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

EIGHTY-EIGHTH SESSION

In re Boivin (No. 2)

Judgment 1899

The Administrative Tribunal,

Considering the second complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 29 January 1999, Eurocontrol's reply of 7 May, the complainant's rejoinder of 10 August and the Agency's surrejoinder of 15 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Facts relevant to this dispute are to be found in Judgments 1768 (*in re* Bodar) of 9 July 1998 and 1870 (*in re* Boivin) of 8 July 1999. The complainant's appointment to a position as an expert at the Agency's Institute of Air Navigation Services in Luxembourg was cancelled as from 31 August 1996, after an employee of the Agency, Mr Bodar, challenged it. The complainant was subsequently appointed to the position of "head of the Accountancy and Personnel Office" of the Institute. Mr Bodar also challenged this appointment and the implied rejection of his internal complaint was quashed by the Tribunal in Judgment 1768, mentioned above. During the process Mr Boivin was invited to submit his point of view, which he did in the form of a brief to the Tribunal. He relied on an expert opinion of a graphologist to show that Mr Bodar has falsified a document.

On 22 December 1997 the complainant asked the Agency to open a disciplinary inquiry against Mr Bodar. He asked that Mr Bodar be sanctioned and ordered to pay him 100,000 euros and that the Organisation compensate him for the moral, professional and financial injury he said he sustained. Having received no reply, on 8 June 1998 he lodged an internal complaint against the implied rejection of his request. In its report of 15 October the Joint Committee for Disputes unanimously recommended rejecting the complaint but suggested that, while not at fault, the Agency seek an amicable arrangement with the complainant to compensate him for the "inevitable stress incurred". By a letter of 17 November 1998, the impugned decision, the Director of Human Resources rejected the internal complaint on the Director General's behalf.

B. The complainant holds the Agency responsible for the injury he suffered as a result of "marital separation" and of having to maintain two households for a prolonged period. He contends that, according to the case law of the Tribunal, the Agency had a duty to protect him against any injury resulting from the cancellation of his first appointment and that the daily subsistence allowance it paid him was not enough to cover the injury actually incurred. He alleges psychological and professional harassment on the part of Mr Bodar and complains that Eurocontrol failed to sanction him.

He estimates the amount of the damages at 1,718,440 Belgian francs, broken down as follows: 190,191 francs for additional accommodation costs following the cancellation of his move to Luxembourg that had been planned for early March 1996; 19,654 francs for additional telephone costs incurred largely by the separation from his wife; 1,525 francs for access to television in Belgium; 89,570 francs for the cost of travel between Belgium and Luxembourg; 337,500 francs for his wife's loss of earnings and 1,080,000 francs for the loss incurred in the sale of his wife's translation business when he had had to move at very short notice.

He seeks the quashing of the impugned decision; the opening of a disciplinary inquiry and the imposition of a sanction against Mr Bodar; material damages in the amount set out above, plus interest; the same amount in moral damages, and costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable because it concerns injury allegedly caused by the cancellation of the complainant's appointment in 1996. It is therefore time-barred. Besides, he already made the claim to moral damages in his first complaint and his claim to the opening of an inquiry would constitute an injunction against the Agency.

In subsidiary pleas Eurocontrol denies the existence of any injury. The cancellation of his first appointment did not interrupt his career, since not only did the Agency continue to pay his salary, but also the daily subsistence allowance to compensate for the uncertainty of his situation, and the household allowance. Therefore, it discharged its obligations under the case law. It points out that since the complainant's probationary period expired on 31 May 1996, it would have been able to confirm his appointment and authorise the removal only as from 1 June. His plan to move early in March was therefore premature and rash. The Agency also has doubts about the alleged injury to his wife. It rejects the allegation of harassment.

Eurocontrol asks the Tribunal to order the complainant to bear the full costs.

D. On receivability, the complainant rejoins that he tried to start negotiations at the beginning of October 1996 and only when the Administration failed to take a decision did he file an official request.

