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

THIRTY-SIXTH ORDINARY SESSION

In re BREUCKMANN

Judgment No. 270

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Organisation for the Safety of Air Navigation (Eurocontrol) drawn up by Mr. Elmar Breuckmann on 6 May 1975, the Organisation's reply of 11 June 1975, the complainant's rejoinder of 8 July 1975 and the Organisation's surrejoinder of 12 September 1975;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 70 and 87 to 93 of the Eurocontrol Service Regulations and Rules of Application Nos. 7 and 8;

Having examined the documents in the dossier, the oral proceedings suggested by the complainant having been deemed unnecessary by the Tribunal;

Considering that the material facts of the case are as follows:

A. By decision of 4 December 1969 the complainant, a citizen of the Federal Republic of Germany, was appointed to the Eurocontrol Agency at the grade of Chief of Division with effect from 15 April 1969. He has one child, who was born on 22 July 1964. For several years his wife had been authorised by a West German court to live separately from her husband with the child and a divorce was decreed on 23 January 1975. The complaint consists of two separate claims, but both are based on the fact that the complainant does not have the same place of residence as his former wife and his child. One claim is for reimbursement of travel expenses for annual leave, the other for payment of school allowance at a higher rate.

B. The first claim is for reimbursement of travel expenses for annual leave. Having discovered that the court had authorised the complainant's wife to live with the child in Salzburg, his home town, by letter of 3 December 1973 signed by the Director of Personnel and Administration the Administration refused to pay him in respect of 1973 the travel expenses prescribed in Article 4 of Regulation No. 8 for his wife and child. By letter of 2 January 1974 the complainant contended that that decision was based on an internal instruction of the European Communities which had no legal force in the Eurocontrol Agency and, besides, applied only to cases of divorce or judicial separation analogous to divorce, whereas in his case the West German court had decreed only "provisional" separation. On 9 January 1974 the Director of Personnel dismissed that argument on the basis of an interpretation of the actual terms of Article 4 of Regulation No. 8. On 28 February 1974 the complainant appealed to the Director-General, but to no avail. On 25 September 1974 he claimed reimbursement of travel expenses for 1974. That claim was refused in respect of the wife and child on the same grounds as those set out by the Director of Personnel on 9 January 1974.

C. The second claim is for payment of school allowance at the higher of two possible rates. The complainant was receiving school allowance in respect of his son only at the lower rate and by letter of 21 February 1974 put in a claim in accordance with the second paragraph of Article 3 of Rule of Application No. 7 for payment of the school allowance at the higher rate prescribed for any child attending school "away from the breadwinner's place of residence". By minute of 5 April 1974 the Director of Personnel consented and the complainant was paid the school allowance at the higher rate from 1 April 1974 until 30 June 1974. With effect from 1 July 1974 however, the words "away from the breadwinner's place of residence" were replaced by the words "away from the family home", and the complainant was informed by letter of 25 June 1974 that under the new rule he would be paid the allowance only at the lower rate. The complainant protested in a letter of 25 July 1974 to the Director of Personnel. An instruction of 6 August 1974 explained that "the family home is the place of residence of the father or of the mother" and that was confirmed in a letter of 2 December 1974 from the Director of Personnel to the complainant.

D. On 12 December 1974 the complainant appealed to the Director-General against the following decisions of the Director of Personnel and Administration: the decision of 1 October 1974 concerning the refusal to pay annual

leave expenses for his wife and child in respect of 1974 and the decision of 2 December 1974 to cancel payment of school allowance at the higher rate from 1 July 1974. Having received no reply from the Administration, on 6 May 1975 the complainant lodged a complaint with the Tribunal.

E. In support of his claim for payment of travel expenses the complainant argues that Article 4 of Rule No. 8 was misinterpreted in his case. Whereas the Organisation contends that only expenses actually incurred may be refunded, he points out that the rules refer to lump-sum payment and in his view that means a lump sum is to be paid to the staff member and his family and he is "free to decide whether or not he wishes to travel". The complainant further points out that since being separated from his wife in 1971 he and his wife and son have made the journey between Brussels and Salzburg far more often than would normally have been the case.

