

SIXTY-EIGHTH SESSION

***In re* AELVOET (No. 2) and others,
BOLAND (No. 2), DE GROOTE
and LEFEBVRE**

Judgment 1012

THE ADMINISTRATIVE TRIBUNAL,

Considering the joint complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 15 July 1988 by:

Mr. D. Aelvoet (No. 2)

Mrs. V. Alminana (No. 2)

Miss L.T. Aridjis

Mr. C. Barret

Mr. M. Besson

Mrs. D. Boets

Mrs. V. Brown (No. 2)

Mr. J-P. Claes

Mr. D. Daubenspeck

Mr. F.A.C. Degrijse (No. 2)

Mr. R. De Houwer

Mr. P. Delplace

Mr. H.F.R.Y. De Maeyer

Miss J. Drochmans (No. 2)

Mr. F. Dupont (No. 2)

Mrs. M. Engels (No. 2)

Mr. R.J-M. Engels (No.2)

Mr. G.K. Gaydoul

Miss J. Goyens

Mr. D. Hedley

Mr. H. Herbert

Miss G. Hody (No. 2)

Mr. F.J. Jadoul (No. 3)

Mr. L. Kelly (No.2)

Mr. C. Kraaij (No.2)

Mr. J.J. Krieger

Mr. G.P. Lambert (No. 2)

Mr. P.F. Lascar (No.2)

Mr. C.L. Leclerc (No. 2)

Mr. L. Lelarge

Mr. J. Lemazurier

Mr. D. Liesert

Mrs. I. Luppens (No. 2)

Mr. P. Maes

Miss Y. Marchal

Mr. P. Martinez-Martinez

Mr. J-M. Pessus (No. 4)

Mr. M. Platteau

Mr. J-M. Purnelle (No. 2)

Mrs. L. Rabozee (No. 2)

Mrs. M. Ribeiro Resende (No. 2)

Mrs. C.L. Richez (No. 2)

Mr. F. Ronchain

Mr. C. Saey (No. 2)

Mr. P. Schmutz

Mr. D. Scordel

Miss E. Talboom

Mr. R. Thacker (No. 2)

Mr. J.A. Thiecke (No. 2)

Miss S. Thoma (No. 2)

Mrs. R. van Cauwelaert (No. 2)

Mr. A. van den Broeck (No. 2)

Mr. P. van der Kraan

Mr. A.M. van Loveren

Mr. J. van Raayen (No. 2)

Miss G. Vermoesen

Mr. J. Wondergem (No. 2)

Mr. A. Xhonneux (No. 2)

Considering Eurocontrol's reply of 27 October to the joint complaint, the complainants' rejoinder of 27 December 1988, Eurocontrol's surrejoinder of 16 March 1989, the complainants' further submissions of 3 May and Eurocontrol's comments thereon of 18 May as corrected on 22 May 1989;

Considering the second complaint filed by Mr. Pierre Boland and the complaints filed by Mr. Pierre De Groote and by Mr. Pierre Lefebvre against Eurocontrol on 25 February 1988, Eurocontrol's replies of 29 June, the complainants' rejoinders of 6 September, the Organisation's surrejoinders of 15 December 1988 as supplemented at the Tribunal's invitation on 13 June 1989, the complainants' further submissions of 7 July and Eurocontrol's observations thereon of 19 September 1989;

Considering the application to intervene filed in Mr. Boland's, Mr. De Groote's and Mr. Lefebvre's complaints by:

E. Abel

J. Abramowski

A. Abts

P. Agre

K. Albert

A. Albertini

V. Alminana

H-R. Altmann

B. Anderson-Germis

J. Andriese

R. Angermeyer

H. Ansorge

F. Arrasse

J. Arp

B. Bams

A. Barnby

F. Bartocci

M. Baudot

H-W. Becker
J. Beckers
B. Bedetti
P. Behier
J. Beishuizen
D. Bell
B. Bercq
H. Bergevoet
G. Bernard
J-P. Berthommier
J. Beyer
M. Biardeau
F. Bidaud
N. Bisdorff
R. Blau
L. Bleyens
B. Bocquillon
W. Bodenstein
B. Boerrigter
H-J. Bolz
C. Bonadio
A. Bonne
H. Bons
F. Bontems
R. Bootsma
A. Booy
R. Borre
M. Borsu
M. Bory
A. Bos
J. Bralet

C. Breeman
C. Breeschoten
M. Bremmers
T. Brennan
O. Brentener
G. Bricart
V. Brown
L. Brozat
M-N. Brun
O. Buchheim
H. Buck
W. Buckschewski
A. Bulfon
H. Burgbacher
F. Caloo
A. Carruthers
F. Carson
B. Cassaignau
L. Cassart
M. Castenmiller
L. Charon
R. Charpantier
C. Chauveau
M. Chauvet
N. Chichizola
P. Chudant
A. Claes
W. Claessens
L. Clarke
N. Clarke

