

SEVENTIETH SESSION

***In re* SCHAACK**

Judgment 1078

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jacques-Yves Schaack against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 December 1989, Eurocontrol's reply of 5 April 1990, the complainant's rejoinder of 4 July and Eurocontrol's surrejoinder of 11 October 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article 7 of the Rules of Court and Articles 92 and 93 of the Staff Regulations governing officials of the Eurocontrol Agency;

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 case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Luxembourg, is a qualified electronics engineer and holds a grade A5 post at Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. The Agency recruited him on 1 June 1965 at A6. It made him head of Bureau 4 (Administration, Finance and General Services) on 1 April 1977 at grade A6. On 30 November 1978 it promoted him to A5 as from 1 October 1978. Between 1985 and 1989 he headed the list of those who were recommended for promotion, but he was not promoted. He objected to the lack of promotion and to the Director's behaviour towards him in two minutes he sent the Director General on 16 and 26 May 1989.

From May to July 1989 his relations with the Director of the Centre took a marked turn for the worse. In a memorandum to the Director General of 7 July 1989 the Director recommended transferring him to Division 2 as administrative co-ordinator of a plan for administrative automation at the Centre. The Director's memorandum was critical of him: he got on badly with his staff, the atmosphere in Bureau 4 was "one of the worst" at the Centre, his performance was "erratic" and he was disloyal.

At a meeting on 10 July 1989 the Director of the Centre told him of the recommendation for transfer. He stated his preliminary comments in a minute of 11 July to the Director General. He had a talk with the Director of Personnel and Finance at headquarters in Brussels on 13 July. By a memorandum of 14 July the Director General informed him that his transfer would take effect at 17 July. He sent further detailed comments to the Director General in a minute of 19 July. On 2 August he lodged a "complaint" under Article 92.2 of the Staff Regulations, but the Director General rejected it on 29 November 1989, and that is the final decision he is now impugning.

B. The complainant contends that the decision to transfer him is in breach of the disciplinary provisions in the Staff Regulations because it is tantamount to a hidden disciplinary sanction. It is an abuse of authority because it was taken in disregard of the Agency's interests: he is not properly qualified for his new position. It does not keep him busy full time. It was prompted by the unfair criticisms of him in the Director's memorandum of 7 July 1989. Since he has fewer subordinates than before, his responsibilities have been reduced. The transfer has cost him certain privileges he formerly enjoyed in France. It impairs his dignity and shows him lack of respect. He had financial responsibilities before, and the hasty way in which he was moved out, with just three days' notice, was calculated to arouse suspicion inside and outside the Agency that he had done wrong. It cast doubt on his integrity.

He invites the Tribunal to quash the impugned decision, order his reinstatement in his old job or an award of an appropriate amount in damages and an award of 27,000 French francs in costs.

C. Eurocontrol replies that the complaint is irreceivable. What the complainant is challenging is not really transfer but just a move to new duties. As the case law makes plain, internal administrative measures of that kind are not challengeable. Besides, the lodging of an internal appeal is only one condition of receivability: he ought to be

challenging the decision to reassign him, not the rejection of his internal appeal.

The Organisation has subsidiary pleas on the merits. It submits that the reassignment is in no way disciplinary since it was ordered for administrative reasons. When someone cannot get on with his superior, his reassignment is a proper solution. Training can remove any deficiency in the complainant's qualifications and ability to carry out his new duties. His responsibilities have been changed, not lessened, and his reassignment does not damage his career. Any changes there may be in his status with respect to the authorities of the host country are irrelevant. Since his new post has the same grade as the old one he has suffered no prejudice.

The reassignment neither harms his dignity nor shows him lack of respect. He has not produced a shred of evidence to support his allegation of suspicions of wrong-doing.

D. In his rejoinder the complainant submits that, though he is not questioning the Director General's managerial prerogative, he may challenge a decision he sees as a breach of his rights. In answer to the Agency's other objection to receivability, he cites Article VII of the Tribunal's Statute and Articles 93(2) and 93(3) of the Staff Regulations: he has to exhaust the internal means of redress and so the decision he must impugn is the final one, not the original decision to transfer him.

