

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

E. (No. 7)

v.

Eurocontrol

132nd Session

Judgment No. 4401

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms N. E. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 17 January 2018 and corrected on 26 January, Eurocontrol's reply of 4 May, the complainant's rejoinder of 22 June and Eurocontrol's surrejoinder of 26 September 2018;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to dismiss her application for the reimbursement of medical expenses.

The complainant is an official assigned to the Organisation's headquarters in Brussels. On 1 August 2016 the complainant was prescribed 30 sessions of acupuncture by her doctor on medical grounds. By an email of 21 October 2016 to a contact person at the Sickness Fund, the complainant asked whether a member of the Belgian Acupunctors Federation (BAF) could be considered a legally authorised provider within the meaning of Rule of Application No. 10 concerning sickness insurance cover. On 24 October she was told that the BAF member had to be a doctor who could issue a certificate for the treatment in question.

On 6 December 2016 the complainant sent the Sickness Fund application claim form for the reimbursement of medical expenses relating to five acupuncture sessions with Ms Q., who holds a degree in traditional Chinese medicine and is a member of the BAF. On 15 December 2016 the complainant was informed that the cost of these sessions would not be covered because the treatment had not been carried out by a doctor. On 19 January 2017 the complainant lodged an internal complaint with the Director General against the decision of 15 December 2016. On 10 August 2017 the Sickness Fund Management Committee, which is responsible for considering internal complaints concerning medical matters, delivered a divided opinion.

A majority of the members of the Committee recommended that the decision at issue be set aside. In their view, the ambiguity in the provisions of Rule of Application No. 10 in respect of the requirement that acupuncture be provided by a doctor or legally authorised practitioner had to be interpreted in the complainant's favour. One member of the Committee recommended that the internal complaint be dismissed. He took the view that the Rule of Application was unambiguous since acupuncture was included in the section on treatments that had to be carried out by a doctor or in a hospital. He also pointed out that the complainant had previously been informed of this requirement by the Sickness Fund.

On 7 November 2017 the Principal Director of Resources informed the complainant of the decision to dismiss her internal complaint on the grounds that the acupuncture sessions had not been carried out by a practitioner legally authorised to provide this kind of treatment. First, he considered that, under the applicable Belgian law, only acupuncture provided by a doctor or in a hospital qualified for reimbursement. Second, he stated that under Rule of Application No. 10, the practitioner had to be authorised by the competent national authorities, which Ms Q. was not at the material time. That is the impugned decision.

The complainant seeks the setting aside of the decision of 7 November 2017 and the reimbursement of all the acupuncture sessions prescribed by her doctor and the expenses incurred for her treatment. She claims interest on these sums at the statutory rate increased by 10 percentage points from the date of this complaint. In addition, the complainant claims 8,000 euros in moral damages and 5,000 euros in costs.

Eurocontrol asks the Tribunal to reject all the complainant's claims as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 7 November 2017 in which the Principal Director of Resources of Eurocontrol rejected her claim for reimbursement of medical expenses relating to five acupuncture sessions delivered by Ms Q., who holds a degree in traditional Chinese medicine and is a member of the Belgian Acupunctors Federation (BAF), a professional body recognised by the Belgian authorities. Among other claims, she asks the Tribunal to order Eurocontrol to pay for all the acupuncture sessions prescribed by her doctor.

2. The complainant takes issue with the Organisation for having taken the impugned decision on the basis of Belgian national law and the practice of the European Commission, whereas Eurocontrol's internal rules providing for a free choice of doctor and treatment facilities applied to her. She points out that health insurance for Eurocontrol staff is independent of national insurance schemes and that Rule of Application No. 10 concerning sickness insurance cover expressly allows acupuncture sessions to be reimbursed, regardless of whether or not such sessions are reimbursed under Belgian national law. In her view, applying national law leads to unequal treatment of members of staff depending on where they are employed. She further argues that as Eurocontrol is not part of the European Commission, the Commission's practice cannot be applied to Eurocontrol. She submits that she is entitled to reimbursement of the acupuncture sessions at issue under the Rule of Application No. 10 since her situation satisfies the three conditions for such reimbursement, namely, the existence of a medical prescription, a limit of 30 sessions per year and their delivery by a practitioner legally authorised to perform this kind of treatment.

3. Rule of Application No. 10 states that acupuncture must be carried out by a practitioner legally authorised to perform this kind of treatment, up to a maximum of 30 sessions per year, and is reimbursed at 80 per cent with a ceiling of 25 euros per session.

4. Under paragraph 1.1 of the general provisions of Chapter 1, concerning claims for reimbursement and supporting documentation, of Rule of Application No. 10: “The treatment referred to in Title II of these general implementing provisions must be carried out by a legally authorised medical or paramedical practitioner, or by medical or paramedical establishments duly approved by the competent authorities.”

