

Registry's translation the French text alone being authoritative.

SEVENTY-FIRST SESSION

In re CUVELIERS (Nos. 1, 2 and 3), ESSLEMONT-RICHEZ (No. 3), F. J. (Nos. 3, 4 and 5), GÖTTLING, OURY (Nos. 1, 2 and 3), PARVAIS and PUSCH

Judgment 1119

THE ADMINISTRATIVE TRIBUNAL,

Considering the first, second and third complaints filed by Mr. August Cuveliers and Mr. Jacques Oury and the third, fourth and fifth complaints filed by Mr. G. F. J. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 11 May 1990, the Agency's replies of 26 July, the complainants' rejoinders of 30 October 1990 and the Agency's surrejoinders of 24 January 1991;

Considering the complaints filed by Mr. Hans Fritz Göttling and Mr. Hervé Parvais against Eurocontrol on 25 July 1990, the Agency's replies of 4 October, the complainants' rejoinders of 9 November 1990 and the Agency's surrejoinders of 8 February 1991;

Considering the third complaint filed by Mrs. Christine Esslemont-Richez and the complaint filed by Mr. Christian Pusch against Eurocontrol on 25 July 1990 and corrected on 3 August, the Agency's replies of 11 October, the complainants' rejoinders of 9 November 1990 and the Agency's surrejoinders of 8 February 1991;

Considering the applications to intervene filed by:

E. Abel

J. Abramowski
A. Abts
D. Aelvoet
K. Albert
A. Albertini
H-R. Altmann
J. Andriese
R. Angermeyer
H. Ansorge
L. Aridjis
F. Arrasse
B. Bams
A. Barnby
S. Basu
B. Baudier
M. Baudot-Zimmer
J. Beaufils
H-W. Becker
J. Beckers
B. Bedetti
D. Bell
B. Berecq
H. Bergevoet
J. Berthommier
M. Besson
J. Beyer
M. Biardeau
F. Bidaud
N. Bisdorff
R. Blau
L. Bleyens
B. Bocquillon
J. Bodar
P. Boland
H-J. Bolz
C. Bonadio

A. Bonne
H. Bons
F. Bontems
A. Booy
R. Borré
B. Böttigter
M. Borsu
A. Bos
J. Bouillier-Oudot
R. Braun
C. Breeman
C. Breeschoten
T. Brennan
O. Brentener
V. Brown
L. Brozat
M-N. Brun
H. Buck
W. Buckschewski
A. Bulfon
H. Burgbacher
F. Caloo
F. Carrara
F. Carson
B. Cassaignau
L. Cassart
M. Castenmiller
R. Celis
L. Charon
R. Charpantier
C. Chauveau
M. Chauvet
N. Chichizola
P. Chudant
W. Claessens
L. Clarke

N. Clarke
G. Coatleven
C. Collignon
J. Collignon
M. Coolen
E. Corsius
J-M. Cosyns
P. Cracco
P. Crick
H. Czech
P. D'Haese
M. Da Silva
C. Dagneau
F. Dahlbuedding
F. Daly
D. Danaux
H. Dander
B. Darke
H. David
P. David
A. Davister
V. Day
J. De Beurs
W. De Boer
J-M. De Boever
P. De Grootte
J. De Keukelaere Meyer
P. De La Haye
J. De Lange
M. De Ligne
W. De Love
A. De Monte
J. De Poorter
I. De Riemaeker Luppens
L. De Schepper
A. De Vos

J. De Winter
P. De Zeeuw
J-M. Debouny
G. Debruyne
J. Decarnière
J-M. Dechelle
C. Degenaar
J. Degrand
R. Dehouwer
H. Delachaux
J. Delwarte
P. Demelinne
J. Demesmaeker
W. Depouillon
J. Dessart
E-M. Deter
F. Detienne
F. Devillières
H. Devry
V. Dick
J. Dickmann
P. Domogala
D. Dörr
J. Douplat
J. Doyle
L. Driessen
G. Drost
E. Dubiel
S. Dubuisson
D. Dugailliez
F. Dupont
M. Durasse
U. Eckert
C. Edeb
D. Edgerton
P. Emering

