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

EIGHTY-SEVENTH SESSION

Judgment 1880

The Administrative Tribunal,

Considering the complaint filed by Mr V. L. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 January 1998 and corrected on 10 March, Eurocontrol's reply of 19 June, the complainant's rejoinder of 25 August and the Agency's surrejoinder of 18 December 1998, the complainant's further submissions of 23 February 1999 and the Agency's observations of 4 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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 Greek citizen who was born in 1948, is principal assistant at grade B1 serving at the Agency's Central Flow Management Unit (CFMU) in Brussels.

On 16 October 1996, the complainant submitted a request to the Sickness Fund of Eurocontrol for his daughter to benefit, in accordance with Article 72(1) of the Staff Regulations, from reimbursement at 100 per cent for serious illness. By a letter dated 11 November 1996, the Fund accepted this request for the period 12 September 1996 to 11 September 1997, which was subsequently extended until 11 September 1998 by a decision of 15 September 1997.

At the beginning of 1997, as the state of health of the complainant's daughter had deteriorated, her doctor recommended treatment in the United States. On 5 February, the complainant submitted a request to the Fund for the direct payment of medical costs and informed it that he was leaving immediately for the United States to accompany his daughter, who was scheduled to be operated upon there. The direct payment of costs was granted that same day for a duration of twenty days. On 12 February, the Fund paid a deposit of 90,000 United States dollars to the American hospital in which the complainant's daughter was being treated. On the same day, it reminded the complainant of the rules governing the reimbursement of medical expenses established under Rule of Application No. 10 concerning sickness and accident insurance cover. The reimbursement of the medical costs for which no ceiling had been fixed was based on the cost of equivalent care in Belgium, which according to the Fund, generally corresponded to about 30 per cent of the costs charged in the United States, with 70 per cent remaining at the charge of the staff member. On 7 March, the complainant requested an extension of time regarding the direct payment of costs. His request was refused on the grounds that the deposit paid to the hospital had not yet been used up.

By a memorandum dated 4 April 1997, the head of Personnel Management informed the complainant that, on the advice of the medical adviser of the Sickness Insurance Scheme, it had been decided that an exceptional reimbursement would be made at 100 per cent for all the medical costs for treatment before the intervention and for the surgical intervention itself, with the exception of the costs of the hospital stay, which would be limited at 20,000 Belgian francs a day. However, he informed him that, since the medical adviser considered that post-operative treatment could be provided in Europe, the limits set out in Rule No. 10 would be applied to all costs subsequent to the operation. As agreed during a meeting held on 7 April, the complainant indicated by electronic mail on 9 April that his daughter's operation would occur around the middle of May and that she would remain hospitalised until the end of May. On 10 April, the Sickness Fund informed the American hospital that the direct payment of costs had been extended until 31 May 1997.

On 16 April 1997, the Director of Human Resources issued an information note to staff indicating that the Sickness Fund would no longer authorise the direct payment of hospital costs in non-member States of Eurocontrol, including the United States. The complainant's daughter was operated upon on 14 May. On 11 June, the Fund refused a further request for the direct payment of hospital costs submitted by the complainant on 29 May and informed the American hospital.

On 2 July 1997, the complainant initiated a "complaint" against the decision of 4 April. In an internal memorandum dated 22 August, the Sickness Fund Management Committee welcomed the strict application of the limits set out in Rule No. 10, but strongly recommended that the Director General assist the complainant under the terms of Article 76 of the Staff Regulations, which envisages the possibility of making gifts, loans or advances to officials who are "in a particularly difficult position as a result of serious or protracted illness or by reason of family circumstances". By a letter of 29 October 1997, which is the impugned decision, the Director of Human Resources rejected the "complaint" on behalf of the Director General.

B. The complainant contends, first, that the application of 100 per cent reimbursement for serious illness, in accordance with Article 72(1) of the Staff Regulations, precludes the application of ceilings to the reimbursement. He refers to an obvious error of appraisal. He says that the Sickness Fund applied global ceilings to the reimbursement of his daughter's medical costs by referring arbitrarily to the presumed cost of similar medical care in Belgium, whereas such care is not to be found in that country.

Secondly, he alleges a breach of Articles 8 and 9 of Rule of Application No. 10 respecting "special reimbursements" and the "free choice of practitioner and hospital or clinic", as well as of the principles of non-discrimination and proportionality. He says that the Fund refused to apply an "equality coefficient" to take into account the difference in the cost of medical care between the United States and Belgium, on grounds which included the fact that the United States is not a member of the Organisation.

Finally, the complainant maintains that the information note to the staff dated 16 April 1997 is in breach of his acquired rights and of the principles of non-discrimination and non-retroactivity. Furthermore, since these are in his view new provisions, the Organisation should have acted in conformity with Article 100 of the Staff Regulations regarding the general provisions for giving effect to the Staff Regulations.

He seeks the quashing of the impugned decision and costs.

C. In its reply, Eurocontrol maintains that the complaint is only receivable in so far as it contests the limit of 20,000 Belgian francs applied to the costs of the hospital stay, because in other respects the decision of 4 April 1997 was favourable to the complainant who had not yet requested reimbursement of post-operative costs. It adds that the information note to the staff does not constitute an individual decision which can be challenged.

