

**SEVENTY-FOURTH SESSION**

***In re* KIRSTETTER (No. 2)**

**Judgment 1223**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Bernhard Kirstetter against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 17 September 1991, the Agency's reply of 19 December, the complainant's rejoinder of 23 March 1992, the Agency's surrejoinder of 8 May, the complainant's further brief of 24 June, Mr. Xavier Fron's brief of 24 July and Eurocontrol's final brief of 30 October 1992;

Considering Articles II, paragraph 5, VII and X, paragraph 1(c), of the Statute of the Tribunal, Articles 25, 30, 31, 45 and 92 of the Staff Regulations governing officials of the Eurocontrol Agency and Rules of Application Nos. 1, 2 and 4 and office notices 42/77 and 10/89;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a German, is employed by Eurocontrol at its Brussels headquarters as a principal expert at grade A4. On 23 August 1990 he applied for an A3 post as Head of Division 2 in the Agency's Experimental Centre at Brétigny-sur-Orge, for which Eurocontrol had issued a "vacancy notice/notice of competition" on 26 July 1990.

By a minute of 11 September 1990 the Director of Personnel and Finance informed the Director General and the Director of the Centre that there were three officials at grade A4, including the complainant, who had applied for the vacant post.

According to office notice 42/77 of 14 June 1977 the appointing authority shall consider the possibility of transferring or promoting internal candidates. After consulting the Director of Personnel and the Director of the Centre on 9 October the Director General decided that the internal candidates lacked the necessary experience. On 11 October 1990 he instructed the Director of Personnel to open an external competition and he called the selection board for 9 November. It recommended Mr. Xavier Fron. On 8 February 1991 Mr. Fron accepted an offer of appointment from the Director General dated 28 January and he was appointed on 2 April 1991.

By a letter of 6 February 1991 the Head of Personnel informed the complainant that his application for the post had been unsuccessful.

On 6 May 1991 he lodged an internal "complaint" under Article 92 of the Staff Regulations alleging breach of (1) Article 45 of the Staff Regulations and the provisions of office notices 42/77 and 10/89 on the filling of vacant posts; (2) the Agency's duty to state the reasons for any decision adversely affecting its employees; and (3) Rule No. 1.

On 19 June 1991 the Director of Personnel and Finance rejected his "complaint" on the Director General's behalf on the grounds that it was both irreceivable and devoid of merit. That is the decision he challenges.

B. The complainant pleads flaws in the procedure laid down for filling vacant posts. Office notice 42/77 provides for posts to be filled in the first instance by transfer or promotion or, at a later stage, by competition. Under Articles 30 and 31 of the Staff Regulations the appointing authority, who is the Director General, shall first consider inside applicants for transfer or promotion; only when such applicants prove unsuitable will the post be put up for external competition. The complainant points out that Eurocontrol issued the notice of vacancy and the notice of competition at the same time and allowed only one month between the deadlines for applications. The interval should have been long enough to allow the Director General to complete the procedure for internal transfer or

promotion before starting the external competition. No promotion board was ever convened to look at the records of the complainant and the other candidates even though his curriculum vitae shows him to be both qualified and fit for the post. The decision to reject him therefore shows gross misappraisal of the facts. Moreover, it was taken after Eurocontrol had decided to appoint Mr. Fron and after he had accepted its offer.

As the Director General acknowledges in office notice 10/89 of 22 May 1989, it is established practice for a nominee of the Staff Committee's to sit on every selection board. There was none in this case.

The complainant alleges breach of Article 25, second paragraph, of the Staff Regulations in that Eurocontrol failed in its duty to state the reasons in writing and without delay for a decision adversely affecting a staff member. It informed him of the rejection of his application by an unsubstantiated impersonal minute that bore a date - 6 February 1991 - over five months past the deadline for applications.

He submits, lastly, that the Agency was in breach of the duty of care and sound management it owes its staff. It issued at the same time both the notice of vacancy for inside applicants and the notice of competition for outside ones. By so doing it aroused legitimate expectations of promotion or transfer in the officials who applied. It then failed to tell them how they had fared and went on to the competition stage without letting the inside applicants know why.

