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

SEVENTY-SECOND SESSION

In re SCHEU (Nos. 1 and 2)

Judgment 1148

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Jacqueline Scheu against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 31 October 1990;

Considering the second complaint filed by Miss Scheu on 1 February 1991 against Eurocontrol and corrected on 15 March;

Considering the Agency's reply to both complaints of 13 June 1991, the complainant's letter of 30 August informing the Registrar of the Tribunal that she did not wish to rejoin and the Organisation's observations of 25 October 1991 on that letter;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, Articles 72, 92 and 100 of the Staff Regulations governing officials of the Agency and Articles 14 and 24 of Rule No. 10 concerning sickness and accident insurance;

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. The complainant, a French citizen, is employed by Eurocontrol at its institute for air navigation in Luxembourg.

As stated under A in Judgment 1101 (in re Cassaignau and Karran No. 3), in which the complainant was an intervener, Eurocontrol officials and their dependants are insured in keeping with Article 72 of the Staff Regulations against sickness in accordance with rules drawn up by the Director General. Those rules are in Rule No. 10 concerning sickness and accident insurance. Article 14 of the Rule reads:

"Pharmaceutical products prescribed by the practitioner or on a 'repeat' basis as evidenced by the prescription subject to a maximum of six months shall be reimbursed at the rate of 85%. Mineral waters, tonic wines and beverages, infant foods, hair care products, cosmetics, special diet foods, hygiene products, irrigators, syringes, thermometers and similar products and instruments shall not be considered as pharmaceutical products. ..."

By office notice 2/89 of 9 February 1989 the Director General of the Agency, "after consulting the medical officer and the Management Committee of the Sickness Fund", announced in point 1 that "expenses arising from trace-element therapy (oligoelements), aromatherapy and phytotherapy are not reimbursed by the Sickness Fund" and in point 4 that the staff should not submit claims to such reimbursement.

Having claimed refund of the cost of a product known as Crataegus and described as "phytotherapeutic", the complainant was sent a statement, No. 1/90 of 17 January 1990, in which she found a reference to a product bearing code number 119 opposite "non-refundable items". The stated value of the item was 16.60 French francs.

By a letter of 21 February 1990 the complainant asked the manager of the Sickness Fund for an explanation. The Personnel and Finance Department answered her by a minute of 7 March 1990 citing office notice 2/89 and saying that the cost of Crataegus was not refundable because in the medical officer's opinion it was a phytotherapeutic remedy.

On 6 June 1990 she submitted an internal "complaint" under Article 92(2) of the Staff Regulations against the minute of 7 March.

Having got no answer, she filed her first complaint on 31 October 1990 impugning the implied rejection of her claim.

The matter went to the Management Committee of the Fund which was unanimous that Crataegus was not refundable. By a letter of 24 October 1990, which the complainant says she received on 5 November, the Director General accordingly rejected her appeal.

On 1 February 1991 she filed her second complaint against that express decision.

B. The complainant submits that according to Article 14 of Rule No. 10 the cost of Crataegus should be refunded. Her doctor prescribed it, it is a pharmaceutical product registered as a drug, and health insurance schemes in Luxembourg, among others, treat it as refundable.

Office notice 2/89, on which Eurocontrol based its refusal of her claim, may not properly amend Article 14 of Rule No. 10. Yet, far from confirming practice as Eurocontrol makes out, the notice broadens the scope of the rules in force.

What valid medical reason can there be for refusing to refund the costs of a product for which she has a doctor's prescription? Crataegus is unquestionably a pharmaceutical product, as the medical officer acknowledged in describing it as phytotherapeutic. Unlike the corresponding rule in the European Communities, the second sentence of Article 14 of Rule No. 10 does not include phytotherapeutic products among those that are not refundable.

She also cites the pleas which Mr. Cassaignau and Mr. Karran put forward in support of their complaints and which are summed up in Judgment 1101, under B.

