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

**FORTY-FIFTH ORDINARY SESSION**

# *In re* DROST

**Judgment No. 432**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Gerd Julius Drost on 9 July 1979, the Agency's reply of 29 October, the complainant's rejoinder of 11 January 1980 and the Agency's surrejoinder of 25 July 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 91 of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre and Article 15 of Rule of Application No. l0 on sickness and accident insurance;

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

Considering that the material facts of the case are as follows:

A. The complainant is a citizen of the Federal Republic of Germany and employed by the Eurocontrol Agency at its Maastricht centre. On 16 May 1978 he submitted to the Agency

estimates made by a West German dental surgeon of 3,600 Deutschmarks for himself and the same amount for his wife. The estimates were to cover both routine and special dental treatment. By minute No. 478/78 of 30 May 1978 the medical consultant of the Agency informed the complainant that he was not entitled to reimbursement of the cost of special treatment: "Rejection of the application and the reasons therefor: the treatment applied for is orthodontic ... Article 15, paragraph 3, of Rule of Application No. 10 [on sickness and accident insurance] precludes reimbursement of the cost of such treatment if the patient is more than sixteen years of age at the commencement of the treatment". The complainant replied on 29 September 1978, supplying fuller information on the treatment and asking whether the medical consultant stood by his decision. He observed that his dental surgeon had provided "sophisticated" and up-to-date treatment which only a few dental surgeons in the Federal Republic of Germany were able to provide. Although, strictly speaking, it was not orthodontic he had merely drawn an analogy and entered it in his estimate under "orthodontics", there being no specific heading for the treatment in question. The medical consultant asked the complainant on 16 October and his wife on 3 November to have their dental surgeon report more fully. The complainant returned two short reports, dated 8 April and 6 October 1978, together with a paper running to some eighty pages on the method used for the special treatment. On 6 December the medical consultant informed the complainant that, after study of the material, he felt unable to authorise reimbursement of the cost of pantographic analysis and of "models for repair of the mandibular occlusion". On 8 February 1979 the complainant appealed to the Director-General. On 2 May the Director-General rejected the appeal on the grounds that after careful review of the dossier and "consultation of a medical specialist in the field in question" he had decided that the treatment was orthodontic and that no payment was due.

B. In his complaint, which impugns the decision of 2 May 1979 notified to him on 9 May, the complainant refers to his letter of 29 September 1978, in which he explained the most unusual nature of the treatment and pointed out that there was no suitable heading in the tariff list of the dental profession in the Federal Republic of Germany under which such up-to-date treatment might be brought. The medical consultant was not, in his view, competent to qualify such special treatment, and the report of the expert whom he consulted was made available neither to the complainant nor to his dental surgeon. The decision to refuse reimbursement, the grounds for which were not notified to the complainant, has caused him and his wife a total loss of 6,813 Deutschmarks. That the treatment was not orthodontic is clear from the fact that Rule of Application No. 10 "obviously starts from the assumption that orthodontic treatment is given to children only". In his claims for relief he asks the Tribunal to declare that "pantographic analysis does not fall under orthodontic" work within the meaning of Article 15(3) of Rule No. 10 and consequently to quash the decision of 2 May 1979.

C. Although not formally challenging the receivability of the complaint in its reply, the Agency does have doubts on the matter. It argues that the medical consultant's letter of 6 December 1978 merely confirmed the final decision in minute No. 478/78 of 30 May 1978 and therefore gave rise to no new time-limit for appeal. On the merits it points out that the material rule - Article 15(3) of Rule No. 10 - indisputably precludes reimbursement of the cost of orthodontic treatment after the age of 16 years. The nub of the dispute is therefore whether the treatment was orthodontic. The medical consultant is experienced in such matters and also consulted other doctors. He was under no duty to inform the complainant of the outcome of those consultations. It is not true to say that the method of treatment was modern and unusual: it was known in Germany as long ago as 1930 and has been correctly classified as orthodontic in the tariff list of the dental profession. In any event, whatever the terminology may be, the Agency is bound only by its own rules. "Pantographic analysis" consists in taking photographs and measuring any deformation so as to determine the scope for remedial action. It therefore does come under orthodontic work. Only in exceptional circumstances, for example in the event of an accident, may the medical consultant authorise reimbursement of the cost of such treatment for an adult. The complainant and his wife began the treatment after being told that the cost would not be reimbursed. The Agency invites the Tribunal to consider the matter of receivability, to dismiss the complaint as unfounded and to award costs against the complainant.

