

The Administrative Tribunal,

Considering the second complaint filed by Mr J.S. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 September 2005, Eurocontrol's reply dated 11 November 2005, the complainant's rejoinder of 14 February 2006 and the Agency's surrejoinder of 13 April 2006;

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. As stated in Judgment 2545, also delivered this day, the complainant, who is of Danish nationality, joined Eurocontrol in 1995. Both he and his wife are covered under the Agency's Sickness Insurance Scheme.

Rule of Application No. 10 of the Staff Regulations governing officials of the Eurocontrol Agency concerns sickness insurance cover. Article 8(1) of Rule No. 10 concerns "special reimbursements" and provides in part as follows:

"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."

Article 8(2) provides in part that:

"When the non-reimbursed portion of the expenses covered by the scales annexed to this Rule [...] exceeds during any twelve-month period half the average basic monthly salary [...] the special reimbursement [...] 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."

In September 2002 the complainant and his wife received dental treatment in Denmark. His wife received further treatment in July 2003. The complainant went through the normal procedure to obtain reimbursement through Eurocontrol's Sickness Insurance Scheme for two separate bills. The first bill was reimbursed by the Sickness Fund in October 2002 and the second in August 2003. The two bills together totalled 5,396.77 euros. He was reimbursed 2,244.94 euros and the part of the expenses that had to be borne by him thus amounted to 3,151.83 euros.

On 12 September 2003 the complainant submitted a request for special reimbursement under Article 8 of Rule No. 10, for the period from 1 September 2002 to 31 August 2003. The Supervisor of the Sickness and Accident Insurance Scheme Section acknowledged receipt of that request on 10 November 2003. By a letter of 25 February 2004 she informed the complainant that his request would be finalised when the "latest salary adjustment" had been received.

By a memorandum of 30 April 2004, which the complainant says he did not receive at the time, the Supervisor informed the complainant that the medical expenses that could be considered for special reimbursement had been reviewed, but it appeared that the portion of expenses not reimbursed by the Sickness Insurance Scheme was "not in excess of half [his] average basic monthly salary" and he was therefore not entitled to the special reimbursement. It was indicated that details of the calculation were attached to the memorandum. By an e-mail of 3 August the

complainant enquired about the status of his request for special reimbursement. On 9 August 2004 he received by e-mail a scanned version of the decision of 30 April; this copy did not include the calculations. According to the complainant, he only received the official copy of the decision, along with the attached calculations, on 19 November 2004. According to those calculations, the amount equal to half his average basic monthly salary for the period considered was given as 1,754.20 euros; the amount that he would have been due in special reimbursement was calculated at 1,683.17 euros.

By a letter of 15 February 2005, addressed to the Director General, the complainant filed an appeal against the decision denying him the special reimbursement. He explained why he thought the calculation was erroneous and claimed reimbursement of 3,151.83 euros, with interest from 12 September 2003. He also claimed 1,754.20 euros for the “inconvenience and additional time [the] matter [had] cost him”. The Organisation acknowledged receipt of his appeal on 9 March 2005. In his complaint to the Tribunal, filed on 14 September 2005, the complainant is challenging the implied rejection of the claims he put forward on 15 February 2005.

The appeal lodged by the complainant was referred to the Management Committee of the Sickness Insurance Scheme for advice. In an opinion issued on 2 June 2005, the Committee found that the complainant had misconstrued Article 8 of Rule No. 10, which had to be read in conjunction with Section XV of Annex I to Rule No. 10, as well as the relevant “rules of interpretation”. It recommended rejecting his appeal on the grounds that he was not entitled to special reimbursement. It considered that it was not competent to decide on the issue of the compensation he requested for “inconvenience”.

B. The complainant submits that the processing of his request for special reimbursement was “unnecessarily prolonged and delayed”. In his view, the Human Resources Directorate failed in its role to provide him “necessary and timely support”. He had to make numerous requests in order to receive the official copy of the decision of 30 April together with the calculations on which it was based, but did not actually receive them until 19 November 2004. Moreover, instead of forwarding his appeal of 15 February 2005 to the Joint Committee for Disputes, the Director General gave it to the Human Resources Directorate and, more particularly, to the same official who was involved in the decision-making process regarding his request for the special reimbursement. In the light of events at issue in Judgment 2545, on his first complaint to the Tribunal, the complainant considers that he has been “seriously discriminated against” and subjected to “administrative harassment”.

