

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

FIFTY-EIGHTH ORDINARY SESSION

In re FLICK

Judgment No. 743

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Peter Flick on 6 February 1985 and corrected on 5 March, Eurocontrol's reply of 12 June, the complainant's rejoinder filed on 5 July and Eurocontrol's surrejoinder of 2 August 1985;

Considering the brief submitted on 4 December 1985 by Mr. Kees Scholts at the Tribunal's invitation and the observations thereon filed by the complainant on 17 December 1985 and by Eurocontrol on 8 January 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 62, 67(1)(a) and (b) and (2) and 91 of the General Conditions of Employment governing officials of the Eurocontrol Agency and Article 2 of Eurocontrol Rule 7 concerning remuneration;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant is an official of the Agency in Maastricht. He has a son, Thorsten, by his first wife. On 18 July 1984 he married as his second wife Dianne née Stenvert, the former wife of another Agency official, Mr. Kees Scholts. By Mr. Scholts she has a son, Pim, of whom she has custody and who lives with her and the complainant. Her first husband, Mr. Scholts, pays her alimony for the maintenance of Pim. By a notice of 10 September 1984 the head of Personnel of the Agency informed the complainant that Pim was to continue to be treated as his father's dependant. On 18 September the complainant submitted to the Director General a "request" for a decision under Article 91(1) of the General Conditions of Employment, claiming payment of the child allowance, which is worth 5,237 Belgian francs a month. On 14 November the Director of Personnel and Administration refused. On 5 December the complainant lodged a "complaint" under Article 91(2). Having received no answer, he is challenging the implied decision to reject it.

B. The complainant observes that under Article 2 of Rule 7 concerning remuneration an official shall receive an allowance for each "dependent child", this term being defined as meaning "the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official". Pim Scholts is beyond question living under the complainant's roof and, as he can readily prove, being maintained by him. There is nothing in the rules which says that the complainant's rights thereunder can be affected by the rights of any other, even Pim's father. He seeks the quashing of the decision and payment of the child allowance as from 18 July 1984.

C. In its reply Eurocontrol observes that the complainant does not mind receiving the allowance from the Agency for his own child Thorsten, yet expects the Agency to pay him the allowance for Pim Scholts as well. Although Pim lives under the complainant's roof, what Article 2(2) of Rule 7 requires is that the child be "actually being maintained by the official". Under the divorce settlement his mother is receiving from Mr. Scholts a monthly sum for maintenance of their son, and her second marriage has not shifted responsibility for his maintenance to the complainant. The latter does not even deny that Pim remains Mr. Scholts's dependant. What he wants is that the allowance be paid twice over. That clearly runs counter to the letter and spirit of Article 2 of Rule 7 and Article 67(1)(a) and (2) of the General Conditions of Employment.

D. In his rejoinder the complainant observes that Eurocontrol admit by implication that if Mr. Scholts were not a staff member the complainant would be entitled to the allowance provided he was actually maintaining the child. The distinction Eurocontrol draw between actual maintenance and letting Pim live under the complainant's roof is a false one: there is nothing in Rule 7 to suggest that the mere payment of alimony as a contribution towards the costs of bringing up a child amounts to maintenance. What counts is the provision of food, lodging, education, care

and so on, and that depends on the complainant, even if contributions come from elsewhere. There is nothing in Article 67 of the General Conditions of Employment or in Rule 7 which precludes giving the complainant satisfaction. He is neither challenging nor upholding Mr. Scholts's rights, which are immaterial, nor has he ever acknowledged that the child is still Mr. Scholts's dependant. He presses his claims.

E. In their surrejoinder Eurocontrol develop in detail the arguments in their reply and seek to rebut the pleas in the rejoinder. They submit in particular that it is Mr. Scholts who is actually maintaining the child and who has the legal obligation to do so; that if the complainant is dissatisfied with the amount of the alimony, the solution is to apply to the courts for an increase; that the payment of the allowance to Mr. Scholts is not in question; and that the wording of Article 67 is not consistent with paying the allowance to two officials for the same child, as is borne out by the case law of the Court of Justice of the European Communities.

F. At the Tribunal's invitation Mr. Scholts filed observations on the complaint, reply, rejoinder and surrejoinder. He says it is not for him to comment on the complainant's claim to payment of a child allowance by Eurocontrol, but observes that the complainant is receiving such an allowance for his own son Thorsten, who is in the custody of his former wife, and that the rules cannot be applied differently to different staff members. In his observations on Mr. Scholts's brief the complainant says he does not deny that Mr. Scholts is making a contribution to the costs of maintaining Pim, but he observes that that does not mean he is not himself actually maintaining the child. In their further observations Eurocontrol develop their earlier submissions in the light of Mr. Scholts's and the complainant's additional briefs.