Citing Judgment 1094 (*in re* Gérard and others) the Organisation states that the application of the 100 per cent reimbursement rate is not without limits and, in particular, it does not allow the reimbursement of expenses considered excessive by the medical adviser. The financial situation of the Fund has to be taken into account.

It observes that the application of Article 8 of Rule of Application No. 10 would have been less favourable to the complainant than the exceptional reimbursement from which he benefited, and it explains that equality coefficients were only calculated for member States of Eurocontrol as the sickness insurance scheme was "supposed to replace the national schemes in these countries". It does not deny the right of the complainant to the free choice of medical practitioner, but maintains that the complainant's daughter could have been treated in Europe and that the rules governing reimbursement apply irrespective of the place of treatment.

Subsidiarily, Eurocontrol notes that the direct payment of hospital costs is not a right, but a facility offered to insured persons. A service ruling was not therefore necessary to change this practice. Moreover, since the complainant benefited from this facility until 31 May 1997, he cannot invoke the retroactivity of the note of 16 April. It asks the Tribunal to order the complainant to bear the full costs of the complaint.

D. In his rejoinder, the complainant contends that his choice of the American hospital was not a "mere whim", because this hospital was the only one providing the most advanced treatment methods, including an experimental treatment, and it had the level of specialisation required to save his daughter's life after the many medical errors committed in Belgium. He invites the Tribunal to order a medical enquiry to satisfy itself as to the gravity of the mistakes.

He maintains that the decision of 4 April 1997 was prejudicial to him because it established rigid terms for reimbursement in the future. Moreover, Article 92(2) of the Staff Regulations and Article VII(2) of the Statute of the Tribunal allow a general measure, such as the information note of 16 April, to be challenged. His complaint is therefore receivable.

On the merits, the complainant affirms that the estimate made by the Agency of the cost of similar care in Europe is unrealistic. The cost of a room in a Brussels hospital specialising in cancer would amount to 34,000 Belgian francs a day, exclusive of medical costs. He says that the Fund should have assessed such costs taking into account the exceptional nature of the treatment received by his daughter, rather than evaluating them in an automatic manner. He accuses the Organisation, by interrupting the direct payment of the bills, of trying "to strangle him financially" and of attempting to "oblige him ... to repatriate his daughter to Europe", thereby placing her life in danger. Finally, he contends that a commitment to assist him made by the Director General on 22 August 1997 to the Sickness Fund Management Committee to allocate 9 million Belgian francs under Article 76 of the Staff Regulations was not respected, as he was finally proposed a loan of 4.5 million francs with interest.

The complainant enlarges on his claims. He requests that the Tribunal note the discriminatory nature of the decision to interrupt the direct payment of the bills, and order the defendant to reimburse without any restriction the total medical costs incurred in the United States for his daughter.

E. In its surrejoinder, the Agency requests that the Tribunal determine the receivability of the complainant's new claims. It contends that the complainant's daughter could have been treated in Europe, but affirms that this is not relevant to the case. It observes that the cost of similar care is determined with reference to the fees published by the National Sickness and Invalidity Insurance Institute, a Belgian institution, and that the reimbursements received by the complainant were "very generous". The hospital fees mentioned by the complainant are the rates that apply to someone not covered by a mutual insurance policy. Under an agreement between the Agency and the Brussels hospital in question, its staff and their dependants are given the same treatment as persons that are covered by a mutual insurance policy. Finally, it refutes the allegation that the Director General made a commitment to the Sickness Fund Management Committee: he never attends it. It adds that the Committee went beyond its terms of reference when it recommended recourse to Article 76 of the Staff Regulations, as that Article does not concern the health insurance cover.

F. In further submissions the complainant denies that Eurocontrol staff are treated in the same way as persons with mutual insurance coverage and maintains that they pay higher hospital fees than the latter.

G. In its comments on the complainant's further submissions the Agency maintains that its staff members do get the same treatment as persons with mutual insurance in the Brussels hospital in question owing to the financial Agreement, of which it produces a copy. The complainant seems to be confusing the notion of accommodation and board with the notion of medical costs. In 1997 the cost of accommodation and board alone was between 11,000 and 15,000 Belgian francs in the hospital cited by the complainant, which is well below the disputed 20,000 francs threshold.

CONSIDERATIONS

1. V. L., a Greek citizen, holds a B1 post at Eurocontrol's headquarters in Brussels.

Pursuant to Article 72 of its Staff Regulations the Agency insures its employees and their dependants against sickness. This sickness and accident insurance is governed by Rule of Application No. 10 Concerning Sickness and Accident Insurance Cover (hereinafter Rule No. 10). Although Eurocontrol has set up a Sickness Fund, disputes concerning benefits provided by the Fund are dealt with through the usual procedures.

In 1996 the complainant's daughter was treated in Belgium for a cyst. It was initially diagnosed as fairly benign but was later proved to be a malignancy requiring specific treatment. The specialist who made that diagnosis spoke of an extremely rapid evolution.