F. In support of his claim for payment of the school allowance at the higher rate, which he was refused from 1 July 1974, the date of amendment of Rule No. 7, the complainant contends that even on a literal interpretation of the new text he would be entitled to payment at the higher rate. In his view a child who lives with his mother but is maintained by his father does not have a single family home. His family home is not only with his mother, but also with his father, with whom he stays from time to time. If the father is a staff member it is the father's place of residence which matters. Since the child attends school at his mother's place of residence, in fact he is living away from his father's family home.

G. The complainant asks the Tribunal: (1) to declare the complaint receivable; (2) to quash all decisions of the Director of Personnel which are not final, namely: (a) the decision of 1 October 1974; (b) the decision of 3 December 1973; (c) the decision of 9 January 1974; and (d) the decision of 2 December 1974; (3) as regards the claim for reimbursement of travel expenses for annual leave: (a) to order the defendant organisation to pay in respect of 1974 the complainant's travel expenses as prescribed in Article 4 of Rule No. 8 relating to the reimbursement of expenses; (b) as appropriate, to order the Organisation to pay the expenses indicated above in respect of 1973; (c) to hold that with effect from 1975 the Organisation is bound to pay travel expenses for annual leave for the complainant's son in respect of the period during which he is the complainant's dependant: (4) as regards the claim concerning the school allowance: (a) to order the Organisation to pav with effect from 1 April 1971 the school allowance prescribed in Article 3 of Rule No. 7 relating to remuneration, less the amount paid for 1974; (b) to hold that the special rate of school allowance shall be paid in respect of the child for periods during which he is his father's dependant but lives with his mother: and (5) to award costs against the Organisation.

H. The Organisation notes that the complainant's claims for relief go much further than his original grievance and points out that any claims which have not formed the subject of an earlier appeal are irreceivable. A second reason why the claims are irreceivable is that the complainant is asking the Tribunal to make a judgment which shall apply in future. And thirdly, the complaint is irreceivable in that the time limits have not been observed. As regards the claim for travel expenses for annual leave of the wife ind child an appeal was submitted to the Director-General on 28 February 1974. Since no reply was given to that appeal by 29 June 1974, there was an implied decision to dismiss it, and the complaint therefore became time-barred on 30 September 1974 in accordance with Articles 92 and 93 of the Service Regulations. since the appeal of 12 December 1974 was submitted too late in regard to the claim for annual leave travel expenses, the complaint of 6 May 1975 is irreceivable in that respect. As regards the claim for payment of school allowance at the higher rate, the Organisation contends that the complaint of 6 May 1975 is again irreceivable since the appeal of 12 December 1974 was not lodged within the three months' time limit prescribed.

I. As to the merits, with regard to the claim for travel expenses, the Organisation points out that the purpose of Article 4 of Rule No. 8 adopted in pursuance of Article 70 of the Service Regulations is to enable the staff member, his wife and dependants to return regularly to his home town and to prescribe the payment of expenses relating to such travel. Hence the article does not apply to such persons as a wife and children who in any case normally live and reside in the staff member's home town since the complainant's son normally lives with his mother in Salzburg, the complainant's home town, the complainant cannot properly claim payment of travel expenses. Es regards the claim relating to the school allowance, the Organisation points out that Article 3, paragraph 2, of Rule No. 7 in the form adopted on 1 July 1974 prescribes payment of the higher rate when a child attends school "away from the family home". The family home has been defined as the place of residence of the father or of the mother. since the complainant's son attends school at his mother's place of residence the higher rate is not payable.

J. The defendant organisation accordingly asks the Tribunal: as to receivability: to declare the complaint irreceivable: as to the merits (should the question arise): subsidiarily, to dismiss the complaint as unfounded; again

subsidiarily: to dismiss the claim for compensation as unwarranted; and to award costs against the complainant.

