

NINETY-FOURTH SESSION

Judgment No. 2210

The Administrative Tribunal,

Considering the second complaint filed by Mrs M. I. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 18 February 2002, the Agency's reply of 24 May including the written observations submitted by Ms B. at the request of the Tribunal, the complainant's rejoinder of 30 August and Eurocontrol's surrejoinder of 18 October 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Italian national born in 1970, joined Eurocontrol in 1995. At the material time she was a secretary at grade C4 officially attached to the Human Resources Directorate but loaned to the European Civil Servants' Federation (*Fédération de la fonction publique européenne*), a trade union represented at Eurocontrol.

In September 2000 the Agency published a notice of competition LX-2000-CA/086 to recruit a Clerk-Secretary for the Personnel Office at the institute of Air Navigation Services in Luxembourg. The notice stated that "the appointed candidate [would] be required to participate in numerous administrative tasks linked to human resources management and management of the medical services". The notice also stated that it could be used to recruit candidates for one or more similar posts which were to become vacant by the end of 2001. No internal candidate applied. In March 2001 Eurocontrol used the reserve list for future recruitment resulting from the above-mentioned competition in order to fill the position of Clerk in charge of course bookings at the Training Division of the Institute. No notice of competition was issued for this post. Ms B. was appointed with effect from 1 April 2001.

On 29 June the complainant filed an internal complaint against this appointment. In an opinion of 7 November 2001 the Joint Committee for Disputes unanimously recommended that the complainant's internal complaint be allowed. In a memorandum of the same date the Director of Human Resources rejected the internal complaint on the Director General's behalf. That is the impugned decision.

B. The complainant argues that the Agency breached Article 30(1) of the Staff Regulations governing officials of the Eurocontrol Agency, which states that all vacancies must be notified to staff members. The post announced in the notice of competition and the post for which no notice of competition was issued were not similar positions. The former was in the Personnel Office and required, according to notice LX-2000-CA/086, experience gained, if possible, in the medical field and experience in interpreting complex statutory provisions concerning human resources management. When the complainant saw the specific qualifications required in the notice of competition, she did not apply as she did not consider herself to have a suitable profile for the post. The second post was that of Clerk in charge of course bookings in the Training Division and the Agency should have verified, in accordance with Article 31 of the Regulations, whether any internal candidate possessed the necessary qualifications. She denounces the Agency's unlawful use of the reserve list.

The complainant asks the Tribunal to set aside the appointment to the disputed post as well as the decision rejecting her internal complaint. She also claims 2,500 euros in damages for material and moral injury and 2,500 euros in costs.

C. In its reply Eurocontrol asserts that the complaint is irreceivable because the complainant has no cause of action. Since February 2000, the complainant has held a post corresponding to her wishes and she did not apply for the secretarial post opened to competition on 8 October 2001 under the reference LX-2001-CA/101, which was at the same grade and in the same division as the disputed post.

On the merits the defendant points out, subsidiarily, that Article 30(3) of the Staff Regulations states explicitly that the selection procedure in paragraphs 1 and 2 of that same article can be adopted with a view to constituting a reserve list for future recruitment. It asserts that the notice of competition LX-2000-CA/086 specified this in accordance with Article 2(1)(h) of Rule of Application No. 2 concerning the procedure for assignment to a post. The post of Clerk-Secretary in the Personnel Office and that of Clerk in the Institute's Training Division were at the same grade, and both posts covered a variety of duties and were in the same Directorate and duty station. According to the Agency, the similarity of the desired profiles and the fact that the two posts were advertised in close succession justified the use of the reserve list. Eurocontrol points out that the specific qualifications outlined in the notice of competition LX-2000-CA/086 were not obligatory or essential criteria but were merely an advantage.

Eurocontrol asks the Tribunal to "order the complainant to bear all costs".

D. In her written observations submitted at the request of the Tribunal, Ms B., who was appointed to the post of Clerk in charge of course bookings, states that she accepted the appointment in good faith and asks to be shielded from any injury in the event that the Tribunal sets aside her appointment.

E. In her rejoinder the complainant "fails to see what right the defendant has to substitute itself for her and decide what her wishes and professional aspirations may be". She adds that the disputed post and the post of secretary opened to competition in October 2001 have nothing in common.