He seeks the quashing of the rejection of his application for the post of Head of Division 2 at the Centre and of the decision appointing Mr. Fron to the post. He seeks awards of one ECU in token damages and of costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable. No appeal lay against the minute of 6 February 1991 telling the complainant that his application had been unsuccessful because it did not constitute a decision depriving him of any right he might rely on. Since there is no right to promotion the minute does not adversely affect him.

Nor may he rely on any flaw in the promotion procedure. Paragraph 2.1.5 of office notice 42/77 of 14 June 1977 says that if an inside applicant is not appointed the procedure for promotion is not to be followed. In this case, so as to gain time, Eurocontrol issued a combined notice of vacancy and notice of competition in keeping with paragraph 2.3 of 42/77, but it kept the two procedures separate. The internal procedure for promotion did not go ahead because none of the three applicants was suitable and so there was only the procedure for competition. In any event the complainant was not competing with Mr. Fron, and appointing Mr. Fron caused him no injury.

The complainant's objection to the membership of the selection board is unsound. Boards are set up only after competition proceedings have begun. Being eligible for promotion under Article 45 of the Regulations, the complainant did not come under the procedure reserved for outside applicants. So he may not plead any flaw in the membership of the board set up for the purposes of the competition.

The Agency's arguments on the merits are subsidiary. In answer to the complainant's allegations of procedural flaws it submits that it kept apart the two stages of the procedure for filling vacancies as set out in office notice 42/77 and that the second began only after the first had ended. After considering the three inside applicants the Director General came to the view that it would not be right to promote any of them. So according to paragraph 2.1.5 of notice 42/77 no promotion board had to meet anyway.

Paragraphs 2.1.3, 2.1.4 and 2.1.5 of the office notice require the appointing authority to consider transferring or promoting serving officials. The Director General did so. After holding a meeting on 9 October 1990 with the Director of Personnel and the Director of the Centre, he decided against all the inside applicants. On 11 October he told the Director of Personnel to start the procedure for external competition and set up a selection board. The inside applicants' records were duly taken first. The Agency informed the complainant on 6 February 1991 that he was rejected, Mr. Fron accepted its offer on 8 February and the letter of appointment was dated 2 April.

Article 3 of Rule No. 2 makes no provision for appointing a Staff Committee representative: that is just, as the complainant himself acknowledges, a custom which the Director General observes. Besides, Eurocontrol was not to blame for there being no staff representative: the Staff Committee's members had all resigned and had not been replaced.

Nor did the Agency obviously misread the facts. The case law has consistently allowed the heads of international organisations wide discretion in promoting staff. The reason why Eurocontrol does not state its reasons for

rejecting candidates is that it wants to safeguard the Director General's discretion and avoid injuring them by citing their shortcomings.

The post the complainant wanted calls for up-to-date knowledge of advanced electronic data-processing systems and a creative mind: the notice of vacancy and the notice of competition of 26 July 1990 both stressed the special requirements. Eurocontrol took the view that none of the three inside applicants passed muster. Though the complainant is confusing the procedure for promotion with the procedure for competition, he does not actually venture to rate himself more highly than Mr. Fron.

His second plea - breach of Article 25, second paragraph, of the Staff Regulations - does not hold water. Absence of promotion is not a decision adversely affecting an official, and precedent shows that there is no rule that requires explanation of a refusal to promote someone. The official is thereby spared an explanation that may prove detrimental to his career.

The duty of care and sound management applies only when the official suffers injury at the hands of a third party.

D. In his rejoinder the complainant presses his claims.

He submits that he has never asserted any right to promotion. All he wants is the quashing of the decisions to reject him and pick someone else. Any breach by the Agency of the Staff Regulations, of the Rules of Application or of its own instructions on how to process applications for vacancies is an act that adversely affects a candidate and appeal will lie under Article 92(2) of the Staff Regulations and then to the Tribunal. As an official eligible for promotion the complainant may ask the Tribunal to determine whether in his case the Agency granted the safeguards provided for in Article 45 of the Staff Regulations and whether the conditions of fact and of law for proper exercise of the Director General's discretion were met.