On the advice of his daughter's general practitioner, the complainant decided to get her treated in New York at the Memorial Sloan-Kettering Center (hereinafter, the American hospital), which admitted her on 5 February 1997. The medical care consisted of specific treatment followed by a delicate operation and further treatment. The Sickness Fund accepted the case, but there was a dispute as to the extent of the complainant's insurance coverage. This point will be dealt with below in so far as is necessary. The Fund agreed to reimbursement at the rate of 100 per cent within the meaning of Article 72 of the Staff Regulations. For the period ending 31 May 1997 it covered all medical costs except for the stay in hospital, on which there was a ceiling of 20,000 Belgian francs a day any amount above that being considered "excessive" as compared to Belgian rates - and a sum of 1,303.85 Belgian francs for telephone, television and drinks, which was not refundable.

On 4 April 1997 the head of Personnel Management sent the complainant an internal memorandum about his daughter's medical bills. It said that out of the total amount of the claims he had submitted, 1,293,317 Belgian francs were admitted, but that in accordance with Rule No. 10 the cost of the stay in hospital was calculated on the basis of the rates applied in Belgium; that is, up to a maximum of 20,000 Belgian francs per day, and that the costs of television, telephone and drinks were not refundable. A total of 434,634 francs remained at the complainant's charge. At the end of this memorandum, the head of Personnel Management drew the complainant's attention to the fact that after his daughter's operation he would no longer benefit from the exceptional rate of reimbursement and the normal rates would be applied.

On 16 April 1997 the Director of Human Resources issued an information note to staff about payment of hospitalisation costs by the Sickness Insurance Scheme.

On 6 November 1997 the same Director wrote to the American hospital to remind them that the Agency's guarantee of payment of hospitalisation costs had ended on 31 May 1997 and that any bills after that date were to be sent directly to the complainant.

2. The complainant lodged an internal appeal against the decision of 4 April 1997, against the communication from the medical adviser and "more generally, against any other previous or subsequent, preliminary or related act relied on in support of the offending decisions".

On 29 October 1997 the Director of Human Resources informed him of the Director General's rejection of his appeal and the reasons for it.

In his complaint to the Tribunal the complainant challenges not only the decision of 4 April 1997 but also the communication from the medical adviser, the information note to staff issued by the Director of Human Resources and the communication to the American hospital. On the merits, he submits that to place a ceiling on expenditure is against the rule giving entitlement to 100 per cent reimbursement.

Eurocontrol asks the Tribunal to dismiss the complaint. It submits that only the decision of 4 April 1997 is a challengeable one. On the merits, it cites the case law (see Judgment 1094 *in re* Gérard and others), according to which 100 per cent coverage does not preclude the setting of maximum limits to avoid payment by the Agency of "excessive expenses".

Receivability

3. The medical costs were incurred by a person who has attained the age of majority and is the daughter of an official. The material rules apply by virtue of the official's contract of employment. Except in the case of a deceased official, the Tribunal is open only to the official himself (Article II(6) of the Tribunal's Statute). It follows that the official is also entitled to request application of the provisions of the Statute to his dependants, even if they have reached the age of majority.

4. In his complaint to the Tribunal, the complainant seeks the quashing of four acts of the Organisation, which he takes to be decisions by Eurocontrol: (1) the Agency's decision of 4 April 1997 - which was presented as such and concerns the admissibility of bills submitted to the Sickness Fund; (2) the letter of 4 April 1997 in which the medical adviser gave his personal opinion as to the Fund's obligations; (3) the information note to staff issued by the Director of Human Resources on 16 April 1997 concerning payment of hospitalisation costs by the Sickness Insurance Scheme; and (4) the communication of 6 November 1997 from the same Director to the American hospital reminding them that the Fund's undertaking to pay costs directly had ended on 31 May 1997. In essence, he objects to the reductions under "excessive expenses" and the end of direct payments by the Fund to the American hospital.

The Agency submits that the complaint is receivable in so far as it challenges the decision of 4 April 1997; for the rest, it is irreceivable for lack of any individual decision.

In his rejoinder the complainant drops his claim to direct payments, having found an arrangement with the American hospital for the payment of the bills. He nonetheless seeks a ruling in law that the Agency had an obligation to continue direct payments. He also seeks the quashing of the Director General's decision refusing "the effective refund of all medical costs incurred in the United States for [his daughter]" and asks the Tribunal to state

that "all the above-mentioned medical costs must, without any restriction or reduction whatsoever" be refunded to him.

The conclusion is that his claim for payment by the Agency to the American hospital has become devoid of substance. His new claim to a ruling in law on this point is irreceivable for want of an adequate cause of action; if the matter arises again it may be settled in the context of some specific claim (see for example, Judgment 1666 *in re* Bedrikow under 4(a)).

The same holds good for his claim to a ruling in law concerning the Agency's future obligations as to the extent of its refunds. Such issues may be dealt with as each specific decision on reimbursement arises. Some of the issues may be examined in the context of the decision of 4 April 1997.

The statement at the end of the memorandum of 4 April 1997, concerning the Fund's future intentions, is not presented in the form of a binding decision. It appears as a statement of intent, and so is not a challengeable decision (on the notion of decision see Judgment 1694 under 7, and the case law cited).

Furthermore, as the Agency rightly observes, the medical adviser's letter had none of the characteristics of a specific decision adversely affecting the complainant. No more does the information note to the staff.

The complaint is therefore receivable only in so far as it challenges the reductions referred to in the decision of 4 April 1997.