On the merits, he submits that the household allowance is a statutory allowance which is not meant to compensate for injury. He accuses the Director of Human Resources of wanting to dismiss him in order to fall in with the wishes of a staff member who was threatening to challenge all decisions on the reorganisation of the Institute of Air Navigation Services. He produces an attestation from his supervisor at the time, the former Director of the Institute, stating that "the bias on the part of [Director of Human Resources] ... was such" that he had advised the complainant to seek external legal counsel to ensure "proper defence" of his case. The complainant produces a statement from the former Director of the Institute to the effect that, in view of the complainant's excellent performance, he had consented to the removal planned for March 1996. Relying on this statement, the complainant enlarges on his claims: in view of the additional rent he had to pay for seven months, he estimates the amount of material damages at 1,915,960 Belgian francs. He leaves it to the Tribunal to set the amount of moral damages "in the light of Judgment 1870".

E. In its surrejoinder the Agency argues that, the Tribunal having ruled on his claims to financial compensation and moral damages in Judgment 1870, they are *res judicata*.

The attestation of the former Director of the Institute reflects only his personal opinion and constitutes neither a new fact nor evidence. His alleged consent to the complainant's removal has no value in law, as it would have been given without authority. The daily subsistence allowance amply covered the cost of maintaining two households. The Agency did not force the complainant to leave his home in Belgium or sell his wife's company. Nor did it require his wife to live in Luxembourg.

CONSIDERATIONS

1. The facts that gave rise to this dispute, and to which the Tribunal will refer, are set out in Judgments 1768 (*in re* Bodar) and 1870 (*in re* Boivin). The gist of the case is as follows.

By a letter of 6 September 1995 Eurocontrol appointed Mr Boivin, with effect from 1 September 1995, to a position in Luxembourg as an expert. The appointment was to be confirmed after a probation period of nine months. Eurocontrol had picked the complainant from a reserve list of candidates drawn up for a selection process for a post in Brussels requiring similar skills. However, following a successful internal complaint filed by another staff member, Mr Bodar, objecting to the Agency's failure to put the post up for competition, Eurocontrol cancelled Mr Boivin's appointment and so informed him by a letter of 4 March 1996. It nonetheless kept him on the job provisionally under the economic conditions that would have prevailed had it not cancelled his appointment. Mr Boivin applied successfully for another post put up for competition and was appointed to it as from 1 September 1996. Mr Bodar lodged an internal complaint against that appointment too, but it was implicitly rejected. He therefore went to the Tribunal objecting, among other things, to the Agency's failure to seek the opinion of the Joint Committee for Disputes before rejecting his complaint. In Judgment 1768 of 9 July 1998 the Tribunal upheld his plea and quashed the decision to reject the internal complaint.

In Judgment 1870 of 8 July 1999, the Tribunal ruled on a complaint lodged by Mr Boivin against Eurocontrol's rejection of his claim to compensation. It held that redress was warranted in view of the administrative errors committed by the Agency. It noted that the complainant sought compensation for only part of the alleged material injury (costs for legal counsel and an expert opinion in the complaint ruled on in Judgment 1768), whereas he claimed moral damages for all the non-material injury resulting from the two decisions. The Tribunal awarded him 8,000 euros for damages under all heads. However, it reserved judgment on the elements of material injury for which he sought no redress in the complaint and on any claims to compensation for future injury. It also noted that the Agency had protected him against any loss of earnings by paying him the amount he would have earned had his appointment been confirmed, so he suffered no material injury on that score.

2. The present complaint was filed before the Tribunal delivered Judgment 1870 on 8 July 1999.

On 22 December 1997 the complainant had sent a request to the Director General seeking compensation. He asked him to open a disciplinary inquiry against Mr Bodar whom he accused of conduct prejudicial to him and of falsifying a document. He alleged that Mr Bodar changed the date of receipt, written by hand on the text of an Agency decision notified to him, to a later date and then produced the document to make out that an internal complaint - which was in fact late - had been filed in time (see Judgment 1768 under C *in fine*, 1 and 4). He further alleged that the cancellation of his first appointment had involved him in considerable costs.