G. Coatleven

C. Collignon

J. Collignon

M. Coolen

E. Corsius

J-M. Cosyns

M. Cox

P. Cracco

P. Crick

M. Custers

A. Cuveliers

H. Czech

P. D'Haese

C. Dagneau

F. Dahlbuedding

D. Danaux

L. Danby

H. Dander

B. Darke

H. David

P. David

A. Davister

V. Day

J. De Beurs

W. De Boer

R. De Foresta

J. De Keukelaere

P. De la Haye

J. De Lange

W. De Love

J. De Poorter

I. De Riemaeker Luppens

A. De Vos

P. De Zeeuw

G. Debruyn

J. Decarniere

J-M. Dechelle

C. Degenaar

J. Degrand

J. Delwarte

P. Demelinne

J. Demesmaeker

J. Dessart

E-M. Deter

F. Devillieres

H. Devry

V. Dick

J. Dickmann

G. Dijkstra

K. Dittmar

D. Doeblor

D. Doerr

P. Domogala

J. Dos Santos

J. Douplat

J. Doyle

L. Driessen

G. Drost

E. Dubiel

F. Dufier

M. Durasse

L. Duysens
R. Ebs
P. Emering
H. Englmeier
A. Enright
I. Evans
R. Evans
H. Evers
H-J. Exner
T. Eymael
G. Fairfax Jones
M. Falk
G. Falkenstein
J. Falkingham
Y. Fauchot
F. Faurens
A. Feyder
R. Feyens
R. Fisch
J-L. Flament
P. Flick
J-P. Florent
B. Flynn
M. Fontaine
G. Fortin
J. Fortin
J-P. François
G. Frank
G. Frost
J. Frusch
C. Fuchter

G. Gabas

C. Galeazzi (Goetz)

M-T. Garzend

G. Gaveau

G. Gaydoul

F. Gehl

O. Geigner

A. Geirnaert

R. Geldhof

M. Gerard

M. Germans

L. Geurten

J. Geurts

R. Gillis

Y. Giusti

S. Gloden

K. Glover

J. Godde

W. Goettlinger

I-D. Goossens

L. Gotting

M. Grebien

D. Grew

W. Gribnau

R. Grimmer

A. Gruenewaelder

M-T. Guerin

I. Guild

T. Guldemont

B. Gundermann

A. Guyot
K. Haage
W. Haarmann
E. Haas
H-J. Habel
J. Haine
J. Haines
I. Hamers
W. Handke
J. Handschuh
C. Hantz
G. Harel
H. Hauer
H. Heepke
J. Hein
G. Heinz
G. Hembise
G. Henot
G. Hepke
L. Hertog
R. Hess
P. Hijnens
M. Hitchcock
E. Hochstein
T. Hoesen
H-D. Hoeyng
E. Hofmann
W. Holtmann
G. Horsman
M. Hoss
J. Hougardy

E. Huebsch
H. Huizer
P. Hunt
M. Jacobs
M. Jacobs
W. Jagemann
R. Janssens
R. Jenyns
M. Jenz
R. Johnson
F. Joris
A. Jourdain
K-D. Jung
P. Kaisin
A. Kalkhoven
H. Kaltenhauser
G. Karran
A. Kicken
N. Kieffer
W. Klaes
G. Klawitter
J. Klijnstra
H. Klos
U. Kluvetasch
T. Knauss
H. Koot
W. Koper
F. Korff
A. Krahl
W. Kramer

F. Krella

L. Kroll

W. Kron

J. Kuijper

H. Kunicke

G. Lambert

L. Lambrechts

L. Lang

D. Laurent

G. Lauter

J. Leclere

J. Lecuyer

M-C. Leduc

H. Leenders

M. Lefebvre

Y. Lefebvre

F. Legrand

W. Leistico

E. Lejeune-Dirichlet

W. Lembach

M. Lenaerts

M. Lenglez

P. Lenoir

J. Lenzi

Y. Leroux

D. Liesert

A. Lieuwen

M. Lillo

H. Liss

W. Lockner

L. Loeser

R. Lucas
W. Lumpe
H. Maas
J. Maes
P. Maes
J. Mager
J-P. Majerus
R. Maloney
W. Marchand
B. Marschner
T. Martens
J. Martin
C. Massie
C. Massinon
D. Mauge
P. Meenhorst
H. Meertens
C. Meier
A. Meloen
J. Mercier
J. Meredith
E. Merklinger
H. Mertz
W. Mesman
E. Meyenbert
B. Meyer
B. Michaux
W. Miller
M. Minner
F. Moitier

B. Molloy
M. Mommers
A. Mounier
R. Muehlstroh
L. Mulkens
G. McAuley
E. McCluskey
C. McLachlan
J. McNeill
F. Nauta
B. Neher
C. Nelissen
H. Neumann
M. Nicolay
C. Niesing
C. Nijpels
A-M. Nouvel
D. Nymeijer
L. Olivier
G. Ostertag
J. Oury
H. Pannenbergh
H. Parvais
R. Paulssen
K-U. Pawlicz
G. Peerbooms
F. Peeters
P. Peeters
R. Peiffer
R. Perry
C. Petit

