

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

SEVENTY-FIFTH SESSION

Judgment 1275

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. G. F. J. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 August 1992, the Agency's reply of 19 November 1992, the complainant's rejoinder of 2 February 1993 and Eurocontrol's surrejoinder of 7 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 87 and 92(2) of the Staff Regulations governing officials of the Agency and Articles 2 and 3 of Rule No. 7 concerning remuneration;

Having examined the written submissions and decided not to order hearings;

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

A. The complainant, a British subject who was born in 1944, is employed by Eurocontrol as a principal assistant at grade B1 at its Institute of Air Navigation Services in Luxembourg. He has a daughter who was born in 1968 and who moved to Brussels in 1988 to take training courses.

On 18 September 1990 and 15 October 1991 he filed forms applying for the dependent child and education allowances provided under Articles 2 and 3 of Rule No. 7 concerning remuneration. In November 1990 the Division of Personnel told

him that it had received no certificate of his daughter's enrolment as a student. In November 1991 it reminded him that it was still waiting for the certificate for 1990 and it asked for a certificate for 1991. On 18 November 1991 he told the Division by telephone that his daughter had dropped out at the end of the 1989-90 academic year. In a telefax message of 22 November 1991 the Head of Personnel said he would stop paying the allowance for her and suggested seeing the complainant in Brussels when he came on 26 November so that they could agree on how Eurocontrol would recover the overpayments.

In a letter of 19 December 1991 the Director of Personnel and Finance informed the complainant that Eurocontrol would recover overpayments it had made since 1 September 1990. On 29 January 1992 it sent him a statement showing the material amounts and a schedule of the dates of refund.

On 28 February the complainant filed an internal "complaint" under Article 92(2) of the Staff Regulations, adding a request - in the event of refusal - that his daughter be treated as his dependant from 1 September 1990 to 6 January 1992. A letter of 14 May 1992, the decision impugned, notified to him the Director General's rejection of both "complaint" and request.

B. The complainant submits that in November 1990, as soon as the Personnel Division told him it had not got a certificate of enrolment of his daughter, he asked her to provide it. He felt sure she had done so because the Division went on making the payments without asking for the certificate again. Not until November 1991, when it asked for two certificates of enrolment at a school, did he discover that she had dropped out of her course in Brussels. He at once told the Division and asked it to suspend payment of the education allowance for his daughter.

He relies on Article 87 of the Staff Regulations, which says:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

He neither realised that payment had been improper nor doubted that his daughter had provided the certificate for 1990-91 since the Personnel Division did not ask him for it until November 1991. His good faith is beyond dispute because office notice 11/90 of 17 August 1990 about the education allowance says:

"Applications must reach [the Personnel Division] by 22 October 1990 at the latest. Failing this, payment of dependent child and education allowance will be suspended automatically without prior notice at 1 January 1991. Any overpayments will be recovered at the same time with retroactive effect."

and office notice 15/91 of 20 August 1991 is to the same effect, the deadline being 15 October 1991 and the date of suspension 1 January 1992.

The Division neither warned him that it had no certificate for 1990-91 nor "automatically" suspended payment at 1 January 1991. So he could but assume that everything was in order.

He seeks the quashing of Eurocontrol's decision to recover the sum of 434,554 Belgian francs from him and an award of costs.

C. In its reply Eurocontrol contends that even if, as he says, the complainant did not know that his daughter had given up her studies that does not bar repayment. It was not her duty but his to provide the certificate, and he had been remiss in relying on her to do so.

The office notices which the Agency issues each year serve as reminders of what an official must do to qualify for and claim the

education allowance and warn that if he fails to provide the required papers by the deadline he may forfeit it altogether. But because enrolment in courses takes a long time in some countries Eurocontrol is wont to apply the rules leniently, and the complainant may not properly take it to task for indulgence towards its staff. In any event the claim form states that "any overpayments will be recovered ... subsequently", and claimants expressly undertake to report any change that may affect entitlement.

All the conditions for recovery being met, Eurocontrol cannot allow him the unjust enrichment.

D. In his rejoinder the complainant maintains that recovery is warranted only when the official knew payment to have been improper, and he did not. Although his daughter had let him down, payment went on after 1 January 1991 only because Eurocontrol was negligent and failed to warn him that he no longer qualified. Had he known in October 1991 - as he knew only a month later - that Eurocontrol did not have the certificate for 1990-91 he would never have claimed the allowance for 1991-92.

Eurocontrol has not shown that he knew the payments for his daughter to be improper and its decision is therefore in breach of Article 87.

E. In its surrejoinder Eurocontrol insists that the complainant has failed to prove that he acted with due care. His charge of negligence is mistaken. He has had unjust enrichment and cannot establish that his daughter was able to mislead him for so long.

