

## NINETY-THIRD SESSION

(Application for review)

Judgment No. 2158

The Administrative Tribunal,

Considering the application for review of Judgment 2034 filed by Mr P. G. L. B. on 10 May 2001 and corrected on 13 July, the reply of 14 September by the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), the complainant's rejoinder of 18 October and the Agency's surrejoinder of 10 December 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant was employed by Eurocontrol from September 1995 to January 1999. His career at the Agency is recounted in Judgments 1768, 1870, 1899, 2034 and 2035.

By Judgment 2034 the Tribunal quashed the impugned decisions "insofar as they reject[ed] the complainant's claims for damages", ordered the Agency to pay the complainant 220,000 euros in damages for injury under all heads and 3,000 euros in costs, and dismissed all other claims.

2. The complainant has applied for review of Judgment 2034. He seeks a new ruling on the claims he made in the complaint on which that judgment ruled.

The pleas he puts forward in support of his application will be examined below.

The Agency asks the Tribunal to declare the application irreceivable or else dismiss it, and to award costs against the complainant.

3. Consistent precedent has it that the Tribunal's judgments are "final and without appeal" as stated in Article VI of its Statute, and carry the authority of *res judicata*. They may be reviewed only in quite exceptional circumstances and on strictly limited grounds: failure to take account of some material facts, a material error that involves no exercise of judgment, an omission to rule on a claim, or the discovery of some new essential fact that the complainant was unable to rely on in the original proceedings. Moreover, the plea must be such as to affect the original ruling. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review (see Judgment 2059 and the others cited therein).

Taking one by one the instances of admissible review, the complainant puts forward pleas which, in his view, constitute grounds for review.

4. The first is "failure to take account of some material facts". He cites facts which, to his mind, ought to have prompted the Tribunal to reach a different decision had it not omitted to consider them.

There is no need to determine whether or not his objections amount to admissible grounds for review, because they are ill-founded in that they concern facts and points of law that have no effect on the Tribunal's ruling. In Judgment 2034 the Tribunal found the Agency liable for its conduct towards the complainant. It also held that

reinstatement was neither possible, no suitable post being available, nor advisable, as the Agency had valid reasons for losing confidence in him. The Tribunal therefore awarded the complainant financial relief as the only appropriate form of redress. It did so on the basis of Article VIII of its Statute, which says that if the rescinding of an impugned decision is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.

5. Secondly, the complainant pleads a "material error". The gist of his argument is that the Tribunal failed to admit the existence of promises by the Agency concerning the renewal of his appointment.

The Tribunal noted in Judgment 2034, under 15, 16 and 17, that the complainant cited specific promises to that effect. He relied among other things on a statement of 22 July 1998 by the former Director of the Institute of Air Navigation Services in Luxembourg. The Tribunal found that, even if there had been promises made, the complainant had failed to prove that they had been taken by the competent authority, since it is the Director General who has sole responsibility for employment policy of Eurocontrol. The Tribunal further observed that the complainant had failed to prove that he was to be given a permanent appointment or that the competent authority had assured him at some stage that his appointment would be renewed and subsequently converted into a permanent one.

The conclusion is that the Tribunal did examine the evidence and made an appraisal of it which may not be challenged in an application for review. The plea is therefore inadmissible.

6. The complainant's third plea in favour of review is "omission to rule on a claim". In his submission the Tribunal ought to have considered his 23 pleas individually and failed to rule on his claims to the quashing of the decisions of 10 November 1998 and 18 January 1999.

The objection is inadmissible insofar as its basis is absence of comment on pleas.

The decision in Judgment 2034 dismissed all claims that were not allowed. That being so, the Tribunal did rule on all the claims.

7. The complainant's fourth plea in favour of review is a "new fact". He asks the Tribunal to hear witness testimony from one of the members of the Selection Board that sat in 1995 and 1996 and who had made statements which, he says "suggest[ed] that the official has first hand information in the complainant's favour".

Eurocontrol submitted a written statement by that official to the effect that, having learned that the Agency was planning to dismiss the complainant, he had tried to intervene on his behalf but had been asked not to involve himself in the matter.

Although a new fact may afford grounds for review, mere suspicion about unspecified facts does not warrant further investigation of the matter.

His objection is thus too vague to warrant the Tribunal's ordering hearings.

The plea fails.

8. The complainant's fifth plea is that the Tribunal showed bias, Judgment 2034 being in contradiction with the case law.

What he is pleading therefore is a mistake of law, which does not constitute grounds for review.

In any event, his objections have no apparent relevance:

(a) breach of a staff member's rights is not fatal to the impugned decision when to rescind it is neither possible nor advisable (Article VIII of the Tribunal's Statute);

(b) the existence of a promise to renew an appointment has not been proved;

(c) in the judgments cited the Tribunal did not find covert recordings by staff members to be licit;

(d) the complainant's 23 pleas were not examined individually because many of them were immaterial to the outcome of the case;

(e) where a competition procedure is flawed, the case law requires it to be cancelled and resumed from the point at which it became flawed, but resumption at an earlier stage is not excluded.

9. The complainant's sixth plea is that in Judgment 2034 the Tribunal failed to state the reasons for its decision.

The plea does not constitute an admissible ground for review.

Even if it did, it would be unfounded. The reasons why the Tribunal was not required to rule on the complainant's many pleas that had no bearing on the outcome of the case, are given above. As to the amount of the compensation, the Tribunal made clear that it was awarded to him *ex aequo et bono* and stated the main elements it took as the basis for setting the amount (moral damages, direct material damages, the amount he would have earned up until the end of his initial contract had it not been cancelled, and loss of a legitimate expectation of a renewal of appointment).

10. The application for review is thus quite devoid of merit.

Given the circumstances, particularly the Agency's original mistakes and the injury they caused him, the Tribunal sees no justification for awarding legal costs against the complainant.

## DECISION

For the above reasons,

1. The application is dismissed.
2. The Agency's counterclaim is dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet