Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3361**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 21 November 2011 and corrected on 24 December 2011, Eurocontrol's reply of 4 April 2012, the complainant's rejoinder of 1 June and Eurocontrol's surrejoinder of 6 September 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. On 15 March 2009 the complainant sent to Eurocontrol's Sickness Insurance Scheme (hereinafter the "Insurance Scheme") an estimate and an application for prior authorisation for a course of orthodontic treatment. Although on 31 July the application was rejected, she began the treatment in October 2009.

On 19 August 2010 the complainant submitted a request for advance payment and an application for prior authorisation in anticipation of a surgical operation of an orthodontic nature which

would require hospitalisation. The operation took place on 30 August, although she had been informed on 27 August that her request for payment had been refused. On 14 September the Settlements Office informed her that the refusal was based on the opinion of the consulting doctor, who considered that the "treatment was not functional".

On 8 December 2010, acting under Article 92 of the Staff Regulations governing officials of the Eurocontrol Agency (hereinafter "the Staff Regulations"), the complainant filed an internal complaint against the decisions of 31 July 2009 and 14 September 2010. In accordance with Article 35 of Rule of Application No. 10 of the Staff Regulations, concerning sickness insurance cover, the complaint was transmitted to the Management Committee of the Insurance Scheme. On the basis of recommendations made by the Committee, the Director General decided to dismiss as time-barred the complainant's claim seeking cancellation of the decision of 31 July 2009, and not to grant her any compensation for moral injury. He proposed, however, that she should invite the medical practitioners who had treated her to meet with the consulting doctor and the consulting dentist of the Insurance Scheme, and explained that a final decision would be taken following those consultations. By a memorandum of 12 October 2011, which constitutes the impugned decision, the complainant was informed that her internal complaint was being dismissed as unfounded.

B. The complainant contends that her request of 15 March 2009 should not have been rejected as time-barred because, in her view, the orthodontic treatment she followed cannot be dissociated from the surgical operation she underwent in 2010. She points out that no reasons were given for the decision of 27 August 2010, and complains that she was treated in an off-handed manner. She disputes the reasons for refusal given to her on 14 September 2010, and argues that the practitioners she had consulted had made clear than in her case, treatment was both necessary and functional. She therefore concludes that the expense she has borne ought to be reimbursed, because according to Article 20 of Rule of Application No. 10, the only

treatments not reimbursed are those which are deemed to be non-functional or unnecessary. In her view, Eurocontrol failed in its duty of care, put her through a "Kafkaesque" form of torment and prioritised the financial aspect to the detriment of her health.

The complainant also alleges that the Management Committee failed to seek expert medical advice, which it was authorised to do under Article 35 of Rule of Application No. 10. As for the Director General, she complains that he rejected forthwith the Committee's recommendation to proceed to arbitration if the meeting between the above-mentioned practitioners, the consulting doctor and the consulting dentist proved unsuccessful. She states that it was not possible to organise that meeting, and that in September 2011 the Insurance Scheme finally sought the opinion of an expert who not only was not impartial, but failed to transmit to her a copy of the report he had written.

The complainant requests the Tribunal to set aside the impugned decision and, in consequence, to order Eurocontrol to reimburse her the cost of her orthodontic treatment and her surgical operation, with interest, and also to cover and reimburse her for all past and future post-operative care. She also claims 5,000 euros in compensation for the moral injury sustained, and the same amount for costs.

C. In its reply, Eurocontrol states that the orthodontic treatment and the surgical operation undergone by the complainant were not indissolubly linked. As she did not challenge the decision of 31 July 2009 within the time limit allowed for doing so, she is time-barred for that purpose.

On the merits, Eurocontrol states that the rejection of her requests for payment was based on the opinion of several outside experts, who concluded that a course of orthodontic treatment and an operation were neither functional nor necessary. The complainant has not proved that the handling of her application was biased, and moreover, "excessive laxity" in the management of the Insurance Scheme has to be avoided. The complainant had taken a contradictory stance in first complaining that the Management Committee had not sought an

opinion from a medical expert, and then criticising it when it did consult one in September 2011.

D. In her rejoinder, the complainant argues that her internal complaint was admissible because the time limit had begun with the reasoned decision of 14 September 2010. She also alleges a conflict of interest, because the head of the Settlements Office submitted to members of the Committee a report which, according to her, recommended that her complaint should be rejected for financial reasons, and then took part in the meeting at which the complaint was discussed.

E. In its surrejoinder, Eurocontrol maintains its position. It explains that it was for the purpose of giving an informed opinion on the complainant's internal complaint that the Management Committee decided to invite the head of the Settlements Office to attend its meeting, but she did not have a vote at the meeting.

CONSIDERATIONS

1. The subject of the complaint is the decision of 12 October 2011 by which the Director General of Eurocontrol rejected the complainant's internal complaint dated 8 December 2010, seeking payment by Eurocontrol's Sickness Insurance Scheme (hereinafter "the Insurance Scheme") of the cost of a course of orthodontic treatment beginning in October 2009, and of a maxillofacial surgical operation she underwent on 30 August 2010.

2. Reimbursement of the medical and hospital expenses incurred by members of the Insurance Scheme is governed by Rule of Application No. 10, adopted in accordance with the Staff Regulations and the General Conditions of Employment of staff members of the Eurocontrol Centre at Maastricht.

3. Where the reimbursement of expenses is subject to prior authorisation, a member of the Insurance Scheme must, except in

emergencies, apply to the Settlements Office for authorisation before the beginning of the treatment. The application form must be accompanied by a detailed medical prescription or a full medical report on the treatment received. The decision on the application is taken on the advice of the Medical Adviser, who determines whether the treatment is appropriate. In some cases, the Medical Adviser may contact the prescribing doctor before giving an opinion. (General Provisions on the reimbursement of medical costs, Rule of Application No. 10.)

The cost of orthodontic treatment is subject to prior authorisation from the Settlements Office, on presentation of an estimate and subject to the opinion of the Dental Adviser. The cost of treatment for persons over the age of 18 at the start of treatment is reimbursed only in the case of serious disease of the buccal cavity, maxillofacial surgery, maxillofacial trauma or serious problems of the temporomandibular joint diagnosed by X-ray and clinical examination. In all cases, only 80 per cent of the costs of orthodontic treatment are reimbursed, with a maximum limit of 3,300 euros for the overall treatment. (Title II of the above-mentioned General Provisions, Rules on reimbursement, Chapter 5, Dental care, treatment and dental prostheses, paragraph 3, subparagraphs 1 and 2.)

The cost of treatment deemed to be non-functional or unnecessary by the Settlements Office after consulting the Medical Adviser will not be reimbursed (Article 20, paragraph 3, of Rule of Application No. 10).

4. The procedures applicable to prior authorisation and applications for reimbursement are governed by Articles 27 and 28 of Rule of Application No. 10, which read as follows:

"Article 27

Prior authorisation

Where, pursuant to these Rules, reimbursement of expenses is subject to prior authorisation, the decision shall be taken by the Director General or by the Settlements Office designated by the Director General in accordance with the following procedure:

a) the application for prior authorisation, together with a prescription and/or an estimate made out by the attending dentist or doctor, shall be submitted by the member to the Settlements Office, which shall refer the matter to the Dental or Medical Adviser if need be. In the latter case, the Dental or Medical Adviser shall transmit his opinion to the Settlements Office within two weeks;

b) the Settlements Office shall take a decision on the application if it has been appointed to do so or shall transmit its decision and, where applicable, that of the Dental or Medical Adviser to the Director General for a decision. The member shall be informed of the decision forthwith;

c) applications for reimbursement of expenditure on treatment for which prior authorisation is required shall not be considered unless the authorisation is requested before the treatment begins. An exception may be made in medically justified emergencies deemed to be such by the Medical Adviser of the Settlements Office.

Article 28

Applications for reimbursement

Applications shall be made by members to the Settlements Office on standard forms accompanied by the originals of the supporting documents […]."

5. Article 35 of Rule of Application No. 10 defines the appeal procedure as follows:

"1. Any person to whom this Rule applies shall be entitled to resort to the appeal procedure provided for in Articles 92 and 93 of the Staff Regulations or in Articles 91 and 92 of the General Conditions of Employment.

2. Before taking a decision regarding a complaint submitted under Article 92.2 of the Staff Regulations or Article 91.2 of the General Conditions of Employment, the Director General shall request the opinion of the Management Committee.

The Management Committee may instruct its Chairman to make further investigations. Where the point at issue is of a medical nature, the Management Committee may seek expert medical advice before giving its opinion. The cost of the expert opinion shall be borne by the Agency's Sickness Insurance Scheme.

The Management Committee must give its opinion within two months of the request being received. The opinion shall be transmitted simultaneously to the Director General and to the person concerned.

> Should the Management Committee fail to deliver an opinion within the period prescribed above, the Director General may take his decision."

6. The provisions concerning the Settlement Offices and the Medical Adviser attached to the Management Committee of the Insurance Scheme read as follows:

> "Article 40
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> Offices responsible for settling claims
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> […]
>
> 4. Medical and Dental Advisers shall be attached to each Settlements Office and perform the tasks specified in this Rule.
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> […]
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> 5. Each Settlements Office shall:
>
> a) accept and process applications for reimbursement of expenses submitted by members registered with it and make the relevant payments;
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> b) as provided for in these Rules and where matters of a medical nature connected with the payment of benefits are raised by the Management Committee or by the Central Office, consult the medical officer;
>
> c) examine applications for prior authorisation and take the necessary action;
>
> d) deliver opinions as provided for in this Rule;
>
> e) provide secretarial services for the Medical Advisers.
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> Article 41
>
> Medical Council
>
> The Management Committee shall be assisted by a Medical Council composed of the Medical Advisers attached to each Settlements Office.
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> The Medical Council may be consulted by the Management Committee or the Central Office concerning any matter of a medical nature which arises in connection with the Scheme. It shall meet at the request of the Management Committee, of the Central Office or of the Medical Adviser of the Settlements Officers and shall deliver its opinion within such time as may be specified."

7. Like the ceiling placed on costs, the requirement of prior authorisation for some forms of treatment is an appropriate

mechanism to protect the functioning and viability of the Insurance Scheme, in which the cost is shared between Organisation and staff, in line with the principle of solidarity (Article 72 of the Staff Regulations and the General Conditions of Employment; see Judgment 1094, under 24). One of the aims of this measure is to prevent unwise recourse to unwarranted medical and surgical treatments which are either unsuitable or carry risks disproportionate to the desired result, and which should therefore be avoided in the light of the precautionary principle.

8. The Tribunal, having before it a dispute relating to the payment or reimbursement of medical expenses, such as a challenge to the refusal of a prior authorisation, has to determine whether the material provisions have been complied with (see Judgment 992, under 10), but cannot substitute its own views for the medical opinions on which the impugned decision was based. This is especially true in cases such as the present one, where specialists regarded by both parties as being highly qualified have given different opinions on the advisability of a treatment and a surgical operation.

The Tribunal is, however, fully competent to assess whether the procedure that has been followed was correctly carried out, especially as regards respect for the adversarial principle or the right to be heard, and to examine whether the reports used as the basis for an administrative decision contain any substantive error or inconsistency, overlook essential facts or draw erroneous conclusions from the evidence (see Judgments 620, under 4, 1284, under 4, and 2361, under 9).

9. The first application by the complainant for prior authorisation related to a course of orthodontic treatment. It was submitted in accordance with the conditions laid down in Article 27 of Rule of Application No. 10, but was rejected by the Settlements Office on 31 July 2009. That decision could have been appealed through the internal appeal procedure provided for in Article 35 of the said Rule, within the three-month period specified in Article 92 of the Staff Regulations, to which this Article of the Rule refers. However,

the complainant, who began and completed her treatment after being notified that her application had been refused, did not appeal that refusal. It was only in her internal complaint of 8 December 2010, lodged against the rejection of another application for prior authorisation for a subsequent maxillofacial surgical operation, that she challenged for the first time the decision of 31 July 2009, using the appeal mechanism open to her. It must therefore be concluded that this internal appeal was time-barred insofar as it related to the refusal of prior authorisation for the orthodontic treatment.

Contrary to the arguments of the complainant, the file does not contain sufficient evidence to establish that the orthodontic treatment of 2009 and the maxillofacial surgical operation of 2010 were linked in such a way that the two medical procedures must be regarded as one. Her argument that the internal appeal against the refusal to authorise the surgical operation should also be deemed receivable with respect to the refusal to authorise the orthodontic treatment, cannot therefore be accepted. It would result in the unwarranted restoration of a time limit for internal appeals which was not observed.

It follows that on this point the complaint is irreceivable for failure to exhaust internal remedies, and must be dismissed for that reason, as the defendant requests in its principal claim.

10. On 19 August 2010 the complainant submitted a further application for prior authorisation under Article 27 of Rule of Application No. 10. This application concerned the maxillofacial surgical operation she was to undergo on the advice of the specialist who had previously prescribed her orthodontic treatment. The operation was scheduled for 30 August 2010. On 27 August 2010 the Settlements Office notified her that her application had been refused, on a form which merely indicated that the application was being refused and that an official would be available to provide further information. The operation took place on the scheduled date. On 14 September 2010 the Settlements Office gave a further notification of the refusal of the application for prior authorisation, on another form which stated:

> "Subsequent to the opinion of the Medical Adviser dated 27/08/10:
>
> Negative opinion given to the patient: treatment considered non-functional in relation to the report of pain in the left temporo-maxillary joint."