The complainant submits that because of the sparse information provided by Eurocontrol, it is not clear on what basis he was refused the special reimbursement. He points out that the total amount he had to pay against the two bills in question was 3,151.83 euros, which amounted to nearly his entire average monthly salary.

He seeks payment of the special reimbursement, with interest calculated from 12 September 2003, as well as moral damages and 3,000 euros in costs.

C. In its reply the Organisation states that the decision of 30 April 2004, by which the complainant’s request for special reimbursement was rejected, was legally correct and in accordance with the applicable rules, that is to say Rule of Application No. 10 as well as the relevant annexes thereto and the interpretation rules.

First, the complainant did not meet the requirement contained in Article 8(1) of Rule of Application No. 10, whereby the special reimbursement may be granted if the portion of expenses that is not reimbursed places “a heavy financial burden” on the staff member. As specified in the “Interpretation of Rule No. 10” in relation to Article 8(1), the “condition of ‘a heavy financial burden’ is deemed to be met when the portion of expenses not reimbursed amounts to 60% of the expenses incurred”. In his case the portion of expenses not reimbursed amounted to 3,151.83 euros, which was 58.4 per cent of the total amount of the two bills. Secondly, the complainant did not fulfil the requirement of Article 8(2) of Rule No. 10. The Organisation points out that the amount of 3,151.83 euros that the complainant actually paid is irrelevant to the calculation. The amount to be considered is the amount of costs that would be reimbursed in application of all the rules pertaining to special reimbursement, and not the amount that he effectively had to bear. Moreover, in order to calculate whether he qualifies for the reimbursement, expenses are assessed item by item.

The Organisation explains the basis for its decision of 30 April 2004, and refers to the calculation sheet that accompanied the decision. The calculation sheet showed item by item the amounts that the complainant would have been reimbursed under the rules pertaining to special reimbursement, and they totalled 1,683.17 euros. It is the sum of those amounts that would have to exceed the amount of half the complainant’s average basic monthly salary. In

his case, the total amount of 1,683.17 euros was clearly below the figure of 1,754.20 euros corresponding to half his average monthly salary. His request for special reimbursement therefore had to be rejected. Accordingly, it submits that the complainant's claims for moral damages and costs are unfounded.

D. In his rejoinder the complainant states that it was only when he received the Organisation's reply to the present complaint that he found out that his appeal of 15 February 2005 had been referred to the Management Committee of the Sickness Insurance Scheme. He draws attention to Article 16(2) of Rule No. 10, which provides that the opinion of the Management Committee shall be "transmitted simultaneously to the appointing authority and to the person concerned". No such report was sent to him, and that is why he is challenging the implied rejection of his internal appeal before the Tribunal.

He maintains that he is entitled to the special reimbursement, contending that he fulfils the requirement set out in Article 8(2) of Rule No. 10.

E. In its surrejoinder Eurocontrol says that due, it seems, to a particularly heavy workload arising from administrative reform, the Management Committee was not able to send its report to the complainant at the appropriate time. It denies that there are any grounds for his allegations of "administrative harassment".

The Organisation argues that the criteria for special reimbursement are different from those that the complainant is applying.

## CONSIDERATIONS

1. The complainant is a member of the Eurocontrol Sickness Insurance Scheme. His wife is also covered by that Scheme. In September 2002 the complainant and his wife received dental treatment in Denmark. His wife received treatment again in July 2003. The cost of the first lot of treatment was 3,227.62 euros of which the Sickness Fund reimbursed 1,242.61 euros. The cost of the second was 2,169.15 euros of which the complainant was reimbursed 1,002.33 euros. After various communications with the Sickness Insurance Scheme, the complainant submitted a request for special reimbursement pursuant to Article 8 of Rule of Application No. 10. The request was made on 12 September 2003 for the period 1 September 2002 to 31 August 2003.

2. The complainant's request was rejected by a decision dated 30 April 2004 but not received by him in written form until 19 November of that year. He lodged an appeal with the Director General on 15 February 2005 and it was referred to the Management Committee of the Sickness Insurance Scheme for an opinion. On 2 June 2005 the Committee recommended that the appeal be rejected. However, no formal decision was communicated to the complainant and, on 14 September 2005, he lodged his second complaint with the Tribunal. Although Eurocontrol contends that the complainant was aware of the reasons for the rejection of his request for special reimbursement well before 19 November 2004, it does not contend that his subsequent appeal to the Tribunal was irreceivable.