On the merits he maintains that there was breach of Article 45 of the Staff Regulations and Article 3 of Rule No. 4 in the Director General's failure to convene the competent promotion board when applications for promotion had been duly lodged.

He points out that, though the internal procedure for transfer or promotion ended on 11 October and the selection board met on 9 November 1990, he was not told of his rejection until 6 February 1991, almost four months after the decision had been taken. Yet according to the second paragraph of Article 25 Eurocontrol has a duty to inform staff "at once" of any decision affecting them.

By way of subsidiary argument he observes that office notice 10/89 of 22 May 1989, which provides for the appointment of a board of specialists, confirms the duty to convene a promotion board for each vacant post. The Director General should have appointed such a board with a staff representative among its members. At the meeting on 9 October 1990 there were only the Director General, the Director of Personnel and the Director of the Centre.

E. In its surrejoinder the Agency submits that promotion possibilities, i.e. those posts which are in principle held for promotion purposes at each grade, are the subject of a decision which the Director General takes each year and which appears in the form of a personnel notice. But no A3 vacancy at the Centre was to be filled by promotion either after the 1990 and 1991 yearly reviews or as the result of any ad hoc decision. Since it was therefore impossible for a serving official to be promoted to the post, the promotion board had no cause to meet and draw up a short list. The complainant's reliance on a flaw in the promotion procedure is mistaken since the procedure was never applied. Unlike the European Communities' Regulations, which give preference to promotions when vacancies are filled, Eurocontrol's Staff Regulations pit staff members against applicants from the member States. The appointing authority decided lawfully to have a competition rather than follow the promotion procedure and that was a matter of internal organisation that is not open to appeal.

F. The Tribunal having given leave for further submissions, the complainant has filed another brief. In it he objects to the Director General's decision, which he learned of only from the Organisation's surrejoinder, to eliminate applications from Eurocontrol officials and to alter the requirements in the notice of vacancy. That, he says, was a breach of good faith. He observes that, contrary to its earlier account, Eurocontrol did review the applicants' qualifications but failed to comply with the provision on convening a promotion board.

G. At the Tribunal's invitation Mr. Xavier Fron has submitted comments on the pleadings and reference is made to

them in 18 below.

H. In its final brief the Agency maintains that the choice of how to fill a vacancy is at the Administration's discretion. As the disputed post was not to be filled by promotion there was no reason to convene a promotion board and the external competition was not open to the complainant. The rules do not favour internal promotions over recruitment through competition. The decision of 11 October 1990 to hold a competition was not an individual one and the Administration was therefore under no duty to notify it to the complainant at once.

#### CONSIDERATIONS:

1. On the strength of office notice No. 42/77, issued by the Director General on 14 June 1977, Eurocontrol published on 26 July 1990 a "vacancy notice/notice of competition", No. CE-90-AT/35. The purpose was to fill a grade A3 post as Head of Division 2 at Eurocontrol's Experimental Centre at Brétigny-sur-Orge. In accordance with paragraph 2.3.1 of the office notice the announcement set off two procedures at the same time. One was prescribed in Articles 30 and 45 of the Staff Regulations and was for inside applicants; the other was provided for in Article 31 and was for outside ones.
2. The complainant, a grade A4 official, applied on 23 August 1990 for appointment to the post by promotion under Article 30. But on 6 February 1991 the Head of Personnel wrote him a letter which said:  
  