CONSIDERATIONS:

As to the reimbursement of travel expenses:

1. According to Article VII, paragraph 1, of the Statute of the Tribunal a complaint is receivable only if the complainant has exhausted all means of redress available to him under the Staff Regulations, i.e. the internal means of redress. Hence Eurocontrol staff members may lodge a complaint with the Tribunal only if within a period of three months they have submitted an appeal to the authority empowered to make appointments, as provided for in Article 92(2) of the Eurocontrol Service Regulations. Moreover, the complainant's claims for relief are receivable only if they fall within the scope of that appeal.

On 28 February 1974 the complainant submitted to the Director-General, the authority empowered to make appointments, an appeal against the decision taken by the Director of Personnel and Administration on 3 December 1973 not to repay him travel expenses for his wife and son. The complainant contends that no effect was given to that appeal because he had been paid school allowance at the higher rate for his son and had thereby surrendered his claim to repayment of travel expenses. That explanation, which was given in a subsequent appeal dated 12 December 1974, raised no objection on the part of the Organisation and is in fact quite plausible. It is immaterial whether or not the appeal of 28 February 1974 formed the subject of a legal compromise. Be that as it may, it appears that the complainant withdrew his claim only on condition that he would continue to be paid the school allowance at the higher rate, and the competent authorities of the Organisation were quite aware of that. Hence, since he lost that allowance on 1 July 1974, from that date he was entitled to allege non-fulfilment of the condition and to revive the claim which he had temporarily withdrawn. No doubt he might have directly invited the Director-General to decide on that claim. There being no text which covers his particular case, however, he cannot be held to account for first submitting a new claim to the Director of Personnel and Administration on 25 September 1974. Although the Director refers merely to a letter of 9 January 1974 his decision of 1 October 1974 to dismiss the complainant's claim should therefore be regarded, not as merely confirming an earlier decision and not giving rise to further appeal, but rather as a new decision, and the complainant was entitled to appeal to the Director-General against that decision within three months, as indeed he did on 12 December 1974. Hence he had recourse in accordance with the relevant rules to the internal means of redress in pursuing his claim for repayment of travel expenses.

It appears from the foregoing, however, that the complaint is irreceivable in so far as the claims for relief go beyond those set out in the appeal of 12 December 1974. That appeal relates solely to the Director of Personnel's decision on 1 October 1974 to dismiss "a claim for repayment of travel expenses for annual leave in 1974". The Tribunal cannot therefore consider the claims under headings 3(b) and (c) for repayment of travel expenses for 1973 and from 1975. The Tribunal has to consider only the claim ir respect of 1974.

2. According to Article 4.1.1 of Rule No. 8 relating to the repayment of travel expenses:

"The staff member is entitled for himself and, if he is entitled to residence allowance, for his wife and dependants within the meaning of Article 2 of the rule relating to remuneration, to lump-sum payment of expenses of travel from the duty station to the place of origin defined in Article 3 above, on the following conditions...".

As the Organisation concedes in its surrejoinder, the words "lump-sum" in this article relate "to the number of journeys, the calculation of the distance and the rate per kilometre". Hence the amount of expenses paid by the Organisation will not vary, however often the staff member and his family travel each year from the duty station to the place of origin and whatever means of transport they use. On the other hand, contrary to what the complainant contends, Article 4 of Rule No. 8 cannot be interpreted to mean that a staff member may claim repayment of travel expenses for his wife and children when they live in the place of origin. If the article were interpreted so widely it would not serve its purpose. As appears from the text, that purpose is to enable staff members and their family to visit their place of origin from time to time. Hence it does not apply in respect of a wife and children who live in the place of origin.

The complainant's home town is Salzburg, in Austria. Since 1971 his wife and son have lived in Salzburg and not in Brussels, which is his duty station. He cannot therefore properly claim repayment of expenses for any journeys they may have made in 1974 from one city to the other.