5. An amount of 1,303.85 Belgian francs was not refunded since it was for the costs of telephone, television and drinks, which are not covered by the insurance. The complainant neither objected to nor made any claim to reimbursement of that amount under Article 72, so there is no dispute on that score.

So the only issue remaining is the reduction that the Agency made from the costs of the hospital stay on the grounds that any amount over 20,000 Belgian francs a day would be treated as "excessive expenses" and therefore would not be refundable.

The merits
The material rules

6. Sickness insurance and the refund of costs in particular are dealt with in the following provisions of Eurocontrol's Staff Regulations and Rules.

The Regulations provide that:

"Article 72

1. An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants, are insured against sickness up to 80% of the expenditure incurred, pursuant to the provisions of a rule of the Director General.This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalization, pharmaceutical products, radiology, analyses, laboratory tests and prostheses on medical prescription with the exception of dental prostheses. It shall be increased to 100% in cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness, and for early detection screening and in cases of confinement. However, reimbursement at 100% shall not apply in the case of occupational disease or accident having given rise to the application of Article 73.

One-third of the contribution required to meet such insurance cover shall be charged to the official but so that the amount charged to him shall not exceed 2% of his basic salary.

...

3. Where the total expenditure not reimbursed for any period of twelve months exceeds half the official's basic monthly salary or pension special reimbursement shall be allowed by the Director General, account being taken of the family circumstances of the person concerned, in manner provided in the rules referred to in paragraph 1.

...

Article 76

Gifts, loans or advances may be made to officials, former officials or where an official has died, to those entitled under him who are in a

particularly difficult position as a result of serious or protracted illness or by reason of family circumstances."

Under Article 72, the Director General issued Rule No. 10, the current version of which reads:

"Article 1

Object

In pursuance of Article 72 of the Staff Regulations ... a Sickness Insurance Scheme is hereby set up within the Agency. Within the limits and under the conditions provided for in this Rule and the Annexes thereto, the Scheme will guarantee to persons covered by it the reimbursement of expenses incurred as a result of illness ...

...

Article 8

Special reimbursements

1. Special reimbursements may be granted when the expenses incurred are for treatment of a member or of a person covered by his insurance in a country where the cost of medical treatment is particularly high and the portion of expenses not reimbursed by the Scheme places a heavy financial burden on the member. The application of this paragraph will be the subject of a decision by the Director General taken on the basis of a report of the Central Office and having regard to the advice of the Committee of Management.

2. When the non-reimbursed portion of the expenses covered by the scales annexed to this Rule which are incurred by a member in respect of himself and in respect of persons covered by his insurance exceeds during any twelve-month period half the average basic monthly salary ... the special reimbursement provided for in Article 72.3 of the Staff Regulations shall be determined as follows:

- the non-reimbursed portion of the above expenses which is in excess of half the average basic monthly salary ... shall be reimbursed at the following rates:

- 90% in the case of a member by whose insurance no other person is covered;

- 100% in other cases.

...

4. Where the member so requests, the weighting for his place of employment ... shall be applied to the basic monthly salary ...

5. Decisions on requests for special reimbursement shall be taken by:

- either the appointing authority, on the basis of an opinion delivered by the office responsible for settling claims in accordance with general criteria adopted by the Management Committee after consulting the Medical Council for determining whether the expenses incurred are excessive;

- or the office responsible for settling claims, on the basis of the same criteria, where it has been empowered by the appointing authority to do so.

Article 9

Free choice of practitioner and hospital or clinic

1. Persons covered by this Scheme shall be free to choose their practitioners and hospitals or clinics.

2. The Agency shall, wherever possible, endeavour to negotiate with the representatives of the medical profession and/or the competent authorities, associations and establishments, agreements specifying the rates for both medical treatment and hospitalisation applicable to persons covered by this Scheme, account being taken of local conditions and, where appropriate, the scales already in force.

...

Article 27

Financial balance

The cost of benefits provided under this Scheme must be balanced by contributions from the Agency and from members over a three-year period."

Annex I to Rule No. 10 contains the "rules governing the reimbursement of medical expenses". They set a maximum limit expressed in Belgian francs, for the main items of medical expenditure, and rules on the method of

calculating the various rates of reimbursement. The following provisions are relevant:

"III. HOSPITALISATION

1. The costs of a stay in hospital shall, in the case of a surgical operation or medical treatment, be reimbursed at the rate of 85%, subject to a maximum limit of BEF 4,127 and BEF 3,851 per day, respectively.

The costs of a stay shall comprise the costs of board and service, plus taxes.

2. The surgical operation expenses, as specified in Section II, the expenses incurred for the use of the operating theatre, plaster room, dressings and other expenses in respect of any general care pertaining to the surgical operation, medical fees for visits and calls, laboratory analyses and tests, X-rays, medicines and other diagnostic or therapeutic services shall be reimbursed separately, in accordance with the provisions for the reimbursement of each of these categories of expenditure. If at a hospital centre the all-in charge for a day in hospital comprises the cost of the stay as defined in the second subparagraph of paragraph 1 and all or part of the expenses listed above, reimbursement shall be at the rate of 85%.

...

