

SEVENTY-SEVENTH SESSION

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

Judgment 1357

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 June 1993 and corrected on 14 and 17 June, Eurocontrol's reply of 21 September 1993, the complainant's rejoinder of 4 January 1994 and the Agency's surrejoinder of 24 March 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 25, 30, 31 and 92 of the Staff Regulations governing officials of the Agency, Article 7 of Rule No. 4 concerning the procedure for grade promotion, office notice 42/77 of 14 June 1977 and office notice 10/89 of 22 May 1989 as amended on 30 January 1990;

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. The complainant, a Frenchman born in 1943, is an expert at grade A5 at Eurocontrol's Institute of Air Navigation Services in Luxembourg.

On 2 March 1992 the Agency issued under number LX-92-AO/046 a "vacancy notice/notice of competition", the former for serving staff members and the latter for inside and outside applicants and those sponsored by national administrations. The purpose was to fill a post for a principal expert at grade A4.

On 21 April the complainant applied in keeping with section 2.1 of office notice 42/77 of 14 June 1977. The Director General decided as the "appointing authority" that none of the inside applicants met the stated requirements. The Director of the Institute told them so at a meeting on 12 May 1992 and a few days later saw the complainant again to talk of his career prospects.

In a minute of 2 September 1992 the complainant asked the Director General for formal confirmation of the rejection of his candidature. This he got, after seeing the Director General on 2 October, from the Director of Personnel in a letter sent on 7 October on the Director General's behalf.

In September 1992 the staff were told of plans for reform of the Institute which were to take effect on 1 January 1993. Three departments, L1, L2 and L3, which had been sharing responsibility for training and maintenance, were to be merged into two new units, the Training Division and the Systems Bureau. More particularly, the duties set out in notice 46 were not after all to be given to a principal expert at grade A4 but to someone at a lower grade subordinate to such an expert.

So on 16 October 1992 Eurocontrol issued a new notice, under number LX-92-AO/143, announcing a vacancy for an expert at grade "A5/6/7". In letters of 5 November 1992 the head of Division PF1 informed the applicants that the Director General had decided to stop the process of recruitment announced in notice 46. By a letter of 10 November 1992 to the Director General the complainant applied for transfer to the post announced in notice 143. But the Director General preferred an outside applicant, Mr. Michel Pistre.

On 14 January 1993 the complainant lodged a "complaint" under Article 92(2) of the Staff Regulations against the decision of 7 October 1992 rejecting him in the competition announced in notice 46. In a letter of 3 March 1993, the impugned decision, the Director of Personnel told him that the Director General had rejected his "complaint" as irreceivable.

B. The complainant has three pleas.

His first is that the Agency was in breach of Articles 30(2) and 31 of the Staff Regulations and of office notice 10/89 as amended on 30 January 1990. Those texts read as follows:

Article 30(2):

"For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.

The appointing authority shall decide which of these candidates to appoint to the vacant posts.

In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

Article 31:

"In the event of the application of the provisions of Article 30 above not enabling the Agency to obtain, by promotion or transfer or appeal for applications from the National Administrations, a sufficient number of qualified staff to fill its needs, it may proceed to direct recruitment by means of competitions, selection being made according to a procedure similar to that described in Article 30. ..."

In 10/89 the Director General says:

"In future, therefore a separate specialist selection board will be appointed for each A grade vacancy. Generally, the board will be chaired by Director, Personnel and Finance and will also include a staff representative and two nominees of the Director in whose area the vacancy arises."

The complainant points out that no selection board was set up to consider the inside applicants and no staff representative was appointed. That offended against the staff's right to open and objective decision-making.

His second plea is that the Director General's failure to explain the rejection of his application was in breach of the second paragraph of Article 25 of the Staff Regulations, which reads:

"Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

The complainant observes that the Director of the Institute is not the appointing authority and that that authority, in giving him notice of the decision on 7 October 1992, failed to explain why he was not up to requirements. Citing Judgment 1223 (in re Kirstetter No. 2) he submits that an organisation's duty to state the reasons for a decision is a basic principle of the international civil service.

Thirdly, he alleges obvious misappraisal of the facts inasmuch as he met all of the requirements in notice 46.

He wants the quashing of the decision of 3 March 1993 confirming the rejection of his application for the vacancy announced in notice 46, a new process of recruitment to fill the vacancy properly and an award of costs.

C. In its reply Eurocontrol submits that his complaint is irreceivable because it shows no cause of action. By the time he filed it on 6 June 1993 notice 46 had already been withdrawn and replaced by another, No. 143, which he knew about and which indeed prompted him to apply. In any event his claim to a new recruitment exercise is irreceivable because it was not part of his "complaint" of 14 January 1993. And the Tribunal may not issue orders to the Agency.

In subsidiary argument on the merits Eurocontrol denies breach of Articles 30 and 31 of the Staff Regulations. Under Article 7 of Rule No. 4 on the procedure for promotion in grade* the allotment of vacancies between inside and outside applicants is a matter of management at the Director General's discretion. According to paragraph 2.1.5 of office notice 42/77 the promotion board meets only when the Director General has allowed for the filling of a vacancy by promotion. But here it was impossible to fill the post by promotion, there was no need to convene a

promotion board and the vacancy had been abolished anyway. Office notice 10/89 is about boards for filling vacancies by competition, not by promotion; so it is not material. (*The article reads: "The Director General shall determine the maximum number of officials per grade and budgetary section to be entered in the promotion lists.")