It was he, not his daughter, who got the payments: Eurocontrol had no contractual relationship with her. He does not deny laying on her a duty he owed to the Agency himself; he failed to exercise due diligence and should have made sure she was keeping up her studies and had sent the certificate to the

Administration. He may not plead an administrative oversight as an excuse for refusing repayment.

Eurocontrol showed restraint by not exacting interest on the sums due and by spreading refund over almost two years.

CONSIDERATIONS:

1. The complainant, who is on the staff of Eurocontrol, is assigned to its Institute of Air Navigation Services in Luxembourg. Eurocontrol has ordered the recovery from him under Article 87 of the Staff Regulations of undue payments made to him by way of dependant's and education allowances and by virtue of Articles 2 and 3 of Rule No. 7 concerning remuneration. He seeks the quashing of that decision.
2. From September 1990 to December 1991 the complainant was paid allowances to meet the cost of courses which his daughter was supposed to be taking in Brussels. He filled up the relevant form at the start of the academic year 1990-91 and explained that his daughter's certificate of enrolment would come later. He says that he agreed at the time with Eurocontrol that his daughter would herself send the certificate straight to the Personnel Division in Brussels.
3. At the start of the academic year 1991-92 he again applied for the allowances and again declared that the certificate would come later. Eurocontrol then pointed out that it had not yet got the certificate for 1990-91. That, he says, is when he learned that his daughter had dropped out at the end of the academic year 1989-90.
4. After a telephone conversation the Head of Personnel told the complainant by a message of 22 November 1991 that payment would stop "on your January salary" and the undue payments already made would be recovered. By a minute of 9 December

the complainant confirmed that his daughter had given up her studies and he proposed that recovery should be only of payments from the start of the academic year 1991-92. In a letter of 19 December 1991 the Director of Personnel and Finance answered that he had no choice but to demand repayment from 1 September 1990. On 29 January 1992 Eurocontrol sent the complainant a statement of the sums due, and the total came to 434,554 Belgian francs.

5. On getting that statement the complainant submitted to Eurocontrol on 28 February 1992 a "complaint" claiming the retroactive benefit of Article 2(4) of Rule No. 7. That provision says that an official who is responsible in law for someone whose maintenance "involves heavy expenditure" may "exceptionally" be granted allowances. The Director of Personnel and Finance dismissed the claim on 14 May 1992 in a decision which he took on the Director General's behalf and which he fully substantiated.

6. That is the decision impugned in his complaint, which he filed in time, on 12 August 1992. The complainant seeks the quashing of the decision, in other words that he be relieved of repayment altogether. He pleads that he did not know what his daughter was up to and that Eurocontrol is to blame for the undue payments because it failed to warn him promptly that his daughter had not supplied the school certificate. As for the recovery of the undue payments, he relies on Article 87 of the Staff Regulations, which says that "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it". He argues that because of his daughter's behaviour he was in good faith in failing to realise that the sums were not due.

7. In its reply the Organisation observes that it is fairly lenient about the submission of certificates of enrolment for children of

staff who get the allowances prescribed in Articles 2 and 3 of Rule No. 7. The reason is that dates of enrolment differ from country to country and many schools are sluggish in providing certificates. But Eurocontrol maintains that in return for its leniency officials owe it a higher duty of care in the matter and may not shirk responsibility by shifting to it what is after all an obligation of their own. It categorically denies making any arrangement with the complainant whereby his daughter and not he should send it the certificate.

8. The Organisation is quite right. It is indeed the claimant who is under the duty to meet the conditions for the grant of family allowances. So it was for the complainant and for him alone to establish, and as promptly as possible, that his daughter was enrolled in a course, and he may not plead her misbehaviour to secure release from his own obligation.

9. The conclusion is that the complainant was receiving undue payments by the start of the academic year 1990-91. His further attempt at the start of 1991-92 to get the allowances without providing the certificate, and his blatant lack of interest in his daughter's studies in the preceding year, cast doubt on his good faith. The Organisation has a policy of trusting staff, and its provisional payment of the allowances he claimed may on no account be put down to any "omission" or "negligence" on its part. Indeed his getting the allowances before he had even supplied all the required papers laid on him a special duty of care. His irresponsible attitude was in gross breach of that duty.

10. Lastly, he may not obtain relief from repayment by pleading the conditions set in Article 87 of the Staff Regulations for recovery. As he knew full well, he was not entitled to payment at all unless he provided a certificate of enrolment. He must have known too that by making his claim without being able to append the requisite evidence he undertook the obligation of doing so as soon as he could. He took no interest in making the

claim good and left the matter - or so he says - in his daughter's hands. He thereby incurred the risk that the certificates would never be supplied at all. So he may not plead that he did not know the payments he had received to be improper. The Organisation is entitled to full recovery of the sums mistakenly paid to him from 1 September 1990.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
William Douglas
P. Pescatore
A.B. Gardner