fail. In these circumstances, taking into consideration the written submissions, the reimbursement rates applied by the Sickness Fund were in accordance with the relevant provisions of the Staff Regulations, Rule of Application No. 10 and Annex I.

8. The complainant contends that the method applied by the Sickness Fund in determining the excessive nature of the medical expenses is arbitrary and discriminatory in taking as a reference amounts that are much lower than the actual cost of equivalent care in Belgian hospitals, or more generally in institutions in Eurocontrol member States. The Agency retorts that either the ceilings set out in the rules have to be applied, or reference has to be made to the average costs in the member State under consideration. In the case of Belgium, reference is made to the rates published by the National Sickness and Invalidity Insurance Institute. According to the Agency, arbitrary decisions are therefore never made.

In this respect, the Tribunal recalls its finding in Judgment 1880 that "the fixing of the level of expenses in Belgium and in the member States provides a valid, objective figure for all patients receiving treatment outside these States". The complainant's plea must therefore fail.

9. The complainant submits that the decisions of 11 November 1996 and 15 September 1997 guaranteed that all the medical expenses incurred for his daughter would be refunded in full. He says that the Sickness Fund failed to abide by these decisions in not granting him the reimbursements to which he considered he was entitled.

On the contrary, the written submissions show that the commitment made in these decisions does not imply acceptance of the need for hospitalisation in the United States. Nor does it guarantee that an exception will be made to the rules that govern the reimbursement of medical expenses.

10. The claims relating to the internal complaint of 9 December 1999, challenging the three statements of account of 10 September 1999 issued by the Sickness Fund, must therefore fail.

Special reimbursement

11. The complainant asserts that the impugned decision, in dismissing his internal complaint of 3 March 2000 against the decision to reject his claim for a special reimbursement, was in breach of Article 8 of Rule of Application No. 10 and Section XV of Annex I to that same rule.

He pleads blatant misappraisal of facts, breach of the principle of free choice of practitioner as set out in Article 9 of Rule of Application No. 10 and of the principles of non-discrimination, the guarantee of general social coverage, and proportionality by which the action of institutions must be governed.

In his submission, as there is no equality coefficient which takes into account the significant difference between the cost of medical care in the United States and Belgium, the Sickness Fund committed an error in reckoning the reimbursements, which should have been double the level of 150 per cent of the ceiling that it decided upon. He adds that it refused to grant him the special reimbursements envisaged in Article 8 of Rule of Application No. 10.

12. There is no need to deal once again with the pleas that were examined in Judgment 1880 and on which the Tribunal has already ruled.

It therefore only remains to rule on the granting of a reimbursement under Article 72 of the Staff Regulations and Article 8 of Rule of Application No. 10.

The internal complaints filed by the complainant related to the granting of a special reimbursement under Article 8 of Rule No. 10. The response he received was that the "conditions for the application of Article 8(2), [were] not fulfilled."

The Tribunal found that it was premature to rule on this point due to the fact that, when the complaint was filed, treatment was being continued, expenses were being incurred and the period of twelve months specified in Article 72 had not been completed. The Sickness Fund was not therefore in a position to determine the amount of any special reimbursement.

13. Article 72(3) of the Staff Regulations reads:

"Where the total expenditure not reimbursed for any period of twelve months exceeds half the official's basic monthly salary ... special reimbursement shall be allowed by the Director General, account being taken of the family circumstances of the person concerned, in manner provided in the rules referred to in paragraph 1."

Paragraphs 1 and 2 of Article 8 of Rule of Application No. 10 provide that:

"1. Special reimbursements may be granted when the expenses incurred are for treatment of a member or of a person covered by his insurance in a country where the cost of medical treatment is particularly high and the portion of expenses not reimbursed by the Scheme places a heavy financial burden on the member. The application of this paragraph will be the subject of a decision by the Director General taken on the basis of a report of the Central Office and having regard to the advice of the Committee of Management.

2. When the non-reimbursed portion of expenses covered by the scales annexed to this Rule which are incurred by a member in respect of himself and in respect of persons covered by his insurance exceeds during any twelve-month period half the average basic monthly salary ... the special reimbursement provided for in Article 72.3 of the Staff Regulations ... shall be determined as follows:

- the non-reimbursed portion of the above expenses which is in excess of half the average basic monthly salary ... shall be reimbursed at the following rates:

- 90% in the case of a member by whose insurance no other person is covered;

- 100% in other cases."