P. Petit
P. Petitfils
W. Petter
A. Peyrat
V. Pfeiffer
P. Philips
E. Phillips
M. Picard
W. Pieper
J-F. Pieri
C. Poinso
M. Pommez
P. Praet
J. Prevoo
L. Prevot
J. Prochasosn
M. Prosser
H. Purvis
B. Puthiers
L. Putz
B. Quentin
J. Raes
M-C. Ragot
S. Ralston
M. Reck
J. Reiss
J-J. Richer
J-M. Rigolle
H. Rison
A. Ritchie

G. Riu
C. Robijns
M. Roebroeck
J. Roelofsen
J. Ronk
G. Rossignol
F. Roth
R. Rother
J. Roulleaux
G. Roumajon
E. Rousee
J-M. Rousot
J-P. Rue
B. Runacres
A. Rutherford
A. Rutherford
J-C. Salard
G. Sanderse
P. Sargent
J. Sawtell
J-Y. Schaack
G. Scheltien
J. Scheu
J. Schiettekatte
P. Schmitt
G. Schneider
H. Schneider
P. Schneider
U. Schoeke
G. Schoeling
M. Schoeling

K. Scholts
J. Schraa
A. Schuh
J. Schuller
M. Schwaller
K. Seipke
M. Severac
K. Seybold
W. Sieg
H. Siera
W. Sillevis
G. Sizun
F. Skerhut
P. Slingerland
A. Smith
P. Smith
M. Sneyers
E. Snijders
E. Soehnle
J. Sondt
D. Spragg
S. Starlander
B. Stefens
F. Steijns
E. Steiner
W. Steiner
J. Storms
J. Storms
U. Strech
E. Stuhlsatz

E. Suetens

B. Swinnen-Stappaerts

N. Szewczuk

A. Talboom

J. Thiecke

J-P. Thiel

A. Thill

G. Thorel

R. Tielemans

H. Tielker

J. Tillie

J. Timmermans

C. Tovy

J-C. Tumelin

M. Turcan

J. Uhl

A. Urlings

J. van Belle

H. van De Vorst

E. van Den Heuvel

C. van Der Flier

M. van Der Sluis

A. van Der Welle

G. van Dijk

A. van Dooren

S. van Dronkelaar

J. van Eck

J. van Elst

H. van Everdingen

G. van Gansewinkel

P. van Grieken

T. van Hal

H. van Hoogdalem

F. van Landuyt

M. van Loon

A. van Loveren

A. van Ommen

J. van Riemsdijk

J. van Tilburg

T. Vandamme

C. Vandenbergh

J-P. Vanderspikken

D. Vanderstraeten

E. Vanschoenwinkel

M. Vatinel

K. Vent

W. Verbruggen

P. Vercruysse

P. Vergauts

J. Verlinden

H. Vermaesen

M. Verschaffel

L. Verwilt

W. Viertelhauzen

Y. Viroux

C. Vodak

J-C. Vollant

N. Vrancken

E. Vreede

F. Wagner

W. Warner

O. Warns
E. Watkins
J. Watson
H. Weis
G. Wendling
F. Werthmann
P. Wildey
H. Wilk
R. Williams
J-P. Willox
D. Winkler
F. Wissink
W. Withofs
M. Woods
R. Xhrouet
D. Young
H. Zandvliet
W. Zieger
J. Zipp
R. Zoellner

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, the International Convention on Co-operation for the Safety of Air Navigation concluded on 13 December 1960 (the Eurocontrol Convention) as amended, in particular as from 1 January 1986 by the Protocol dated 12 February 1981, Articles 63, 64, 65 and 92 of the Staff Regulations governing officials of the Agency and Article 2.2 of Rule No. 27 concerning the method of calculating remuneration;

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

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. At its 63rd Session, on 7 July 1983, the Permanent Commission of the European Organisation for the Safety of Air Navigation decided (a) to bring in a 5 per cent differential between the net pay of staff of the European Communities and that of Eurocontrol staff; (b) to start the consequent reduction in Eurocontrol pay at the date on which the International Convention on Co-operation for the Safety of Air Navigation was amended for the purpose; and (c) to spread the reduction over three years.

At its 62nd Session, on 15 November 1983, the Commission decided to make the differential in stages by holding Eurocontrol pay in check if pay in the European Communities rose, save that the reduction should not exceed 2 per cent in any one year.

The Protocol dated 12 February 1981 that amended the Convention came into force on ratification at 1 January 1986. But not until 7 July 1987, at its 71st Session, did the Commission decide, subject to its later final approval, to make as from 1 July 1986 the first reduction in staff pay, which was by 0.7 per cent. At its 72nd Session, on 12 November 1987, it gave that decision its final approval.