5. In this case, the Organisation refused the complainant’s claim for reimbursement of the medical expenses corresponding to the treatment provided by Ms Q. on the grounds that the acupuncture had not been carried out by a practitioner legally authorised to perform this kind of treatment; that, under the applicable Belgian law, only acupuncture performed by a doctor or in a hospital qualified for reimbursement; and that under Rule of Application No. 10, the practitioner had to be authorised by the competent national authorities, which, according to the Organisation, was not the case for Ms Q. at the material time.

6. Precedent has it that “[a]s a rule the conditions of employment of staff are subject exclusively to the [organisation]’s own Staff Regulations and to the general principles of the international civil service: see Judgments 322 [...], under 2; 473 [...], under 2 and 3; and 493 [...] under 5. National laws, and in particular those of the host country, apply only where there is express reference thereto” (see Judgment 1311, consideration 15).

7. The Tribunal notes that paragraph 1.1 of the general provisions of Chapter 1, concerning claims for reimbursement and supporting documentation, of Rule of Application No. 10 does not expressly refer to Belgian national law, but requires that the treatment be carried out by a legally authorised medical or paramedical practitioner. In addition, a table annexed to Rule of Application No. 10 indicates that this treatment must be carried out either by a doctor or in a hospital, or by a practitioner legally authorised to perform this kind of treatment.

The question that must be decided in order to resolve this dispute is therefore whether Ms Q., as a holder of a degree in traditional Chinese medicine, was legally authorised to practise acupuncture at the date of the claim for reimbursement. This legally delicate question should have been referred by the Organisation to the Belgian authorities, who

alone were in a position to provide the correct answer. As it did not do so, Eurocontrol could not lawfully refuse to effect the reimbursement at issue, since the file shows that acupuncture is widely practised in Belgium and it is clear from the evidence that the complainant had every reason to believe that the treatment carried out by Ms Q., who had been recommended by her doctor, was performed legally.

Accordingly, the impugned decision must be set aside, without there being any need to consider the complainant's other pleas.

8. It follows from the foregoing that the complainant is entitled to reimbursement of the expenses that she incurred in respect of acupuncture, with interest at the rate of 5 per cent per annum from the date when her complaint was filed with the Tribunal until the date when the reimbursement is made.

By contrast, the complainant cannot seek, in these proceedings, reimbursement of the other sessions prescribed. The Tribunal cannot rule in the abstract and for the future on the reimbursement of sessions that were not covered by the impugned decision. As regards the request for the defrayal of other expenses incurred by the complainant for her treatment, the Tribunal finds that, in the circumstances of the case, there are no grounds for granting this claim either.

9. The complainant alleges that moral injury was caused by the Organisation's breach of its duty of care. However, a refusal to reimburse expenses based on the rules in force, even if it results from an error in their application, cannot be regarded as a breach of the duty of care. This argument will therefore be dismissed.

10. The complainant also submits that the slow handling of her internal complaint caused her medical and psychological harm.

Under Article 35(2) of Rule of Application No. 10, "[b]efore taking a decision regarding a complaint submitted under Article 92.2 of the Staff Regulations [...], the Director General shall request the opinion of the Management Committee. The Management Committee may instruct its Chairman to make further investigations. Where the point at issue is of a medical nature, the Management Committee may seek expert medical advice before giving its opinion. The cost of the expert opinion shall be borne by the Agency's Sickness Insurance Scheme. The Management Committee must give its opinion within two months

of the request being received. The opinion shall be transmitted simultaneously to the Director General and to the person concerned.” Under Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency, the Director General is to notify the person concerned of her or his reasoned decision within four months from the date on which the internal complaint was lodged.

In this case, on 19 January 2017 the complainant lodged an internal complaint with the Director General against the decision of 15 December 2016 informing her of the refusal to cover the costs of the acupuncture sessions because the treatment had not been carried out by a doctor. The impugned decision was taken on 7 November 2017, more than ten months later.

The Tribunal notes that the Organisation had four months from the date when the internal complaint was filed to take a decision on it. It breached its own rules by exceeding this period by six months. However, in her submissions, the complainant does not establish that any particular injury arose from that breach. In the circumstances, it is unnecessary to award her compensation under this head (see, for example, Judgment 4396, consideration 12).

11. As she succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of 7 November 2017 is set aside.
2. Eurocontrol shall reimburse the complainant for the expenses incurred by her in respect of the five sessions of acupuncture referred to in her initial claim for reimbursement, together with interest as specified in consideration 8 above.
3. Eurocontrol shall also pay the complainant costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 17 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.
(Signed)

PATRICK FRYDMAN GIUSEPPE BARBAGALLO FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