As to the rate of school allowance payable:

3. On 21 February 1974 the complainant asked the Director of Personnel and Administration to calculate the school allowance payable for his son on the basis of Rule No. 7. His claim was met with effect from 1 April 1974. Rule No. 7 was amended by circular No. 37/74 of 17 June 1974 and the Director of Personnel told the complainant on 25 June 1974 that under the amended text his allowance would be reduced from 1 July 1974. Since that notification was tantamount to a decision, the complainant was entitled to appeal against it to the Director-General within three months. Instead of doing so he wrote to the Director of Personnel on 25 July 1974 asking for an explanation. He had to wait until 2 December 1974 before receiving a reply. Referring to the notification of 25 June 1974, the Director explained that circular No. 37/74 removed the notion of "breadwinner" found in the provisions in force in the European Communities and was supplemented by circular No. 47/74, which determined the place of residence of the father or of the mother to be the family home. On 12 December 1974 the complainant appealed against both the reply of 2 December 1974 and the decision of 1 October 1974 relating to his claim for repayment of travel expenses.

In determining whether he exhausted the internal means of redress the Tribunal has to consider whether the reply of 2 December 1974 merely confirms an earlier decision. If so, then the complainant did not use the means of redress available since he failed to appeal to the Director-General within three months against the confirmed decision, namely the notification of 25 June 1974. If it is not a mere confirmation, however, the reply of 2 December 1974 gave rise to a further three-month time limit, which the complainant respected since he appealed on 2 December 1974. The second of the two hypotheses is the correct one. In view of the explanations which it contains, and in particular the reference to a circular subsequent to the notification of 25 June 1974, the reply of 2 December 1974 is not a mere confirmation of that notification. In fact it is a new decision which gave rise to a new time limit for appeal. Hence the complainant had recourse to the internal means of redress in accordance with the relevant rules.

The complainant's claim for relief under heading 4(a) must nevertheless be dismissed outright insofar as it relates to any period preceding 1 July 1974. First, on unconditionally accepting payment of the school allowance at the higher rate with effect from 1 April 1974 the complainant implicitly surrendered his claim for the period preceding that date. Secondly, from 1 April to 30 June 1974 he was actually paid that allowance. Claim 4(b) - for a declaration of his entitlement to payment of the school allowance at the higher rate for as long as the child is his father's dependant but lives with his mother - is in principle receivable, subject to amendment of the relevant rules. In other words, the question to be determined is whether from 1 July 1974 the complainant's claim is allowable under the provisions in force.

4. Under Article 3(1) of Rule No. 7 relating to remuneration staff members are entitled to payment of "school allowance for each dependent child within the meaning of Article 2, paragraph 2, above who is in regular and full-time attendance at an educational establishment". According to Article 3(2)(1) as originally worded school allowance was payable at the higher rate only in respect of children "attending a university or similar establishment or a school away from the breadwinner's place of residence". Circular No. 37/74 of 17 June 1974 amended that provision by replacing the words "away from the breadwinner's place of residence" with the words "away from the family home".

The complainant argues that "the family home" means the place of residence of the father who is required to maintain children in respect of whom school allowance is payable. The Organisation, on the other hand, contends that if the parents are separated the family home is the home of the parent who has custody of the child. The latter interpretation is more in keeping with the purpose of payment of school allowance at the higher rate. Payment of such an allowance is warranted where the child attends school away from the place of residence of the parent with whom he normally lives - that is, if his education entails unusual expenditure. If, however, the child attends school at the place of residence of the parent who has custody of him, that is a normal situation and there is no reason to pay the allowance at the higher rate. It is immaterial that the parents are separated and that, though living with his mother, the child is a dependant of the father. It is true that in the present case the child's maintenance is in general more costly to the father than it would be if father and son were living together. But that is a consequence not of the choice of school but of the separation of the parents, and the Organisation cannot be held liable therefor.

The complainant and his wife were separated in 1971. Since then the child has lived with his mother in Salzburg, where he attends school. He therefore does not attend school away from the family home within the meaning of Rule No. 7. Nor is he attending a university or similar establishment. The complainant is therefore not entitled to

payment of the school allowance at the higher rate.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, T.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 12 April 1976.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

Updated by PFR. Approved by CC. Last update: 7 July 2000.