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

SEVENTY-FIRST SESSION

In re CASSAIGNAU and KARRAN (No. 3)

Judgment 1101

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 December 1989 and corrected on 22 January 1990, Eurocontrol's reply of 5 April, the complainant's rejoinder of 11 June and Eurocontrol's surrejoinder of 2 August 1990;

Considering the third complaint filed by Mr. Günther Karran on 21 December 1989 against Eurocontrol and corrected on 29 January 1990, Eurocontrol's reply of 5 April, the complainant's rejoinder of 7 June, and Eurocontrol's surrejoinder of 2 August 1990;

Considering the Organisation's brief of 21 September

1990 in answer to questions the Tribunal put to it in the Registrar's letter of 30 August about the two complaints, Mr. Cassaignau's observations of 13 October and Mr. Karran's of 11 October on that brief, the texts communicated by Eurocontrol on 17 October at the Tribunal's instructions and its submissions of 31 October 1990 on the complainants' observations;

Considering the applications to intervene filed in the two complaints by:

J. Abramowski

A. Abts

D. Aelvoet

K. Albert

A. Albertini

J. Andriese

R. Angermeyer

H. Ansorge

B. Bams

E. Bartels-Lemmens

H-W. Becker

B. Berecq

H. Bergevoet

N. Bisdorff

R. Blau

L. Bleyens

G. Boel

P. Boland

C. Bonadio

M-C. Bonn

F. Bontems

B. Börrigter

A. Bos

J. Bouillier-Oudot

C. Breeschoten

O. Brentener

L. Brozat

M-N. Brun

H. Burgbacher

M. Castenmiller

O. Celebi

R. Charpantier

C. Chauveau

M. Chauvet

N. Chichizola

L. Clarke

C. Collignon

M. Coolen

E. Corsius

A. Cuveliers

C. Dagneau

H. Dander

B. Darke

A. Davister

J. De Beurs

A. De Monte

J. De Poorter

A. De Vos

J-M. Debouny

G. Debruyn

H. Delachaux

J. Delwarte

R. Denolle

J. Dessart

F. Detienne

R. Deweer

V. Dick

J. Dickmann

K. Dittmar

D. Dörr

E. Dubiel

J. Ellermann

P. Emering

A. Enright

A. Essers

C. Esslemont-Richez

H. Evers

H-J. Exner

G. Fairfax Jones

R. Feyens

J-L. Flament

P. Flick

J-P. Florent

G. Fortin

J. Fortin

J-P. François

G. Frost

B. Führer

C. Galeazzi

M-T. Garzend

F. Gehl

L. Geurten

M-T. Gilles

C. Gilvert

K. Glover

J-P. Godde

H. Goldner

J. Gordts

L. Gotting

W. Göttlinger

R. Grimmer

B. Gundermann

A. Guyot

K. Haage

J. Haines

I. Hamers

W. Handke

C. Hantz

G. Harel

H. Hauer

H. Heepke

J. Hein

J. Heller

G. Hepke

E. Heppner

H. Hermanns

M. Hervot

R. Hess

H. Hoekema

R. Hofmans

W. Holtmann

J. Hooijmaijers

P. Hunt

P. Kaisin

A. Kalkhoven

H. Kaltenhäuser

B. Kerkhoff

A. Kicken

N. Kieffer

G. Klein

H. Klos

U. Kluvetasch

J. Koolen

H. Koot

F. Korff

A. Krahl

J. Kuijper

H. Kunicke

L. Lambrechts

L. Lang

W. Leistico

L. Lelarge

M. Lemmens

C. Licker

A. Lieuwen

M. Lillo

W. Lockner

R. Lucas

H. Maas

J. Maes

P. Maes

J-P. Majerus

R. Massa-Moyaerts

C. Massie

K. Mayer

E. McCluskey

N. Mehrtens

C. Meier

J. Mercier

J. Meredith

H. Mertz

B. Michaux

P. Montenez

R. Mühlstroh

B. Neher

H. Neumann

L. Newlands

M. Nicolay

E. Noel

L. Olivier

J. Otten

J. Oury

R. Peiffer

C. Petit

P. Petit

P. Petitfils

A. Peyrat

E. Phillips

M. Picard

W. Pieneman

J-F. Pieri

C. Poinsot

M. Pommez

J. Prochasson

C. Pusch

B. Puthiers

M. Reck

M-L. Rensink

N. Reuter

J-J. Richer

E. Rinkens

A. Ritchie

J. Rose

G. Rossignol

F. Roth

J. Roulleaux

G. Roumajon

E. Rousée

J-M. Roussot

K. Rozenbeek

J-P. Rue

J-C. Salard

N. Santilhano

P. Sargent

G. Scheltien

J. Scheu

H. Schneider

K. Scholts

A. Schuh

M. Schwaller

W. Sillevis

F. Skerhut

E. Snijders

J. Sondt

A. Stickland

E. Suetens

C. Suttie

A. Thill

H. Tielker

J. Timmermans

C. Tovy

R. Ueberhofen

E. van den Heuvel

L. van der Hoest

A. van Dooren

H. van Everdingen

G. van Gansewinkel

H. van Hoogdalem

M. van Loon

A. van Zanten

B. Vandenberghe-Vaury

D. Vanderstraeten

E. Vanschönwinkel

L. Verwilst

W. Viertelhauzen

P. Visser

C. Vodak

N. Vrancken

J. Watson

H. Weis

G. Wendling

P. Wildey

H. Wilk

J-P. Willox

W. Withofs

R. Xhrouet

D. Young

H. Zandvliet

W. Zieger

K. Zimmermann

