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

FORTY-FIFTH ORDINARY SESSION

In re ROELOFSEN

Judgment No. 423

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mrs. Joyce Ellen Roelofsen on 18 July 1979 and brought into conformity with the Rules of Court on 30 August, the Agency's reply of 29 November, the complainant's rejoinder of 24 January 1980 and the Agency's surrejoinder of 8 July 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 2, 62, 64, 87, 92(2) and 93 of the Eurocontrol Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a citizen of the Netherlands, joined the staff of the Agency in 1973 and on 1 August 1978 was assigned to the Agency's experimental centre at Brétigny, in France. Two years earlier she had married Mr. Roelofsen, who was also employed at the centre and who by a first marriage had three dependent children born in 1955, 1957 and 1960. As an Agency official she was informed on 19 December 1978 by the Head of Personnel that because of a change in her family circumstances the weighting applied in the calculation of her salary to take account of the tax which she had to pay to the French internal revenue was altered with retroactive effect from 1 November 1977. In a minute which she wrote on 22 February 1979 to the Director of Personnel and Administration the complainant challenged that decision. In his reply of 23 May the Director explained how the new weighting had been worked out. On 18 July the complainant appealed to the Tribunal against the decision of 19 December 1978.

B. The complainant: (1) objects to the date from which the decision took effect; (2) expresses the view that the recovery of the sum which, by virtue of the retroactive decision, was overpaid is in breach of Article 87 of the Staff Regulations ("Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it"); and (3) contends that Article 64 of the Staff Regulations was misapplied ("An official's remuneration expressed in the currency of the country where the Agency has its headquarters shall, after the compulsory deductions set out in these Staff Regulations or in any implementing regulations [which] have been made, be weighted at a rate above or equal to 100 per cent depending on living conditions in the various places of employment and the income tax systems special to the different service countries.") She asks the Tribunal to order: (1) that her salary should be weighted to take account of the tax which she is actually paying, and which is levied on the sum of her own salary and her husband's; (2) that the sums withheld by virtue of Article 87 should be reimbursed since she was not aware that there was no due reason for their payment to her; and (3) that the sums which she paid back to the Agency in respect of two months, and which were incorrectly calculated by reference to the date given in the decision of 19 December 1978, should be reimbursed to her.

C. In its reply the Agency explains that its officials are compensated for the payment of tax for which they are liable. Compensation is only approximate, however. It takes the form of a lump-sum payment predetermined by reference to a small number of standard cases and based on pay at the third step in each grade. A distinction is drawn between expatriate and non-expatriate officials according to the composition of the family: bachelor, married, married with one child, married with two children, and so on. As a rule the weightings are worked out twice a year when pay is increased. What is increased is either the cost-of-living component of the corrective weighting which offsets rises in the cost of living appears to be too high, it is incorporated in basic rates. Thus the weighting is reduced but net remuneration remains constant. The purpose of the weighting is not to reimburse in full any tax paid but to ensure that the pay of all officials, whatever their duty station may be, has equal purchasing

power and to give them the same net pay as the staff of the European Communities. Thus when both spouses are Eurocontrol officials, their salaries are separately weighted to make compensation for tax paid even when under national law they are taxed jointly. In determining the weighting the husband was originally deemed to be the breadwinner, the children to be his dependants and his wife to be unmarried. But in France the rate of tax payable on total income falls as the size of the family increases, and the complainant was thus paying less national tax than a spinster and receiving greater net remuneration than a married female official in the European Communities. Accordingly, from 1 January 1974 account was taken of the number of children in weighting the wife's salary as well as the husband's. Then two further adjustments were made, one on 1 September 1977, when one child ceased to be dependent, and another on 1 November, when a second child ceased to be dependent. The complainant is therefore mistaken in contending that the weighting introduced on 1 November 1977 was applied from a date two months earlier: the change made on 1 September was a different one altogether. Two decisions were taken on 19 December 1978: one of them took effect from 1 September 1977 and set the weighting at M+2 (married plus two children) and the other took effect from 1 November 1977 and set the weighting at M+1 (married with one child).

D. The Agency argues that the complaint is irreceivable on the grounds that the complainant sent her letter of 22 February 1979 to the Director of Personnel and Administration and so submitted her "complaint" to Personnel and not, as Article 92(2) of the Staff Regulations requires, to "the appointing authority". Besides, the letter merely asks for an explanation and makes no specific claim. Consequently the reply dated 23 May 1979 from the Director of Personnel and administration constituted neither in form nor in substance any reply to a "complaint" but merely gave explanatory information. Subsidiarily, the Agency observes that the complaint's claims for compensation for loss incurred owing to the change in weighting did not form part of her letter of 22 February 1979 and are therefore irreceivable. As to the merits, and in particular the application of Article 64, the Agency argues that there are no legal grounds for her contention that the weighting fails to compensate her in full for the tax levied on her income and that the percentage of tax for which she is not compensated has steadily increased since 1 January 1974. The Staff Regulations make provision, not for repayment of tax, but for a procedure for giving equal purchasing power to the remuneration of all officials, whatever their duty station may be. The Agency is not bound to take account of the staff member's other income, nor that of the spouse, nor of the taxing of spouses' combined income. The reason for the increase in the percentage of tax for which the complainant is not compensated is that the weighting takes the form of a lump-sum payment. The decision which came into force on 1 November 1977 was not, as the complainant contends, prematurely applied from 1 September. Two decisions were taken on 19 December 1978, one setting the weighting at M+2 with effect from 1 September 1977 - when one child ceased to be dependent - and the other setting it at M+1 with effect from 1 November 1977 - when a second child ceased to be dependent. Lastly, as regards the recovery of the sum overpaid, by 1977 the complainant must have known full well that the number of dependent children was reflected in the weighting. Accordingly, when two of the children ended their studies - one on 1 September and the other on 1 November 1977 - she knew that she ought to report the fact. In failing to do so and in leaving it to the Agency to find out from statements made by her husband, she herself was to blame for the fact that the decision was retroactive. In sum, the Agency contends that the complaint is irreceivable and, subsidiarily, that it ought to be dismissed as unfounded.