Rule No. 27 of Eurocontrol relates to "the method of calculating remuneration by applying Article 64 of the service regulations and the Eurocontrol internal tax". Article 2.2 of the Rule formerly read:

"Net remuneration shall be determined on the basis of the following factors, and in the following sequence:

- a) basic salary, plus the allowances provided for in Article 62 of the service regulations, less deductions in pursuance of Articles 72, 73 and 83 of the aforesaid regulations:
- b) application of the cost-of-living weighing;
- c) deduction of the internal tax applicable at the European Communities in accordance with the rules in force;
- d) adjustment of the result obtained under a) so as to give, after deduction of the Eurocontrol internal tax, the same net figure as obtained under a), b) and c) above."

Making the reduction in pay meant amending 2.2d), and the Director General announced in office note 23/87 of 29 July 1987 that as from 1 July 1986 the clause would read:

"adjustment of the result obtained under a) so as to give, after deduction of the Eurocontrol internal tax, a net amount of 99.3% of the net figure obtained under a), b) and c) above."

The complainants are all members of the staff of Eurocontrol. At the end of July 1987 the fifty-eight who have lodged the joint complaint, and on 14 August 1987 Mr. Boland, on 31 July Mr. De Groote and on 4 August Mr. Lefebvre got pay slips covering 1986 and the first eight months of 1987: each slip said "Eurocontrol reduction - 0.7%" and gave the actual amount of the reduction in "aggregate arrears". On 31 August 1987 Mr. Boland, on 28 August Mr. De Groote and on 31 August Mr. Lefebvre, and in September 1987 the other complainants each received a slip showing the amount of the reduction for September. In fact it was a reduction in an increased sum of pay.

From the end of September 1987 onwards they all filed internal "complaints" under Article 92(2) of the Eurocontrol Staff Regulations. Having got no answer within the time limit of four months in that article, Mr. Boland, Mr. De Groote and Mr. Lefebvre lodged the present complaints on 25 February 1988 against the implied decisions to reject their claims. Letters of 30 March 1988 from the Organisation expressly rejected their claims as devoid of merit.

By letters dated 18 April 1988 the Administration answered the other complainants that their internal "complaints" were irreceivable because they were challenging general decisions of the Commissions's and not, as Article 92 required, individual ones by the "appointing authority"; besides, their claims were devoid of merit. Those complainants filed their joint complaint on 15 July 1988.

B. Mr. Boland, Mr. De Groote and Mr. Lefebvre contend that their complaints are receivable. They lodged their internal appeals within three months - the time limit in Article 92(2) of the Staff Regulations - of the dates at which they got the pay slips first applying to the pay cut to each of them. Since their appeals were not answered within the further time limit of four months in 92(2) they appealed to the Tribunal against the implied rejection.

They put forward five pleas on the merits.

(1) They contend that because there has been no formal statement of the reasons the Tribunal may not review the impugned decisions properly.

In their submission, however, the debates in the Permanent Commission and in the Committee of Management of Eurocontrol suggest what the reasons for the decisions were, and those reasons were mistaken. First, a desire to make savings is no proper reason since other steps, such as an "internal tax", have already been taken for the purpose in line with similar arrangements in the European Communities. Secondly, it cannot fairly be said that staff

pay was too high: comparative studies belie that. Thirdly, it is wrong to attribute the reduction to amendments in the Eurocontrol Convention since the amendments have made no difference to the sort of work the staff do.

(2) The impugned decisions are in breach of the rules on setting pay, which include custom and usage in international organisations. Eurocontrol has consistently followed any adjustments made to staff pay in the Communities. Indeed it was the same rule of parity that prompted Eurocontrol to impose its own internal tax on pay.

(3) The pay cut offends against the basic principles of proper management: there was no consultation about it between the authorities of Eurocontrol and the staff representatives.

(4) It is in breach of the staff's acquired rights in that a fundamental term of conditions of service is parity in pay between Eurocontrol and the Communities.

(5) The Organisation's breach of good faith has betrayed the trust the staff reasonably put in it.

The three complainants ask the Tribunal to quash the initial action taken towards making staff pay 5 per cent lower in Eurocontrol than in the Communities, the amount of the reduction since 1 July 1986 being 0.7 per cent. They want Eurocontrol to pay back to them, with interest, the sums wrongly withheld since that date in keeping with the decision to reduce pay. They claim an award of costs.

C. The other fifty-eight complainants observe that, in keeping with what the Tribunal said in Judgment 902, they are not seeking the quashing of the Commission's general decisions, though they do object to the lawfulness of those decisions as a plea in support of their claim to the quashing of the individual ones, of the amendment to Article 2.2d) of Rule 27 and of the rejection of their internal "complaints". The grounds for rejection stated in the defendant's letters of 18 April 1988 were mistaken in fact: since the internal "complaints" did challenge individual decisions Eurocontrol's objections to receivability are unsound.

The fifty-eight complainants have three pleas on the merits.

(1) The main one is breach of their acquired rights. Since the outset one custom at Eurocontrol has been to keep staff pay on a par with pay in the Communities, and corollaries of such parity include making good the sums that staff pay in national income tax and the imposition of the tax on salary intended to ease the organisations' financial troubles. That custom, since it relates to pay, forms part of the terms of the complainants' appointment. The 0.7 per cent cut in pay was in breach of those terms and so of their acquired rights. The general decisions being therefore unlawful, so are the individual ones giving effect to them.