Having received no reply within the prescribed time limit, on 8 June 1998 he filed an internal complaint with the Director General, who referred it to the Joint Committee for Disputes. The Committee unanimously recommended rejection on the grounds that the Agency had committed no act for which it might be held responsible, that it was "too late for Mr Boivin to claim compensation in connection with his appointment of 1 September 1996" and that there was "no causal link between the cancellation of his first appointment and the injury of various kinds alleged by Mr Boivin". However, it recommended that the Agency seek an amicable arrangement with the complainant in order to compensate him for the stress he had incurred. The Director General rejected the complaint on 17 November 1998.

That is the decision he is now impugning. He asks the Tribunal to set it aside, to order the Agency to open a disciplinary inquiry against Mr Bodar for his reprehensible behaviour, particularly his falsification of a document for the purpose of deceiving the Agency. He seeks moral damages. He also seeks material damages on the grounds that the cancellation of his first appointment had the effect of delaying his removal from Belgium to Luxembourg, which he had planned for early March 1996 (on the strength of a good probation report), until 6 September 1996. He submits that in the intervening period he had to maintain two households - his wife's in Belgium and his own in Luxembourg - which increased his accommodation and communication costs. The daily subsistence allowance the Agency paid him during that period was enough to cover the additional accommodation costs but not the other elements of injury. The complainant's calculation of the injury is set out in detail below in the discussion of the pleas.

The Agency asks the Tribunal to dismiss the complaint. It submits that the complainant may not request a disciplinary inquiry nor a disciplinary sanction against another staff member. Such action is within the discretion of the Director General and therefore not subject to review by the Tribunal. In this case the Agency had no reason to start such proceedings: Mr Bodar was exercising his legitimate right to appeal, and to have written a wrong date of receipt on an administrative decision, if indeed he did, is less serious than the complainant makes out. As to the injury, the complainant may not submit a claim for which he already received compensation under Judgment 1870. In fact there was no injury, since the costs incurred in maintaining two households were amply covered by the daily subsistence allowance of 1,100 Belgian francs that he received from the time of the first decision to appoint him until 6 September 1996, the date when he actually moved.

3. Disciplinary relations between an organisation and a staff member do not directly concern other members of staff or affect their position in law. Consequently, a decision regarding a disciplinary inquiry or a disciplinary measure relating to one staff member will not adversely affect other staff, so the latter will have no cause of action for challenging a disciplinary sanction or a refusal to impose one.

4. Insofar as the complainant is seeking further moral damages, his claim must fail as *res judicata* under

Judgment 1870. The Tribunal recognised in that judgment that he was entitled to moral damages for the harm caused to his personal interests from the time when Mr Bodar challenged the complainant's first appointment up until the quashing of the decision rejecting Mr Bodar's second internal complaint and for its immediate effects, while reserving judgment as to compensation for any moral injury for the subsequent period (see Judgment 1870, under 6 and 10). Mr Boivin's claim does not pertain to that period and so must fail.

Judgment 1870 gave no ruling as to compensation for material injury not alleged in the course of the procedure that led to the judgment. To that extent, the complaint is not *res judicata*.

5. The Organisation submits that the claims to damages are time-barred. The complainant should have submitted them within the time limit set in the Staff Regulations for challenging the decisions that had been deemed unlawful and which had caused the injury, in other words "within three months from the decision of 4 March 1996 cancelling his appointment, or within three months following his new appointment that took effect on 1 September 1996", but he submitted them only on 22 December 1997.

The argument is unconvincing. It overlooks the difference between a claim to the quashing of a decision and a claim to the payment of a sum of money on which there has not yet been a decision. The Agency cites no specific rule on a time limit for monetary claims. In fact, it attempts to infer such a time limit from the time limit for challenging the decisions, by extending the effects of the time bar on these decisions to the related monetary claims. Article 92 of the Staff Regulations, which is about appeals, distinguishes between a "complaint against an act adversely affecting" someone, which must be challenged within three months (Article 92(2)) and a request to the body competent for appointment, for which there is no time limit (Article 92(1)). If the request is rejected by a decision, the latter may be challenged under Article 92(2). To extend the time bar to related monetary claims would have the effect of subjecting those claims to a time limit equivalent to that for attacking decisions. A time limit for such a claim - which would be subject to that set in the Staff Regulations for challenging a decision - would need to be clearly stated. In this connection, the Tribunal stated in Judgments 1502 (*in re* Baillon) under 6, and 1877 (*in re* Serlooten No. 2) under 3 that:

"If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour."