She asks the Tribunal to quash the decision rejecting her appeal and to order Eurocontrol to refund to her the costs of Crataegus. She also seeks an award of costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable since the complainant's internal appeal was time-barred. The act adversely affecting her is statement 1/90, which the Sickness Fund issued on 17 January 1990 and she received on 29 January. Under Article 92(2) of the Staff Regulations she had three months from the notification of the decision in which to appeal, i.e. to the end of April 1990. The minute of 7 March 1990 from the Personnel and Finance Department merely confirmed the refusal dated 17 January and did not extend the time limit, which had started at 29 January, the date of notification of the decision.

In subsidiary pleas on the merits the Agency refers chiefly to its own arguments in reply to the case made by Mr. Cassaignau and Mr. Karran: see Judgment 1101, under C. It contends once again that Article 14 of Rule No. 10 does not confer entitlement to the refund of any product a doctor may prescribe. Office notice 2/89 merely clarified that article. In any event Article 100 of the Staff Regulations empowers the Director General to determine the general provisions for giving effect to the Staff Regulations. Even if other health insurance schemes do refund the costs of Crataegus - which she has failed to prove - their practice is not binding on Eurocontrol.

The Agency relies on Article 24(2) of Rule 10, under which it may refuse to reimburse "Expenses relating to treatments considered to be non-functional, superfluous or unnecessary, after the Medical Officer has been consulted".

CONSIDERATIONS:

1. The complainant is on the staff of Eurocontrol's institute for air navigation in Luxembourg. She is asking the Sickness Fund of Eurocontrol, in accordance with Rule No. 10 concerning sickness and accident insurance, to pay for a product known as Crataegus, a "phytotherapeutic" remedy of which the Organisation has refused to refund her the cost.

2. She was sent a statement, No. 1/90, on 17 January 1990 and opposite "non-refundable items" found a reference to an item which was identified under code number 119 and said to have cost 16.60 French francs.

3. By a letter of 21 February 1990 the complainant asked the manager of the Sickness Fund to tell her what the item was, explain why it was not refunded and supply evidence in support.

4. In a minute of 7 March 1990 the Personnel and Finance Department replied:

"The item is Crataegus (2 x 8.30 francs). In the medical officer's opinion it is a phytotherapeutic remedy and it is therefore non-refundable (see office notice 2/89)."

5. On 6 June 1990 the complainant appealed against that reply to the Director General under Article 92(2) of the Staff Regulations. She pointed out that Crataegus was a "pharmaceutical product properly registered as a medical remedy"; that a medical practitioner had prescribed it in accordance with Article 14 of Rule No. 10; that, being at odds with Article 14, office notice 2/89 was not a valid bar; and that it was idle to brand Crataegus under Article 24 as a "non-

functional" or "unnecessary" form of treatment.

6. Her appeal was referred to the Management Committee of the Fund. The medical officer having given his opinion that Crataegus came under phytotherapy, the Committee unanimously concluded that it was not a refundable product. The staff representatives on the Committee nevertheless questioned the lawfulness of office notice 2/89, an issue then pending in a case the Tribunal ruled on later, on 3 July 1991, in Judgment 1101 (in re Cassaignau and Karran No. 3). In giving the Committee his opinion the medical officer cited his earlier substantiated opinion on phytotherapy in the context of that other case.

7. By a letter dated 24 October 1990, which the complainant seemingly did not get until 5 November, the Director General rejected her appeal and confirmed the Organisation's position, citing its arguments on the earlier case.

8. The complainant filed her first complaint on 31 October 1990 challenging the rejection she inferred from the Director General's failure to answer her appeal. On 1 February 1991 she filed her second complaint challenging the express decision she had received in the meantime.

9. Her case is that Crataegus is beyond doubt a "pharmaceutical product" and the medical officer indeed acknowledged it as such by bringing it under phytotherapy. In her submission Article 14 is the general rule and, unlike the corresponding rule in the European Communities, the second sentence does not exclude treatment of that kind. Office notice 2/89 may not lawfully narrow the scope of the article. The decision she was given was not a reasoned one. She cites Mr. Cassaignau's and Mr. Karran's arguments on their case, in which she was an intervener.