Judgment 902 rejected, in 27, the objection that custom may not fetter the authority which the Commission draws from the Eurocontrol Convention.

(2) The general decisions are in breach of Articles 64 and 65 of the Staff Regulations, which set the criteria for changing staff pay. The reduction took no account of those criteria, the amount being determined without regard to any of the factors mentioned in the articles.

(3) The third plea, subsidiary to (2), is that no reasons were stated for the general decisions, or at least none that will pass muster in law. Since the decisions are unexplained the Tribunal may not exercise its power of review. Contrary to what Eurocontrol makes out, general decisions do have to be substantiated. As the Tribunal said in Judgments 899 and 902, an organisation may not cite its own decision-making procedures to avoid compliance with the rules in dealings with staff.

Though some sort of substantiation may be inferred from the records of the Commission's and the Committee of Management's proceedings it is mistaken and inadequate. It is mistaken if the Commission thought that the amendments to the Convention would alter the Organisation's functions so as to make fewer demands on staff: the 1981 Protocol changes the functions neither of Eurocontrol nor of its staff. It is inadequate in that the general decisions would fail in their purpose if pay in the European Communities was allowed to soar and would prove too drastic if it was kept down.

The fifty-eight complainants ask the Tribunal to order the Organisation to disclose the administrative records about the impugned decisions and the general ones they give effect to. They seek the quashing of the amendment of

Article 2.2d) of Rule 27; of the individual decisions to apply to them that decision of the Director General's and the general decisions taken by the Commission at its 62nd and 71st Sessions; and of the decisions in the letters of 18 April 1988. They claim costs.

D. In its replies to the complaints filed by Mr. Boland, Mr. De Groote and Mr. Lefebvre Eurocontrol contends that those complaints are irreceivable: as is stated in point 6 of the complaint forms, they are challenging "the Permanent Commission's decision of 7 July 1987" whereas the Tribunal may review only decisions of the appointing authority's.

In arguments which are subsidiary the Organisation addresses the complainants' five pleas on the merits.

(1) In its submission they cannot properly object to the reduction on the grounds that no reasons for it were given. Reasons need to be stated only when there is a text that says so, and there is no text that requires the Permanent Commission to explain its decisions. Besides, the reasons are immaterial in this case because there was no risk of discrimination against any staff member in applying the reduction. The complainants were given the reasons for the individual decisions, in particular in the replies to their internal appeals. Though the Tribunal may review the lawfulness of an individual decision, it may not replace the judgment of a legislative body with its own when the decision is a matter of policy.

Contrary to what the complainants maintain, there has been radical reform of the Organisation's work and finances. It now depends on work that member States or other countries choose to commission from it. Staff pay in Eurocontrol is on a par with pay in other European organisations and even higher than pay in the United Nations system. The Permanent Commission was anxious to check the rise in pay, two of its aims being to make for easier exchange of staff with government departments and to make the cost of services to States more competitive. So the workload will be as before.

(2) The reduction is not in breach of any rule of law. The approximate alignment of pay in Eurocontrol with pay in the Communities does not amount to a legal obligation for the Organisation even though in practice it does follow the base rates in force in the Communities. Since the Commission's decisions affect only the arrangements for reckoning adjustments in base rates to take account of the cost of living and of tax liability, only net pay has been altered. Articles 63, 64 and 65 of the Staff Regulations and Article 2.2 of Rule 27 do not ordain parity in pay between Eurocontrol and the Communities. There are no grounds for relying on any subsidiary source of law such as custom. The purpose of the internal tax was not to establish parity in pay between Eurocontrol and the Communities. Eurocontrol authorities decide in the last resort on what staff pay is to be.

(3) The charges of breach of the principles of sound management are immaterial; in any event the Organisation has always been willing to consult staff representatives.

(4) In a subsidiary plea Eurocontrol contends that there has been no breach of the complainants' acquired rights. For one thing, parity with the Communities is prescribed neither in the Staff Regulations nor in the contract of appointment; for another, the reduction is so small as not to disrupt the structure of that contract.

(5) Since there is no acquired right to parity in pay the allegations of breach of trust are immaterial.

E. In its reply to the joint complaint Eurocontrol contends that it too is irreceivable under Article VII(1) of the Statute of the Tribunal because the complainants have failed to exhaust the internal means of redress. They have not lodged internal "complaints" challenging the individual decisions by the Director General. Their internal "complaints" challenged the Commission's decisions, not the individual decisions, the only ones they may challenge before the Tribunal.

The Organisation's pleas on the merits are subsidiary.

(1) It denies breach of acquired rights. There is, in its submission, no rule of parity in staff pay between Eurocontrol and the Communities. The Staff Regulations lay down no such rule; indeed they embody many differences that preclude it. Pay has never been the same in Eurocontrol as in the Communities. The practice the complainants rely on is not binding. Only for the sake of administrative convenience has the practice been to refer to basic rates of pay in the Communities. The authorities of the Organisation have consistently declared that changes in such pay were not binding on them in setting pay in Eurocontrol. Since there is no binding custom of parity there can be no breach of any acquired right. Even if there were such a right it would not fetter the

Commission's sovereign authority to determine terms of employment as it sees fit. Besides, the practical effect of the decisions impugned was not so great as to "disturb the structure" of the complainant's contracts, the test applied by the case law. Indeed their contracts state that they are subject to the Staff Regulations and to other rules as amended from time to time.

