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

SEVENTY-FIRST SESSION

In re PURNELLE (No. 3)

Judgment 1123

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Jean-Marie Purnelle against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 15 October 1990, the Agency's reply of 17 January 1991, the complainant's rejoinder of 11 March and the Agency's surrejoinder of 23 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 64, 65 and 92 of the Staff Regulations governing officials of the Agency and Rule No. 27 concerning the method of calculating remuneration;

Having examined the written evidence and decided not to order oral proceedings, which neither party 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 Eurocontrol 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 at its 72nd Session, 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) on 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.

Rule No. 27 of Eurocontrol relates to "the method of calculating remuneration by applying Article 64 of the service regulations and the Eurocontrol internal tax". Article 2.2 of the Rule formerly read:

"Net remuneration shall be determined on the basis of the following factors, and in the following sequence:

a) basic salary, plus the allowances provided for in Article 62 of the service regulations, less deductions in pursuance of Articles 72, 73 and 83 of the aforesaid regulations;

b) application of the cost-of-living weighting;

c) deduction of the internal tax applicable at the European Communities in accordance with the rules in force;

d) adjustment of the result obtained under a) so as to give, after deduction of the Eurocontrol internal tax, the same net figure as obtained under a), b) and c) above."

Because of the reductions in pay 2.2d) was amended, several times, to read:

"adjustment of the result obtained under a) so as to give, after deduction of the Eurocontrol internal tax, a net amount of 98.47% of the net figure obtained under a), b) and c) above."

On 15 December 1989 the complainant, who is a staff member of Eurocontrol, got one pay slip showing payment of arrears from July to December 1988 and another showing arrears from January to December 1989. Each slip said "Eurocontrol reduction - 1.53%" and gave the actual amount. His pay slips for January, February and March 1990 showed the same reduction.

On 14 March 1990 he filed two internal "complaints" under Article 92(2) of Eurocontrol's Staff Regulations, one against the reduction in the arrears, the other against the reduction shown in his last three pay slips. Having got no answer, he lodged this complaint on 15 October 1990 against the implied decisions to reject his claims.

B. The complainant challenges the lawfulness of the impugned decision on several grounds.

(1) He submits that the general policy of bringing in a 5 per cent differential in pay between the European Communities and Eurocontrol is in itself unlawful.

It is in breach of the staff's acquired rights. Since the outset Eurocontrol has consistently made the same adjustments in staff pay as were made in the scales of the Communities. The de facto pursuit of such parity is borne out by the decisions to make good the sums that staff pay in national income tax and to impose a levy on salary so as to ease the organisations' financial troubles. Since it relates to pay, the practice is a fundamental term of the complainant's appointment. So the decision to apply the 5 per cent differential is in breach of an acquired right and since the whole policy is unlawful so are the individual decisions giving effect to it.

His second plea is breach of Articles 64 and 65 of the Staff Regulations in that the reduction disregarded the criteria prescribed therein for adjusting pay.

His third plea is that no reasons, or none admissible in law, were stated for the general decision, so that there can be no proper judicial review.

Though some sort of explanation may be inferred from the records of the Commission's and the Committee of Management's proceedings it is mistaken and inadequate. It is wrong to assume that the amendments to the Eurocontrol Convention alter the Organisation's functions and the chosen means are in any event unsuited to the end: the reduction will not achieve that end if pay goes up in the Communities and will go far too far if it does not.

(2) The complainant puts forward a subsidiary plea that it was unlawful to impose the 1.53 per cent rate from late in 1988: since confirmation did not come through until 4 July 1989 there was no basis in law. It was also unlawful to give retroactive effect as from 1 July 1987 to the decision to increase the rate to 1.53 per cent.

(3) His final plea is subsidiary to (2). It is that the 1.53 per cent rate failed to take account of the revised cost-

of-living weightings in force as from 1 January 1981. The retroactive application of those weightings precluded reduction because there was no scope left for it. It follows that the "Eurocontrol reduction", whatever the rate, cannot stand since the figures it is based on are wrong.

The complainant seeks the quashing of the 1.53 per cent reduction in arrears of salary for the periods from July to December 1988 and from January to December 1989 and in his salary for January, February and March 1990. He claims repayment of the sums withheld, plus interest at the rate of 10 per cent a year as from the date of withholding. He seeks costs.