E. In her rejoinder the complainant states that she honestly believed that the statement duly made by her husband was valid also for herself. Her letter of 22 February 1979 was clearly intended to lodge a "complaint", concluding as it did with the words "I cannot agree with your decision. The reply dated 23 May 1979 dismissed her arguments one by one and therefore did constitute a decision taken on the Director-General's behalf. The complaint is therefore receivable. As to the merits, she points out that, contrary to what the Agency contends, she is not claiming full repayment of French income tax paid on her remuneration but compensation amounting to the difference between the tax she paid and that imposed by the European communities on an official in like position. In other words she is asking that, within the limits of the weighting procedure, her net remuneration should be restored to the level of net remuneration payable to her counterpart in the Communities. Lastly, as regards the recovery of the sum overpaid, she affirms again that she was quite innocently unaware of her obligation to mention the children's status in her statement. In any case the Agency cannot use her ignorance as an excuse for failing to exercise ordinary care to put matters right. She therefore presses all her claims for relief.

F. The Agency contends in its surrejoinder that the complaint is irreceivable. The complainant's letter of 22 February 1979 was not addressed to the decision-making authority. The Agency's reply dated 23 May merely gave information in reply to a request for an explanation. Even if the letter of 22 February did constitute an appeal - although in fact it did not - the present claims for relief would go beyond those set out in the letter, particularly the claim that account should be taken of the husband's remuneration in calculating the weighting. As to the merits, and particularly this claim, the Agency points out that according to Article 64 of the Staff Regulations the weighting

applies to the "official's remuneration", defined in Article 62 to include basic salary, family allowances, expatriation and various other allowances and therefore excludes any other sum, such as any received by the spouse. Although Eurocontrol remuneration should be to a certain extent reasonably comparable with that of the staff of the European Communities, nothing in the Staff Regulations requires that net salary should be the same as in the Communities. The weighting is the same for married women as for married men. The Agency is not bound to take account of the peculiarities of the French tax system relating to the aggregate taxation of married couples. Moreover, if, as the complainant contends, the weighting was fair several years ago but has since ceased to be so, the reason is that tax compensation will be more or less favourable in the course of an official's career because of the lump-sum notion of adjustment weightings. As regards the recovery of the sum due, the Agency points out that the complainant cannot take it to task for negligence, for which in any case it was in no way to blame, when she herself was negligent in failing to make the statement she was bound to make. The complainant knew perfectly well that she was bound to report any change in her family situation.

CONSIDERATIONS:

1. According to Article VII, paragraph 1, of the Statute of the Tribunal, a complaint shall not be receivable "unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The Tribunal will accordingly consider whether the complainant has exhausted all the means of redress provided under the Staff Regulations.

2. According to Article 93 of the Staff Regulations, a "complaint to the Tribunal shall lie only if the appointing authority has previously had a complaint submitted to it pursuant to Article 92(2) within the period prescribed therein...".

Article 2 of the Staff Regulations, which identifies the appointing authority, reads:

'"The Director General is empowered to make all appointments to all posts with the exception of those in Grades A1 and A2 who shall be appointed by the Committee of Management on the recommendation of the Director General."

3. The Tribunal will therefore consider whether the minute which on 22 February 1979 the complainant addressed to the "Director Personnel and Administration for the attention of Mr. Schmidt" - the Chief of the Personnel Division - may be treated as an internal "complaint" within the meaning of Article 93.

4. In the minute mentioned above, the complainant sets out under three heads her reasons for challenging the decision of 19 December 1978. In the last sentence of the minute she asks for fuller information on the decision of the Director of Personnel and Administration and states that she cannot agree with his decision. The term "complaint" does not occur in the minute, nor in the list of appendices to the complaint, which refer merely to the "letter" dated 22 February 1979.

5. When a staff member seeks further information and explanations on a decision which the organisation has notified to him, there is reason to believe that his own opinion differs from the organisation's. That is how the minute of 22 February, which reads "I cannot agree with your decision", is to be construed. The complainant ought to have worded her minute differently and used terms more nearly approaching those of an appeal. Merely to state that there is absence of agreement will not suffice.

6. It appears from the foregoing:

(a) that the complainant's minute of 22 February 1979 is not a "complaint" within the meaning of Article 93 of the Staff Regulations; and

(b) that when she filed her complaint she had not yet exhausted the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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