(2) There has been no breach of Articles 64 and 65 of the Staff Regulations. The Commission's decisions on pay are untrammelled by automatic indexing. Article 65 says merely that the Committee of Management shall "take particular account" of certain stated factors: that does not exclude other ones, and the term "take account" shows that the effect even of the stated factors is not supposed to be binding. The rules are flexible and the impugned decisions are in keeping with them both in letter and in spirit.

(3) The Eurocontrol Convention does not require the Commission to explain its decisions., Besides, the absence of a formal statement of the reasons does not prevent the Tribunal from exercising its power of review on the strength of the evidence before it or of any further evidence it may wish to have. The reasons for the reduction in the increased figure of pay are plain from the copious records of proceedings of the competent bodies and from other texts. The Protocol that amended the Convention as from 1 January 1986 altered the Organisation's duties, operation and financing in radical ways; in sum, it now carries out tasks that member States or other countries entrust to it and has to keep costs low to stay competitive. Since pay in Eurocontrol was double what it was for similar posts in some member countries it had to be held back. Though some countries would have welcomed more drastic cuts, the general decisions the complainants object to are in fact fully suited to the Organisation's new position. Trends in pay in the Communities are immaterial since, contrary to what the complainants contend, an independent organisation like Eurocontrol is not bound to follow the Communities but may set its own pay scales as it pleases.

Lastly, there are no relevant records that have not yet been published.

F. In their rejoinders Mr. Boland, Mr. De Groote and Mr. Lefebvre point out that there can be no doubt about which decisions they are impugning. Both in the original complaint forms they filed and in their statements of claim the only dates they mention are those at which they got pays lips showing the reduction in pay. In their submission their complaints are therefore receivable.

As for the merits, they enlarge on their pleas on two issues.

(1) They address mainly the question of the past policy of aligning pay in Eurocontrol and in the Communities. They maintain that custom is a main source of international law that is binding on the Organisation.

(2) They deny that the obligation to state the reasons for an administrative decision has to be in writing.

G. In their rejoinder the other complainants reaffirm that the Organisation's objections to receivability are mistaken since their internal appeals expressly challenged the individual decisions reducing their pay.

They develop their pleas on the merits.

(1) As to their plea of breach of acquired rights, they cite a report of 7 January 1988 by the Committee of Management to the Permanent Commission containing terms which, in their submission, bear out their contention that there is a custom of parity in pay between Eurocontrol and the Communities. That custom is binding in law: Eurocontrol has abided by it for over twenty years, as the written records again show. Besides income tax policy and the levy, they see evidence of parity in the wording of Article 2.2c) of Rule 27 and in Eurocontrol's giving effect to a ruling by the Court of Justice of the European Communities on the yearly adjustment of pay in the Communities. The level of pay is an essential element of the terms of their appointment. Whatever the Commission's authority may be and whatever their contracts may say, Eurocontrol must respect the general rule that an international organisation may not unilaterally impair essential and therefore acquired rights. In answer to the Organisation's plea that the amount of the reduction was too small to disturb the structure of their contracts, the complainants observe that the material issue is not the content but the nature of the right impaired. Besides, if small changes were admissible they might be allowed to build up into a big one.

(2) The complainants enlarge on their plea of breach of Articles 64 and 65 of the Staff Regulations, observing that Eurocontrol, in disregard of the criteria for adjustment and of actual circumstances, has simply decreed a reduction by a fixed and invariable percentage in relation to what the Communities may decide.

(3) They submit that a statement of the reasons for a decision is required even if the rules do not say so. Since the individual decisions are not explained, at least the general ones must be. The Organisation misrepresents the effects of the Protocol, which did not reduce the importance of its functions at all and indeed gave it new ones. Even if it needed fewer staff the quality of those it did need would be as before. Eurocontrol may no longer carry on operational activities, but the Communities never have anyway. Comparison with pay for like employment in member States is irrelevant: pay has to be higher in Eurocontrol to attract good recruits. The need to keep costs down is an implausible argument: the system prescribed in the Staff Regulations for adapting staff pay - particularly in the first paragraph of Article 65 - already holds rises in check, as has the levy on salaries. The reasons for the reduction in pay are therefore mistaken. They are also inadequate - and Eurocontrol has failed to address the point - in that the reduction is predetermined as a fixed and unalterable percentage of amounts to be set by authorities outside the Organisation: if pay in the Communities actually doubled, so would pay in Eurocontrol, subject only to the cut of 5 per cent.

H. In its surrejoinders on the cases of Mr. Boland, Mr. De Groote and Mr. Lefebvre the Organisation contends that by entering the Commission's decision of 7 July 1987 as the impugned decision under point 6 of the complaint forms the complainants have set the context of the dispute: their case turns entirely on that decision, not on the perfectly proper application thereof.

