

The Administrative Tribunal,

Considering the complaints filed by Messrs D. B., N. D., Anthony L., D. P.-C., S. R. and J.-M. V. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 December 2002, Eurocontrol's reply of 9 May 2003, the complainants' rejoinder of 18 July and the Agency's surrejoinder of 3 October 2003;

Considering the complaints filed by Messrs N. C. and S. S. against Eurocontrol on 14 February 2003, the Agency's reply of 9 May, the complainants' rejoinder of 14 August and Eurocontrol's surrejoinder of 3 October 2003;

Considering the application to intervene in the case of B. and others filed by Mr S. S. on 27 August 2003 and the Agency's comments thereon of 8 October 2003;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. Facts relevant to the present case are to be found under A in Judgments 1959 and 2149, and in the judgments cited therein.

Article 4a of Rule of Application No. 7 of the Staff Regulations governing officials of the Eurocontrol Agency provides as follows:

"An official in category C employed as a copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance."

Until 1995, this allowance, known as the "typing allowance", could also be granted by analogy to staff in category C who were clerical officers and who spent at least 60 per cent of their time using a typewriter 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By office notice 19/95 of 22 December 1995 the Director General repealed Article 4a of Rule of Application No. 7.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 retroactively from 1 January 1996 in order to give effect to Judgment 1712, delivered on 29 January 1998. 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, as from the date of publication of office notice 8/98, Article 4a of Rule No. 7 would apply only to the staff expressly mentioned therein, and the practice of awarding the allowance by analogy would cease, except for employees who met the qualifying conditions prior to the date of publication of the notice.

In Judgment 1959, delivered on 12 July 2000, the Tribunal upheld the claims of a group of clerical officers and operators whose applications for the allowance had been refused on the basis of irrelevant criteria. The Agency had argued that it had consistently refused to grant the allowance by analogy to Flight Data Operators, because of the specific nature of the duties they performed. However, the Tribunal found no evidence of any such distinction in the criteria applied previously by Eurocontrol. In that case, the Tribunal held that the complainants, who had applied for the allowance in 1998, should be entitled to the allowance retroactively - as from 1 January 1996, for those in service prior to that date, and as from the date of their application, for those who had joined the Agency since 1 January 1996 - because during the period between the repeal and the reintroduction of Article 4a they had

been unjustly denied their right to claim the allowance.

On 9 August 2000 the Director General issued office notice 00/21, by which he extended the benefit of Judgment 1959 to clerical staff who, like the complainants in that case, had applied for the allowance previously. Clerical staff who had not applied previously but who qualified for award by analogy were invited to apply by 20 September 2000 but were informed that they would be paid the allowance only as from 1 July 2000.

This decision was in turn challenged by several employees who had applied for the allowance for the first time in September 2000 and been awarded it from 1 July 2000. In Judgment 2149 the Tribunal held that they were not in the same position as those who had benefited from Judgment 1959 and rejected their claims to be granted the allowance as from 1 January 1996. It also confirmed that the grant of the allowance by analogy is subject to a prior application.

The complainants in the present case, who joined the Agency at various dates between September 1998 and November 2000, applied to the Director General in December 2001 for payment of the typing allowance. By letters dated 1 March 2002 the Director of Human Resources informed them individually that their requests had been rejected by the Director General in accordance with office notice 8/98. In May 2002 the complainants submitted identical internal complaints against the Director General's decisions. In an opinion dated 13 November 2002 the Joint Committee for Disputes, to which the complaints had been referred, unanimously recommended that they be rejected as having no legal substance.

By letters of 11 December 2002 the Director General informed each complainant that he had decided to reject their internal complaints in accordance with the recommendation of the Joint Committee for Disputes. Prior to receiving these letters, which took several weeks to arrive via various hierarchical channels, six of the complainants filed complaints with the Tribunal against the implicit rejection of their internal complaints, fearing that if they waited any longer for an express decision their appeals to the Tribunal might be time-barred. The two remaining complainants - Messrs C. and S. - waited and then filed complaints with the Tribunal against the express decision that they received on 8 January 2003.