She does not contest the legality of the reserve recruitment lists, but the fact that no vacancy notice was published for the post in question. Contrary to Eurocontrol's assertion, it is the similarity between the vacant posts and not the similarity between the candidates' profiles which, in accordance with notice of competition LX-2000-CA/086 and Article 2(1)(h) of Rule of Application No.2, could have justified the use of the reserve list. However, the posts in question were not similar and the Agency's assertions to the contrary are neither substantiated nor verifiable. Furthermore, neither the grade of the vacant post, nor the Directorate to which it is attached, let alone the short time frame of the selection procedures, provides the slightest explanation as to the nature of these posts.

F. In its surrejoinder Eurocontrol invites the Tribunal to examine whether the complainant has a cause of action. It points out that her evaluation reports seem to indicate that she is satisfied with her current job.

On the merits the Agency explains that the use of the term "profile" in its brief referred to the "profile of the post" and not to the profile of the candidates. It specifies that "similarity does not mean absolute identity" and that the posts of Clerk-Secretary in the Personnel Office and Clerk in charge of course bookings in the Training Division were sufficiently similar to justify the use of the reserve list. Lastly, it asserts that Articles 30 and 31 of the Staff Regulations give priority to internal candidates insofar as they apply (and hence, in this case, appear on the reserve list) and that their skills are equivalent to those of external candidates. The fact that no internal candidates applied for the competition LX-2000-CA/086 cannot invalidate the selection procedure for the post of Clerk in charge of course bookings.

CONSIDERATIONS

1. At the material time the complainant was employed as a secretary assigned to the European Civil Servants' Federation, although her post was officially attached to the Human Resources Directorate.

The notice of competition bearing the reference LX-2000-CA/086, which was open to both internal and external candidates, for a post of Clerk-Secretary in the Personnel Office of the Institute of Air Navigation Services in Luxembourg required, in particular, secretarial and administrative experience gained in a medical environment, and experience in interpreting complex statutory provisions relating to personnel management.

The notice of competition also indicated that it might be used to recruit candidates for one or more similar posts

which would become vacant by the end of 2001. No internal candidates applied.

In March 2001 Eurocontrol resorted to the reserve list established during the above-mentioned competition in order to fill the post of Clerk in charge of course bookings at the Institute's Training Division. Ms B. was appointed with effect from 1 April 2001.

The notice of competition bearing the reference LX-2001-CA/101 for a post of Secretary for the Institute's Training Division was also open to both internal and external candidates and was at the same grade as notice of competition LX-2000-CA/086. The complainant did not apply.

2. On 29 June 2001 the complainant filed an internal complaint against the appointment of Ms B. on the grounds that it had been made in breach of the rights of internal candidates and by unlawful use of the reserve list.

In an opinion of 7 November 2001 the Joint Commission for Disputes unanimously recommended that the internal complaint should be allowed. By a memorandum of that same date, which is the impugned decision, the Director of Human Resources rejected the internal complaint on behalf of the Director General.

The complainant asks the Tribunal to set aside the decision to appoint Ms B. and likewise the decision to reject her internal complaint. She claims 2,500 euros in damages for material and moral injury and 2,500 euros in costs. She asserts that the reserve list could only be used to fill a similar post, which this post was not.

The Agency submits that the complaint is irreceivable on the grounds that the complainant has no cause of action: since February 2000 she has held a post corresponding to her wishes, and she did not apply for the secretarial post at the same grade and in the same division as the disputed post, opened to competition in October 2001, after the filing of her internal complaint.

In her written observations, Ms B. states that she accepted the appointment in good faith.

3. According to firm precedent, an organisation has wide discretion in appointing or promoting staff. As any such decision is subject only to limited review, the Tribunal will interfere only if it was taken *ultra vires*, it shows some formal or procedural flaw, there was misuse of authority, there was a mistake of fact or of law or essential facts were overlooked or a clearly mistaken conclusion was drawn from the evidence.

Any candidate for a competition, whatever the likelihood of their being selected for the vacant post, has a right to be treated in good faith and in accordance with the fundamental principles guaranteeing fair competition between candidates. If the procedure was tainted with irregularity, the resulting appointment must be cancelled, although the appointed candidate must be held harmless if he/she has accepted the post in good faith, (see, for example, Judgment 2060, under 4, and the cases cited therein).

Receivability

4. The Agency raises an objection to receivability.

(a) The fact that the complainant did not apply for the disputed post of Clerk in the Institute's Training Department is not a bar to her complaint, since the Agency did not hold a competition to fill that post.