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Articles 72, 92(2) and 100 of the Staff Regulations governing officials of the Agency and Articles 14 and 24(2) of Rule No. 10 concerning sickness and accident insurance;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. According to Article 72 of the Eurocontrol Staff Regulations an official and his dependants are insured against sickness in accordance with rules drawn up by the Director General. Those rules are in Rule No. 10 concerning sickness and accident insurance. Article 14 of the Rule reads:

"Pharmaceutical products prescribed by the practitioner or on a 'repeat' basis as evidenced by the prescription subject to a maximum of six months shall be reimbursed at the rate of 80%. Mineral waters, tonic wines and beverages, infant foods, hair care products, cosmetics, special diet foods, hygiene products, irrigators, syringes, thermometers and similar products and instruments shall not be considered as pharmaceutical products. ...".

By office notice 2/89 of 9 February 1989 the Director General of the Agency, "after consulting the medical officer and the Management Committee of the Sickness Fund", announced in point 1 that "expenses arising from trace-element therapy (oligoelements), aromatherapy and phytotherapy are not reimbursed by the Sickness Fund" and in point 4 that the staff should not submit claims to such reimbursement.

Eurocontrol employs Mr. Cassaignau, who is French, at its institute for air navigation in Luxembourg and Mr. Karran, a citizen of the Federal Republic of Germany, at its headquarters in Brussels. They received the office notice later in February 1989. On 11 May 1989 Mr. Karran, on 18 May Mr. Cassaignau and at about the same time another 129 staff members each lodged a "complaint" under Article 92(2) of the Staff Regulations seeking the reversal of the decisions in points 1 and 4 of the office notice as contrary to the provisions of Rule No. 10. By minutes dated 18 September 1989, which Mr. Karran got on the 27th and Mr. Cassaignau on the 28th and which are the decisions they impugn, the Director General informed them that he rejected their claims as devoid of merit.

B. The complainants submit that the office notice is at odds with Article 14 of Rule No. 10, which does entitle them to claim the refund of the costs of trace-element therapy, phytotherapy and aromatherapy and under which the Sickness Fund indeed used to refund such costs. The notice misrepresents former practice by implying, when it says that such costs "are not reimbursed", that it is making no change. The complainants are claiming the refund of the costs, not of just any pharmaceutical products, but of those that, as Article 14 says, a medical practitioner has prescribed. The article is intended to be binding, else it would not set out exceptions. The complainants rely on a

judgment the Court of Justice of the European Communities made on 13 December 1989 (in re Prelle) on a similar rule.

Since Rule No. 10 does not define pharmaceutical products the Fund has cited a ruling of the Council of the European Economic Community of 26 January 1965 (65/65), but the definition it draws therefrom is, in the complainants' view, too narrow; properly construed that ruling is wide enough to cover trace-element, phytotherapeutic and aromatherapeutic prescriptions. The efficacy of such products is immaterial. So is the fact that they may be obtained without prescription. There is no threat to the financial stability of the Fund since a doctor's prescription is always required. The refund the complainants are claiming is not barred by the phrase "and similar products" in the second sentence of Article 14 since the items the sentence does list are cosmetic, tonic or dietetic and so not "similar" at all.

Since point 1 of the office notice offends against the article it is unlawful: the proper way to exclude refund would have been to amend the article.

The complainants seek the quashing of the decision in point 1 and, subsidiarily, of the decision in point 4 of office notice 2/89 as from the date of publication. They claim costs.