14. Eurocontrol argues that, in the case at bar, Article 72(3) of the Staff Regulations and Article 8, paragraphs 1 and 2, of Rule of Application No. 10 are only applicable to the portion of the refundable medical expenses that have remained at the charge of the insured person. It asserts that the provisions of Article 8(1) only apply to treatment for which a ceiling has been set, and not to care subject to a limitation by a reason of its excessive cost. It adds that, for the types of care for which a ceiling exists, the latter was doubled under the terms of paragraph 1 of Article 8.

Eurocontrol contends that Article 8(2), of Rule of Application No. 10 is not applicable either, as the non-reimbursed portion of the medical expenses incurred by the complainant's daughter corresponds, on the one hand, to non-refundable expenses (telephone, television, drinks, etc.) and, on the other hand, to expenses considered to be excessive. It submits that the portion of expenses considered excessive following consultation of the medical officer is not taken into account for the special reimbursement envisaged in Article 8(2). It adds that Section XV, paragraph 3, second indent, of Annex I to Rule of Application No. 10 provides in this respect that "[t]hat part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed."

15. In refusing the special reimbursement, the Tribunal notes that Eurocontrol relies on the interpretation of Article 72, paragraph 3, and the provisions issued thereunder.

In its submission, the "'non-reimbursed expenses' must be understood as the portion of refundable medical expenses under the rules which have remained at the charge of the member (15% or 20%, as appropriate), and not the total of non-reimbursed expenses under all heads (excessive costs or expenses not related to medical care)".

This restrictive interpretation cannot stand.

With regard to the application in the present case of Article 72(3) of the Staff Regulations and Article 8(2), of Rule of Application No. 10, the Tribunal found in Judgment 1880 that it was premature to rule on this matter because the

period of twelve months had not yet been completed. But it also added the following:

"It is only at the end of this period that the Fund will be able, if needs be, to fix the reimbursement of uncovered expenses which could, under these provisions, give rise to a special reimbursement; it shall examine the application of [rules of interpretation] ...; it shall ensure that the interpretation does not rob the original rule - especially Article 72(3) - of its meaning."

While it is justifiable to set aside expenses not related to medical treatment in determining the expenses which have not been accepted but could be taken into consideration for a special reimbursement, the same does not hold for all expenses considered to be excessive.

In Judgment 1880, under 13 *in fine*, the Tribunal found that the application of Article 72(3) of the Staff Regulations relating to the special reimbursement should not be based on an interpretation that would rob this provision of its meaning. Eurocontrol did not take a stand on this point in the impugned decision, as it only referred to the provisions for the interpretation of Rule of Application No. 10.

The meaning and scope of Article 72(3) of the Staff Regulations therefore need to be examined. This provision, covering sickness benefit and the reimbursement of the expenses incurred, sets out, firstly, certain basic rules relating to the special reimbursement and, secondly, delegates authority to the Director General to issue rules for their implementation. However, the authority to which this power is entrusted may only issue rules within the scope of the powers thus delegated. Article 72(3) of the Staff Regulations lays down the principle of a special payment to cover "expenditure not reimbursed", without making a distinction as to the nature of such expenditure. This is therefore a statutory safeguard for the staff. Moreover, it was clear from the outset when this provision was adopted that a large part of the expenditure not reimbursed would consist of expenses incurred abroad which could not be wholly refunded. Indeed, Article 8(1), of Rule of Application No. 10 refers to precisely this case. Nor does the text delegating authority empower the Director General to issue a rule excluding special reimbursement on the sole grounds that the respective expenditure is incurred abroad, considered excessive and therefore excluded from the refund.

Indeed, the Agency's view that expenses considered excessive cannot be admitted for special reimbursement would rob the provision of its meaning. This view could by definition be applied to all expenditure not reimbursed, for which Article 72(3) of the Staff Regulations specifically provides for the possibility of special reimbursement under more restrictive conditions.

16. The upshot is that the decision of 5 June 2000 must be set aside, but only insofar as it rejected the complainant's claims for special reimbursement of medical expenses for the period from 8 September 1997 to 7 September 1998.

The Agency shall, therefore, reckon the complainant's monthly salary for the above period and take into account the portion of expenditure incurred and not reimbursed during that period, with the exception of expenses not related to medical care, in determining whether the complainant may be entitled to the special reimbursement envisaged in Article 72, paragraph 3, of the Staff Regulations.

17. The complainant is entitled to costs, which are set at 4,000 euros.

DECISION

For the above reasons,

1. The decision of 5 June 2000 is set aside insofar as it rejected the complainant's claims for the special reimbursement for the period from 8 September 1997 to 7 September 1998.

2. The Agency shall proceed as indicated under 16 above in determining whether the complainant can claim a special reimbursement.

3. It shall pay the complainant 4,000 euros in costs.

In witness of this judgment, adopted on 10 May 2002, 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 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.