IV. SPECIAL CASES

1. In cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness, expenses shall be reimbursed at the rate of 100%.

However, reimbursements in any one of such cases under Section VI.1, second paragraph, Section XI.Ia), Section XII.E and F, Annex III.A and B.2 and 3, and Annex IV.B.2) may not exceed an amount equal to twice the maximum amount provided for therein.

Reimbursements under Section III.3, Section VI.3, Section VIII, first and fourth paragraphs, Section X, Section XI.1b), Section XII.B and Annex III.B.1 may not exceed the maximum amounts provided for in the Rule.

Applications for the recognition referred to in the first paragraph shall be made to the office responsible for settling claims; they shall be accompanied by a report from the practitioner treating the person concerned.

The appointing authority or the office responsible for settling claims, if the requisite powers have been delegated to it by the said authority, shall take its decision after consulting the Medical Adviser, whose opinion shall be based on general criteria drawn up by the Medical Council.

Reimbursement at the rate of 100% shall not apply in cases of occupational disease or accident resulting in the application of Article 73 of the Staff Regulations.

...

XV. COMMON PROVISIONS GOVERNING REIMBURSEMENT

1. The following provisions shall apply to reimbursement of the medical expenses referred to in Sections I to XIII.

2. Expenses in respect of items not mentioned in the Annexes to this Rule may be reimbursed at the rate of 80% after consultation of the Medical Adviser attached to the office responsible for settling claims. Maximum limits may, however, be set in each case after the Management Committee has been consulted.

3. Expenses in respect of treatment considered non-functional or unnecesary by the office responsible for settling claims after consultation of the Medical Adviser shall not be reimbursed.

That part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed."

...

As noted below, the daily rates for hospitalisation were nonetheless increased after the Annex was originally adopted.

Under Article 31 of Rule No. 10 the Director General also issued provisions for the interpretation of this Rule, the following of which are relevant:

"ARTICLE 8 of Rule No. 10

...

1) Paragraph 1

In the interests of equal treatment, equality coefficients have been introduced for the reimbursement of expenditure incurred in currencies other than Belgian and Luxembourg francs. The list of these coefficients, which are set periodically by the Director General, is circulated to members on a regular basis in an Office Notice.

Article 8 of Rule No. 10 does not rule out special decisions in individual cases not covered by the equality coefficients.

In such cases,

- expenses will be reimbursed up to double the maximum amounts specified in the Annexes to this Rule, where appropriate, on a proposal from the Central Office and subject to approval by the Management Committee;

- the condition of 'a heavy financial burden' is deemed to be met when the portion of expenses not reimbursed amounts to 60% of the expenses incurred;

- 'expenses incurred' are assessed item by item.

2) Paragraph 2

...

b) This paragraph applies subject to the rules for the interpretation of Article 8.1 and Section XV of Annex I.

...

ANNEX I - SECTION XV

Second subparagraph of paragraph 3

1. Expenses exceeding by 50% (fifty percent) the cost corresponding to 100% (one hundred percent) of the maximum rates laid down in Annex I to this Rule are to be considered excessive and will not be reimbursed under Article 8.2 of this Rule, subject to the second subparagraph of Section IV.1 of Annex I.

2. For treatment billed in currencies to which an equality coefficient applies, the 50% rate obtains after application of the coefficient."

The Agency also compiled a list of equality coefficients for medical care outside Belgium in other States that are parties to the Eurocontrol Convention. It makes no mention of any equality coefficient for any other State.

The pleas

7. The complainant has the following pleas:

(1) The decision of 4 April 1997 is in breach of Article 72 of the Staff Regulations and its rules of application, since under that article, the rate of reimbursement in the case of a serious illness is 100 per cent. The Agency itself concedes that paragraph 2 of Section XV of Annex I to Rule No. 10, which allows "maximum limits" for some items, does not apply to hospitalisation costs; it does not even mention them. However, the Agency relied on paragraph 3 of Section XV of that Annex which does allow it to refuse reimbursement of the "part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer ...". The Sickness Fund appears to treat as "excessive" all the medical expenses incurred by the complainant's daughter in the United States, which exceed the presumed cost of the same treatment in Belgium. That is arbitrary and amounts to applying Section XV(2), although the Agency has declared this provision inapplicable. To determine whether the costs were "excessive", there has to be an itemised assessment. But there was no such assessment and besides, the patient's condition required treatment in the United States, so the costs were not "excessive".

(2) Secondly, he pleads breach of Article 8(1) and (2) of Rule No. 10 and Section XV of Annex I of the rules of interpretation of Rule No. 10: the Sickness Fund refused to apply equality coefficients which take account of the difference in medical costs between the United States and Belgium, and it overlooked the fact that the treatment that his daughter received in New York does not exist in Belgium. The Fund also disregarded the rules of interpretation of Rule No. 10 by failing to count the "tolerance" of 50 per cent, whereby "costs are excessive only over and above the initial maximum of 150 per cent; in view of the rules of interpretation of Article 8, paragraph 1, of Rule No. 10, the amount to be reimbursed is equivalent to double the 150 per cent (i.e. 300 per cent of the original maximum, after application of an equality coefficient)". The Fund should also grant him benefit from Article 8(2) of Rule No. 10 which, according to the complainant, applies "as soon as the amount of the non-reimbursed expenses exceeds, over a twelve-month period, one half of the basic monthly salary".

