

## **EIGHTY-SECOND SESSION**

### ***In re De Riemaeker (No. 3)***

#### **Judgment 1595**

The Administrative Tribunal,

Considering the third complaint filed by Mrs. Irène Eugénia Luppens, née De Riemaeker, against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 May 1995, Eurocontrol's reply of 21 September 1995, the complainant's rejoinder of 1 January 1996, the Organisation's surrejoinder of 26 April, Mr. Alexander Rutherford's observations of 5 July, the complainant's comments thereon of 24 August and the Agency's final submissions of 30 September 1996;

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

Having examined the written submissions;

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

A. The complainant, a Belgian born in 1946, joined the staff of Eurocontrol on 2 January 1969. She was employed at the material time as a reviser at grade LA4 in the Translation and Interpretation Division (GS.3) at the Agency's headquarters in Brussels.

On 1 July 1992 she became deputy head of the division. On 31 March 1994 the head of division retired and his post, graded LA3, fell vacant. On 5 May the Director of Personnel told the complainant that the Director General had decided to appoint her as acting head as from 1 April 1994.

On 10 June 1994 the Agency issued a "vacancy notice/notice of competition", No. HQ-94-LA/080, for the post of head of the division. On 6 July the complainant applied. So did Mr. Alexander Rutherford, a reviser at grade LA4 who was head of the English translation unit. On 21 October a selection board was set up under Article 30 of the Staff Regulations. On 25 October the board declared both the complainant and Mr. Rutherford suitable for the post. By a letter of 2 November a personnel officer invited the complainant for a "further interview" on 22 November by private consultants on recruitment. He invited Mr. Rutherford too.

On 12 December a body which Eurocontrol calls an "ad hoc promotion board" and the complainant a "second selection board" recommended Mr. Rutherford. The Director General saw the complainant on 20 December 1994 and told her that he had decided to put Mr. Rutherford on the post. By a decision of 13 January 1995 the Director of Personnel, acting on the Director General's behalf, relieved her of her duties as acting head of the division and in a letter dated 26 January told her that she had not been appointed.

On 1 February she submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations against the decision of 13 January and asked him to make her the head of the division. By a memorandum of 3 March, which she impugns, the Director of Personnel announced that her "complaint" had been rejected.

On 29 March the Director of Personnel informed her of the Director General's decision to appoint her chief interpreter as from 1 April 1995.

B. The complainant has four pleas.

The first is that Eurocontrol offended against the rules on filling vacancies. The Director General took no account of the preference the selection board had expressed by putting her name above Mr. Rutherford's on its short list of 25 October 1994. Although Article 30(2) of the Staff Regulations empowers the Director General to reject a recommendation by the board he must state his reasons for doing so. Eurocontrol obliged both her and Mr. Rutherford to undergo "psychological tests" for which there was no provision in Article 30, the purpose being to

override the board's recommendation. When the tests failed to yield the desired result Eurocontrol convened a second selection board in breach of the requirement in Article 30 that a single board consider the candidates.

Secondly, she pleads mistakes of law and of fact in acting on the vacancy notice, which required extensive experience of translation, revision, interpretation and supervision of a team of linguists doing such work. Mr. Rutherford had neither training nor experience in interpretation, whereas she is a trained interpreter and had worked as a translator and interpreter since 1971 and as a reviser since 1973.

Her third plea is that the decisions of 13 January and 3 March 1995 are unexplained and that the decision of 26 January did not give the real reasons for appointing Mr. Rutherford.

Lastly, she pleads misuse of authority. It had, she says, been decided long before that Mr. Rutherford should become the head of the division. That is why Eurocontrol held up the vacancy notice until 10 June 1994 when it knew full well that the former head was to retire at 31 March 1994: Mr. Rutherford could not apply until 1 July 1994 since not until then did he meet the requirement of two years' service at LA4.

The complainant asks the Tribunal to (1) order Eurocontrol to produce "all the material evidence", (2) hold hearings, (3) set aside Mr. Rutherford's appointment as the head of GS.3, the decision of 13 January 1995 relieving her as acting head and the one of 26 January 1995 rejecting her application, (4) reinstate her in her former duties and (5) confirm her appointment as the head of the division.

C. In its reply Eurocontrol contends that the complainant's claim to the quashing of the decision of 26 January 1995 is irreceivable because she has failed to exhaust her internal remedies and that claims (4) and (5), which would entail giving the Agency instructions, are irreceivable because the Tribunal may not do so.