C. In its replies Eurocontrol questions whether the complainants have any cause of action: what they are challenging are not decisions to reject individual claims to refund of costs but an office notice of general purport. A further objection is that they have failed to exhaust the internal means of redress: the notice went out on 9 February 1989, and by the time they appealed the three months' time limit in Article 92(2) of the Staff Regulations had expired.

As to the merits, Eurocontrol submits that the notice merely confirmed earlier practice. Though the costs of trace-element therapy and the like were occasionally refunded before, that was a mistake that bestowed no rights on staff for the future. Sometimes the doctor's prescription or the nature of the product prescribed was unclear; yet checking every prescription would have held up the settlement of claims. No provision in the rules confers entitlement to the refund of all pharmaceutical expenses; indeed Article 24(2) of Rule No. 10 states: "Expenses relating to treatments considered to be non-functional, superfluous or unnecessary, after the Medical Officer has been consulted, shall not be reimbursed".

The Prelle case is irrelevant: it was about organotherapy, the Court held that the staff had not been warned that such costs would be refused, and rules on the matter had not been laid down. That was precisely the purpose of office notice 2/89, which affords grounds in law for refusing to defray the costs of trace-element therapy and the like.

The office notice is lawful. The complainants are mistaken in challenging the Director General's authority to decide what products Article 14 covers. The Director General derives such authority from Article 100 of the Staff Regulations, and he was empowered to issue in the notice what was mere clarification of existing practice. The notice merely reflects the same policy as that of national and other international social security schemes that refuse to meet the costs of treatment which, on the best medical authority, are of no therapeutic value. In any event objections on grounds of policy are immaterial. The Director General consulted beforehand the Management Committee of the Fund, which includes staff representatives. He must look to the Fund's financial stability by preventing the over-indulgent handling of claims.

Since the case raises medical issues and questions relating to management policy Eurocontrol appends observations on the complaints by the medical officer and by the Fund.

D. In their rejoinders the complainants submit that they do have a cause of action in that the office notice, which is unlawful, is to their detriment. Besides, since the filing of the complaints the Fund has refused claims by many staff members, including Mr. Karran, and so declaring the complaints irreceivable would just mean delay until the Tribunal ruled on new complaints challenging those individual decisions. In another case (Judgment 292, in re Molloy) Eurocontrol argued that the complainant had failed to appeal in time against office notices; so on its own admission such notices are in themselves challengeable.

The Organisation's plea that the internal appeals were time-barred is a new one and in any case mistaken. Though the office notice was dated 9 February 1989 it took time to reach the complainants: Mr. Karran did not get it until

14 February, and Mr. Cassaignau cannot have received it before 21 February, when it was delivered to the institute in Luxembourg. So their internal appeals were each filed several days before the three months had elapsed.

The complainants develop their pleas on the merits and seek to refute the defendant's. They reaffirm that the office notice did not reflect practice: Eurocontrol produces no earlier text refusing claims to refund of the costs of the items at issue. In fact it changed the practice, and it did so because in July 1988 it realised that it was not in line with social insurance policy in the European Communities, which were already refusing such costs. The medical officer, whom it consulted at the time, suggested that the former practice was to allow them and said that the staff should be warned "of any decision taken". If the office notice merely confirmed earlier practice why was there any need to consult the Fund's Management Committee?

Article 24, which Eurocontrol relies on for the first time, is irrelevant to the office notice and to the subsequent refusal of individual claims: it applies to medical treatment, not to pharmaceutical products.

The Prelle ruling does support the complainants' case: it defines the term "pharmaceutical products", rejects the argument that the efficacy of the product as prophylactic or cure is relevant; and confirms the view that, to fail to qualify for refund, trace-element therapy and the like must be either listed among the exclusions in Article 14, which they are not, or assimilated to the items mentioned, which they cannot be.

Eurocontrol's arguments are inconsistent: though it says that former practice was not to allow refund it contends that it may enlarge the list of disallowed products and actually did so in the office notice. But in fact the notice did not constitute a lawful amendment of Article 14. The complainants cite the conditions the Tribunal set in Judgment 292, under 17, for amendment of a Rule by an office notice, and they submit that Eurocontrol failed to meet those conditions. Not having been lawfully amended, Article 14 must be construed as it stands, and it does not allow refusal of the costs at issue in this case.

E. In broadly similar surrejoinders Eurocontrol enlarges on its replies, the force of which it submits the rejoinders do not weaken. As to receivability it says that it is not arguing that office notices are unchallengeable but that the complainants show insufficient cause of action: they are objecting merely to potential injury whereas the Tribunal rules only on allegations of actual injury.