C. In its reply Eurocontrol submits that the complaint is time-barred and therefore irreceivable. The most recent decision on adjustment was taken on 22 November 1988, at the Permanent Commission's 74th Session, and was put into effect from December 1988, with explicit reference to the 1.53 per cent rate. What the complainant should have challenged was the first pay slip to show that adjustment.

The Organisation's pleas on the merits are subsidiary.

The adjustment is not in breach of any acquired right since there is no binding practice of parity in net pay between Eurocontrol and the Communities. The many differences in the Staff Regulations between Eurocontrol and the Communities preclude it. Only for the sake of administrative convenience has Eurocontrol commonly cited the Communities' figures on variations in national salaries and prices, but its method of adjusting pay is its own.

Eurocontrol authorities have all along maintained that they felt free not to keep up in future with any adjustments the Communities make. Parity is therefore not an acquired right. Even if it were, the Organisation's supreme body, the Commission, would still have unfettered authority to determine conditions of service. Besides, the amendment to Article 2.2d) of Rule No. 27 concerning the method of calculating remuneration has too trifling an effect to disturb the structure of the staff's contracts. On recruitment the complainant signed a letter of appointment that said he was subject to the Staff Regulations and to implementing rules, including any amendments thereto.

Eurocontrol has committed no breach of Articles 64 and 65 of the Staff Regulations. In its decisions on staff pay the Commission is by no means bound to any system of automatic indexing. All that Article 65 says is that the Committee of Management shall "take particular account" of a few factors it mentions: that means that others may be relevant and that taking account even of the ones mentioned is not compulsory. The rules are flexible and have been respected both in letter and in spirit.

The Eurocontrol Convention does not require the Commission to explain its decisions. Besides, even if there is no formal statement of the reasons for them the Tribunal may still exercise its power of review on the strength of the evidence before it or of any further evidence it may ask for. The reasons for checking the increase in pay in this instance are plain from the copious records of proceedings of the competent bodies and from other texts. The Protocol of 12 February 1981, which amended the Convention as from 1 January 1986, radically altered the Organisation's terms of reference, operation and financing. It has come to depend on commissions from member States and other countries and must keep the costs of its services competitively low. Since pay in Eurocontrol was sometimes twice as much as pay for similar work in member countries it was only reasonable to keep rises in check. Although some member States would have liked more drastic cuts, the solution is very well suited to the way in which the Organisation now works. An independent organisation like Eurocontrol is not bound to take over the Communities' figures but may decide on pay rises as it pleases.

The 1.53 per cent rate of adjustment which applied to arrears of salary from July 1988 to December 1989 is lawful. The rule against retroactivity, when relied on in respect of a further adjustment, will not serve in challenging all the percentage adjustments that in the end are applied. Besides, the adjustment of pay in keeping with the Staff Regulations necessarily involves retroactivity, as the Court of Justice of the European Communities has ruled in its judgment of 30 September 1986 (in re Ammann and others). The construction the complainant puts on Judgment 1012 is at odds with that ruling and therefore unacceptable. It is not true that the decision of 22 November 1988 raising the rate of adjustment from 1.25 to 1.53 per cent as from 1 July 1987 had retroactive effect: the extra 0.28 per cent was not applied until December 1988. In fact pay has been raised, not lowered, and the words "Eurocontrol reduction - 1.53%" on pay slips merely indicated the level the adjustment had reached as against figures in the Communities.

The complainant is mistaken in contending that the revision of the weightings ought to have done away with the adjustments retroactively. Since pay never actually went down there was nothing wrong with the adjustments. Net pay has steadily risen since 1 January 1986, the date at which the rate of the initial stage of the differential was reckoned. It took the five-year review of national salary and price trends in the Communities to show that the salaries approved by Eurocontrol on the strength of the Communities' figures had been too high in the Federal Republic of Germany and in the Netherlands since 1 July 1985. Yet the over-payments were not claimed back and Eurocontrol staff in those countries are still being paid at inflated rates. To ensure parity between the various duty stations, however, the rate of adjustment had to be held at 1.53 per cent because the already high pay levels in the Federal Republic and in the Netherlands have not risen for two years.

D. In his rejoinder the complainant challenges Eurocontrol's objections to receivability. He observes that, as Judgment 1012 said, pay slips apply only to the periods they cover. His complaint cannot therefore be time-barred on the grounds that pay slips issued before those he is challenging had already given effect to the 1.53 per cent reduction.