D. In his rejoinder the complainant contends that minute No. 478/78 cannot be regarded as the final decision. It was only preliminary "advice" warning him that if he underwent the treatment he would not recover the cost. Moreover, in his reply of 29 September 1978 he formally challenged the correctness of that position. According to Article 91(1) of the General Conditions of Employment the Director-General himself was required to take a "reasoned decision" on his objections. The complainant asks the Tribunal to order the Agency to disclose the expert report mentioned in the text of the final decision of 2 May 1979. It is true that the method of treatment was known as long ago as 1930 but it fell into oblivion in the turbulent pre-war and war years and has only recently been re-imported from America. It does not, strictly speaking, fall within the definition of orthodontic treatment, and he has only just learned it is to be known as "gnathology" and come under a separate heading in the dental tariff list.

E. In its surrejoinder the Agency observes that in his report of 30 May 1978 the medical consultant informed the complainant that he would not be reimbursed if he had the treatment carried out. He ought to have challenged that decision. His subsequent appeal of 8 February 1979 is therefore time-barred except insofar as he claims the cost of treating his wife. He may not argue now that the treatment was medical and that prior approval was therefore unnecessary. Full reasons were given for the decision of 30 May 1978. Nor may the complainant now seek repayment of the cost of the actual operational work carried out since his claim would be wider in scope than his appeal of 8 February 1979, in which he claimed merely the cost of the preliminary pantographic analysis. As to the merits, the Agency observes that the complainant's dentist has not supplied the more detailed and specific report asked for by the medical consultant. The rules are explicit: there is no reimbursement of the cost of orthodontic treatment of adults, and it is the medical consultant who determines whether or not treatment is orthodontic. The burden of proof of any error by the medical consultant is on the complainant. It was open to the dentist, under point 6 of the West German list of items of treatment to classify the treatment by analogy, and that is what he actually did: by analogy he classified the treatment as orthodontic, and not medical. He was also quite explicit that the crowning of teeth did not come under the heading of orthodontic treatment. That he did not say that about the pantographic analysis is evidence of his belief that the treatment he had given was orthodontic. In reply to the complainant's request that the Agency disclose the advice which the medical consultant sought from others on the subject the Agency says that it cannot do so since the advice was oral, but that the gist of it appears in the consultant's report of 24 September 1979, which is appended to its reply. The whole dispute turns on whether or not pantographic analysis is orthodontic treatment. The Agency maintains that it is, consisting as it does in an analysis of mastication by way of preparation for the correction of dental anomalies - in other words, orthodontic treatment. The complainant is mistaken in saying that the analysis was made in preparation for the fitting of 16 crowns at a total cost of over 14,000 Deutschmarks, for which a reimbursement was made. In a letter dated 25 July 1980 to the medical consultant the complainant's dentist draws a distinction between the fitting of crowns and the other treatment, which he describes as "orthodontic treatment carried out at the same time and completed on 14 December 1978".

CONSIDERATIONS:

1. In its reply dated 29 October 1979 and its rejoinder dated 25 July 1980 the Agency contends that in respect of the claims of Mr. Drost himself the complaint is irreceivable.

The complainant's appeal to the Director-General is dated 8 February 1979. The time limit within which it should have been filed had then expired, assuming that it is the "medical report" - the title of the Medical Adviser's letter of 30 May 1978 - which is the decision.

