Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

J.

v.

Eurocontrol

133rd Session **Judgment No. 4473**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. J. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 17 May 2019, Eurocontrol's reply of 23 September, the complainant's rejoinder of 28 November 2019 and Eurocontrol's surrejoinder of 13 March 2020;

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 contests the decision not to recognise his son's condition as a "serious illness" within the meaning of the provisions governing reimbursement of medical expenses.

The complainant's son suffers from a neurological illness for which psychotherapy is indicated. On 4 July 2017 the complainant submitted a request for prior authorisation with a view to obtaining reimbursement for psychotherapy sessions in excess of the statutory ceiling. On 7 August 2017 the complainant was informed that he had been granted 100 per cent coverage for his son from 29 March 2017 until 28 March 2018 for all medical expenses directly related to the illness. He was further informed that a request together with a medical report should be

sent to the Sickness Fund by 28 March 2018 if he was to seek a renewal of this decision.

On 10 November 2017 the complainant was notified of the decision of the Sickness Fund, based on the Medical Adviser's opinion, to reimburse him for ten sessions of psychotherapy. This authorisation was valid until 31 December 2017 and stated that a further medical report on the progress of treatment would be needed if the authorisation were to be extended.

On 12 March 2018 the complainant submitted a request for an extension of 100 per cent coverage for all medical expenses directly related to his son's illness. That request amounted to a request for recognition of the "status of serious illness", whereby the complainant's son could receive 100 per cent coverage of expenses caused by his illness.

By letter of 28 March 2018, the complainant was informed that the Medical Adviser had issued a negative opinion on the grounds that two of the four criteria required for granting the status of serious illness were not met in the light of the medical report provided by his son's treating physician.

On 26 June 2018 the complainant challenged this decision through his legal counsel. By letter of 5 July 2018, the Administration informed the complainant that he could not lodge an internal complaint under Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency (hereinafter "the Staff Regulations") through his legal counsel. The complainant was invited to submit a new internal complaint himself within a reasonable time. On 10 July 2018 the complainant re-submitted his internal complaint.

On 18 July 2018 the internal complaint was forwarded to the Sickness Insurance Management Committee. By internal memorandum of 31 July 2018, the supervisor of the Sickness Insurance Scheme provided clarification concerning the refusal of 28 March 2018 to recognise the illness suffered by the complainant's son as a "serious illness" within the meaning of the applicable provisions.

On 2 October 2018 the Management Committee submitted to the Director General a divided opinion according to which four members recommended that the internal complaint be dismissed, and four other members recommended that it be allowed.

By internal memorandum of 21 February 2019, the Head of Human Resources and Services, by delegation of the Director General, endorsed the opinion of the four members of the Management Committee recommending that the internal complaint be dismissed. She considered that, in this case, the decision not to recognise the status of serious illness was justified in the light of the applicable regulations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 21 February 2019 and to recognise his son's condition as a "serious illness". In this regard, he seeks 100 per cent reimbursement of the fees for the psychotherapy recommended by the treating physician.

Eurocontrol asks the Tribunal to dismiss all the complainant's claims as unfounded, including the claim seeking 100 per cent reimbursement of psychotherapy fees.

CONSIDERATIONS

1. In his submissions, the complainant seeks the setting aside of the final decision taken, on the Director General's behalf, on 21 February 2019. This decision dismisses his internal complaint against the decision of 28 March 2018 refusing to grant him 100 per cent reimbursement of his son's medical expenses. The complainant requests that the illness from which his son is suffering be recognised as a "serious illness". In support of his request, the complainant raises four pleas. Firstly, he submits that the administrative procedure was flawed owing to a failure to comply with the applicable time limits. Secondly, he alleges a failure to state sufficient reasons for the impugned decision. Thirdly, he argues that a specific, detailed assessment of his son's situation was not carried out before the refusal to recognise his illness as serious was issued. Fourthly, he submits that there was a contradiction between the decisions issued by the Eurocontrol Sickness Insurance Scheme in respect of his

son's situation, and that an error of judgement was made when assessing the case.

2. In respect of the first plea, Article 35 of Rule of Application No. 10 concerning sickness insurance cover provides that the Sickness Insurance Management Committee must give its opinion within two months of the request being received from the Director General. The Committee received the request for an opinion on 18 July 2018, considered the complainant's internal complaint at its meeting of 24 September, and issued its opinion on 2 October 2018. Two months and thirteen days thus elapsed between the request for an opinion and the delivery of the opinion by the Committee. The evidence shows that the delay owed to the fact that the Committee meets only four times a year. The Head of Human Resources and Services at Eurocontrol had, moreover, already informed the complainant on 18 July 2018 that his internal complaint of 10 July, which had already been forwarded to the Chairman of the Committee, would be examined at its next meeting, in September 2018.

The Tribunal notes that Article 35(2) provides that a failure to observe the two-month time limit afforded to the Committee to issue its opinion, which allows the Director General to take a decision without having received that opinion, does not in itself render the decision on the internal complaint unlawful. Moreover, the time limit was exceeded by a mere 13 days, which did not cause the complainant any particular harm.

In respect of the impugned decision of 21 February 2019, Article 92 of the Staff Regulations provides that a failure to reply to a request within four months from the date on which an internal complaint was lodged is to be deemed to constitute an implied decision rejecting it. It follows that an explicit decision taken later is not unlawful, despite the fact that the time limit has been exceeded.

The first plea is therefore unfounded.

3. In respect of the second plea, which concerns the inadequacy of the statement of reasons, the Tribunal notes that the decision of 21 February 2019 states that the medical certificate submitted in support of the request for an extension of the recognition of serious illness

contains nothing to suggest that life expectancy is shortened or that the illness referred to in the request requires aggressive diagnostic and/or therapeutic procedures. It also refers to the medical certificate drawn up by the treating physician of the complainant's son, which does not indicate how the four criteria which must be taken into account under Chapter 5 of Title III of Rule of Application No. 10 on recognition of the status of serious illness are met.

4. The decision of 21 February 2019 then sets out the reasons why its author deemed it necessary to follow the opinion expressed by the four members of the Committee who recommended that the internal complaint be dismissed as unfounded. The Tribunal observes that of the eight-member Committee, four were in favour of dismissing the internal complaint. In this respect, the Tribunal refers to Judgment 4281, consideration 11, which states, in a situation where two opinions enjoyed equal support as in this case:

> "In stating, in the decision of 13 December 2016, that he 'share[d] the opinion of [those members]', the Director General endorsed their reasoning. The plea alleging a failure to state reasons is therefore unfounded."

5. Thus, the impugned decision of 21 February 2019 not only endorses the findings of the four members of the Committee who opposed the recognition of serious illness, but also provides further justification for the choice to accept the negative opinion and specifies the reasons for the complainant's internal complaint being dismissed.

6. The Tribunal adds on this point that Eurocontrol is right to state that it provided clear statements of reasons for all its decisions throughout this case.

7. In respect of the decision of the Eurocontrol Sickness Insurance Scheme of 28 March 2018, which the complainant describes as a terse standard reply, the Tribunal has already accepted that it is not inappropriate to use a "standard reply" to communicate a decision of this nature in view of the type of decision involved. In consideration 27

of Judgment 1148, which likewise concerned the Eurocontrol Sickness Insurance Scheme, the Tribunal found as follows:

> "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."

8. In this case, in the decision of 28 March 2018, which refers to the opinion of the Medical Adviser and the refusal by the Eurocontrol Sickness Insurance Scheme, the statement of reasons for the decision mentions specifically the grounds for the rejection, namely the absence of two of the four necessary elements set out in the applicable provision of Chapter 5 of Title III of Rule of Application No. 10.

9. Moreover, as Eurocontrol notes in its reply, the decision of 28 March 2018 essentially refers to the Medical Adviser's opinion, and it is then up to the Administration to convey this opinion to the official concerned, that is, the complainant. Here, this was done both at the time of the decision of 28 March 2018 and subsequently by means of a much more detailed explanation supplied by the internal memorandum of 31 July 2018 sent to the complainant and signed by the supervisor of the Eurocontrol Sickness Insurance Scheme. In this memorandum, the supervisor explains why, when examining the complainant's request, the Scheme had initially recognised his son's situation as a serious illness for a period of one year, in order, as she states, to give the patient the opportunity to undergo technical examinations and reviews, which are often extremely expensive. This internal memorandum goes on to offer straightforward and reasoned clarifications. The assessment is based, in particular, on the certificate dated 23 January 2018 provided by the treating physician of the complainant's son, which the complainant had submitted in support of his internal complaint. The certificate confirms that the complainant's son's seizures had not recurred since the end of December 2016 and that excellent progress had been made using drug monotherapy. The supervisor also points to the treating

physician's assessment of 5 July 2017, which states that the patient may be able to drive a vehicle in the near future.

10. Lastly, at the next stage of the Committee's assessment, the opinion that it issued on 2 October 2018 states that the four members who were opposed to recognising the status of serious illness specifically noted that the treating physician's certificate does not contain anything "suggesting that life expectancy is shortened or that the illness referred to in the request requires aggressive diagnostic and/or therapeutic procedures"[*]. These members also reiterate that the last medical certificate issued by the treating physician does not explain how the criteria to be taken into account are met in respect of the situation of the complainant's son. The impugned decision of 21 February 2019 relies mostly on this opinion of the Committee.

11. The Tribunal concludes that the impugned decision contains an adequate statement of reasons. Accordingly, the second plea is unfounded.

12. In his third plea, the complainant argues that Eurocontrol did not carry out a specific, detailed assessment of his son's situation. Chapter 5 (entitled "Recognition of the status of serious illness") of Title III of the general implementing provisions relating to the reimbursement of medical expenses of Rule of Application No. 10 provides in Article 1 thereof:

> "Definition
>
> Serious illnesses include tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the Director General as of comparable seriousness.
>
> Such illnesses typically involve, to varying degrees, the following four elements:
>
> - a shortened life expectancy;
> - an illness which is likely to be drawn-out;
> - the need for aggressive diagnostic and/or therapeutic procedures;
> - the presence or risk of a serious handicap."

[*] Registry's translation.

13. As the Medical Adviser's opinion of 28 March 2018 and the supervisor's internal memorandum of 31 July 2018 show, the complainant's son was not recognised as suffering from a serious illness because two of the four criteria that had to be met were not fulfilled. The finding that the patient's condition had generally improved and, accordingly, that life expectancy was not shortened and there was no need for aggressive diagnostic and/or therapeutic procedures was based on the medical certificates provided by the treating physician. This is evidence that the Medical Adviser analysed the four applicable criteria and, contrary to what the complainant contends, it cannot be inferred that no analysis of their possible interdependence took place. In this regard, it should be pointed out that, in Judgment 3994, the Tribunal recalls that, according to consistent precedent, it may not replace the medical findings of medical experts with its own assessment. In that judgment, the Tribunal clarifies that, although it does have full competence to say whether there was due process and to examine the medical reports on which an administrative decision is based, its role concerns situations in which a material mistake or inconsistency, a failure to consider some essential fact or a plain misreading of the evidence can be demonstrated. Moreover, in consideration 6, the Tribunal states:

> "The complainant has produced no evidence in support of her claims that challenges either the lawfulness of the procedure followed during that expert assessment or the soundness of the expert's conclusions."

In the present case, the Tribunal finds no failure to follow due process.

The third plea is also unfounded.

14. In support of his fourth plea, the complainant raises the contradictions between the decisions issued by the Eurocontrol Sickness Insurance Scheme on 10 November 2017 and 28 March 2018 in respect of his son's serious illness. The complainant adds that these contradictions reveal an error in assessing the case which should lead to the impugned decision of 21 February 2019 being set aside and his son's condition being granted the status of serious illness.

15. It is true that, at first sight, the decisions of the Eurocontrol Sickness Insurance Scheme may appear somewhat contradictory in the absence of explanations. However, such explanations become obvious when the evidence is examined. As noted by the sickness insurance supervisor in the internal memorandum of 31 July 2018, the Medical Adviser's first opinion on which the initial decision of 7 August 2017 was based did not recognise the patient's serious illness status. Rather, it gave him the benefit of the doubt in terms of verification of the four criteria set out in the aforementioned article in order to allow technical examinations and reviews to be performed with the aim of properly defining the problem and permitting 100 per cent reimbursement of the medical expenses incurred. The decision of 7 August 2017 includes the comment "Extension depending on progress"[*]. The prior authorisation of 10 November 2017 states: "If extended: a further medical report detailing treatment progress is necessary"[*].

16. However, the medical certificate issued on 23 January 2018 by the treating physician of the complainant's son submitted in support of the request for an extension instead confirms excellent progress with monotherapy – just as the previous medical certificate of 5 July 2017 had already noted – and adds that the patient may be able to drive in the near future. This indicates positive progress in the medical situation of the complainant's son, which seems far from an unchanged condition or an illness which is likely to be drawn-out.

17. Furthermore, the error of judgement which the complainant alleges in respect of the two elements which the Eurocontrol Sickness Insurance Scheme deemed to be missing concerns the reference in the treating physician's certificate to "depressive effects"[*] as a comorbidity of the complainant's son's medical condition. The complainant argues that the criterion of the need for aggressive diagnostic and/or therapeutic procedures should be assessed in the light of this aspect of the medical certificate.

[*] Registry's translation.

18. The error of judgement alleged by the complainant is not supported by any medical evidence other than his own assessment. That is not capable of calling the Medical Adviser's findings or the supervisor's assessment into question. To repeat, the Tribunal may not replace the medical findings of medical experts with its own assessment. Unless a material mistake or inconsistency, a failure to consider some essential fact or a plain misreading of the evidence can be demonstrated, which is not the case, the Tribunal cannot find that there has been an error of judgement. The contradictions raised by the complainant are ultimately explained and warranted. The assessment of the complainant's son's medical situation was based primarily on the medical certificates provided by his treating physician. The finding of the Eurocontrol Sickness Insurance Scheme that these certificates do not allow the conclusion to be drawn that the four applicable criteria are met is warranted on the basis of the evidence.

The fourth plea is therefore unfounded.

19. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