3. Article 8(2) of Rule of Application No. 10, pursuant to which the complainant made his request for special reimbursement, relevantly provides:

"When the non-reimbursed portion of the expenses covered by the scales annexed to this Rule [...] exceeds during any twelve-month period half the average basic monthly salary [...] the special reimbursement [...] 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:

- [...]

- 100 % [...]"

4. It is not disputed that the non-reimbursed portion of the expenses actually incurred by the complainant exceeded half of his average basic monthly salary. Nor is it disputed that the expenses actually incurred related to treatments covered by the scales in Annex III to Rule of Application No. 10. However, Eurocontrol contends that the complainant is not entitled to special reimbursement by reason of Annex I – Section XV – and the second

subparagraph of Section IV.1 of Annex I.

5. The “Interpretation” of Section XV of Annex I relevantly provides:

“Expenses exceeding by 50% [...] the cost corresponding to 100% [...] of the maximum rates laid down in Annex I to this Rule are to be considered excessive and will not be reimbursed under Article 8.2 [...], subject to the second subparagraph of Section IV.1 of Annex I.”

This second subparagraph provides that reimbursements under Annex III.A, which relates to dental treatment, may not exceed twice the maximum amount therein provided.

6. The effect of Sections IV and XV of Annex I is that the maximum additional amount that may be reimbursed to the complainant is 1,683.17 euros. Eurocontrol contends in its reply that this sum is less than half the complainant’s average basic monthly salary and, therefore, he is not entitled to any special reimbursement. It contends in its surrejoinder that the “amounts that would be reimbursed in addition to the costs [...] already [...] reimbursed” must exceed 50 per cent of the average basic monthly salary. No matter which way it is put, the argument is untenable. The condition for the payment of a special reimbursement is that the “non-reimbursed portion” of the expenses should exceed half the average basic monthly salary of the person concerned, not that the maximum which may be reimbursed should exceed that amount.

7. The meaning of Article 8(2) was considered in Judgments 2153 and 2154. In those cases Eurocontrol contended that the words “non-reimbursed portion of [...] expenses” should be construed as meaning “the portion of refundable medical expenses [...] which [...] remained at the charge of the member”. The arguments advanced in the present case by Eurocontrol repeat the error of law identified in Judgments 2153 and 2154, in which it was held that the “restrictive interpretation” then advanced could not stand. The interpretation advanced in those cases and, again, in the present case, is contrary to the plain meaning of the words “expenses” which, in its ordinary meaning, relates to “expenditure incurred”, as clearly pointed out in Judgment 2154. Moreover, the interpretation is inconsistent with the clear purpose of Article 8(2). The interpretation must be rejected.

8. In addition to his claim for payment of special reimbursement together with interest, the complainant seeks moral damages on the basis that the failure to make that reimbursement is another example of the discrimination of which he complained in his first complaint which is the subject of Judgment 2545 also delivered this day. The circumstances relating to the present case do not provide any basis for a finding of discrimination. However, until it filed its surrejoinder, Eurocontrol provided no explanation for its failure to provide the complainant with the opinion of the Management Committee. And although Eurocontrol has been aware since July 2002, when Judgments 2153 and 2154 were delivered, that its interpretation of Article 8(2) was not tenable, it has nonetheless maintained that interpretation and, thus, needlessly obliged the complainant to pursue his rights before the Tribunal. In the circumstances, there should be an award of moral damages in the amount of 1,000 euros.

9. The complainant is entitled to a special reimbursement of 1,683.17 euros which, as already pointed out, is the maximum which may be reimbursed. He is also entitled to interest at the rate of 8 per cent per annum from the date of his request, namely 12 September 2003, until the date of payment. Eurocontrol should pay the complainant costs in the amount of 500 euros.

## DECISION

For the above reasons,

1. The implied decision refusing the complainant’s appeal relating to a special reimbursement for dental expenses incurred during the period 1 September 2002 to 31 August 2003 is set aside.
2. Eurocontrol shall pay the complainant 1,683.17 euros together with interest at the rate of 8 per cent per annum from 12 September 2003 until the date of payment.
3. It shall pay the complainant moral damages in the amount of 1,000 euros.
4. It shall pay him costs in the amount of 500 euros.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.