The two claims can be exercised separately without the risk of any major difficulty. This case in fact illustrates that they are independent of each other. The claim to damages can hardly be linked to a decision that the complainant could have challenged within a given time limit, because he had no reason to challenge his own appointment and probably lacked grounds to challenge the cancellation of the appointment even if it was required by the Organisation's rules. Besides, in many cases injury resulting from a decision can be determined only later.

6 (a) The complainant also claims compensation for material injury resulting from the cancellation of his appointment. It therefore needs to be ascertained whether he suffered material injury in the legal sense.

There is no need to consider the items of injury already dealt with in Judgment 1870.

(b) If there had been no decision adversely affecting him, the complainant and his family would have had the benefit of a long-term appointment and the remuneration of an official confirmed in his post. His family would have moved under the same conditions from Belgium to Luxembourg, with all the advantages and disadvantages that a removal entails.

(c) How did the cancellation of the first appointment change the situation?

In terms of resources received from the Agency, the cancellation of the appointment brought no change, since Eurocontrol paid the complainant the salary he would have received if his appointment had been confirmed.

The cessation of the complainant's former gainful activities, and those of his wife following the removal, would have occurred even if the first appointment had not been cancelled, and so does not in itself constitute injury.

The same holds good for expenditure. At the present stage of the proceedings, costs that the complainant would have in any case incurred in taking up his duties in Luxembourg and moving there cannot be considered as constituting injury.

(d) The complainant alleges, however, that he suffered injury over and above that which can be caused by a change of activity or residence.

(aa) He seeks 190,191 Belgian francs to cover the cost of additional rent.

On the strength of a good probation report written on 6 February 1996, the complainant planned to move in early March 1996 and to observe a period of notice up to the end of July 1996. The cancellation of his appointment obliged him to postpone the removal and pay two rents for an additional period. The removal took place on 6 September 1996 and the notice period terminated at the end of October 1996. According to his reckoning, he paid additional rent (an office and a apartment with various charges) for four months.

(bb) The complainant alleges that the trouble the Agency caused him upset him deeply and for four months he had more frequent telephone conversations with his wife, amounting to an additional 19,654 francs as compared to the average of the other months.

(cc) For those same four months, he also claims 1,525 francs for additional television and radio costs.

(dd) For the period from May to August 1996, for travel costs between Belgium and Luxembourg he claims 89,570 francs.

(ee) For the period from May to September 1996 he claims 337,500 francs to compensate for his wife's loss of earnings.

Mrs Boivin was joint owner with her husband of a translation business in Belgium. The complainant asserts that, "because the contract was cancelled, [his] wife ... had to turn down offers of employment over a prolonged period. ... Without the procedural flaw, that income was guaranteed". He no doubt refers to the income she could have earned in Luxembourg.

(ff) Lastly, the complainant alleges that he sustained a loss of 1,080,000 francs on the sale of the translation business. It had to be sold very quickly, the Agency having required him to move at very short notice. At the end of 1995 the business was valued at 1,250,000 francs, but they were able to sell it for only 170,000 francs.

He estimates the total additional injury at 1,718,440 francs.