"Further to your application with regard to above-mentioned vacancy notice/notice of competition, I regret to inform you that after due consideration it has not been successful on this occasion".
3. On 2 April 1991 Eurocontrol appointed an outside candidate, Mr. Xavier Fron, to the post.
4. On 6 May 1991 the complainant submitted to the appointing authority a complaint seeking reversal of the decision to reject his own application and appoint Mr. Fron. In support he had three main pleas. One was breach of procedural rules: the first stage of the selection procedure was flawed in that it had involved no consultation of the promotion board and had not been over when the external stage began. Secondly, the reasons for the decision not to appoint the complainant had not been notified to him. And thirdly, Eurocontrol had failed in the duty of care and sound management it owed its staff.
5. On 19 June 1991 Eurocontrol sent him a reply signed by the Director of Personnel and Finance. It began by declaring the complaint to be irreceivable on the grounds that a staff member had no right to promotion and the Director General had the widest discretion in the matter. It added that as an inside applicant the complainant might not properly object to the external stage of the competition.
6. The Organisation's answer on the merits was that according to office notice 42/77 consultation of the promotion board was optional. The internal selection procedure had been proper. The appointing authority had carefully considered the candidates after the date for applications - the end of August 1990 - had gone by and long before the eventually successful candidate had entered the external competition. Not one of the inside applicants had been found qualified. There had therefore been compliance with paragraph 2.3.1 of the office notice, which said that if the external and internal competitions were combined the external stage might start only when the internal one was over. So applicants who were dropped at the internal stage had to await the outcome of the external one before they got to hear the result.
7. As for the reasons for its action, Eurocontrol contended that according to the case law of international administrative tribunals a decision not to grant promotion was not covered by the requirement, embodied in Article 25 of the Staff Regulations that the reasons should be stated. Where there was no right to promotion the rejection of an applicant caused him no injury and did not need to be substantiated. Indeed the very disclosure of the reasons might in such circumstances cause him injury. In support the Organisation cited a ruling by the Court of Justice of the European Communities of 22 June 1989 (Brus v. the Commission, Case 104/88, ECR, page 1873).
8. Lastly, in answer to the complainant's plea that it had acted in breach of a duty of care and sound management Eurocontrol submitted that it had merely followed the ordinary and usual procedure and that he had failed to show that the decision not to promote him caused him any particular injury.
9. The complainant seeks the quashing of the decision of 6 February 1991 to reject his application and of the decision of 2 April 1991 to appoint Mr. Fron. He seeks an award of costs against the Agency and the payment of

one ECU in moral damages. He puts forward the same pleas in his complaint as he did in his internal appeal, and they are summed up in 4 above.

10. In its reply Eurocontrol gives an account of some features of the administrative procedure that was followed. It says that after consulting the Director of Personnel and the Director of the Centre at a meeting on 9 October 1990, the Director General came to the view that the inside applicants, "whatever their merits, did not have enough experience for the vacant post". He thereupon summoned a selection board and it chose Mr. Fron. Eurocontrol sent Mr. Fron an offer of appointment on 28 January 1991 and told the complainant and the other applicants on 6 February 1991 that they had been unsuccessful. Mr. Fron accepted the offer and was appointed on 2 April 1991.

11. The Organisation presses in full its contention that the complaint is irreceivable and the pleas on the merits it put forward in answer to the internal appeal. Thus it submits that, although the internal and external stages of the procedure, where combined, must remain distinct, the career ambitions of staff may not in the last resort prevail over the Organisation's own interests. In this case Eurocontrol needed someone with sound and up-to-date experience of advanced electronic data-processing systems, as it says the notice of vacancy duly made clear.

12. In its surrejoinder the Organisation argues that the complainant is mistaken in making out that the Staff Regulations give priority to promotion under Articles 30 and 45 over recruitment by competition as prescribed in Article 31. It says that it decided in this instance to fill the vacancy not by promotion but by external competition. That was a prior decision of internal policy that was not open to challenge. So the complainant was seeking to enter a competition that was not open to him. The Director General's purpose in consulting the directors on 9 October 1990 was "to look at all the objective factors and find the better way - be it promotion or competition - of filling the vacancy". The complainant was wrong to treat their meeting as relevant to his own position. The decision that followed did not adversely affect him and there was no need to explain it to him.