On the merits it says that it complied with the material rules, including the ones on promotion. The selection board that met on 21 October never intended to put the applicants in order of merit: it declared them *ex aequo* and put them in alphabetical order on its short list of 25 October. Since the board's choice fell on Mr. Rutherford there was no need to explain the appointment. The "psychological tests" the complainant refers to amounted to "personal development evaluation" and were in line with the notice. Eurocontrol convened the selection board only once: it was the promotion board that recommended Mr. Rutherford for the post on 12 December 1994 and promotion requires prior consultation of that body.

The selection board made no mistake of law or of fact in declaring both applicants suitable. Since the post was for a head of division the board had discretion as to some of the requirements of the notice. It took the view that Mr. Rutherford's many years of service qualified him for the post. Besides, neither of the applicants met all the requirements stated in the notice, and insisting on them would have meant rejecting both in favour of some outsider.

The defendant says that it did state the reasons for the decision of 13 January 1995. Though the complainant failed to exhaust the internal procedure for challenging the decision of 26 January, the Agency gave such explanation for it as precedent requires.

Misuse of authority may not be presumed and the complainant offers no evidence of it.

The Agency claims an award of costs against her.

D. In her rejoinder the complainant challenges Eurocontrol's objections to receivability and enlarges on her pleas on the merits. Since the Administration chose to put the post up for competition and allow outside applicants the body competent to make a final assessment of the candidates was the selection board, not an "ad hoc promotion board".

She claims costs.

E. In its surrejoinder the Agency restates its pleas on receivability and on the merits. It maintains that the selection board rated the two applicants *ex aequo*. Since both were at a grade lower than that of the vacancy each was seeking promotion. So the complainant may not properly object to the setting up of the ad hoc promotion board.

F. In observations invited by the Tribunal Mr. Rutherford demurs at disclosure of the findings of the "personal development evaluation" on the grounds that the private and confidential information they contain was intended for

only a few senior officers. He applied for the post because he was a university graduate who had experience of work at the Agency and training in management. Though not an interpreter, he says that the head of a language service has no time for actual translation, revision or interpretation, which he must delegate so as to be free for administrative work.

G. In her comments on Mr. Rutherford's observations the complainant says that the Agency "dissembled" by alleging that its preference rested on the findings of the "psychological tests". By concealing the reasons for the appointment it has made an improper use of its discretionary authority and acknowledged its failure to act in the interests of the service. The notice of vacancy precluded appointing someone who was not an interpreter. Only a trained interpreter can head a team of interpreters.

H. In a final brief Eurocontrol denies that only a trained interpreter may head the division. More countries having joined the Organisation, the work of the division has so grown that the head of it must spend all his time managing and planning and leave translation and interpretation to others. That is why both the selection board and the promotion board chose Mr. Rutherford and why the Director General appointed him.

## CONSIDERATIONS

1. The complainant, who is at present chief interpreter at Eurocontrol, is impugning the Director General's decision to appoint Mr. Alexander Rutherford head of the Translation and Interpretation Division (GS.3) as from 1 January 1995 and to reject her own application for the post. She is also challenging a decision of 13 January 1995 to relieve her of the duties of acting head which she had had since 1 April 1994. She seeks reinstatement in those duties and permanent appointment as head of the division.

2. Eurocontrol pleads that the complaint is irreceivable on two counts. One is that her challenge to the decision of 26 January 1995 rejecting her application was never put to the Director General and is therefore new. The other objection is that her claims to reinstatement in her former duties and to permanent appointment to the post are not of a kind that the Tribunal may entertain since it may not interfere in the Director General's exercise of his discretion.

3. The Agency's first plea is mistaken. The complainant's "complaint" of 1 February 1995, which the Director General rejected on 3 March 1995 -- the impugned decision -- sought the reversal of the decision of 13 January 1995 relieving her of duties on the grounds that "Mr. Alexander Rutherford is appointed head of division GS.3 as from 1 January 1995". She objected to the process of selection and asked the Director General to appoint her instead. Even if she had not expressly asked him to reverse the decision of 26 January 1995 rejecting her application -- which she seems to have got only after lodging her appeal -- her present claims fall within the ambit of that appeal and her complaint puts forward none that is new.