In the medical report the reasons for the decision not to repay the cost of the orthodontic treatment are stated in the most clear and unambiguous terms. The word "decision" actually occurs in the text. The letter which the Medical Adviser sent to the complainant on 6 December 1978 therefore merely repeats and upholds his decision of 30 May 1978. It is even less detailed since it does not refer to the tariff list used in West Germany (Gebuhrenordnung fur Zahnarzte (Bugo)) he complainant's appeal is therefore irreceivable. As regards the claims made in respect of his wife, however, the complaint has been filed within the time limit since the decision not to repay the cost of her treatment was not notified until the Medical Adviser wrote his letter of 6 December 1978.

In fact there is no need to consider the matter further since the applications for repayment by the Agency of the cost of the dental treatment both of the complainant and of his wife are identical, and any decision on the receivability of claims made in respect of the complainant's wife will hold good also for the claims made in respect of the complainant.

2. As to the merits of the complaint, the decisive point is whether the sums claimed by the complainant and his wife - 3,600 Deutschmarks in each case - meet the requirements of Article 15(3) of Rule of Application No. 10. That rule precludes reimbursement of the cost of orthodontic treatment if the patient "is more than sixteen years of age at the commencement of the treatment", save in exceptional cases. The only point in dispute, therefore, is whether the treatment provided by the dentist, Dr. Hertzog, which consisted in general realignment of the teeth, included work which fell under the heading of orthodontics.

3. Each time the defendant organisation refers to the matter, it does insist that some of the treatment provided by Dr. Hertzog was orthodontic and that its decision refusing repayment under Article 15 (3) of Rule No. 10 was therefore right. It cites the detailed study of the case carried out by the Medical Adviser, Dr. Evrard, and mentions his long professional experience, his competence to express an opinion on the matter, and his impartiality. In the light of the written evidence filed by the Agency, particularly the Medical Adviser's report, the Tribunal has no reason to cast any doubt on his professional competence.

There is no need to consider further the substance and purport of the report requested from the Medical Adviser. It is clear from the explanations given by the dentist, Dr. Hertzog, that the complainant and his wife did not undergo ordinary dental treatment.

4. Dr. Hertzog provided the following documents:

(a) An estimate dated 16 May 1978 amounting to DM3,600 for the treatment of the complainant and an estimate of the same amount for the treatment of his wife. Both estimates duly refer to items on the official list of forms of treatment (known as "Bugo"), namely items Ä25, para. 6, 5B, para. 5/2, 7, 4 x 7, 4 x 117 and 120 a, b, c and d. The items are the same in both estimates. Items 117 and 120 expressly refer to treatment provided under Chapter II/F of the tariff list, which is headed "Orthodontic treatment".

(b) A letter signed by Dr. Hertzog, dated 18 December 1978, giving an estimate of DM11,377 and setting out details of treatment corresponding to items in the list. The estimate gives a separate figure for orthodontic treatment. The Tribunal concludes that from the outset Dr. Hertzog wished to draw a distinction between ordinary dental treatment and special or orthodontic, treatment.

(c) A letter which Dr. Hertzog wrote to the complainant on 24 April 1979. The letter twice states that orthodontic treatment was given and that it was complete on 14 December 1978. Again it appears that a clear distinction was drawn between general dental treatment and orthodontic work.

5. The defendant organisation has also appended to its surrejoinder reports - one on the complainant and another on his wife - identifying malformations of the jaw. It appears that eight of the findings are common to both reports. The Tribunal may conclude that the reason why those findings and the cost of the treatment DM3,600 in each case - are identical is that the treatment provided was the orthodontic work separately mentioned in the Medical Adviser's letter and the direct preparatory, or pantographic work. It is also striking that the dentist was unwilling to give further details of his findings, even though the Medical Adviser had asked for them in the letter he wrote on

16 October 1978 to the complainant and the letter he wrote on 3 November to the complainant's wife.

6. The complainant maintains that the pantographic analysis carried out does not come under orthodontic work. But his contention is belied by Dr. Hertzog's estimates on 16 May and 16 October 1978, which expressly refer to items 117 and 120 in the tariff list, i.e. to orthodontic treatment. In his description of the treatment Dr. Hertzog does not distinguish between pantographic analysis and orthodontic work. Indeed such analysis comes under items 117 and 120 and is therefore a form of orthodontic treatment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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