He points to what he sees as mistakes in Eurocontrol's account of the facts and enlarges on his pleas on the merits. He observes that he is the only full-time administrative co-ordinator and again affirms that his new appointment was really a disciplinary sanction because it deprived him of responsibility and of status in regard to the French authorities. The decision was sudden: he was unable to make final observations until it had been put into effect and was not allowed to see the Director General.

E. In its surrejoinder the Organisation comments on several issues of fact which the complainant's rejoinder raises. It enlarges on its objections to the receivability of the complaint and its pleas on the merits. It maintains in particular that the decision did not amount to any disciplinary sanction. The complainant was not punished but simply assigned more suitable duties. He has the right sort of formal qualifications and experience for them and can readily be trained to meet the requirements of his new job. He is objecting to them only because they are not to his liking. He was not downgraded; indeed he has ample opportunity to show his mettle and do creative and more responsible work. He exaggerates the importance of his former duties. There was nothing hurried about the decision and he had every opportunity to state his case orally and in writing. He offers no evidence to suggest that anyone suspected him of misdemeanour. The staff knew well what he thought of the Director, and his behaviour had for some time become more and more disturbing. There was no injury to his dignity and he was treated considerately and with respect.

CONSIDERATIONS:

1. The complainant, a citizen of Luxembourg and a qualified engineer, is a staff member of Eurocontrol employed at grade A5 at its Experimental Centre at Brétigny-sur-Orge. He is seeking the quashing of a decision which the Director General took on 29 November 1989 to reject his appeal against transfer. A decision of 14 July 1989 had terminated his appointment as head of the Bureau of Administration, Finance and General Services (Bureau 4) and transferred him, together with his post, to Division 2 of the Centre as "Administrative Coordinator" of a plan for automation.

2. For some time the complainant had been getting on badly with his supervisors and more particularly with his first-level supervisor, the Director of the Centre. He disagreed with them about his own career advancement and about the running of the unit he was in charge of, and the decisions he is objecting to were the outcome of that disagreement.

3. On 1 April 1977 the complainant was made head of Bureau 4 at grade A6. As such he had some 20 or 30 subordinates in categories B and C. Correspondence on the subject shows that although his post was regarded as an A4 one the Administration had sought applications from officials in a lower grade provided that the one appointed would be expected to act "as if he were an A4". As things turned out the complainant was fairly soon promoted to A5, by a decision of 30 November 1978.

4. The Director of the Centre proposed him several times as the top candidate for promotion to A4 but the Promotion Board and the Director General did not endorse the proposal. Having failed again to obtain promotion

he filed a "complaint" with the Director General in a minute of 16 May 1989. In his reply of 13 June the Director General said that he understood the complainant's disappointment and was willing to see him and talk the matter over. The Director General was unwell, however, and could not see him.

5. On 22 June the complainant saw the Director instead and they had a fairly sharp conversation about several problems relating to his personal status and the organisation and running of his unit. In a memorandum of 7 July 1989 the Director asked the Director General to transfer the complainant to some post in which he would not be directly in charge of staff; and proposed putting him on a post with less exposure as administrative co-ordinator in charge of carrying out the Centre's administrative automation plan.

6. In support of his proposal the Director observed that the complainant's behaviour had destroyed the mutual trust that must underlie the team work that running the Centre required; the atmosphere in Bureau 4 had got steadily worse; the complainant did not know how to handle staff at the Centre, could not distinguish the minor from the important, worked erratically and exaggerated the needs for services he was in charge of. The Director expressed "strong suspicion" of his disloyalty towards his superiors and accused him of being an agitator among the staff and of constantly trying to get people in the Government of Luxembourg to take political action on his behalf.

7. The Director arranged a meeting between him and the Director of Personnel and Finance at headquarters in Brussels on 13 July 1989. On 11 July he sent the Director General an urgent minute in which he warned of the "politically serious" consequences of "removing" him and demanded that the text be passed on to the transport minister of Luxembourg as a member of the Permanent Commission of Eurocontrol.