4. The Agency's other plea is, however, sound. Whether or not the Tribunal quashes the impugned decision it may not replace the Organisation's assessment of the applicants with its own and order any particular appointment. So the complaint is irreceivable insofar as the complainant is claiming reinstatement in her former duties and permanent appointment to the post.

5. She has four main pleas on the merits. Her first is that the process of selection was in breach of Article 30 of the Staff Regulations and the implementing rule, No. 2. Secondly, she accuses Eurocontrol of departing from the terms of the notice and committing mistakes of law and of fact in appointing someone who did not meet the stated requirements and in rejecting herself, who did. Thirdly, she contends that the impugned decision was unexplained and so in breach of Article 25(2) of the Staff Regulations. Lastly, in her submission the Director General exercised his discretion for a purpose extraneous to the Agency's interests, gave in to influence of a kind he may not openly acknowledge, and thereby misused his authority.

6. Since the second plea -- failure to observe the terms of the notice -- is upheld there is no need to entertain the other three.

7. The vacancy notice/notice of competition, No. HQ-94-LA/080 of 10 June 1994, announced the vacancy and set out the qualifications required for head of the Translation and Interpretation Division. Besides "general" requirements that are not at issue the notice stated the following "special" ones:

"long experience (at least 10 years) of translation, revision and interpretation; experience as head of a team of translators, revisers and

interpreters; perfect grasp of the problems of managing a multilingual translation service; thorough proficiency in at least two official languages of the Agency, one of them being English or French, including both technical and legal terminology; proficiency in at least two other official languages; the ability to write and to speak clearly, accurately and concisely; and the ability to ensure smooth working relations."

8. The complainant says that she herself met those requirements but the successful applicant did not. Translation and interpretation are, in her view, quite different things and the head of the division must be proficient in both. Indeed, she argues, that is why the notice required long experience, of at least ten years, of translation and interpretation alike and experience in managing a team of translators and interpreters. Mr. Rutherford has never been an interpreter and has no experience of interpretation.

9. The Agency's answer is that, though not himself an interpreter, Mr. Rutherford knows enough about interpretation to run a language service and has skills in management that the complainant lacks; an applicant did not have to meet all the requirements set out in the notice; so it was a quite proper exercise of discretion to lend more weight to some of them than to others, especially since no one candidate, and certainly not the complainant, had all of them.

10. That line of argument, though not without merit, does not pass muster. For one thing, even if she were unqualified for the post the complainant would not forfeit her right to challenge the appointment. For another, though the qualifications stated in a notice of vacancy are not absolutely binding and the Director General may still exercise some discretion, he may not so utterly discard them as to flout the rules that ensure the proper openness and objectivity of the competition. Here the qualifications that Eurocontrol set out were fully warranted by its desire to get someone with experience of both translation and interpretation to head the service. Having itself laid down those essential qualifications, the Agency had a duty to abide by them. Yet it plainly failed to do so since, as it admits, Mr. Rutherford had never worked as an interpreter, though he had spent "22 years in the English language section of Division GS.3", and so had no experience at all of interpretation, let alone the "long" experience the notice had called for. And his having had one interpreter as a subordinate obviously did not amount to experience in heading a team of translators and interpreters.

11. There is no need for the disclosure of evidence and the hearings that the complainant asks for. The Tribunal is satisfied on the evidence before it that the Agency failed to abide by the terms of the notice that had prompted the complainant to apply for the post and that Mr. Rutherford's appointment as the head of the Translation and Interpretation Division therefore cannot stand. For the reasons set out in 4 above, however, the complainant's claims to reinstatement in the duties of acting head and to permanent appointment to the post must fail.

12. She is awarded 100,000 Belgian francs in costs. So the defendant's claim to an award of costs against the complainant fails.

## DECISION

For the above reasons,

1. The Director General's decision of 3 March 1995 is set aside insofar as it rejects the complainant's claim to reversal of the decision appointing Mr. Alexander Rutherford as the head of the Translation and Interpretation Division.

2. The procedure for appointment to the post is cancelled and the case sent back to Eurocontrol so that it may make an appointment to the post by due process.

3. Eurocontrol shall pay the complainant 100,000 Belgian francs in costs.

4. Her other claims are dismissed.

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

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

William Douglas  
Michel Gentot  
E. Razafindralambo  
A.B. Gardner

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