

SEVENTY-FIRST SESSION

***In re* DECARNIERE, EMERING
and WATSON**

Judgment 1120

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Jacques Decarnière, Mr. Paul Emering and Mr. Jeremy Watson against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 5 April 1990 and corrected on 17 April, the Agency's replies of 12 July, the complainant's rejoinders of 16 August and the Agency's surrejoinders of 22 November 1990.

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

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
A. Cuveliers
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 Groot
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. Debruyn
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
R. Engels
H. Englmeier
A. Enright
R. Erdmann
C. Esslemont-Richez
I. Evans
R. Evans
H. Evers
H-J. Exner
T. Fagulha
G. Fairfax Jones
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. Götting
H. Götting
W. Göttinger
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. Leistico

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

P. 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. Mehrtens
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
J. Oury
H. Parvais
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
L. Rabozée-Trembloy
M-C. Ragot
H. Rakete
M. Reck
J-L. Renteux
J-J. Richer
A. Ritchie
G. Riu
C. Robijns
M. Roebroek
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. Vachier
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. Vandenbergh-Vaury
J-P. Vanderspikken
D. Vanderstraeten
E. Vanschönwinkel

M. Vatinel
K. Vent
P. Vercrujssse
P. Vergauts
F. Vergne
J. Verlinden
H. Vermaesen
F. Vermoesen
M. Verschelden
L. Verwilst
W. Viertelhauzen
Y. Viroux
P. Visser
C. Vodak
J-C. Vollant
N. Vrancken
E. Vreede
F. Wagner
W. Warner
E. Watkins
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 as 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 per cent 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 31 August 1989 they each got two pay slips, one for the period from July to December 1988 and the other from the period from January to September 1989. The pay slips bore the words "Eurocontrol reduction - 1.53%", followed by the amount in arrears. On 29 November 1989 the complainants filed internal "complaints" under Article 92(2) of the Staff Regulations against the reduction. Having got no reply within the time limit in Article VII of the Tribunal's Statute, they lodged the present complaints on 5 April 1990 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 advance several pleas to challenge the reduction.

The Commission's decision of 22 November 1988 to increase the rate of reduction to 1.53 per cent was retroactive as from 1 July 1987. According to the case law - for example Judgments 963 of 27 June 1989 and 1012 of 23 January 1990 - it was therefore unlawful. Moreover, since that decision did not become final until 4 July 1989, it was unlawful to apply the 1.53 per cent reduction before that date.

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.

The reckoning of the rate of 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. 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 as 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 whole policy of reducing pay is unlawful on several grounds, and in particular 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 invite the Tribunal to quash the Director General's decisions reducing arrears of salary by 1.53 per cent from July to December 1988 and from January to September 1989 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 as 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 was taken on 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 at the end of August 1989 were not retroactive and did have a sound basis in law.

The 1.25 per cent rate was approved on 30 March 1988, so the confirmatory decision of 4 July 1989 related only to the further 0.28 per cent. Besides, the adjustment of pay has to be retroactive to some extent, as the Court of Justice of the European Communities acknowledged in a judgment of 30 September 1986 (in re Ammann and others). In fact there has never been any actual fall in pay, but a retroactive increase applying to the period just ended and subject to a 0.28 per cent reduction as against pay in the Communities.

The basis in law of the contested pay slips is the Commission's decision of 22 November 1988, which it confirmed on 4 July 1989.

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 decision to restrain 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 consistent 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. It was plainly unlawful to apply the 1.25 per cent reduction as from 1 July 1987 since Judgment 1012 set aside all decisions taken by the Director General before 12 November 1987 to reduce pay. 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 Eurocontrol's terms of reference do not warrant the reduction in pay: Eurocontrol is growing apace, taking on new staff and having bigger and bigger budgets. Lastly, the Organisation is in breach of equal treatment by sparing only some C5 officials the reductions.

E. In its surrejoinders Eurocontrol maintains that the complaints are irreceivable. It answers each of the complainants' pleas in their rejoinders. It observes that they are objecting to a single additional adjustment in pay on the grounds that it breaks the rule against retroactivity; in its submission those are not proper grounds for challenging the final and total percentage rate. All that Judgment 1012 declared unlawful was the application of a decision to the period from 1 July 1986 to 12 November 1987: that judgment does not impair the soundness of the previously cited ruling by the European Court that retroactive adjustment is inevitable and therefore lawful and that the staff have no right to an increase until the Organisation has agreed to it and set the amount. Eurocontrol did not act in breach of equal treatment: it was out of respect for the rule that pay must be kept above an acceptable minimum that Eurocontrol did not adjust the pay of some officials at grade C5. It enlarges on its contention that the decision was lawful, being fully warranted by radical change in its work and financing.

CONSIDERATIONS:

1. The complainants are on the staff of Eurocontrol. The Director General decided to apply to the arrears of salary paid to them for the period from July 1988 to September 1989 the so-called "Eurocontrol reduction" of 1.53 per cent. They want the Tribunal to set aside those decisions, to quash decisions by the Director General applying the same reduction to their actual salaries, to order payment to them of the sums wrongfully withheld, plus interest, and to award them costs. There are 515 applications to intervene, and the ruling on the complaints will hold good for the applications.
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.
3. There is no need to rule on Eurocontrol's objections to receivability because the complaints fail on the merits for the reasons set out below.
4. The adjustment of pay of staff members like the complainants who are not stationed at headquarters is covered by Article 64 of the Staff Regulations. The Tribunal is satisfied on the evidence before it that the Organisation has made allowances for the different circumstances prevailing at each duty station and committed no mistake of fact in making the adjustment at issue in this case.
5. The plea of breach of equal treatment is unsound. It arises seemingly 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 their minimum livelihood.

6. 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 opinions in Judgments 1118 (in re Niesing No. 2 and others) and 1119 (in re Cuvelier and others).

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