13. On the merits Eurocontrol suggests that the selection board set up under Article 31 of the Staff Regulations at the "second stage" prescribed in office notice 42/77 considered several applicants, but not the inside ones, because an essential qualification for the post was experience in areas of research that were new and unknown to the Centre.

14. In its surrejoinder Eurocontrol alters its account of the facts and so also the pleas in its reply. Since parity between the parties means letting the complainant comment on the defendant's new submissions, he has been given leave to put in a further brief and the Organisation to file a final one. He filed his brief on 24 June and Eurocontrol its final submissions on 30 October 1992.

15. In his further brief the complainant objects to the Organisation's raising new issues at the close of the written submissions. He observes that it now admits to not even following the procedure for promotion under which he made his application in accordance with the notice of vacancy. In his submission it thereby acted in breach of the trust of staff members who entered the internal competition on the strength of that notice. The inside applicants were, he says, entitled under the Staff Regulations to expect it to give them actual and objective consideration and priority over the outside applicants. He points out striking shifts in the defendant's posture: to begin with it professed it had compared the merits of the outside and inside applicants; now it owns up that it never did so. To his mind that was in breach both of the Staff Regulations and of the notice of vacancy.

16. In its final brief, insofar as it relates to issues still under discussion after the filing of its surrejoinder, Eurocontrol firmly maintains that the purpose of the meeting of 9 October 1990 was not to compare the applicants but just to see whether the post was to be filled under the procedure for promotion or by competition. The Organisation then simply noted that there were three inside applicants for promotion but "did not compare their merits", and so, says Eurocontrol, it cannot possibly have made a mistake at that point in rating any one of them. Appraising the complainant's attainments would have served no purpose then; not until much later, when answering his complaint, did it assess him on merit as against the successful applicant.

17. As to the yardsticks it applied in choosing Mr. Fron Eurocontrol says that it was looking for someone to perform "services of quite a new kind" that it had needed only "since 1990". For that it required up-to-date technical knowledge and ability to manage and lead many highly skilled people, something that no-one already on its staff could do.

18. Since one of the complainant's claims is to the quashing of Mr. Fron's appointment, the Tribunal has, in

exercise of its discretion under Article X, paragraph 1(c), of its Statute, let him comment, and he has done so in a letter of 24 July 1992. He observes that it was the French Government that put his name forward - a point he thinks may be material in view of Articles 30 and 31 of the Staff Regulations - and that in any event his fitness for the post is not at issue.

### Receivability

19. The Tribunal rejects the Organisation's objections to the receivability of both the internal appeal and the complaint.

20. True, a staff member may not assert any right to promotion and the choice of the successful applicant is at the discretion of the Administration, which alone may appraise the Organisation's interests. Yet the exercise of discretion is subject to restrictions in law and the Tribunal will to that extent review the decision: see for example Judgment 1016 (in re Assogna). So the staff member has undeniably the right to file an internal appeal or a complaint with the Tribunal if he believes that the appointment to a vacancy he has applied for is improper. He may for that purpose challenge any relevant decision, whether it be the express rejection of his own application or the rejection implied in the appointment of someone else.

### The merits

21. The complainant's three pleas are breach of due administrative process, failure to give reasons for the decision and breach of the duty of care and sound management Eurocontrol owes him. Since the third may be subsumed in the first the Tribunal will not treat it as distinct.

22. What, then, are the provisions that afford the basis for ruling on the parties' pleas?

Articles 30 and 31 of the Staff Regulations, which come under Title III headed "Career of officials" and a chapter headed "Recruitment", draws a sharp and imperative distinction in time between two stages in the procedure to be followed for filling a vacancy.

According to Article 30 the Organisation shall first consider applicants already on the staff or sponsored by a national administration before resorting to outside recruitment. Appointment shall be by competition and the Director General shall set up a selection board for each vacancy.

Where the Article 30 procedure does not enable the Agency to obtain, by promotion or transfer, enough qualified staff to meet its needs, it may resort to direct recruitment by external competition according to a procedure similar to that of internal competition.