8. By a memorandum of 14 July 1989 the Director General told the complainant that "in the interests of the Service, of the good management of the Experimental Centre and in your own best interests" he was transferred from Bureau 4 to Division 2, where he would serve as administrative co-ordinator of the plan for administrative automation. Notice of transfer was appended, moving the complainant together with his post to his new duty station.

9. By a minute of 2 August 1989 he lodged a "complaint" and a lengthy brief challenging the transfer. He concluded with a proposal that his dispute with the Director should be settled by conciliation, an expert being appointed for the purpose by the Government of Luxembourg, and that the outcome should apply to another citizen of Luxembourg who he thought had also been wronged. In a memorandum of 29 November 1989 the Director General rejected his internal "complaint" for reasons which were stated, and that is the decision he is challenging.

Receivability

10. The Organisation has two objections to receivability.

11. One is that the complainant ought to have challenged the actual decision of 14 July 1989 to transfer him, not the decision to reject his internal "complaint".

12. The plea fails. The complainant's internal appeal is against the decision of 14 July 1989, and so the Director General's memorandum of 29 November 1989, which does no more than reject that appeal, is to be identified with the decision it explains and upholds. It is the decision of 14 July 1989 that is really under challenge.

13. Eurocontrol's second objection is that the complainant's transfer is just a matter of internal administration, does not affect his rights under the Staff Regulations and so is not a challengeable decision under Article 93.

14. The answer to that is that even a decision on a matter of internal administration such as transfer may sometimes impair the staff member's rights and legitimate interests. The Organisation is in fact prejudging the merits and the objection is unsound.

15. Being receivable, the complaint will be considered on the merits.

The merits

16. The complainant has two pleas on the merits. The first is that his transfer, though purportedly in Eurocontrol's interests, was in fact a hidden disciplinary sanction improperly imposed. The second one is that it was an inadmissible attack on his dignity and a breach of the Organisation's duty to show him consideration and respect as

a member of its staff.

17. He explains that his transfer stripped him of his rank as head of bureau, which brought him close to the management of the Centre, and relegated him to a position which was separated from management by two levels of command and which gave him no responsibility for running a unit. His status was also more lowly in the eyes of the French Government, with which he had been in constant touch: whereas before he had held a special residence permit - the "FI" card - which is granted to senior international officers, he had to make do with the "AT" card granted to administrative and technical staff. The transfer was so sudden as to arouse all sorts of suspicions about the real reasons for the treatment of him. It was in all respects a disciplinary sanction, ordered hurriedly and with none of the safeguards the Staff Regulations afford in such circumstances.

18. There is no substance, he says, to his new duties, and he cannot perform them anyway because the speed of technical progress has made his experience of data-processing obsolete. In his old job, which he had been in for a dozen years, he could focus on administrative and financial matters.

19. Eurocontrol's answer is that the transfer did not affect his status: he kept his grade and salary and, in the Organisation's interests, was granted an important new assignment in line with his post description. His behaviour was making dealings with his supervisor and the management of his unit more and more difficult, and his transfer was urgently necessary to protect efficiency. There was nothing disciplinary about it.

20. The Tribunal is satisfied on the evidence before it that Eurocontrol did not go beyond the bounds of the discretion it must be allowed in matters of internal administration and management. There is no reason to suppose that the transfer impaired the complainant's status. His new post has the right grade and his duties match what the Administration may expect from someone of his professional attainments. His profession of unfitness for them betokens uncooperativeness and rigidity that show after the event how right his superiors were to take brisk action to sort out a situation they found unacceptable. What they did seems the more reasonable because time and again the complainant threatened to get political protection from the Government of Luxembourg, in breach of the principles of objectivity and independence that should govern international civil service.

21. In such circumstances there is no question of any hidden disciplinary sanction. Eurocontrol found no professional misconduct nor indeed anything that warranted disciplinary action. Moreover, there can have been no loss of dignity for someone who took such an attitude in quarrels with the Administration.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

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