He develops his pleas on the merits.

In support of his plea of breach of acquired rights he cites a report of 7 January 1988 by the Committee of Management to the Permanent Commission that bears out his allegation of a custom of parity in pay between Eurocontrol and the Communities. That custom is binding in law: Eurocontrol has abided by it for over twenty years, as the written records again show. Besides income tax policy and the levy, there is evidence of parity in the wording of Article 2.2c) of Rule 27 and in Eurocontrol's giving effect to the ruling by the Court of Justice of the

European Communities on the yearly adjustment of pay in the Communities. Both accepted opinion and the consistent case law hold that an organisation may not unilaterally impair essential and therefore acquired rights. Eurocontrol must respect that general principle whatever the Commission's authority may be and whatever a staff member's contract may say.

In answer to the Organisation's plea that the amount of the reduction was too small to disturb the structure of the staff's contracts, he points out that the material issue is not the content but the nature of the right impaired. Besides, if small changes were admissible they might be allowed to build up into a big one.

Eurocontrol's comments on its breach of Articles 64 and 65 of the Staff Regulations are irrelevant. To dissociate salary adjustments at Eurocontrol from those in the Communities is one thing; to lower pay by a fixed percentage in disregard of the criteria mentioned in those articles is quite another.

Relying on Judgment 902 of 30 June 1988, which says that Article "92(1) requires that reasons be given for any decision by the appointing authority", the complainant submits that at least the general decisions which the individual ones put into effect must be explained. The Organisation is obviously mistaken in relying on alleged disparities between its own terms of reference and those of the Communities. The changes made by the 1981 Protocol in Eurocontrol's status have not reduced the volume of its duties: indeed it has new ones. Although work at Eurocontrol and in the Communities may have been dissimilar at the outset, it is no longer so. Though Eurocontrol no longer carries out operational programmes the Communities have never done so. Comparison with pay for like employment in member States is irrelevant: pay has to be higher in Eurocontrol to attract good recruits. The need to keep costs down is an implausible argument: the records of the Commission's 62nd Session show that a 5 per cent cut in salaries would bring down the airlines' total operating costs by only 0.01 per cent. The levy and the system of adjusting pay, both taken over from the Communities, have already held rises in check and the rate of the levy is now in decline. The Organisation's reasons for the reduction are therefore mistaken. They are also inadequate - and Eurocontrol has failed to address the point - in that the reduction is predetermined as a fixed and unalterable percentage of amounts to be set by authorities outside the Organisation: if pay in the Communities actually doubled, so would pay in Eurocontrol, subject to the 5 per cent cut.

The complainant maintains that the 1.53 per cent reduction in salary arrears is unlawful because it was retroactive. Although the Commission adopted that rate at its meeting of 22 November 1988 its decision did not become final until 4 July 1989. Besides, though there will always be a retroactive element in adjusting pay that does not mean that a reduction may be retroactive. That would be a flagrant breach of acquired rights.

The complainant reaffirms that the revised weightings so changed the situation as to preclude any reduction. It is immaterial that the weightings have not been applied where they would have entailed a fall in pay.

E. In its surrejoinder Eurocontrol presses its objections to receivability. It enlarges on its pleas on the merits, maintaining that it committed no breach of acquired rights; that it complied with Articles 64 and 65; that there was an adequate explanation of the decisions; that the 1.53 per cent rate is lawful; and that it made no mistake in reckoning that rate.

CONSIDERATIONS:

1. The complainant is on the staff of Eurocontrol. The Director General decided to apply to his salary and to arrears of salary for the period from July 1988 to December 1989 the so-called "Eurocontrol reduction" of 1.53 per cent. He wants the Tribunal to set aside those decisions, to order payment to him of the sums wrongfully withheld plus interest at 10 per cent and to award him costs.

2. On 14 March 1990 the complainant submitted two internal complaints, identical in substance, under Article 92(2) of the Staff Regulations governing officials of the Agency. Having got no answers from the Organisation, he filed the present complaint on 15 October 1990.

3. He develops the following pleas:

(a) The custom at Eurocontrol of aligning the pay of its staff with that in the European Communities is a fundamental term of employment in the Organisation; the impugned reduction is therefore in breach of the staff's acquired rights.

(b) Pay may only be adjusted in keeping with the criteria set out in Articles 64 and 65 of the Staff Regulations. But the reduction which he objects to, and which applies a flat-rate percentage, meets none of those criteria.