R. Engels
H. Englmeier
A. Enright
R. Erdmann
I. Evans
R. Evans
H. Evers
H-J. Exner
T. Fagulha
M. Falk
G. Falkenstein
J. Falkingham
Y. Fauchot
F. Faurens
U. Feldner
A. Feyder
R. Feyens
J. Fiers
R. Fisch
J-L. Flament
P. Flick
J-P. Florent
M. Fontaine
G. Fortin
J. Fortin
J-P. François
Y. François
G. Frost
J. Frusch
C. Fuchter
G. Gabas
C. Galeazzi
M-T. Garzend
G. Gaveau
G. Gaydoul
F. Gehl

O. Geigner
A. Geirnaert
M. Gérard
M. Germans
L. Geurten
M-T. Gilles
R. Gillis
K. Glover
J. Godde
I-D. Goossens
D. Gordon
W. Gorlier
L. Gotting
W. Göttlinger
M-J. Graas
M. Grebien
W. Gribnau
R. Grimmer
E. Groschel
A. Gruenewaelder
M-T. Guérin
T. Guldemont
A. Guyot
K. Haage
W. Haarmann
J. Haine
J. Haines
C. Hantz
G. Harel
H. Hauer
D. Hedley
H. Heepke
J. Hein
G. Heinz
J. Heller
G. Hembise

G. Hepke
E. Heppner
H. Herbert
H. Hering
H-J. Hermanns
M. Hervot
R. Hess
M. Hitchcock
E. Hochstein
G. Hody
H-J. Hoeld
E. Hofmann
G. Horsman
G. Hostyn
J. Hougardy
E. Huebsch
H. Huizer
Marcel Jacobs
Matheus Jacobs
W. Jagemann
E. Jamez
R. Janssens
S. Janssens-Verreth
F. Joris
A. Jourdain
K-D. Jung
P. Kaisin
A. Kalkhoven
H. Kaltenhäuser
G. Karran
L. Kelly
N. Kieffer
W. Klaes
G. Klawitter
H. Klos
U. Kluvetasch

T. Knauss
J. Koch
H. Koot
F. Krella
L. Kroll
J. Kuijper
H. Kunicke
M. Laine
G. Lambert
L. Lambrechts
L. Lang
P. Lascar
D. Laurent
G. Lauter
C. Leclerc
J. Leclère
M-C. Leduc
P. Lefebvre
Y. Lefèbvre
F. Legrand
W. Leístico
E. Lejeune-Dirichlet
L. Lelarge
W. Lembach
M. Lenaerts
M. Lenglez
J. Lenzi
Y. Leroux
C. Licker
D. Liesert
A. Lieuwen
H. Liss
W. Lockner
L. Loeser
R. Lucas
W. Lumpe

J. Maes
Philip Maes
Pierre Maes
J. Mager
S. Mahony
D. Maillet
J-P. Majerus
R. Maloney
B. Marschner
C. Martens-Servaes
J. Martin
J. Martins dos Santos
C. Massie
C. Massinon
G. Mathieu
M. Mathieu
D. Mauge
P. Maurus
E. McCluskey
J. McNeill
P. Meenhorst
N. Mehrrens
C. Meier
A. Meloen
J. Meredith
E. Merklinger
W. Mesman
E. Meyenberg
B. Meyer
B. Michaux
M. Minner
M. Mommers
P. Montenez
A. More
R. Mühlstroh
B. Neher

C. Nelissen
H. Neumann
M. Nicolay
C. Niesing
A-M. Nieuweling
J. Nuyt
L. Olivier
G. Ostertag
K-U. Pawlicz
G. Peerbooms
B. Peeters
P. Peeters
R. Peiffer
R. Perry
M. Pesty
C. Petit
E. Petit
P. Petitfils
W. Petter
A. Peyrat
V. Pfeiffer
P. Philips
E. Phillips
M. Picard
J-F. Pieri
R. Pierrard
C. Poinso
J-M. Pomeret
M. Pommez
P. Praet
V. Priplata
J. Prochasson
C. Prosser
M. Prosser
B. Puthiers
L. Putz