Eurocontrol enlarges on its pleas on the merits.

I. In its surrejoinder on the joint complaint the Organisation points out, as to receivability, that the internal "complaints" not only failed to challenge individual decisions but were premature in that they were filed before 12 November 1987, when the Permanent Commission gave final approval to its decision to reduce pay, and before individual decisions were taken to give effect to that general one of the Commission's. Those individual decisions, which were to deduct arrears of pay as from 1 July 1986, could not themselves become final until the Commission had made its general decision final. The reference to individual decisions in the initial appeals therefore had no effect in law. What the complainants say they are impugning under point 6 of the complaint form is a decision of "July 1987" notified to them, according to point 7, "on 29 July 1987, at the end of July 1987 and in September 1987". In fact 29 July is the date of office note No. 23/87 informing the staff of the likely application of the first reduction in pay subject to later final approval by the Permanent Commission. So that note cannot be treated as a challengeable decision either.

As to the merits Eurocontrol develops its earlier pleas and seeks to refute those developed in the complainants' rejoinder.

J. In a supplement to its surrejoinder on the complaints of Mr. Boland, Mr. De Groote and Mr. Lefebvre Eurocontrol again maintains that they are irreceivable. It observes that it was after reading Judgment 902 of 30 June 1988 that the complainants shifted ground and argued in their rejoinders that they had indeed challenged individual decisions. So it is only by way of subsidiary argument that Eurocontrol seeks to show that the alleged individual decisions applying the general reduction in pay are not challengeable. Not until 12 November 1987 did the Permanent Commission make its decision to reduce net pay. So the notifications, which are mere pay slips, cannot be treated as individual decisions applying a policy decision that had not yet become final. Though office note No. 23/87 of 29 July 1987 explained that the policy decision was still only provisional they took no notice of that.

K. In further submissions Mr. Boland, Mr. De Groote and Mr. Lefebvre contend that the impugned decisions are indeed individual ones. They point out that the Organisation has for the first time argued the provisional nature of the Permanent Commission's decision of July 1987 and they contend that it is estopped from raising as a last resort that objection to receivability.

L. In their further submissions the other complainants reject as unsound the objections to receivability the Organisation has raised in extremis, namely that their internal appeals were premature because they were lodged before the Permanent Commission had finally approved the reduction. Once they had got their pay slips their internal appeals were receivable under Article 92(2) of the Staff Regulations. And the objection overlooks the rule that later approval of a decision that is already under challenge in judicial proceedings has retroactive effect.

M. In comments on the further submissions of Mr. Boland, Mr. De Groote and Mr. Lefebvre Eurocontrol says that it has never denied that pay slips can amount to challengeable individual decisions. But the decision the pay slips

were based on was not yet a final and therefore not yet open to challenge in a complaint to the Tribunal. Estoppel applies only if the conduct of one party has led the other to take up a particular stance and if the other party has suffered prejudice on that account. Neither condition is met here.

N. In further submissions on the joint complaint the Organisation maintains that from the outset it took the view that the decisions impugned in the internal appeals and again in the complaint forms did not amount to individual decisions challengeable under Article 92 of the Staff Regulations. Moreover, the internal appeals were not based even on any transitional measure of the Permanent Commission's and did not become receivable by virtue of the retroactive effect of the Commission's final approval of its decision. Such a notion of retroactivity would impair the stability of relations between the parties in law.

CONSIDERATIONS:

1. The European Organisation for the Safety of Air Navigation, known as Eurocontrol, is an institution which six European countries set up in 1960, and of which two others later in turn became members. At the time the pay of staff of the Agency which serves as the secretariat of the Organisation was on a par with that of staff of the European Communities.

For several years the representatives of some member States advocated changing that policy, and the upshot of much debate on the subject was a decision the Permanent Commission - the governing board of Eurocontrol - took at its 71st Session, on 7 July 1987. Its decision was to keep to the policy of alignment but as from 1 July 1986 to make the net pay of Eurocontrol staff 0.7 per cent lower than that of staff in the Communities. That was the first step in an exercise which was to be spread over three years and to bring in a 5 per cent differential in pay between the two organisations.

The Director General of Eurocontrol - the "appointing authority" - conveyed the matter to the staff in office notes dated 23 and 29 July 1987, and in July, August and September 1987 the staff accordingly received pay slips notifying both payment of sums due in arrears and reductions in current monthly salary.

In conclusion the Commission approved at its 72nd Session, on 12 November 1987, its decision of 7 July.

2. Hundreds of Eurocontrol officials submitted appeals to the Director General. Having got no answer within the time limit of four months set in the Staff Regulations, three of them - Mr. Boland, Mr. De Groote and Mr. Lefebvre - filed their complaints with the Tribunal on 25 February 1988. Others awaited an express decision before doing so, the decision came on 18 April and the joint complaint was lodged with the Tribunal on 15 July.