B. The complainants contend that office notice 8/98, on which the impugned decisions are based, is legally flawed in two respects. Firstly, they assert that the argument put forward by the Agency to justify its decision to end the practice of granting the typing allowance by analogy was invalid. During the consultation with the unions and the Staff Committee which preceded the contested measure, the Agency presented the typing allowance as "the compensation for a hardship which had in the meantime disappeared" insofar as the act of typing was no longer considered to be a hardship. However, according to the complainants, the archives show that the typing allowance was not introduced as compensation for typing. When it was extended to clerical staff, this was done to avoid discrimination between staff doing essentially the same job, and typing was merely the objective criterion used to determine whether a clerical officer was indeed performing tasks similar to those of a secretary, which would render him or her eligible for the allowance by analogy.

Secondly, they submit that the Agency has breached the agreement it reached with the unions in May 1998, during the above-mentioned consultation process, whereby the unions accepted the proposed measure in return for the Agency's assurance that it would "settle all open cases". They refer to the fact that, after the said agreement had been reached, the Agency refused to grant the allowance by analogy to Flight Data Operators. Those recruited prior to May 1998 ultimately received the allowance as a result of Judgment 1959, but those recruited subsequently were denied it.

The complainants ask the Tribunal to order the Agency to grant them the typing allowance with effect from the date when they joined Eurocontrol, together with interest.

C. In its reply the Agency submits that the complaints filed by Messrs B., D., R. and V. are time-barred. It argues that these complainants, who chose to challenge the implicit rejection of internal complaints submitted on 11 May 2002, ought to have filed their complaints with the Tribunal no later than 11 December 2002, in accordance with Article 93(3) of the Staff Regulations.

Eurocontrol also considers the complaints filed by Messrs C. and S. to be time-barred under the Staff Regulations. It submits that these complainants, who chose to challenge the express rejection of their internal complaints, failed to comply with the deadlines set out in the above-mentioned Article 93(3) and ought to have challenged the

implied rejection of their complaints instead.

On the merits, the Agency submits that the reasons for the abolition of typing allowances granted by analogy were made perfectly clear during the consultation process. It produces the minutes of the consultation meeting of 5 May 1998 to support its view and notes that counsel for the complainants, who attended that meeting in his capacity as a staff representative, did not comment on this issue at the time. The Agency considers this plea to be irrelevant five years later.

Regarding the allegation that it has breached its agreement with the unions, the Agency maintains the view expressed by the Director General in his letters of 1 March 2002, namely that the refusal to grant the complainants the typing allowance by analogy was consistent with the terms of office notice 8/98, which was validly issued after full consultation with the staff unions. Under the consultation procedure, the unions are allowed to express their views, but they have no authority to give a conditional approval. Their views were duly taken into account and were reflected in the wording of office notice 8/98, which allowed for the possibility of reviewing the cases of staff meeting the conditions for an award by analogy before and after 1 January 1996.

The Agency considers that since the complainants joined Eurocontrol after the date on which the granting of the typing allowance by analogy was terminated, they cannot claim to have suffered discrimination. The rules applicable to them are those in force at the time of their appointment or as subsequently amended.

The defendant asks the Tribunal to award costs against the complainants in view of the frivolous nature of their complaints.

D. In their rejoinders the complainants maintain their arguments on the merits. They acknowledge that the Agency's objection to receivability is "probably formally correct" with regard to two of the complaints, but refer to Judgment 1720, in which the Tribunal held that "time limits, though necessary in law, are not supposed to set traps". They criticise the Agency for abusing the statutory time limits for appeals by habitually delaying the referral of internal complaints to the Joint Committee for Disputes.

E. In its surrejoinders the Agency denies that its delay in responding to the internal complaints was deliberate and maintains both its objection to receivability and its arguments on the merits.