Eurocontrol asks the Tribunal to dismiss the claim. It asserts that the injury sustained by the complainant was amply covered by the daily subsistence allowance - 1,100 francs - that it paid him for a year. The purpose of that allowance is precisely to compensate an official for the cost of maintaining two households until he is able to move - until 6 September 1996 in the complainant's case. If he planned to move at the beginning of March 1996, it was at his own risk, as he was a probationer and the Agency may not authorise a removal before the end of the probationary period - the end of May 1996 in his case; so if he was unable to move at the date planned, he cannot hold the Agency responsible for the consequences. Likewise, if his wife started to make arrangements for work in Luxembourg before the end of his probationary period, she did so at her own risk. In fact, the evidence on file shows that she started to make such arrangements after the cancellation of the appointment, in other words at a time when her husband's future with the Agency was uncertain. Besides, Mrs Boivin could have carried on working as a translator. The fact that her husband was required to reside at his duty station did not mean that she had to move to Luxembourg immediately, and it might have been in her own economic interests to stay in Belgium at least until she was able to sell the business on better terms. Eurocontrol observes that it is contradictory to cite the fact that Mrs Boivin was unable to engage in gainful activity in Belgium and Luxembourg during the same period.

In his rejoinder the complainant enlarges on his claims. Citing the fact that the Director of the Institute of Air Navigation Services in Luxembourg, at the material time, authorised him to move in March 1996 - he produces an attestation from the Director to this effect - he rebuts the Agency's argument that a removal would have been premature and at his own risk. He submits that the injury arose from the fact that his removal was delayed by seven months (and not four). He sets out his claim to damages for those seven

months as follows:

		(Belgian francs)
aa)	needless additional rent	331,447
bb)	telephone expenses	(unchanged) 19,654
cc)	television and radio costs	2,669
dd)	travel costs	144,690
ee)	wife's loss of earnings	(unchanged) 37,500
ff)	loss on sale of translation business	(unchanged) 1,080,000
	total	1,915,960

Eurocontrol considers that the daily subsistence allowance paid was sufficient to cover the injury. The complainant admits at the beginning of his complaint that the allowance is deductible but he fails to deduct it from his actual claims.

Payment of such an allowance does not in itself release the Organisation if it is at fault, but the allowance must be deducted from the total compensation where applicable. It is necessary in this connection to separate the periods for which the allowance was due.

For the period from his first appointment until its cancellation, the allowance was paid to the complainant, as to any other staff member, to compensate for the inconvenience inherent in the period preceding settlement in the duty station, so there is no need to deduct this from the compensation relating to the postponement of the removal. However, the amount of the allowance paid for the period corresponding to the postponement should be deducted from the total compensation relating to that period.

According to Judgment 1870, the Agency has a duty to protect the complainant from all injury.

Eurocontrol did ensure that he suffered no injury as a staff member in terms of the salary and related benefits.

However, the complainant suffered additional injury because the removal, which was planned for March 1996, took place only at the beginning of September 1996. During that period he and his wife lived apart, one in Luxembourg and the other in Belgium, and maintained two households.

The complainant cannot be blamed for planning the removal before the end of his probationary period or for halting it following the cancellation of his appointment. His appointment was cancelled not because he had failed to complete his probation successfully but because of a procedural flaw attributable to the Agency. The Director of the Institute for Air Navigation Services, satisfied with the complainant's work, had authorised the removal. In these circumstances, the Agency cannot in good faith blame the complainant for having acted at his own risk. Furthermore, the cancellation of his appointment left him without any contractual status. Although he stood a good chance of being kept on when the post was re-advertised, he could not be certain of winning the competition. It would, therefore, have been unwise to go ahead with the removal and abandon accommodation and other resources in Belgium that he might have needed later if Eurocontrol had not re-appointed him.

In establishing the extent of redress, it is also necessary to bear in mind that the injured party has a duty to take appropriate steps to avoid undue injury. In relations between staff and organisation, this duty is based on the mutual respect they owe each other because they are bound by the same rules.

It is for the complainant to prove the injury for which he seeks redress.

In the light of these considerations, the complainant's claims call for the following comments.

Re: aa)

The complainant gives conflicting information on the length of the delay in his removal. In his complaint he

estimates it at four months whereas he mentions seven months in his rejoinder. In the complaint he submits that, in normal circumstances, he should have waited for a probation report to be established in April so that he could then cancel his lease at the end of April, whereas in fact he was unable to cancel it until the end of August. When he drafted his complaint he must have known the date on which he planned to move. The Tribunal will, therefore, retain his first estimate (even though it may not appear altogether accurate). However, for the reasons set out below, this point is not decisive.