Article 45 of the Staff Regulations lays down specific rules on promotion. It sets a minimum requirement of seniority - which is not at issue in this case - and extends the formal requirement of a competition to promotion of an official on his moving from one service or category to another. So holding competitions is a general requirement that, according to the Staff Regulations, marks all decisive steps in the staff member's career.

23. The arrangements for applying the above rules were set out in office notice 42/77, which distinguishes between two successive stages in the procedure for filling vacancies. One, provided for in 2.1, is called "transfer or promotion" and is open to Eurocontrol staff; the other, provided for in 2.2, is called "competition", though wrongly in view of what has just been said. As to the latter stage it is stated in 2.1.5 that a notice of vacancy may be issued provided that there is no applicant or no successful applicant at the "transfer or promotion" stage. So as to shorten the whole process the notice of vacancy to be filled by transfer or promotion and the notice of competition may go out at the same time, save that the external competition stage may not start until the "transfer or promotion" stage has ended: point 2.3, on "combined competitions".

24. The recruitment procedure which has prompted this case began with the publication on 26 July 1990 of the "vacancy notice/notice of competition", No. CE-90-AT35. That notice offered an A3 post as Head of Division 2 at the Experimental Centre. The division is in charge of all work relating to the programme of studies, tests and applied research. Apart from general qualifications, which are not at issue, the notice called for: (\*Registry translation)

"an interest in studies and applied research, together with relevant experience and skills;

thorough and up-to-date experience of the operation, management and supervision of complex electronic data-processing systems such as ATC;

experience of aeronautics (would be useful);

experience of supervisory functions for the purpose of promoting multidisciplinary research projects based on advanced technical competence and ability to cooperate with other international or national research bodies."

The notice said, in keeping with Article 30 of the Staff Regulations, that anyone might apply for the post who was on the Agency's staff or sponsored by a national administration. Furthermore, in accordance with Article 31, "if the post cannot be filled under the Article 30 procedure", others might apply provided they did so on "Eurocontrol forms for outside applicants".

25. Such are the provisions that are material to this case, and the Staff Regulations, office notice 42/77 and the notice of vacancy are to be read in that order of precedence.

The administrative process

26. The complainant raises two procedural issues. The first is that in taking his decision the Director General failed to consult any joint body such as a selection or promotion board, and that was in breach of the procedural requirements of the Staff Regulations. Secondly, he was rejected beforehand in favour of an outside applicant, and that was in breach of the rule, laid down in the Staff Regulations and acknowledged in the office notice, that inside applicants are to have priority over outside ones.

27. There is one preliminary point worth making in this context. The office notice is plainly at odds with Articles 30, 31 and 45 because it does not provide, though Article 30 requires it, for any sort of selection board - or whatever it might be called - for the transfer-and-promotion stage of the process. The Director General was not free to disregard that formal requirement, which affords the staff a basic safeguard of open and objective decision-making, by saying in office notice 42/77 that in the event of promotion a "promotion board" may, but only optionally, be consulted.

28. The complainant is therefore right in objecting to the lack of participation by any independent body in the procedure inasmuch as the Director General took his decision in utter secrecy after consultation with some senior officers.

29. The Tribunal also upholds the complainant's objections to the Director General's preliminary decision of principle - acknowledged by the Organisation itself in its latest version of the facts - to discard applications from serving staff. Eurocontrol admits that because of requirements that became evident after the notice of vacancy had gone out it changed the original terms of recruitment for that purpose to require "outside" experience. That was tantamount to cancelling the notice insofar as it invited inside applications. The decision of 9 October 1990 therefore debarred serving officials from any possibility of having their applications considered on the merits under the terms of recruitment originally announced.

30. The Tribunal will not interfere in drafting a notice of vacancy or comparing candidates who respond to the notice. But for Eurocontrol to open a competition for serving officials and then change the terms of recruitment *sub rosa* so as to deny them any real chance of success was in breach of the duty of trust and fairness the Organisation owes its staff.