The reason for refusal was therefore the one mentioned in Article 20, paragraph 3, of Rule of Application No. 10.

11. It is not disputed that the surgical operation undergone by the complainant on 30 August 2010 was within the category of services for which reimbursement requires prior authorisation within the meaning of the General Provisions for implementation of the above-mentioned Rule, and that the complainant made an application for prior authorisation before the date set for the operation.

Contrary to the view apparently taken by the Management Committee of the Insurance Scheme in its opinion of 29 March 2011, on which the impugned decision is based, the complainant cannot be criticised for having agreed to undergo her operation in spite of the refusal of prior authorisation, of which she was made aware on 27 August 2010. It is true that the General Provisions require the application for prior authorisation to be made before the treatment or services begin, but they do not require authorisation to be given before that time. It was therefore open to the complainant to run the risk of having to bear the cost of the operation herself if the refusal of prior authorisation was later confirmed.

It therefore remains to determine whether the decision to confirm that refusal at the end of the appeal procedure was justified or not.

12. It is clear that the application of 19 August 2010 was handled in conformity with the procedure laid down in Rule of Application No. 10. Admittedly, no reason was given for the refusal, and this could be regarded as irregular notwithstanding the information that the complainant was initially given orally, but this irregularity was corrected three weeks later through the notification of a decision which was adequately reasoned from the viewpoint of case law. More open to criticism is the fact that following the appeal procedure – which had so far been conducted in accordance with

the said Rule – the Management Committee invited the head of the Settlement Office which had been dealing with the case to take part in its meeting, the complainant herself being absent. However, for the reasons given below, there is no need to consider whether this constitutes a procedural flaw.

13. The question whether the maxillofacial surgical operation undergone by the complainant was functional or necessary was a very difficult one. Her doctor, and the expert she consulted, took the view that it was the appropriate method of putting an end to pain which was not contested to have been intolerable. The advisers to the Insurance Scheme suggested other approaches, and the expert consulted by the Scheme confirmed their opinion, with some differences of emphasis. Neither of the parties has questioned the professional judgement involved in these findings. The operation recommended by the former two seems to have achieved the desired result.

In its opinion of 29 March 2011, the Management Committee stated that the procedure had been conducted properly, that the Settlement Office had not acted wrongly and that compensation for moral injury would not be justified. It nevertheless took the view that the outcome of the procedure was unsatisfactory. That is why it recommended not only a process of consultation amongst the practitioners concerned, but also, if the consultation failed to arrive at a solution, the appointment of "an independent doctor […] entrusted by the parties with the task of resolving the matter". The requested consultation took place, in a manner and in circumstances that need not be described here. It failed. The Director General ought then to have sought an independent expert opinion, unless he stated that he did not endorse this part of the recommendation. In the event, although he stated in a memorandum of 3 May 2011, to which his decision refers, that he agreed with the opinion of the Management Committee, he did not seek an independent expert opinion, being of the view that a report from the Medical Council was sufficient. He thus departed from the recommendation of the consultative body on this essential point without clearly stating his reasons.

14. The right to an internal appeal is a safeguard enjoyed by international civil servants. The ultimate decision-maker cannot therefore depart from the conclusions and recommendations of the internal appeal body without giving adequate reasons for her or his decision (see Judgments 2699, under 24, 2833, under 4, and 3208, under 11). As this requirement was not observed in this case, the impugned decision must be set aside insofar as it confirms the refusal of prior authorisation for the maxillofacial surgical operation.

15. In the light of the circumstances revealed by the evidence on file, it is justified for the Tribunal to order the expert investigation recommended by the Management Committee. Eurocontrol will therefore be required to commission an independent expert to determine conclusively whether the maxillofacial operation undergone by the complainant was an appropriate or functional means of restoring her health.

16. The complainant is entitled to compensation of 4,000 euros for the moral injury she has suffered.

Having succeeded in part, she is also entitled to 3,000 euros in costs.

DECISION

For the above reasons,

1. The decision of 12 October 2011 is set aside insofar as it confirms the refusal of the prior authorisation required for the maxillofacial surgical operation.

2. The case is referred back to Eurocontrol for further action as stated in consideration 15 above.

3. Eurocontrol shall pay the complainant compensation of 4,000 euros for moral injury.

4. It shall also pay her 3,000 euros in costs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