The Agency rebuts his pleas. Its arguments will be examined below, as necessary, in connection with each of the complainant's pleas.

Maximum limits

8. Citing Article 72 of the Staff Regulations the complainant submits that, since the Fund accepted his case, he is entitled to 100 per cent cover of the costs incurred. He does not explicitly contend that this article bans any reduction of the rate, but rather that the conditions for such reduction were not met in his case.

According to precedent, which the Tribunal sees no reason to modify (see Judgments 1094 *in re* Gérard and others, and 1095 *in re* Gilles), coverage at the rate of 100 per cent does not mean that in all circumstances an insured person is entitled to full repayment of expenses incurred. Article 72 provides for insurance only up to a percentage of the expenditure incurred and pursuant to the provisions of a rule of the Director General. To allow the Fund not to reimburse the part of the expenses deemed to be excessive is in keeping with the purpose of sickness insurance and it is a means of ensuring sound financing and comparable coverage for the beneficiaries, and as such falls within the authority delegated to the Director General. The reimbursement of expenses can be restricted by setting maximum limits or ceilings for certain types of expenditure or by reckoning limits for each case on the basis of costs incurred. Based on that delegation of authority, the provisions of the rule of the Director-General are consistent with the ranking of rules as regards allowing the restriction of the Fund's benefits to be restricted as necessary.

The alleged promise of reimbursement
at the rate of 100 per cent

9. The complainant cites a statement issued by the Fund on 11 November 1996 promising to refund all medical costs in full, a decision which was extended on 15 September 1997 until 11 September 1998.

It is clear from the documents he cites that they do not have the meaning he seems to attribute to them. Both the complainant's request to the Fund and the latter's decision refer to coverage at the rate of 100 per cent within the meaning of Article 72 of the Staff Regulations and its Rules of Application. So the complainant must have been aware that what the Fund had undertaken was reimbursement at the rate of 100 per cent under this article, which did not imply a promise to pay his expenditure in the United States regardless of its amount.

Nor did the Fund's promises of direct payments to the American hospital imply that it would pay his costs in full for as long as they continued and without limits.

Indeed, in its internal memorandum of 12 February 1997 the Fund explained to him exactly how it envisaged reimbursement for the medical care provided in the United States.

The plea is therefore without merit.

The equality coefficient

10. Citing the rule of interpretation of Article 8(1) of Rule No. 10, the complainant submits that the Agency should work out and apply to him equality coefficents for medical care in the United States. But equality coefficients have been set only for States that are parties to the Eurocontrol Convention. For non-member States the Fund may apply the equality coefficient 100, which is the base coefficient applied to medical care in Belgium and Luxembourg.

The Agency explains that it had to introduce equality coefficients to offset differences between member States because Article 24 of the Convention as amended provides for Eurocontrol to substitute its own sickness insurance scheme for those of its member States. The Article states that: "By reason of its own social security scheme, the Organisation, the Director General and staff of the Organisation shall be exempt from all compulsory contributions to national social security bodies". Since the persons insured under Eurocontrol's scheme were thus entitled to its benefits, to the extent that it replaces national social security schemes - the Agency was bound to set coefficients for equality as between the member States. That is not so for non-member States. When medical treatment is provided in such a State and its cost is particularly high, the Fund may grant special reimbursements under Article 8(1) of Rule No. 10.

The complainant argues that the social protection provided under Article 72 of the Staff Regulations requires that, being free to choose their practitioners (Article 9 of Rule No. 10), staff members and persons covered by their insurance must be able also to obtain equivalent benefits from the Fund regardless of the country in which they are treated. Accordingly, for a country such as the United States where medical costs are particularly high, that means setting an equality coefficient enabling someone treated there to obtain actual cover equal to the cover he would get in one of the member States. By failing to set an equality coefficient or provide some similar arrangement the Agency committed a breach of the principles inherent in Article 72, which warrants the quashing of the impugned decision.

He rightly observes that, as a result of the high cost of medical care in the United States combined with the lack of an equality coefficient and the fact that the Fund's participation is determined on the basis of costs in Belgium, the Fund's share of the costs actually incurred in the United States turned out to be relatively small, the complainant being left to pay the remainder.

Judgment 1094 cited above showed that the purpose of Article 72 is to provide staff with a workable sickness insurance scheme. The article lays down some basic features of the scheme, and one of them is the rates of refund that apply to different kinds of treatment, and sickness insurance must be provided pursuant to the provisions of a rule of the Director General. The latter is thereby empowered to do whatever is needed to make the scheme workable and financially sound, provided that he abides by the provisions of the Staff Regulations. The cost of the scheme is shared between Organisation and staff in line with the principle of solidarity. That is why it is a proper precaution to set maximum limits on the costs of some forms of treatment and to require prior permission in some cases.

The same holds good for medical treatment in a country which is not a member of Eurocontrol. The free choice of practitioner and hospital is not at issue. But sound management of the Fund's finances, as is described above, would not adjust easily to a situation where a member may burden the Fund with additional costs - for the same treatment - simply by choosing to be treated in a non-member State. That would be the case if, for such a country, the Fund had to set an equality coefficient taking account of medical costs which are higher in that country than in Belgium. Besides, the beneficiary is not denied the social protection intended by Article 72 if he has the choice of treatment in a member State. He also has a duty to spare the Fund any unnecessary costs. In these circumstances, it is quite reasonable that the Fund should allow him to choose where he wants to be treated, while letting him bear any additional costs incurred by treatment in another country. This does not apply, however, if he has no alternative but to seek treatment abroad.