As to the merits it develops its contentions that, as the wording makes clear, the notice confirmed practice and was lawful. The construction the complainants put on its reasoning is mistaken. The ruling on Prelle is irrelevant: the Court held, not that the costs claimed should in any event be refunded, but that there were no proper grounds in law for refusing the refund. At Eurocontrol the legal basis for refusal is now sound, with the issue of office notice 2/89. Whereas in the European Communities the competent authority is the Council of Ministers, in Eurocontrol it is the Director General, and he acted correctly in issuing the notice. The passages of Judgment 292 that the complainants rely on were obiter dicta.

What they are really objecting to is the wisdom, not the lawfulness, of policy in the matter.

Eurocontrol appends further observations from the medical officer and the Fund.

F. In their further submissions invited by the Tribunal the parties discuss several specific issues relating to the merits.

CONSIDERATIONS:

1. Both complainants, who are employees of Eurocontrol, seek the quashing of office notice 2/89 issued by the Director General on 9 February 1989. That notice, issued under Rule No. 10 concerning sickness and accident insurance, informs the staff in point 1 that "expenses arising from trace-element therapy (oligoelements), aromatherapy and phytotherapy are not reimbursed" by the Sickness Fund and asks them in point 4 not to claim such refund.

2. On 11 and 18 May 1989 the complainants submitted internal "complaints" to the Director General under Article 92(2) of the Staff Regulations. In replies of 18 September 1989 the Director General explained at length the reasons for the decision, rejected their claims and told them they had "three months from the date of notification of this decision in which to file a complaint".

3. The complainants thereupon filed their complaints with the Tribunal: Mr. Cassaignau did so on 20 December 1989 and Mr. Karran on the 21st. Since the cases raise the same issues they may be joined. Another 240 staff members have applied to intervene.

4. Finding that by the end of the original exchange of briefs it did not have enough information at its disposal, the Tribunal ordered further submissions. It asked the Organisation to explain the meaning of the terms "trace-element therapy", "aromatherapy" and "phytotherapy" in office notice 2/89 and the medical reasons for its refusal to repay the costs of treatment under those three heads. The complainants were allowed to reply.

5. The Organisation answered with a comprehensive explanation of its stand on various kinds of "alternative" medicine. It refuses to pay costs of the three forms of treatment mentioned in the notice because there has been no scientific inquiry showing any of them to have curative effect. It says that as to aromatherapy and phytotherapy it is not clear what the composition of the products and the proper dosage are, and it is not proven that phytotherapy is safe, the component agents being variable. Though extracts from plants are commonly used in medicine the conditions of use are strictly controlled because some of them are highly potent. There are no such safeguards for the use of phytotherapy.

Receivability

6. Although, as was said above, Eurocontrol began by instigating appeals it changed tack in its replies to the complainants by objecting to receivability. It submits that the office notice constitutes a general decision and as such is of only abstract and hypothetical interest to the complainants. What they are seeking is a prior ruling on a general issue, not a specific one on particular disputes, and until they have actual claims to repayment of the costs of one of the products listed they have no cause of action.

7. Because of the shift in Eurocontrol's position it is worth pointing out that in Judgment 961 (in re Fairfax Jones No. 2 and others) of 27 June 1989 the Tribunal held that it was "competent only to entertain individual and actual disputes" and would not make prior rulings of general purport. Again in Judgment 1081 (in re Albertini and others) of 29 January 1991 it affirmed that no appeal would lie against a general decision provided that it was such as needed in all cases to be followed by a challengeable individual one.

8. To judge from both content and context office notice 2/89 is a mere warning to the staff that Eurocontrol does not intend to refund the costs of some kinds of treatment which it does not believe to have curative effect.

9. There will be a decision challengeable under Article VII of the Tribunal's Statute only when Eurocontrol has, in accordance with its rules, refused a staff member refund of the cost of a particular sort of treatment. The Tribunal will then rule according to the criteria it stated in Judgment 1088 (in re Karran No. 2) of 29 January 1991, taking medical advice if need be. It may not make a prior ruling of general application to the sorts of treatment covered by the office notice.

10. The complainants cannot yet show any cause of action and their complaints must fail because they are irreceivable. So do the applications to intervene.

11. Since, however, before altering its stand the Organisation directly encouraged them to file the present complaints, it is only reasonable that it should bear the costs, which the Tribunal sets at 5,000 Belgian francs for each of the complainants.

DECISION:

For the above reasons,

1. The complaints and the applications to intervene are dismissed.

2. Eurocontrol shall pay each of the complainants 5,000 Belgian francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

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

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