(c) Since neither the Permanent Commission's original policy decision to reduce pay nor the individual decisions were substantiated, the Tribunal may not exercise its power of review. Whatever reasons may be gleaned from the records of the Permanent Commission and the Committee of Management are neither correct nor sufficient: there is no connection between the means and the end.

(d) Another plea turns on interpretation of Judgment 1012 (in re Aelvoet No. 2 and others) and on the rule against retroactivity.

(e) The retroactive application of the revised weightings ought to have precluded reductions since it left no scope for further adjustment in the differential.

4. There being no need to rule on Eurocontrol's objections to receivability, those pleas fail for the following reasons.

5. Plea (a) is breach of an acquired right to alignment of pay with the scales of the European Communities. The Organisation states, and the pleadings bear out, that there has never been anything but de facto alignment, and it has never been absolute anyway. Besides, even if it had been, the Organisation made no express or implied commitment to continuing it. The practice has conferred no right on the staff to the continuance of parity. There is no question of any breach of acquired rights.

6. As to plea (b), the rule on the adjustment of base salary is Article 65 of the Staff Regulations. Taking account of Article 65 and relevant data, the Committee of Management came to the conclusion that the proper way of adjusting salary and allowances was to bring in by stages a differential between the Communities and Eurocontrol. The Permanent Commission approved, and so the decision came about in keeping with Article 65.

7. As to plea (c) the objection that there has been no statement of the reasons is unsound: the staff have known all along the reasons for the adjustments, which have been fully discussed in the context of all the cases. There was therefore no need to state reasons for the individual decisions, which were implied ones anyway and not of the sort that could be substantiated.

8. The Tribunal may neither review the reasons of policy underlying the general decision nor say what the rates of pay ought to be. The decision was taken under Article 65, which merely cites examples of circumstances warranting adjustment in pay and is not exhaustive. There may be adjustment for other reasons, whether they be peculiar to the Organisation or attributable to outside factors. The Organisation speaks of work requirements that call for structural reform, comparison of staff pay with pay in member States and in other international organisations, and a need for lower service costs. Those reasons are not factually incorrect and they come within the ambit of Article 65.

9. As to plea (d), the thrust of Judgment 1012, stated in 7, is that "Having been issued before the Commission's decision setting the new pay scales and making the reduction took effect, the pay slips have no basis in law and must be set aside insofar as they cause the complainants injury".

10. Never since the differential between Eurocontrol and the Communities was brought in has pay actually fallen; in fact it has gone up. With every upward adjustment and every widening of the differential the staff have been paid arrears reflecting the new adjustments.

11. The arrears which the complainant was paid for the periods from July to December 1988 and from January to December 1989 corresponded to a rise in pay. His pay slips for January, February and March 1990 reflected his then level of pay, which took account of the adjustments then being applied. He is not entitled to the higher levels of pay in the European Communities because since departing from those scales Eurocontrol has never kept in line with them.

12. The conclusion is that even though the adjustments were made retroactive the staff did not suffer. Setting aside a pay slip showing a rise in pay on the grounds of breach of the rule against retroactivity would mean that the staff member would forfeit the rise in the form of arrears.

13. That being so, the Tribunal points out that, as it said in Judgment 986 (in re Ayoub No. 2 and others), in the fourth paragraph of 13, it has "only a limited power of review in such matters and will declare whether the impugned decisions square with general principles, with the Staff Regulations and with the terms of the complainants' appointment". Those principles include that of trust, and were complied with in this case.

4. The answer to plea (e) is that Article 64, which relates to adjustment in the pay of staff not stationed at headquarters, does not apply to the present complainant.

DECISION:

For the above reasons,

The complaint is dismissed.

DISSENTING OPINION BY MR. PIERRE PESCATORE

I am afraid that for the reasons stated in my dissenting opinion in Judgment 1118 (in re Niesing No. 2 and others) I cannot agree with the other members of the Tribunal. I wish to make a further comment on this case.

It is just quibbling to say that pay at Eurocontrol has never fallen; that the payment of arrears is evidence of that; and that, to quote the Organisation's later submissions, there has been no actual reduction but just a "check" on an increase. The sole purpose of salary adjustment is to offset the decline in the purchasing power of pay. So the "Eurocontrol reduction" - the term that appears on all pay slips - means a cut in pay in real terms.

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

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