In calculating additional costs for rent and incidental expenses, the complainant counts not only the rent of his apartment (21,500 Belgian francs a month) but also that of the translation business (17,500 francs a month) run by his wife. The latter figure is questionable. According to the complainant, evidence on file shows that this business was sold on 25 August 1996, in other words after the complainant had been re-appointed. There was no overlap between the offices in Brussels and the premises leased in Luxembourg. The cancellation of Mr Boivin's first appointment did not prevent his wife from continuing to run the business. On the contrary, if the complainant had not been kept on by Eurocontrol it would have been in his interests to keep the business running. It cannot be established from the evidence on file that he suffered any injury in connection with the operation of the translation business during the period in question.

Furthermore, up until 6 September 1996 when the removal actually took place, Eurocontrol paid the complainant a daily subsistence allowance of 1,100 francs - approximately 33,000 francs a month - to meet the cost of maintaining two apartments. Even taking account of the incidental charges which amounted to some 8,500 francs a month for the two leases, the daily subsistence allowance was enough to pay the rent (21,500 francs) and cover the additional costs arising from the maintenance of two households.

However, Eurocontrol gave the complainant no allowance for the end of the notice period for the apartment in Belgium which, according to the evidence, corresponds to the period from 7 September to the end of November 1996. That does imply additional costs which were not covered. In view of the special circumstances of the case, it was understandable that he should not postpone the removal, and it would be unfair for him to have to bear the additional cost incurred in this latter period of some eighty-five days.

Re: (bb) and (dd)

Although it is very likely that the cancellation of his appointment involved the complainant in additional costs for telephone calls with his wife and travel costs to be with his family, the exact amount has not been established. The daily subsistence allowance should normally be enough to cover such costs but, in view of the circumstances, he may have spent more than he would otherwise have done.

Re: (cc)

The cost of radio and television should also be considered as covered by the daily subsistence allowance.

Re: (ee)

The loss incurred in his wife's earnings is not clearly explained. There would undoubtedly have been no injury if, as a freelance translator, she had been able to carry on working in Belgium earning as much as she could have earned in Luxembourg.

Since there is insufficient evidence to show that she stopped working in Belgium (the translation business was not sold until August 1996, shortly before the removal) or that she could have found gainful employment in Luxembourg at that time, the proof of injury on this count is not sufficiently established.

Re: (ff)

If the complainant did sell the translation business at a loss, the link between the injury he alleges and any fault on the part of Eurocontrol is not sufficiently established. He was informed officially of his new appointment in mid-July 1996 and the translation business was sold on 25 August 1996. He himself says that he "had no opportunity to prepare for the sale of the business" and "had to accept an offer of 170,000 Belgian francs", although it had recently been valued at 1,250,000 francs. However, in his complaint he states that the former Director of the Institute proposed his selection for the post at the end of May 1996. On being so informed he could have started to look for a buyer with a view to concluding the sale when he got

the appointment; but he does not say that he did anything of the sort. And, although he was required to move to his duty station immediately upon appointment, his wife was under no such obligation and, if necessary, could have stayed on in Belgium until the business could be sold at a satisfactory price. Therefore, the complainant did have an opportunity to set about selling the business and he must bear the consequences of failing to act with the diligence required by the circumstances.

7. The conclusion is that the injury warranting redress - as claimed by the complainant - is established only in part and on more than one count the exact amount cannot be determined. In these circumstances, in accordance with the case law, the Tribunal will award the complainant damages in an amount set *ex aequo et bono* which will also take account of the daily subsistence allowance paid until 6 September 1996. It considers that in this case 3,000 euros is an equitable amount plus interest at 8 per cent per annum as from 1 July 1996.

8. Since his main claim succeeds, the complainant is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. Eurocontrol shall pay the complainant damages in an amount of 3,000 euros plus interest at 8 per cent per annum as from 1 July 1996.

3. Eurocontrol shall pay the complainant 2,000 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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