J. Raes
M-C. Ragot
H. Rakete
M. Reck
J-L. Renteux
J-J. Richer
A. Ritchie
G. Riu
C. Robijns
M. Roebroeck
J. Roelofsen
J. Ronk
G. Rossignol
F. Roth
J. Roulleaux
G. Roumajon
E. Rousée
J-M. Roussot
J-P. Rue
B. Runacres
Alain Rutherford
Alexander Rutherford
J-C. Salard
R. Sampoux
P. Sargent
J-J. Sauvage
J. Sawtell
G. Scheltien
J. Scheu
J. Schiettekatte
P. Schmutz
G. Schneider
H. Schneider
U. Schoeke
G. Schoeling
M. Schoeling-Veys

K. Scholts
J. Schraa
H. Schroeter
A. Schuh
M. Schwaller
K. Seipke
A. Sena
M. Severac
K. Seybold
W. Sieg
L. Sillard
W. Sillevis
G. Sizun
F. Skerhut
P. Slingerland
P. Smith
L. Smulders
M. Sneyers
E. Soehnle
J. Sondt
D. Spragg
S. Starlander
B. Stefens
F. Steijns
E. Steiner
W. Steiner
A. Stickland
J. Storms
E. Stuhlsatz
A. Sunnen
B. Swinnen-Stappaerts
A. Talboom
E. Talboom
E. Tant
E. Taylor
R. Thacker

J. Thiecke
J-P. Thiel
A. Thill
R. Tielemans
H. Tielker
J. Timmermans
C. Tovy
J-C. Tumelin
M. Turcan
R. Ueberhofen
J. Uhl
A. Urlings
V. Vachiery
B. Valdenaire
J. van Belle
G. van Campenhout
R. van Cauwelaert
H. van De Vorst
A. van Den Broeck
E. van Den Heuvel
C. van Der Flier
M. van Der Sluis
G. van Dijk
A. van Dooren
S. van Dronkelaar
J. van Eck
E. van Eupen
T. van Hal
M. van Hemelrijck
F. van Landuyt
A. van Loveren
J. van Raayen
J. van Riemsdijk
T. Vandamme
H. Vanden Bosch
C. Vandenbergh

B. Vandenberghe-Vaury
J-P. Vanderspikken
D. Vanderstraeten
E. Vanschönwinkel
M. Vatinel
K. Vent
P. Vercruijse
P. Vergauts
F. Vergne
J. Verlinden
H. Vermaesen
F. Vermoesen
M. Verschelden
L. Verwilt
W. Viertelhauzen
Y. Viroux
P. Visser
C. Vodak
J-C. Vollant
N. Vrancken
E. Vreede
F. Wagner
W. Warner
E. Watkins
J. Watson
H. Weis
G. Wendling
F. Werthmann
P. Wildey
M. Wildner
R. Wilkening
J-P. Willox
D. Winkler
F. Wissink
J. Wolynski
P. Wood

M. Woods
R. Xhrouet
D. Young
J. Zabka
H. Zandvliet
W. Zieger
J. Zipp
R. Zöllner

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 64 and 92(2) of the Staff Regulations governing officials of the Agency;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. At its 62nd Session, on 7 July 1983, the Permanent Commission of the European Organisation for the Safety of Air Navigation decided to bring in by stages a 5 per cent differential between net pay at Eurocontrol and net pay in the European Communities. The Protocol that amended the 1960 International Convention on Co-operation for the Safety of Air Navigation came into force on 1 January 1986.