All the complaints, which unquestionably respect the time limits, raise the same issues and may be joined to form the subject of a single ruling.

There are 526 applications to intervene in Mr. Boland's, Mr. De Groote's and Mr. Lefebvre's complaints from staff members who have the same rights as they. The applications are receivable and the Tribunal's ruling will apply to the interveners as to the complainants themselves.

3. In support of its contention that the complaints are irreceivable the Organisation puts forward different pleas about different complaints; it later adduces further arguments.

4. In its replies to the complaints filed by Mr. Boland, Mr. De Groote and Mr. Lefebvre Eurocontrol submits that what they are challenging is "the Permanent Commission's decision of 7 July 1987" and that that is one of a general nature and not of the kind the Tribunal may review, namely decisions by the Director General.

As for the joint complaint by Mr. Aelvoet and others, the Organisation argues that their internal appeals did not challenge the lawfulness of the individual decisions applying the general one and that since those appeals were therefore irreceivable so is their complaint to the Tribunal.

The pleas are flawed because they rest in part on mistakes of fact.

In their internal appeals Mr. Aelvoet and others each sought, under points 2(a) and (b), the quashing of the general decisions and, under 2(c), the quashing of "the individual decision applying the general decision referred to in (a) and (b)", and they explained that the individual decisions consisted in "the pay slips showing payment of arrears

(Eurocontrol reduction) as from 1 July 1986 and received at the end of July 1987 and the pay slips for September 1987". In its replies Eurocontrol distinguished between the two claims and rejected the appeals as irreceivable only insofar as they challenged the Commission's general decision.

In the statement of their claims in the complaint forms and at the end of their brief Mr. Boland, Mr. De Groote and Mr. Lefebvre explain that what they are challenging are the individual decisions which applied the general decision and which first came to their notice on the issue of their pay slips showing the payment of arrears and the monthly reduction.

5. In line with the principles the Tribunal affirmed in Judgments 624 (in re Giroud No. 2 and Lovrecich) and 902 (in re Aelvoet and others) the complainants may challenge the Director General's decisions to apply the general measures to them and may thereby also challenge the lawfulness of the Commission's decisions. So the Tribunal will entertain any plea to the effect that those measures ran counter to general rules and principles governing the international civil service.

The defendant's objections to receivability fail insofar as they relate to the pay slips the complainants received in July, August and September 1987.

6. The Organisation further contends that the complainants are irreceivable even insofar as they impugn the Director General's decisions, which in its submission were not yet challengeable when the internal appeals were lodged. Being merely provisional the Commission's decision of 7 July 1987 did not apply straightaway: as was stated in the office note of 29 July 1987, it was not to take effect until the Commission had given final approval, and it did not do so until 12 November 1987. Having been lodged before that date and so before the Commission's decision took effect in law, the internal appeals were premature.

That line of reasoning might succeed if the pay slips the complainants object to had had no practical effect. But they did: though they do refer to a rise in pay the rise is reduced by 0.7 per cent.

While not denying that, the Organisation points out that the main purport of the pay slips was to notify a rise in pay and that the 0.7 per cent reduction has to be seen in the context of that rise.

That plea fails too. The pay slips show the 0.7 per cent reduction which the Organisation acknowledges was made. In any event the reduction applies not just to the period in which there was the pay rise but also to the period before that because the reduction was retroactive to 1 July 1986. For that reason alone the complaints are partly receivable.

7. Having been issued before the Commission's decision setting the new pay scales and making the reduction took effect, the pay slips have no basis in law and must be set aside insofar as they cause the complainants injury. Eurocontrol shall therefore make over to them the sums withheld and pay them interest thereon at the rate of 10 per cent a year as from the date at which the deduction was made.

The further flaw the complainants point to in the pay slips - their retroactive effect - is of lesser gravity and maybe subsumed in the greater one.

8. Though the pay slips are set aside insofar as they reduce pay, the complaints go much further in that what they also impugn is the lawfulness of the actual reduction.

Though the pay slips are plainly unlawful because the Commission's decision still had to come into effect, they apply only to the period they cover and cannot be treated as giving effect to a decision that had not yet become final.

Not a single complainant has challenged an individual decision subsequent to 12 November 1987. The Tribunal is therefore bound, regrettable, to declare the claims irreceivable insofar as they object to future reductions in pay.

9. Since the impugned decisions are set aside the complainants are entitled to awards towards costs against Eurocontrol as follows: a total of 100,000 Belgian francs to Mr. Boland, Mr. De Groote and Mr. Lefebvre; and a total of 100,000 Belgian francs to Mr. Aelvoet and the other complainants.

DECISION:

For the above reasons,

1. The pay slips issued by Eurocontrol before the Permanent Commission's decision of 12 November 1987 took effect are set aside insofar as they reduce staff pay by 0.7 per cent.
2. The Organisation shall refund the sums withheld and pay interest thereon at the rate of 10 per cent a year as from the date of withholding.
3. The same ruling shall apply to the interveners ,whose applications are receivable.
4. The Organisatoin shall pay towards costs as set out in 9 above.
5. The complainants' other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner