

SIXTY-FOURTH SESSION

***In re* AELVOET and others**

Judgment 902

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 9 September 1987 by:

Mr. D. Aelvoet

Mrs. V. Alminana

Mrs. B. Anderson

Mr. C. Barret

Mrs. J. Bero

Mr. J. Beyer

Mr. J. Blume

Mr. W. Bodenstein

Mrs. V. Brown

Mrs. M. Champion

Mrs. L. Charon

Mr. N. Clinton

Mrs. C. Correa

Mr. J-M. Cosyns

Mr. P. Cracco

Mr. M. de Faria e Torres

Mr. F.A.C. Degrijse

Mrs. J. Denolle

Mrs. E.M. Deter

Mrs. J. Drochmans

Mr. F.E. Dupont

Mrs. M. Engels

Mr. R.J-M. Engels

Mr. I. Evans

Mr. H. Exner

Mrs. G. Falkenstein

Mr. G.K. Gaydoul

Mr. W. Gorlier

Miss M-J. Graas

Mr. E.G. Hauff

Mr. L. Herbert

Miss G. Hody

Miss G. Hostyn

Mr. F.J. Jadoul (No. 2)

Mr. G.E. Karran

Miss A. Kaul

Mr. L. Kelly

Mr. B. Kirstetter

Mr. C. Kraaij

Mrs. M. Lacroix

Mr. G.P. Lambert

Mr. A. Lamesch

Mr. P.F. Lascar

Mr. C.L. Leclerc

Mr. Y. Lefebvre

Mr. A.L. Lemaire

Miss M. Lemoine

Mrs. B. Lenzi

Mrs. I. Luppens

Miss J. Mager

Mr. P.J.M. Maignon

Miss M. Martin

Mr. F.M. Moitier

Mr. M.F. Montana

Mr. P. Montenez
Miss A.E. Mounier
Miss R. Mouta Lopes
Mrs. A-M. Nieuweling
Mrs. C. Nihoul
Mrs. N. Owens
Mr. J-M. Pessus (No. 3)
Mr. P. Philips
Mr. J-M. Purnelle
Mr. L. Putz
Mr. J-L. Renteux
Mrs. M. Ribeiro Resende
Mrs. C.L. Richez
Mr. H. Robijns
Mr. A. Rutherford
Mr. C. Saey
Mr. J-J. Sauvage
Mr. J.C. Schiettekatte
Mr. G. Schoeling
Mrs. M.M. Schoeling
Mr. H. Schröter
Mrs. A. Stickland
Miss E.S. Taylor
Mr. R. Thacker
Mr. J.A. Thiecke
Miss S. Thoma
Mr. R.P. Tielemans
Miss P. van Berckel
Mrs. R. van Cauwelaert
Mr. A. van den Broeck

Mr. P. van den Wijngaard

Mr. H. van Droogenbroeck

Mr. J. van Raayen

Mrs. H. Vermaesen

Mr. F. Vermoesen

Mr. W.E. Warner

Mr. J. Wondergem

Mr. M.A. Woods

Mr. A. Xhonneux

Mrs. R.M. Xhrouet

Considering Eurocontrol's replies of 8 December 1987, the complainants' rejoinders of 12 February 1988 and Eurocontrol's surrejoinders of 28 April 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 1(2), 5 and 6.2(a) of the International Convention on Co-operation for the Safety of Air Navigation, concluded on 13 December 1960 and amended on 12 February 1981, Articles 3, 4 and 12 of Annex I to the Convention (the Statute of the Agency) and Articles 2, 62 to 87, 92 and 93 of the Staff Regulations governing officials of the Agency;

Considering that the complaints raise the same issues and should be joined to form the subject of a single decision;

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. At its 70th Session, on 25 November 1986, the Permanent Commission of the European Organisation for the Safety of Air Navigation decided:(a) to introduce a 5 per cent differential between pensions in the European Communities and pensions in Eurocontrol;

(b) to apply it to pension rights for the period after the date at which the pay differential attained the full rate of five per cent; and

(c) to approve a new text of Article 82 of the Staff Regulations for the purpose.

Although the decision did not become final until the Commission's 71st Session, on 7 July 1987, the complainants, who are staff members of Eurocontrol, filed internal "complaints" on 20 February 1987 under Article 92(2) of the Staff Regulations asking that it be set aside. By letters of 11 June 1987 they were informed that their appeals had been rejected as irreceivable and, subsidiarily, as devoid of merit.

B. The complainants submit that their complaints are receivable. Not only was the decision they challenge confirmed by the Commission at its 71st Session, on 7 July 1987, but the absence of individual decisions applying it is no bar to receivability because 92(2) says that appeal will lie against a "measure of a general nature". Besides, when such a measure is to affect the individual staff member only in the distant future so that in the meantime he cannot know what his rights will be, he has the right to appeal without further ado.

Turning to the merits, the complainants allege breach of their acquired rights. They submit that the usage of an international organisation forms part of the terms of appointment of its staff; that Eurocontrol has always adjusted staff pay, and so staff pensions as well, to pay and pensions in the European Communities; and that in approving the 5 per cent differential the Commission has unilaterally altered a fundamental and acquired right.

They further observe that no reasons are stated for the decision or at least none that are admissible in law, a mere wish to keep a formal connection between pensions and pay, to which the 5 per cent differential also applies, not being a material reason.

They ask the Tribunal to set aside the Commission's decision and the decisions of 11 June 1987 to reject their internal appeals and to award them costs.

C. The Organisation replies that the complaints are irreceivable. For one thing, the complainants have not awaited the conclusion of the administrative procedure laid down in the new text of Article 82 of the Staff Regulations for applying the Commission's decision of 7 July 1987 and so have failed to exhaust the internal means of redress. What is more, that decision is beyond challenge because it was not taken by the appointing authority.

The Organisation has subsidiary arguments on the merits. It maintains that since neither its Staff Regulations nor its usage prescribes parity in pay and pensions between Eurocontrol and the European Communities there has been no breach of acquired rights.

The plea that no reasons have been stated for the decision is unsound because the duty to state reasons for a decision, as laid down in the Staff Regulations, applies only to individual decisions by the appointing authority, not to general rules adopted by the Commission.

D. In their rejoinders the complainants submit that it is wrong to say a general decision is unchallengeable: their complaints are receivable because they have exhausted the internal means of redress in keeping with 92(2).

They develop their submissions on the merits.

E. In its surrejoinders Eurocontrol enlarges on its objections to receivability and on its subsidiary submission that the claims are devoid of merit.

CONSIDERATIONS:

1. The complaints have been filed by 94 officials of Eurocontrol who seek the quashing of a decision the Permanent Commission of the Organisation took at its 70th Session and duly approved, on 7 July 1987, at its 71st Session. The decision brought in a 5 per cent differential between pensions in Eurocontrol and pensions in the European Communities and for that purpose amended Article 82 of the Staff Regulations.

The material rules

2. The Organisation was set up under the International Convention on Co-operation for the Safety of Air Navigation, which was concluded on 13 December 1960 and amended by a protocol of 12 February 1981. Its activities are carried on by an Agency whose Statute is in Annex I to the Convention. According to Articles 1(2) and 5 of the Convention and 3 and 4 of the Annex the Agency is subject to the authority of the Permanent Commission, which is made up of representatives of member States, but actually administered by a Committee of Management, which is also intergovernmental, and by a Director General.

3. Article 12(1) of the Annex says that the Agency's Staff Regulations of the Agency shall be drawn up by the Committee of Management and submitted to the Permanent Commission for approval, as required by Article 6.2(a) of the Convention.

4. Staff pay is governed by Articles 62 to 87 of the Staff Regulations and pensions by 77 to 84. Article 65 provides for the periodic adjustment of pay and Article 82 for that of pensions. By a decision of 15 November 1986 the Organisation curtailed a pay rise.

5. After taking note of comments by the staff, an oral report from the Director General and a written one from the Committee of Management (WP/CN/70/5) the Permanent Commission decided on 7 July 1987 under the rules set out above:

"(i) to introduce a 5 per cent differential between European Communities and Eurocontrol pensions;

(ii) to apply the measure to pension rights in respect of the period after the date at which the remuneration

differential attained the full rate of five per cent;

(iii) to approve the new wording of Article 82 of the service regulations ...".

6. The new text of 82 authorised applying the "differential" to the "weighting", a factor that had till then been used only to take account of differences in "living conditions" and "income tax system" between the countries of assignment. It also required the Director General to make rules on the procedure governing the adjustment.

7. Circulars of 25 June and 16 July 1987 informed the staff of the text of the decision and the final approval of it.

8. Presumably the amendments to 82, though in an appendix, were the prerequisite in law for lowering the rate of pensions and the reduction the Commission approved on 7 July 1987 was made under the amended text. Though the Director General was to make rules to put the reduction into effect it is not clear whether he has yet done so.

The background and the pleadings

9. On 20 February 1987 the complainants addressed identical internal "complaints" to the Director General under Article 92(2) of the Staff Regulations. On 11 June 1987 they got identical replies rejecting their appeals as irreceivable and, subsidiarily, as unfounded. The terms of the appeals and replies are repeated in the parties' submissions to the Tribunal.

10. The complainants have two pleas on the merits: breach of their acquired rights and lack of reasons for the decision.

11. The former is their main plea. Eurocontrol has, they say, always followed the European Communities in the matter of pay and pensions by making the same adjustments, including an emergency levy. In their submission the practice is a fundamental term of employment at Eurocontrol and the unilateral amendment of it is in breach of the staff's acquired rights.

12. Their other plea is a subsidiary one: no reasons were given for the impugned decision, or at least none that pass muster in law. The only explanation is a reference to

the preparatory papers, and those papers refer in turn to the earlier decision to make the same cut in the pay of serving staff, a decision which the parties say is also under challenge.

13. The Organisation's main plea in reply is that the complaints are not receivable. It observes that the decision of 7 July was not the end of the administrative procedure for applying the new text of 82 and the complaints are premature because the complainants have not yet made use of all the internal means of redress. The decision is beyond challenge because it was not taken by the "appointing authority" within the meaning of Article 92 of the Staff Regulations. Its consequences are not yet quantifiable: what is at stake for the time being is "potential rights", not a situation that is specific in law. The collective nature of the complaints prevents review of the position of each complainant.

14. In answer to the plea of breach of acquired rights the Organisation points out that the Staff Regulations do not prescribe parity between pay in Eurocontrol and pay in the European Communities. Although it broadly follows the rules in the Communities it is not bound always to do so.

15. The Organisation further observes that it took care not to make the decision retroactive. According to precedent the doctrine of acquired rights does not bar non-retroactive amendment to the Staff Regulations. Besides Judgments 29 (in re Shérif) and 51 (in re Poulain d'Andecy), there was such a ruling in Judgment 429 (in re Gubin and Nemo) on a case about an increase in contributions to the Eurocontrol pension scheme: "An organisation's rules do not confer any acquired right on staff members except where ... the amendment of the rules will substantially alter conditions of service which they were entitled to expect would continue." (9).

16. To the plea that the reasons for the decision were unstated the Organisation's answer is that under the Staff Regulations reasons must be given only for individual decisions by the appointing authority, not for rules adopted by the Permanent Commission as the "supreme body". The Tribunal may not, by asserting a right to review the reasons for such rules, displace the Permanent Commission's view in favour of its own as to whether the rules are good policy.

17. As it is, says the Organisation, the impugned decision was warranted by the need to keep pensions in line with the cuts in pay rises.

18. The Organisation rejected the internal appeals as irreceivable, and both in their original briefs and in their rejoinders the complainants answer its objections to receivability. They acknowledge that the impugned decision is a general one and that individual decisions have not yet been taken to apply it, but they submit that that is no reason for declaring the decision immune to review: Article 12(2) of the Annex confers general competence on the Tribunal and Article 92(2) of the Staff Regulations states that general decisions are subject to appeal.

19. They further argue that a decision about pensions is of a somewhat unusual kind because years may elapse before its effects become apparent, only an immediate appeal will make the position in law known, and such appeal can lie only against the general decision. They cite a ruling by the Court of Justice of the European Communities in *re Deshormes* (17/78 of 1 February 1979, 10-13).

20. Such being the parties' submissions on receivability, the Tribunal must first take up the issue of its own competence.

Competence

21. According to Article 12(2) of the Annex to the Convention the Tribunal has "sole jurisdiction in disputes" between the Organisation and the Agency staff. More is said in Articles 92 and 93 of the Staff Regulations under the heading "Appeals". According to 93 the Tribunal is competent to hear "any dispute between the Agency and one of the persons referred to in the present Staff Regulations involving non-observance, in substance or in form, of the provisions of the present Regulations". Even if that may, as the complainants contend, suggest general competence the Tribunal's jurisdiction cannot go beyond the bounds set by the Organisation's procedure for taking decisions and the appeal procedure in the Staff Regulations. Such are the criteria for determining whether the complaints are receivable.

22. As the Organisation says, only a decision taken by the "appointing authority" will be challengeable under Article 92. According to Article 2 that authority is the Director General except for officials in grades A1 and A2, for whom it is the Committee of Management acting on the Director General's recommendation.

23. Article 92 gives a broad definition of challengeable decisions by the appointing authority. They may be express or, where the official's claim is not answered in time, implied. For the purpose of determining the time limit for appeal the express decision may be "a measure of a general nature", which will take effect on the date of publication, or a measure that "affects a specified person", which will take effect on the date of notification to him.

24. The only kind of decision against which appeal will lie to the Tribunal comes under Article 92, namely one taken by the appointing authority, and whether it is individual or general, express or implied, does not matter. Moreover, 92(1) requires that reasons be given for any decision by the appointing authority.

25. Thus of the Organisation's several objections to receivability it is the one about the authority that took the impugned decision that is fatal. The decision was taken by the Permanent Commission in exercise of the authority bestowed on it by Article 12 of the Annex, which empowers it, on the Committee of Management's proposal, to approve the Staff Regulations, including salary scales and pensions. Since the Commission is not the appointing authority its decisions are not subject to appeal under 92 and 93.

26. Though that is the conclusion to be drawn from the Convention and the Staff Regulations, Eurocontrol staff do have means of redress if they believe their interests to have been unlawfully infringed by a decision of the Permanent Commission's. They may seek relief once the appointing authority has taken, on the strength of the decision now impugned, a decision challengeable under 92 and 93. Both parties give figures to bear out their contentions. Whatever value the figures may have as evidence, the possibility of appeal is a real one, even though some time may have to go by first.

27. If a staff member later lodges an appeal under the Staff Regulations he may thereby also challenge the lawfulness of any decision of the Permanent Commission's that affords the legal basis for the individual decision by the appointing authority if he alleges breach of the rules and principles of the international civil service that are binding on the Organisation. As the Tribunal says in Judgment 899 (*in re Geisler and Wenzel*), under 19, an

organisation may not cite its own decision-making procedures to avoid compliance with the rules in dealings with staff.

28. The conclusion is that the complaints fail because they are irreceivable and that the other pleas need not be entertained. The applications for costs therefore fail as well.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner