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

FIFTY-FOURTH ORDINARY SESSION

In re JANSEN (No. 2)

Judgment No. 638

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Günter Gerhard Jansen on 15 October 1983 and corrected on 2 November, the Agency's reply of 5 January 1984, the complainant's rejoinder of 30 January and the Agency's surrejoinder of 16 March 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 9, 10, 41, 59, 78 and 91 of the General Conditions of Employment of officials and section 4 of Rule No. 16 of the Eurocontrol Agency;

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. Information on the complainant's career with the Agency appears in Judgment No. 637, under A. He used to be employed at the Eurocontrol Centre in Karlsruhe, but since 1 January 1984 the West German civil aviation authority has been manning the Centre, with the exception of a small Eurocontrol team of software programmers. The complainant was on sick leave several times from 1978, and in particular from 23 January 1983. On 23 February 1983 he submitted to the Director General, in accordance with Article 91(1) of the General Conditions of Employment, a request for an invalidity pension as prescribed in Article 78: "Servants who are unable to perform the duties attaching to their grade ... shall be entitled to an invalidity pension". On 11 May the Agency engaged Dr. Pfannkuch, a doctor in Karlsruhe, to examine the complainant, who was still on sick leave. Dr. Pfannkuch reported on 22 June that he was fit to resume work. On 25 June, inferring from the absence of a reply the rejection of his claims of 23 February, he submitted an appeal under Article 91(2). In a minute of 19 August to the Director General he asked that an Invalidity Committee be set up without delay, in accordance with the General Conditions and section 4 of Rule No. 16, to report on whether he was incapacitated. By a minute of 27 September, which is the decision he impugns, he was informed that the Director General rejected his appeal of 25 June and he was ordered to go back to work. He protested in further letters and filed his complaint on 15 October.

B. The complainant recounts the history of the dispute. He contends that, suffering as he does from incapacity, he is entitled to an invalidity pension under Article 78 of the General Conditions. He has been unable to work since 23 January 1983 and his own doctor, Dr. Hesse, has found him to be suffering from total permanent invalidity. The Director General should have referred his case to the Invalidity Committee, especially as a West German insurance company has acknowledged his incapacity. He has been put on "non-active status" under Article 41 of the General Conditions of Employment: "A servant having non-active status is one who has become supernumerary by reason of reduction in the number of posts in the Agency." (Such an official performs no duties and is unpaid, but his pension rights go on accruing for up to five years.) It is a breach of the rules to put him on non-active status when he is ill. He invites the Tribunal to hold that his case should have been referred to the Invalidity Committee before the Director General rejected his claim and to order that his case be referred to the Committee.

C. In its reply the Agency points to what it sees as errors of fact in the complainant's version. It submits that the complaint is irreceivable. The decision of 27 September 1983 not to convene the Invalidity Committee caused him no prejudice since he continued to receive his full salary and allowances throughout his sick leave, whereas his invalidity pension would have been only three-fifths of his salary. Moreover, there is no substance to his complaint since on 24 November 1983 the Director General decided to refer his case to the Invalidity Committee. Subsidiarily the Agency argues the merits. It observes that on 23 February 1983 he was not entitled to have his case put to the Committee since he was not certified even by his own physicians to be suffering from "permanent invalidity deemed to be total", the term appearing in Article 78(2), and his sick leave had not totalled over 12 months in any period of three years, as required by Article 59(1). It was decided to convene the Committee when the latter condition was met. Since that decision was not taken until 24 November, the claim relating to the Committee's

membership is premature.

D. In his rejoinder the complainant discusses several questions of fact raised in the reply and reasserts his claims.

E. In its surrejoinder the Agency observes that the rejoinder does not seek to answer its arguments on receivability and merits and again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. The complainant invites the Tribunal to decide (1) that the Director General may not refuse to set up an Invalidity Committee when a staff member so demands; (2) that the Director General may not reject an application for an invalidity pension without first consulting such a Committee; and (4) that the complainant's case should be submitted to such a Committee.

In the claims he submitted to the Director General, in particular on 19 August 1983, the complainant asked that an Invalidity Committee be set up, and on 27 September 1983 the Agency refused. But on 24 November the Director General decided to set up a Committee and instructed it to review the case and advise on the complainant's fitness to perform his duties as a programmer. Claims (1), (2) and (4) therefore have no substance and the Tribunal need not rule on them.

2. Article 19 of Rule No. 16 provides that the Invalidity Committee shall consist of three doctors: one appointed by the Director General, one appointed by the staff member, and the third appointed by agreement between the first two.

The Director General appointed Dr. Pfannkuch and the complainant Dr. Hesse, and on 9 January 1984 these doctors agreed to co-opt Dr. Gattermann. The Committee was therefore set up in compliance with the Rule.

On 12 March 1983 Dr. Hesse had suggested appointing Dr. Schumacher and in claim (3) the complainant asks the Tribunal to approve the appointment. The Tribunal will not do so, because the claim disregards the requirement of the Rule: the doctor appointed by one side may not on his own decide who the third one is to be. The Tribunal merely takes note of the composition of the Committee as determined by the parties and their nominees.

3. Claim (5) is for an order from the Tribunal that the Agency file its reply to the complaint within thirty days. The matter was settled by the President of the Tribunal, who, in the interval between its sessions, sets the time limits for the filing of papers by the parties.

DECISION

For the above reasons,

1. Claims (1), (2) and (4) are devoid of substance.

2. Claims (3) and (5) are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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