CONSIDERATIONS:

1. Article 62 of the General Conditions of Employment of Eurocontrol applicable to the staff in Maastricht reads: "In accordance with the terms of a ruling of the Director General and save as otherwise expressly provided, a servant who is duly appointed shall be entitled to the remuneration carried by his grade and step ... Remuneration shall comprise: ... 2) family allowances...". Article 67(1) states that the family allowances comprise: "b) Dependent child allowance of BF 4,881 per child per month", an amount which, according to the Agency's surrejoinder, has since been increased to 5,237 Belgian francs. Over and above the dependent child allowance the staff member is paid the household allowance and possibly the education allowance.

Article 2(2) of Rule 7 concerning remuneration states that the term "dependent child" means "the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official".

2. Dianne Stenvert married Kees Scholts, a Eurocontrol staff member, and had a child by him in 1978, called Pim. The marriage was dissolved and the divorce decree awarded custody of Pim to his mother, his father being ordered to pay her a monthly alimony of 350 guilders.

On 18 July 1984 the former Mrs. Scholts married the complainant, an air traffic controller also on the Eurocontrol staff.

In accordance with Article 67(2) of the General Conditions of Employment the complainant informed the Agency of his marriage and stated that Pim's father was paying his former wife 350 guilders a month; he asked that Pim should now be treated as his dependent child.

Eurocontrol have gone on paying the child allowance to Mr. Scholts since his divorce and they rejected the complainant's claim on the grounds that Pim should be deemed to be still the dependant of his father. They submit that they are bound to pay only 5,237 Belgian francs each month in respect of the child of the marriage between Dianne Stenvert and Kees Scholts. If they granted the complainant's claim they would seek repayment of the sums already paid to the father. The municipal court determined the amount of the father's contribution to the child's maintenance and in doing so took account of the child allowance he is receiving from Eurocontrol.

The complainant's case is that, together with his wife, he is actually maintaining the child. Eurocontrol were not a party to the case in which the court delivered judgment, and that judgment cannot alter his rights as a Eurocontrol official.

3. The Tribunal is therefore required to construe the term "dependent child" in Article 2(2) of Rule 7.

Both interpretations will square with the wording. The notion of dependence and that of maintenance may be

differently understood. It may be argued either that even a contribution is a form of maintenance or that anything short of full maintenance is not maintenance at all. The text being unclear, the Tribunal has to identify what the purpose of the allowance may be.

The chief purpose is to help with the child's upbringing and education, neither of the parents being supposed to derive benefit. In the event of divorce the duty to maintain and bring up the child falls mainly on the parent who is granted custody, the other having only a right of supervision and a duty to make some financial contribution.

Thus the spouse who is granted custody should ordinarily be deemed to bear actual and lasting responsibility for the child and should be entitled to payment of the child allowance. There is no sound reason to treat a divorced official as the breadwinner simply because he or she contributes towards the support of the child to the parent who has custody. It is the latter who is the breadwinner.

The amount of the contributions payable to a former spouse for a child in the latter's custody will of course vary. Often they will be covered by the amount of alimony paid to the former spouse, and the two components of the total amounts due cannot be disentangled. Very often, too, the contributions paid for the support of the child account for only a tiny fraction of the costs of maintenance. In that case it is not right that the parent who pays the alimony should receive the allowance in full and so derive unjust enrichment from a rule which has a social purpose. Although that does not seem to be the case here, the same construction has to be put on a rule whatever the facts may be. In any event the Tribunal could resort to such comparisons only if there was a precisely worded text specifying the different solutions to be applied to different sets of facts.

There is further justification for the Tribunal's ruling. A child allowance is not repayment of expenditure. To qualify for it the parent does not need to prove that expenses have been incurred, but may spend the money in the way that seems best for the child's welfare. It is not the employer but other bodies that will seek to check any abuses that may occur.

4. Such are the main reasons why, in keeping with earlier rulings on the subject, such as Judgment 216, the Tribunal holds that the complainant, who is actually maintaining his wife's child, is entitled to the child allowance and that the impugned decision must be set aside.

There is nothing in the Tribunal's ruling that is incompatible with the decision by the municipal court on the financial consequences of the divorce decree. The Tribunal and that court are on quite different ground.

5. A copy of the complaint has been passed on to Mr. Scholts and he has filed observations. The attitude the Agency should take towards him in the light of this judgment is no concern of the Tribunal's. Nor is the Tribunal called upon to rule on the complainant's position with regard to Thorsten, his own son by an earlier marriage, of whom his former wife has custody.

6. The complainant is referred to Eurocontrol for execution of this decision.

7. Eurocontrol shall pay him 3,000 guilders in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.

2. The complainant is referred to Eurocontrol for execution of the decision.

3. Eurocontrol shall pay him 3,000 guilders in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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