## CONSIDERATIONS

1. The complainants, all clerical officers, submitted requests to the Director General between 13 and 20 December 2001 for attribution of the fixed allowance by analogy. Some of them also expressly challenged the legality of the decision announced in office notice 8/98 of 14 May 1998, which terminated the practice of awarding the fixed allowance by analogy to clerical officers who, like them, entered the service of the Agency after 14 May 1998. They also asked that said office notice be revoked.

2. The two series of 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. In the circumstances, it is not necessary to rule on the application submitted by Mr S. S. to intervene in the case of B. and others.

3. The Agency objects to the receivability of the complaints, but in the light of the Tribunal's decision on the merits of the case there is no need to deal with the issue of receivability.

4. The complaints pertain to the payment of the fixed "typing allowance" under Article 4a of Rule of Application No. 7 of Eurocontrol's Staff Regulations. Article 4a provides for payment of the allowance to specified employees performing typing duties. This provision, which for many years was also applied by analogy to certain categories of staff not expressly mentioned in it, has acquired a settled interpretation through a series of judgments rendered by the Tribunal (see Judgments 1403, 1461, 1462, 1601, 1712, 1959 and 2149).

5. Office notice 8/98 of 14 May 1998 put an end to the practice of awarding the fixed allowance by analogy. In effect, from the date of the publication of that office notice, Article 4a was to apply only to the staff referred to therein, namely, officials employed as copy typists, shorthand typists, telex operators, varitypists, executive secretaries or principal secretaries, thus excluding clerical officers who had entered the service of the Agency after

14 May 1998. This explicit provision barred the complainants from receiving the fixed allowance by analogy since they all joined the Agency after the cut-off date of 14 May 1998.

6. In the requests they submitted to the Director General in December 2001, the complainants asked for payment of the typing allowance, arguing that they fell within the category of staff who were entitled to it by analogy. Since they were to be deprived of the allowance under the terms of office notice 8/98, they challenged the legality of the decision to abandon the attribution of the typing allowance by analogy, contending that it had been imposed by fraudulent means and that the Administration had not honoured the terms of its agreement with the unions stipulating that all pending cases would be settled.

7. The Director of Human Resources, on behalf of the Director General, rejected the complainants' requests on 1 March 2002. Among other things, he explained that the decision to stop awarding the typing allowance by analogy was arrived at after consultation with the staff unions in accordance with the 1992 Framework Agreement, and that the said Agreement stipulated that the purpose of the consultation procedure was simply to consult the unions and not to obtain an "agreement" to which the subsequent decision of the Director General or the Permanent Commission would be subject.

8. During the consultation, the unions were able to express their respective views on the abolition of the typing allowance granted by analogy, but they had no authority either to object to the publication of the draft office notice or to give a conditional agreement whereby all pending cases had to be settled beforehand.

9. Since the matter concerned the application of a statutory text (Rule of Application No. 7), the final decision was taken by the Director General in the light of the consultation report and published in office notice 8/98 on 14 May 1998.

10. Eurocontrol objects to the complainants' allegation that it used a "flawed argument" to abolish the granting of the allowance by analogy. It considers that such an assertion should have been made at the consultation meeting between the Agency and the staff unions five years earlier when the latter were given the opportunity to air their views and comments.

11. Additionally, Eurocontrol points out that it did not agree to "settle" all cases then outstanding in the sense that it had to reply positively to all applications without verifying whether the applicants met the criteria for the award of the allowance.

12. At the time when the complaints were filed, the Director General had already issued office notice 8/98 to all staff, announcing the termination of the award of the allowance by analogy, a decision which was the outcome of an exchange of views with the staff unions. When the complainants joined the Agency, such a policy was already in place.

13. The complainants have not successfully refuted Eurocontrol's contention that it did not need the unions' agreement to make the decision to issue office notice 8/98 and that the unions were not in a position to lay down any conditions.

14. Considering the foregoing, the complainants' claims for payment of the typing allowance fail. Nor is there any legal basis to contest the applicability of office notice 8/98.

15. The Tribunal sees no reason to allow the Agency's counterclaim to an award of costs against the complainants.

## DECISION

For the above reasons,

1. The complaints are dismissed.
2. The Agency's counterclaim is also dismissed.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.