31. The Organisation may have believed that it was acting in its own best interests by putting in charge of an important division of the Centre someone it thought particularly well-qualified for the job. But it was not entitled to achieve that purpose by a process of selection that cancelled one stage of the procedure it had already announced. So long as the notice remained valid the Organisation was bound by the wording of it and was not free to amend it secretly. The only proper way of doing so would have been to withdraw the notice altogether and open a new competition on terms that better matched actual requirements. The procedure followed must have left the complainant with the unfortunate impression that he had not been given a fair chance to compete. Comments on similar procedures appear in Judgments 1071 (in re Castillo) under 3 and 6 and 1077 (in re Barahona) under 11.

The duty to account for the decision

32. Article 25 of the Staff Regulations says that "any decision adversely affecting an official shall state the reasons on which it is based".

33. The Organisation argues that preferring one applicant to another is not a "decision" at all, let alone - since there is no right to promotion - one "adversely affecting" an official within the meaning of Article 25. And even supposing that refusal to promote someone may be treated as a decision adversely affecting him, it is the sort of decision that by its very nature calls for no explanation, being based on a comparison of candidates' personal attainments. Indeed it would supposedly be detrimental to the staff member to disclose the reasons for rejection.

34. To refuse promotion to an official who has duly applied for a post in answer to a notice of vacancy does amount to a "decision adversely affecting" him within the meaning of Article 25. It is immaterial whether the decision is express, as it was in this case, or implied in the preference for another applicant. Mutual trust between Organisation and staff requires that in such circumstances the applicants should be properly informed of the decision and of the reasons for it.

35. Of course the content of the obligation in Article 25 will depend on the sort of decision that has been taken. Notifying refusal of promotion is an especially delicate matter, and some caution may be advisable, for example in choosing the form that notification is to take, to avoid harming the unsuccessful candidate's career prospects: see for example Judgments 958 (in re El Boustani No. 3) under 17 and 1109 (in re Ouldamar) under 5.

36. Yet the principle holds good: the Organisation has a duty to state the reasons for the decision, that being an essential condition for proper defence of the official's rights. The staff member is therefore entitled to be given any information necessary for that purpose. The Organisation has provided in its reply, then in its surrejoinder and lastly in its further brief inconsistent accounts of the nature of the selection process and the criteria it applied. They reveal that its silence was an inadmissible breach of the complainant's right to defend his interests and has made it harder for the Tribunal to exercise its power of review. Indeed the Tribunal has needed further submissions so as to get to the bottom of the matter.

37. It is evident that in this case, both in its choice of the time for notifying the decision to the complainant and because the information it gave him was scant, the Organisation utterly failed to discharge its duty to inform him of the decision and of the reasons for it. It thereby fell far short of meeting the requirement that the process of management be conducted with a proper degree of openness. The only information it did give the complainant in its letter of 6 February 1991 - that his application had been rejected "after due consideration" - was untrue.

38. The conclusion is that the administrative process for filling the vacancy for Head of Division 2 at the Centre was flawed and that both the decision not to appoint the complainant and the appointment of someone else must be set aside: see Judgment 1049 (in re Dang, Kapoor and Seshadri).

39. The Organisation shall accordingly proceed to fill the vacant post properly. There is no reason why for the time being it may not take steps to ensure that the division continues to function and that Mr. Fron, who accepted its offer of appointment in good faith, suffers no injury.

40. The complainant is awarded costs, and they are set at 100,000 Belgian francs. Since this judgment gives him full satisfaction his claim to damages is disallowed.

#### DECISION:

For the above reasons,

1. The Tribunal sets aside the impugned decision of 19 June 1991 confirming the decision not to appoint the complainant to the post announced in vacancy notice/notice of competition CE-90-AT/35 and the appointment of Mr. Xavier Fron to the post.

2. Eurocontrol shall pay the complainant 100,000 Belgian francs in costs. In witness of this judgment Miss Mella Carroll, Judge, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

Mella Carroll  
P. Pescatore  
Michel Gentot  
A.B. Gardner

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