At its 71st Session, on 7 July 1987, the Commission decided to make the first reduction by 0.7 per cent from 1 July 1986. It gave that decision its final approval on 12 November 1987. The application of that measure gave rise to complaints on which the Tribunal ruled in Judgment 1012 (in re Aelvoet No. 2 and others) of 23 January 1990. The ruling set aside "The pay slips issued by Eurocontrol before the Permanent Commission's decision of 12 November 1987 took effect ... insofar as they reduce staff pay by 0.7 per cent".

On 30 March 1988 the differential was raised to 0.85 and 1.25 per cent and again on 22 November 1988, at the Commission's 74th Session, to 1.53 per cent as from 1 July 1987. The Commission confirmed the increase to 1.53 at its 75th Session, on 4 July 1989. At the same session it decided to hold the differential at 1.53 per cent as from 1 July 1988 until fresh adjustment of cost-of-living weightings offered scope for a further increase in the differential.

The complainants are on the staff of Eurocontrol. On 22 December 1989 Mr. Cuveliers, Mr. Fairfax Jones and Mr. Oury each filed three internal "complaints" under Article 92(2) of the Staff Regulations governing officials of the Agency objecting to the 1.53 per cent reduction shown in the pay slips they got for October, November and December 1989. Having got no answer within the time limit in Article VII of the Tribunal's Statute, they have each lodged three complaints against the implied decisions to reject their claims. The complaints are in three groups: the first complaints lodged by Mr. Cuveliers and Mr. Oury and the third filed by Mr. Fairfax Jones are about their pay for October, the second complaints lodged by Mr. Cuveliers and Mr. Oury and the fourth by Mr. Fairfax Jones about pay for November and the third complaints lodged by Mr. Cuveliers and Mr. Oury and the fifth by Mr. Fairfax Jones about pay for December 1989.

Mr. Göttling, on 26 February 1990, and Mr. Parvais, on 7 March, submitted internal "complaints" against the same reduction shown in their pay slips for January 1990. On 7 March 1990 Mrs. Esslemont-Richez and Mr. Pusch each sub-mitted "complaints" against the reductions on their pay slips for February 1990. Having got no reply within the time limit laid down by Article VII of the Tribunal's Statute, these four complainants have lodged complaints against the implied decisions to reject their claims.

B. The complainants submit that their complaints are receivable under Article VII(3) of the Statute.

They plead as follows on the merits.

The Commission's decision of 22 November 1988 to increase the rate of reduction to 1.53 per cent with retroactive effect from 1 July 1987 did not become final until 4 July 1989. It was therefore unlawful to apply the 1.53 per cent reduction before that date. Being retroactive, the general decision was unlawful, as the Tribunal held, for example, in Judgment 963 of 27 June 1989 and Judgment 1012 of 23 January 1990; so the individual decisions giving it effect are unlawful as well. The Organisation knew by 27 June 1989 that the Commission's decision to reduce pay by 0.7 per cent was unlawful because it was retroactive. It knew a fortiori by 23 January 1990 that all later reductions were unlawful for the same reason. So the Tribunal's order in Judgment 1012 not only covers the period up to 12 November 1987 but the later period as well because the Commission's decision continued to be unlawful after confirmation. The 1.53 per cent rate is in itself unlawful because it is the sum of the successive retroactive and therefore unlawful reductions.

The Director General's decision to apply the reduction at the rate of 1.53 per cent as from 1 July 1988 shows the same flaw.

His decisions to apply from August 1989 the decision which the Commission took on 4 July 1989 and confirmed on 12 December have no basis in law and are on that account unlawful.

Since some officials, for example, those at grade C5, were unaffected by the Eurocontrol reduction, the breach of equal treatment is blatant.

The reckoning of the rate of the reduction is tainted with an obvious mistake of fact. The retroactive revision as from 1981 of

cost-of-living weightings ought to have cancelled the reductions which were based on the wrong figures. As was explained in the cases of Albertini and others (see Judgment 1081, under B), if the weightings had been known in July 1987 there would have been no scope for applying the first stage of the reduction from 1 July 1986. Some of the weightings had gone down so far that in the Netherlands, for example, pay should have been frozen at the July 1985 level. And there is still no room for reduction.

The Director General has broken the *res judicata* rule by failing to give proper effect to the Tribunal's rulings. Instead of treating with utter silence every single internal "complaint" against an individual decision, he should have taken all the action that Judgments 963 and 1012, whether directly or indirectly, required of him.

The whole policy of reducing pay is unlawful because no valid reasons have been stated for it and because it is in breach of the rules on pay-setting at Eurocontrol and of the staff's trust and of their acquired rights.

The complainants variously invite the Tribunal to quash the Director General's decisions to reduce their pay by 1.53 per cent from October 1989 to February 1990 and to order the refund with interest of all sums unlawfully withheld. They claim costs.

C. In its replies Eurocontrol gives its own version of the facts. It explains that what the Commission decided on 22 November 1988 was not to reduce pay at Eurocontrol by 1.53 per cent against pay in the Communities but to raise from 1.25 to 1.53 per cent the rate at which increases in Eurocontrol pay would be held down as against pay in the Communities. At its 75th Session, on 4 July 1989, the Commission preferred to keep the rate at 1.53 per cent. So it took no new decision at that date.

The complaints are time-barred and therefore irreceivable.

The latest decision to "adjust" pay goes back to 22 November 1988 at the Commission's 74th Session and it was put into effect in December 1988 with an explicit reference to the 1.53 per cent rate.

Eurocontrol's replies to the complainants' pleas on the merits are subsidiary.

Since the decision to increase the rate from 1.25 to 1.53 per cent became final on 4 July 1989 the pay slips issued for the material periods were not retroactive and did have a sound basis in law.

Judgments 963 and 1012 do not mean that any check on pay after the periods they cover will be unlawful. Judgment 1012 declared it unlawful to apply the initial 0.7 per cent rate from 1 July 1986 to 12 November 1987 on the grounds of breach of the rule against retroactivity, but not after 12 November 1987, when the decision was no longer retroactive.

Though there was indeed no restraint on the pay of some officials at grade C5, that was because Eurocontrol was complying with the principle, provided for in the Staff Regulations, of protection of their minimum livelihood.

The complainants are mistaken in their belief that the revised weightings should retroactively do away with the adjustments. For one thing, what matters is not the weightings but the actual increase in net pay. The differentials have always been so set as to prevent net pay from falling even in the Netherlands, where the increase is the smallest. Pay has steadily risen since the system was brought in on 1 January 1986. Secondly, the complainants' allegations are radically unsound because they take the wrong date. The relevant date for identifying scope for the adjustment of pay is not 1 July 1985, but 1 January 1986.

The res judicata rule is irrelevant because the conditions for applying it are not met. The pay slips impugned are based on a decision which the Commission confirmed on 4 July 1989 and are therefore in line with Judgment 1012.

The decision to check the rise in pay is not unlawful: it was amply warranted by changes in Eurocontrol's functions, by the policy of having more frequent exchanges of staff with national administrations and by the need to cut the costs of services to States and others; it was not in breach of any legal rule; the case is about adjusting pay, not about an acquired right to pay; and the notion of trust is immaterial.

D. In their rejoinders the complainants observe that by speaking of "restraint" or "adjustment" instead of "reduction" Eurocontrol has altered the terms of the decision the Permanent Commission took in 1983. They object to its creating confusion between provisional and final decisions. Since the final decision to hold the differential at 1.53 per cent was not taken until 12 December 1989, the pay slips that went out before that date showing payment of salary and arrears were indeed based on the provisional decision of the Commission's of 4 July 1989.

Their complaints are receivable. The case law makes plain that appeal against a decision of recurrent effect is not time-barred; each pay slip that shows a reduction - and so causes injury - is actionable. The "decision of 22 November 1988", which Eurocontrol makes out to be the basis of the contested pay slips, was just provisional and did not become final until 4 July 1989, though the Director General had been unlawfully applying it since December 1988; so Eurocontrol's reliance on the time bar is particularly unsound on that score. On the merits they seek to refute the Organisation's pleas in reply and develop in particular the following pleas of their own: in their submission it is immaterial that the final decision of 4 July 1989 relates only to the 0.28 per cent since it is the total reduction they are

challenging. There does exist a direct connection between the weightings and net pay, and applying the weightings should have meant holding pay at the July 1985 levels at the Organisation's own date of 1 January 1986. The changes in the Organisation's terms of reference afford no grounds for the reduction: Eurocontrol is growing apace, taking on new staff and having bigger and bigger budgets.

E. In its surrejoinders Eurocontrol maintains that the complaints are irreceivable. It again submits that it was lawful to apply to the challenged pay slips the decision, confirmed on 4 July 1989, to "adjust" pay increases by 1.53 per cent. It cites a ruling by the Court of Justice of the European Communities in its judgment of 30 September 1986 (in re Ammann and others) that the adjustment of pay is necessarily retroactive and therefore lawful and that staff have no right to a rise in pay until the competent authorities have approved one. It develops its plea that the adjustment is lawful and seeks in particular to show that it was amply warranted by fundamental changes in its work and financing.

CONSIDERATIONS:

1. The complainants are on the staff of Eurocontrol. The Director General decided to apply to their monthly pay in the five months from October 1989 to February 1990 the so-called "Eurocontrol reduction" of 1.53 per cent. They want the Tribunal to set the decisions aside, to order payment to them of the sums wrongfully withheld, plus interest, and to award them costs. In groups of two or three they have filed sets of separate complaints corresponding to each of the monthly payments, and there are many applications to intervene, which will fare as do the complainants themselves.
2. The impugned decisions prompted identically worded internal "complaints" under Article 92(2) of the Eurocontrol Staff Regulations. Having got no answer from the Organisation, the

complainants filed the present complaints under Article VII(3) of the Statute of the Tribunal. Since, apart from the dates of the monthly pay slips, the cases raise the same issues and the parties have the same pleas, they are joined, together with the applications to intervene.

3. Although Eurocontrol submits that none of the complaints is receivable, there is no need to rule on the issue since the complaints fail on the merits for the reasons set out below.

4. The authority of Judgment 1012 is confined to the 0.7 per cent adjustment in pay at issue in the case. There has not yet been any ruling on the later adjustments.

5. The adjustments provided for in Article 64 of the Staff Regulations in the pay of staff not stationed at headquarters do not concern Mrs. Esslemont-Richez or Mr. Götting. As to the other complainants, the Tribunal is satisfied on the evidence that Eurocontrol took proper account of the various circumstances prevailing at each duty station and committed no mistake of fact in applying the adjustment at issue.

6. The plea of breach of equal treatment is unsound. It arises out of the treatment of the lowest-paid staff. For such staff a check in the rise in pay may mean a fall in purchasing power and so a real reduction in pay. It is therefore only reasonable for the Organisation to have waived the adjustment in their case so as to safeguard minimum livelihood.

7. The complainants' other pleas have also been put forward by Mr. Niesing and others and by Mr. Purnelle in the complaints on which the Tribunal rules this day in Judgments 1118 and 1123. For the reasons set out in those judgments the other pleas fail.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

DISSENTING OPINION BY MR. PIERRE PESCATORE

I am afraid I disagree with the other members of the Tribunal for the reasons I state in my dissenting opinion in Judgment 1118 (in re Niesing No. 2 and others). I have the following further comments on this judgment.

The 1.53 per cent reduction was provisionally adopted on 22 November 1988 and applied with retroactive effect as from 1 July 1987. It was "frozen" on 4 July 1989 and "maintained" on 28 November 1989. The Permanent Commission confirmed it by correspondence on 12 March 1990, and that was when the complainants acted. By pleading one date or another the Organisation contends that the complaints are time-barred. Its procedural tactics are yet another illustration of its inscrutable law-making process and betray its intention of setting its staff's right of appeal at naught and putting its acts beyond the reach of judicial review.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

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