10. In its reply Eurocontrol challenges receivability on the grounds that the complainant missed the time limit for internal appeal. As to the merits it cites in the main its reply to the complaints by Mr. Cassaignau and Mr. Karran and relies on Article 24(2) of the Rule, which it points out served as the basis for the Tribunal's ruling in Judgment 1088 of 29 January 1991 on Mr. Karran's second complaint.

11. The complainant has not used her right to rejoin so as to restate her position in the light of Judgment 1088 and of Judgment 1101, which was published, on 3 July 1991, before expiry of the time limit for a rejoinder from her.Receivability

12. The Organisation argues that the "act adversely affecting" the complainant within the meaning of the Staff Regulations is statement 1/90 of 17 January 1990 from the Sickness Fund. According to Article 92 of the Regulations the complainant ought to have lodged her internal "complaint" by the end of April 1990, i.e. within three months of getting the statement. The minute of 7 March 1990, which merely confirmed the original decision, did not relieve her of that obligation.

13. The argument fails. The cryptic allusion in the statement to "non-refundable items" did not suffice to tell the complainant just what she was being refused. The "act adversely affecting" her - to quote the Regulations - did not become specific until she got the minute of 7 March 1990 and so that is the date at which the time limit for her internal appeal began. Since she filed her appeal on 6 June 1990, one day before the expiry of the three months prescribed in Article 92, she acted in time.

14. She also filed her complaints with the Tribunal in time. There is no need to determine whether the decision to be reviewed is the one which she inferred from Eurocontrol's silence or the express but belated one: the cause of action in both complaints is identical.

The merits

15. In Judgment 1101 the Tribunal dismissed as irreceivable the complaints by Mr. Cassaignau and Mr. Karran impugning office notice 2/89 on the grounds that it "may not make a prior ruling of general application to the sorts of treatment" covered by that notice. It observed that appeal would lie if Eurocontrol, "in accordance with its rules, refused a staff member refund of the cost of a particular sort of treatment" and that the complainant might in that event challenge the lawfulness of any rule or of any general decision that afforded the basis in law of the individual decision impugned.

16. The conclusion is that the complainant may properly challenge the refusal to refund the costs of Crataegus and for that purpose put forward any objection she wishes to the lawfulness of office notice 2/89 insofar as it is the basis of the decision she is impugning. The Tribunal will entertain in that context the complainant's objections to the lawfulness of office notice 2/89 and her plea that she was given no reasons for the individual decision she is impugning.

The lawfulness of office notice 2/89

17. What is the thrust of office notice 2/89, and is it valid in law? Rule No. 10 confers discretion on the Fund authorities in refunding the cost of drugs, and they may exercise it in two respects, under Article 14 and under Article 24.

18. Under Article 14 the Administration may determine whether an item that a Fund member wants to have refunded is a "pharmaceutical product" within the meaning of the Rule. As the defendant contended in reply to the complaints by Mr. Cassaignau and Mr. Karran, that is a matter of medical opinion and among the relevant criteria are the preventive or therapeutic efficacy of the product, scientific inquiry into the effects it has, and any risks involved in using it. So decisions by public health bodies are highly relevant, particularly for an international fund like Eurocontrol's that covers more than one country and allows free choice of practitioner.

19. Other points are immaterial. One is that a product has been bought in a pharmacy - the criterion suggested by Mr. Cassaignau and Mr. Karran - since a pharmacy may sell many health items that are not products within the meaning of the Rule. Likewise a doctor's prescription is no criterion since according to the Rule it is a condition of refund over and above the objective effects of the product.

20. Eurocontrol has further discretion under Article 24, which empowers the Fund to refuse refund of the costs of treatment which the medical officer deems to be "non-functional, superfluous or unnecessary". As was said in Judgment 1088, 24 covers all sorts of "treatments", however the term "pharmaceutical product" in 14 is to be construed.

21. The Organisation therefore has wide discretion in the matter and may exercise it as it sees fit for the purpose of ensuring the efficiency and financial soundness of its Fund. There is more than one legal procedure it may resort to. It may adopt general rules under Article 100 of the Staff Regulations, which empowers the Director General to issue such rules by means of "service rulings" or else it may take individual decisions on particular cases. But whichever course it prefers its decisions will be subject to judicial review and, if required to review matters of medical opinion, the Tribunal will do so in the manner it explained in Judgment 1088, under 17.

22. Eurocontrol acted in this instance by making a service ruling. It issued office notice 2/89, which told the staff that the cost of some forms of treatment, including phytotherapy, were not to be refunded in future. As was held in Judgment 1101, the notice is not to be treated as amending the Rule but as "a mere warning to the staff that Eurocontrol does not intend to refund the costs of some kinds of treatment which it does not believe to have curative effect". In this case Eurocontrol has expressly confirmed that view and that intention and there was nothing wrong with its issuing the notice in keeping with Article 100.

23. Its views on "phytotherapy" appear from its answers to questions put to it in the context of Mr. Cassaignau's and Mr. Karran's case. As was said in Judgment 1101, under 5, it bases them on the following points:

no scientific studies show phytotherapy to have curative effect;

neither the composition of the products nor the proper dosage is clear;

it is not proven that phytotherapy is safe, some plant extracts being highly potent.

24. Eurocontrol is here relying on Article 24 of the Rule and submits that, even supposing that phytotherapeutic products are refundable under Article 14, they are in any event "non-functional" and "unnecessary".

25. Since the medical officer in coming to that view is exercising his responsibility under the Rule, the complainant cannot succeed unless she adduces evidence from authorities of equivalent weight in support of her claim to refund. She merely gives the name of the product, which is just the botanical name of a common plant, and offers no evidence to cast any doubt on the soundness of the medical opinion underlying the office notice or of the medical grounds for the individual decision based thereon.

The reasons for the impugned decision

26. According to Article 92 of the Staff Regulations any decision adversely affecting a staff member must be "reasoned".

The complainant submits that the only statement given in the decision of 7 March 1990 for refusing refund is a reference to the office notice. Was that sufficient, seeing that the notice itself states no obvious reason?

27. Though the requirement of a reasoned decision is a formal one the substance of the obligation depends on the nature of the decision. A sickness insurance scheme has to take many day-to-day decisions of a standard kind, and to require it to state reasons for each of them would bring the whole system of refund to a standstill. Decisions of that kind may be treated as sufficiently reasoned provided that the grounds for them are sufficiently obvious to the staff member from the rules they are based on and from their administrative context. For example, a reference to a collective decision may constitute valid grounds provided that that decision does offer some reason intelligible to the staff member. The individual decision of 7 March 1990 does make a reference to a collective decision, namely office notice 2/89.

28. The actual text of the notice does not state any reason. Yet at the Tribunal's request the Organisation appended documents to its further brief on the earlier case, and those documents show that its decision not to refund the cost of phytotherapy was, as is said above, taken on duly considered medical grounds. They were filed on 21 September 1990 in a case in which the complainant was herself an intervener; the Management Committee of the Fund, on which the staff are represented, had seen them; and the complainant was well aware of them by 31 October, when she filed her first complaint.

29. The complainant may not therefore plead any lack of stated reasons for the decision as an excuse for not going into the merits of the issue of the medical efficacy of Crataegus. Indeed she ought to have brought cogent evidence to rebut the medical officer's opinion. As was said in answer to her first plea, she offers not a shred of evidence to cast doubt on the soundness of the decision, and her claims are devoid of merit.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice-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 29 January 1992.

(Signed)

Mohamed Suffian
Mella Carroll
P. Pescatore
A.B. Gardner