In the interests of fairness, in Article 8(1) of Rule No. 10 the Director General established a flexible rule whereby special reimbursements may be granted for treatment in a country where medical costs are particularly high and the portion of expenses not reimbursed places a heavy financial burden on the member. Proper application of this rule enables cases where some kind of weighting is necessary to be taken into account.

It is true that the "interpretation of Rule No. 10" of Article 8(1) which provides for the introduction of equality coefficients, does not expressly differentiate between treatment in member States and treatment elsewhere. The Agency's interpretation of it appears reasonable, however. As it explains, it has to provide the citizens of its member States with benefits equivalent to the ones they would receive under national social security schemes, which at all events is the case as regards treatment in the State of which the complainant is a citizen. But it has no equivalent obligation in respect of other States and their nationals. Article 8(1) of Rule No. 10 presupposes that there are countries for which there is no equality coefficient, and affords a proper basis in law for the Agency's differentiation.

Nor has Eurocontrol committed any breach of equal treatment, since the same rule applies to everyone covered by the Fund. Such differentiation as the Agency does apply is warranted, being based on the consideration that all members of the Fund have a duty to help to keep costs down as far as is reasonable.

That being so, the rule in question and the absence of an equality coefficient for the United States are lawful and show no abuse of the Director General's discretion.

Even if a member had no alternative but to seek treatment outside the member States, in a country where medical costs are very high, it would not be deemed contrary to Article 72 for the Fund to ask for a relatively modest contribution in the form of "excessive expenses".

And that was the case here: for the period taken into account in the impugned decision, the Fund in the end paid 92 per cent of the costs, which left only 8 per cent to be borne by the complainant (as excessive costs for hospitalisation).

So there is no need to determine whether the complainant's daughter's condition required treatment in the United States, as the complainant contends and the Fund denies. To seek a medical opinion on the matter, as the complainant suggests, would therefore serve no purpose.

"Excessive expenses"

11. The complainant contests the reduction of the reimbursement of his hospital bill, which was considered to include "excessive expenses" within the meaning of Section XV, second subparagraph of paragraph 3 of Annex I to Rule No. 10.

(a) The complainant holds first that Section XV.3 of Annex I should not be applied in his case since the Agency wishes to introduce "maximum limits", and it is Section XV.2 which provides for this possibility.

Conversely, the Fund considers that paragraph 2 is not applicable to the case in point, since the complainant's daughter received treatment listed in the annexes, and this excludes the application of paragraph 2. There should be no confusion between the "maximum limits" in the meaning of paragraph 2, and the applicable "thresholds" (which are not "maximum limits"), and which are covered only under paragraph 3.

As the complainant does not contest that the treatment administered is provided for in the annexes to Rule No. 10, from that point of view there is nothing to prevent application of Section XV.3 of Annex I.

(b) *Inter alia*, the complainant asserts that, were a reduction assumed to be generally acceptable, a maximum of 20,000 Belgian francs a day for hospitalisation expenses would be manifestly inadequate, in view of their cost in Belgium and the States members of Eurocontrol; the fixing of an insufficient maximum limit would affect the notion of "excessive expenses", and require correction by the Tribunal.

The Agency contests this. It submits that the ceiling on the costs of accommodation and board reimbursed at 85 per cent, as set forth in Section III of Annex I to Rule No. 10 was 4,127 francs a day in the case of a surgical operation and, in the case of medical treatment, 3,851 francs a day. In 1994 the Sickness Fund Management Committee decided, as a result of increases in hospital charges, to replace the ceilings by maximum reimbursable limits of 8,500 francs in cases of reimbursement at 85 per cent, and 10,000 francs in cases of reimbursement at 100 per cent; a rule of interpretation was provided for Section III.1, second subparagraph and Section III.2 and Annex I to Rule No. 10. Finally, in a minute of 22 July 1997, the amount of 10,000 francs was replaced by 20,000 francs with effect from 1 June 1996; beyond this amount, the medical adviser's opinion is required to determine whether the expenses are to be considered excessive. In the present case, after consultation with the medical adviser, it was considered unnecessary to exceed a participation of 20,000 francs a day, since the amount billed by the American hospital for costs of hospital stay only included board, service and taxes, and was exclusive of medical costs.

These facts are not contested. The complainant submits that for an equivalent stay at the Jules Bordet Institute in Brussels, the current cost is 34,000 francs per day (plus 1,500 francs for a second bed), exclusive of medical treatment.

The Agency explains that the costs quoted by the complainant are applicable to patients who are not covered by a mutual insurance company or by the sickness insurance scheme of an international organisation; Eurocontrol had concluded an agreement with this hospital - as with others - that it was in no case possible for a hospital stay to be charged at more than 20,000 francs a day.

In a further submission, the complainant contested that Eurocontrol staff members were charged at the same rate in this hospital as persons subscribing to a mutual insurance scheme. In reply Eurocontrol produced evidence showing that staff members benefited from arrangements valid for European Union staff members, the same tariffs as those with mutual insurance. It also points out that in 1997 it cost between 11,000 and 15,000 francs per day for those with mutual insurance to stay in a private room in the Jules Bordet Institute.

Thus, the cost of hospitalisation in Belgium for a Eurocontrol staff member in an establishment similar to the

American hospital would not exceed 20,000 francs a day.

(c) The complainant deplores that the challenged decision does not base its estimation of the expenses as "excessive" on the particular case of his daughter, but on an over simple rule applicable to everyone, while failing to take into consideration the real level of expenses he had to bear, or the need for those expenses if his daughter's life was to be saved.

The objection appears groundless.

The fixing of the level of expenses in Belgium and in the member States provides a valid, objective figure for all patients receiving treatment outside these States.

Eurocontrol rules also make it possible to examine the necessity for expenses incurred in the present case where the expenses are not considered excessive and to adjust the level of the Fund's participation.

This is what the Fund has done here. For the first period of stay in the United States (the only part at issue) it approved all medical expenses as such, no doubt assuming that the complainant had serious reasons for admitting his daughter to an American hospital; however, on analysis of the bills submitted for hospitalisation, the Fund considered that certain treatment was not subject to reimbursement at 100 per cent. After consultation with the medical adviser, it deemed that participation beyond the maximum limit of 20,000 francs per day was not justified.

(d) If, by this argument, the complainant maintains that he has a right to reimbursement of the entire cost incurred in treating his daughter in the American hospital, he will run aground against the considerations of the Tribunal in the precedents cited above, regarding the limit of the treatment expenses reimbursed by the Eurocontrol Sickness Fund. These limitations were established with the financing of the scheme in mind, which is shared between the Agency and staff members and based on a certain equality in the cover provided by the Fund.

Given these conditions, part of the expenses arising from accommodation and board could be borne by the insured person, even if treatment in the United States might be preferable for the complainant's daughter.

Non-provision of "special reimbursement"

12. The complainant seems to believe that provision of a special reimbursement under Article 8.1 of Rule No. 10 would enable him to cover the entire expenses.

The Agency replies that the medical costs in their entirety were paid for the period that was covered by the decision of 4 April 1997, and that this was a special measure which meant that the complainant had obtained overall reimbursement at 92 per cent. If, the Agency states, "a special decision was approved pursuant to Article 8.1 and its Rules of Interpretation, the result would in any event be less favourable to the complainant (reimbursement at around 67 per cent only)"; here, the Agency is clearly considering a situation where the medical treatment would be refunded in line with the amount due in Belgium for equivalent treatment, the sums still due being seen as amounts going above the maximum limits, or even as "excessive expenses" dealt with by a special reimbursement under Article 8.1.

The considerable financial advantage given by the payment of the medical costs in their entirety for this period represents a special reimbursement within the meaning of Article 8.1 of Rule No. 10, and the amount allocated is in no way an abuse of the discretionary authority of the Fund, and therefore of the Agency.

It should nonetheless be noted that according to the Fund, the complainant could not benefit from a special reimbursement since the reduction had been made under the heading of "excessive expenses" and, pursuant to Annex I, Article XV.3, second paragraph, of Rule No. 10, "part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed". For the reasons stated above, no judgment is required on this point.

13. The complainant also claims the right to a special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No. 10 (expenses not reimbursed within a period of twelve months exceeding half the average basic monthly salary).

The Agency counters this claim by citing Annex I, Article XV.3, second paragraph of Rule No. 10 "common

provisions governing reimbursement", which reads "[t]hat part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed". It explains that in the absence of such a rule, there would be no limit on reimbursement of excessive expenses. This view was already contained in the impugned decision. Therefore, it may be considered that all the elements of this point have been dealt with.

However, the request for reimbursement based on Article 8.2 of Rule No. 10 appears premature. It presupposes an average salary of the staff member calculated over a twelve-month period, as well as a portion of non-reimbursed expenses incurred "during any twelve month period". Clearly the period during which the expenses were incurred is the one to be taken into consideration. Here, however, the incident that revealed the illness of the complainant's daughter occurred in September 1996. A biopsy was carried out on 13 September 1996 and a first operation took place on 24 September 1996, approved by Eurocontrol's Sickness Fund on 11 November 1996. The complainant's daughter was hospitalised in the United States and the challenged decision of 4 April 1997 concerns expenses incurred for the period from 5 February to 3 March 1997. At that time, the treatment was in progress and was being charged. Since the twelve-month period had not ended, the Fund was unable to establish the possible amount of the special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No. 10.

It is only at the end of this period that the Fund will be able, if needs be, to fix the reimbursement of uncovered expenses which could, under these provisions, give rise to a special reimbursement; it shall examine the application of Annex I, Sections IV and XV, as well as the interpretation to Article 8 of Rule No. 10 and to Annex I, Sections IV and XV; it shall ensure that the interpretation does not rob the original rule - especially Article 72(3) - of its meaning.

14. In brief, the complaint must fail. However, the Tribunal notes that the Fund was premature in considering whether or not to provide a special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No.10.

The Agency asks that the complainant pay costs regarding this complaint. Since his pleas fail, he must pay his own costs. The Tribunal rules that he shall not pay the Agency's costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

Updated by SD. Approved by CC. Last update: 5 March 2008.