Citing the Tribunal's case law and that of the Court of Justice of the European Communities, the Organisation says that it is not bound to give reasons for refusing to promote staff: to do so might harm their career. But the Director of the Institute, who was of the same mind as the Director General, did discuss the matter several times with the complainant.

Eurocontrol denies, lastly, the charge of misappraisal: notice 46 was addressed to air traffic controllers whereas the complainant is an engineer by training and experience and was plainly not fit for the post.

D. In his rejoinder the complainant enlarges on his pleas.

In his submission consistent precedent has it that the Director General's exercise of discretion is fettered and an official may ask the Tribunal to review any refusal to appoint him to a vacancy.

The whole purpose of the new vacancy notice was the unlawful recruitment of Mr. Pistre, who could not be appointed at grade A4. The downgrading of the post, of which the complainant got notice only on the rejection of his application of 3 March 1993, was a new fact and something he may challenge directly before the Tribunal.

In its reply the Agency disregards the principles affirmed in Judgment 1223. Engineering was a requisite for the post announced in notice 46, and the Director General is wrong to say the complainant was not qualified for it when Mr. Pistre too has a degree in engineering.

E. In its surrejoinder Eurocontrol insists that the complaint is irreceivable because it discloses no cause of action, notice 46 having been withdrawn and replaced. The complainant's claim to a new recruitment exercise to fill the post at grade A4, which was not part of the internal appeal, is also irreceivable.

Eurocontrol presses its pleas on the merits.

On the strength of Mr. Pistre's personal history the Organisation contends that he was fitter for the post than the complainant, who is so keen to get promotion as to care not a jot what he would be doing or whether he could do it.

CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services in Luxembourg. He is challenging his rejection for a post as principal expert at grade A4 announced in "vacancy notice/notice of competition" LX-92-AO/046 of 2 March 1992.
2. The material facts may be summed up as follows. The holder of the post announced in notice 46 was to perform new tasks required of Eurocontrol under the European Air Traffic Control Harmonisation and Integration Programme and encourage the use and development of teaching methods and materials for the training of air traffic control staff, the aim being uniformity in member States. Since the incumbent was to be working independently the post was a senior one and graded A4.
3. In keeping with practice at Eurocontrol the process of selection was to be in two stages: first, in response to the "vacancy notice" and according to the purely administrative procedure provided for in paragraph 2.1.2 of office notice 42/77, serving staff might apply for appointment to the post by transfer or promotion; secondly, "the notice of competition" admitted to the selection board procedure prescribed in Articles 30 and 31 of the Staff Regulations anyone sponsored by a national administration, outside applicants and serving staff who sought appointment by promotion or transfer from one category to another.
4. The complainant's supervisors told him orally in May 1992 that he had been unsuccessful. In a minute of 2 September 1991 he asked the Agency to confirm that in writing and state the reasons. The Director of Personnel answered in a letter of 7 October 1992 that comparison with the other inside applicants had shown him not to have all the stated requirements for the advertised post; indeed none of the other inside applicants had been appointed; the Director of the Institute had given him the main reasons when they had met; and it was not the custom to

convey them in writing.

5. On 14 January 1993 the complainant lodged a "complaint" against the decision under Article 92 of the Staff Regulations. In a letter of 3 March 1993 the Director of Personnel notified rejection; explained that the Director General had meanwhile decided not to go ahead with the process of selection for the post advertised in notice 46; said that notice 46 was replaced with "vacancy notice/notice of competition" LX-92-AO/143, which redefined the post and put it at a lower level, A5/6/7; and pointed out that cancelling the earlier notice made null and void the rejection he was objecting to in his "complaint".

6. The complainant is seeking the quashing of that final decision. His three pleas are breach of the procedural rules on promotion; failure to substantiate the decision; and an obvious mistake in assessing his qualifications for the original post. He wants the procedure announced in notice 46 to resume so that he may compete properly.

7. The Agency's main plea is that the complaint is irreceivable because it shows no cause of action. Its answers to the complainant's case are subsidiary.

8. Eurocontrol's submissions, and particularly its surrejoinder, show that by May 1992 it had decided once and for all to reject the complainant and it began the "competition" phase on 26 May. The selection board it set up considered 28 applicants and in a report of 11 June short-listed three of them as fit for the post of principal expert at grade A4. First in the list was Mr. Michel Pistre, whom the French national administration was sponsoring.

9. Eurocontrol explains that at the time - in the second half of 1992 - it was reforming the Institute and so it came to drop notice 46 and replace it with notice 143, which it issued on 16 October 1992. Notice 143 put up for competition a post at grade A5/6/7 that was designed to fit better into the Institute's new structure. In the Organisation's submission the "complaint" of 14 January 1993 was therefore about a post that had ceased to exist on 16 October 1992, the date of issue of notice 143.

10. Notice 46 was still valid in May 1992, when the complainant was given information by word of mouth, on 2 September 1992, when he asked for written confirmation and explanation, and on 7 October 1992, when the Director of Personnel replied. Eurocontrol did not then tell him in writing it had dropped the procedure announced in that notice. And since notice 143 was about another post, at different grades and with different duties, it was not obvious that the issue of notice 143 put an end ipso facto to the procedure announced in notice 46. Only by his letter of 3 March 1993 did the Director of Personnel inform the complainant that in the exercise of his discretion the Director General had indeed decided to cancel the first notice.

11. The Organisation is free to withdraw a notice of vacancy at any time, even when, as in this case, the process of selection has gone quite far. The conclusion is that the complainant's internal appeal disclosed no cause of action at the time of filing and that his complaint must fail for the same reason, there being no need to entertain his arguments on the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas
P. Pescatore
Michel Gentot
A.B. Gardner