(b) The Agency criticises the complainant for having failed to apply for the competition which resulted in the creation of the reserve list. Had she done so, she could have appeared on the reserve list used to fill the disputed post. The complainant argues that the reserve list can only be used to fill "similar" posts, and she asserts that the two posts in question are not similar.

This issue shall be dealt with in examining the merits of the case.

(c) The Agency considers that the complainant had no interest in being appointed to the disputed post, since she has held a post corresponding to her wishes since February 2000.

All staff members are entitled to compete in accordance with the conditions laid down in the applicable provisions. Staff members are free to choose whether or not to apply for a competition, provided that they do not abuse this right. No such abuse has been established in the present case.

(d) The Agency argues that the complainant has no cause of action, because after having filed her internal complaint she did not apply for the secretarial post at the same grade and in the same division as the post advertised in notice of competition LX-2001-CA/101.

The Tribunal notes that the posts in question are not entirely equivalent. The complainant may have preferred to apply for only one of those posts; that too was a matter in which she was free to choose, and she did not abuse that right.

Consequently, the complaint is receivable.

The merits

5. Articles 30 and 31 of the Staff Regulations read as follows:

"Article 30

1. Before filling a vacant post, the Director General shall inform the Agency staff and the States party to the EUROCONTROL Convention.

The selection of candidates shall be based on qualifications or, for certain posts provided for in Article 28, paragraph d), on examination or on qualifications and examination in accordance with the conditions laid down in paragraph 2 below.

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 Director General 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.

3. The procedure laid down in paragraphs 1 and 2 above may also be adopted with a view to constituting a reserve for future recruitment.

Article 31

In the event of the application of the provisions of Article 30 above not enabling the Agency to obtain 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.

For posts in Category C and the Language Service, recruitment may be made directly without prior notification of the States parties to the Convention."

Article 2 of Rule of Application No. 2 of the Staff Regulations provides as follows:

"Article 2

1. Notices of competition shall be drawn up by the Director General after consulting the unit(s) concerned.

They must specify:

- a) the nature of the competition (based on qualifications or on qualifications and tests) and the selection procedure;
- b) the unit of assignment and the type of duties and tasks involved in the post(s) to be filled;
- c) the diplomas and other evidence of formal qualifications or the degree of experience required for the posts to be filled and, in particular, the conditions of seniority required of officials of the Agency;
- d) where applicable, the knowledge of languages required in view of the special nature of the posts to be filled;

- e) the age limits and any extension of the age limit in the case of established staff;
- f) the closing date for applications;
- g) where applicable, any exceptions with regard to nationality pursuant to Article 28(a) of the Staff Regulations;
- h) recruitment, during a limited period, of candidates entered on the list of candidates eligible for this competition to similar posts which might become vacant.

2. Where the competition is on the basis of qualifications and tests, the candidates admitted to the competition shall be informed of the nature of the tests."

As the Tribunal has often stated, when a vacancy is to be filled, staff members must be given sufficient information to enable them to exercise their rights without facing any unnecessary hindrance. A competition aimed at filling a vacant post must be held under satisfactory conditions of objectivity and transparency, which guarantee that the candidates will receive equal treatment (see, for example, Judgments 729, under 2; 1272, under 16; and 1595, under 10).

In this case, the Tribunal must examine whether the Agency was entitled to resort to the reserve recruitment list in order to fill the post of Clerk in the Institute's Training Division. It is necessary to determine whether that post was "similar" to the post of Clerk-Secretary in the Institute's Personnel Office, which was advertised in notice of competition LX-2000-CA/086. If it was not similar, the Agency ought to have followed the procedure defined in Article 30 of the Staff Regulations and Article 2 of Rule of Application No. 2.

Where a reserve recruitment list is resorted to, the vacant post is filled without applying the competition procedure provided for in the above-mentioned provisions. Staff members must be given the possibility of entering competitions on the basis of which reserve lists for filling "similar" posts are to be established. That possibility is denied them if they do not know what is meant by "similar" posts. Indeed, they might then apply for a post without knowing what purpose the reserve recruitment list is to serve. Furthermore, where a notice of competition specifies that a reserve list may be drawn up, a staff member wishing to be placed on that list might apply for a post which is of no interest to him or for which he considers himself insufficiently qualified, solely in order to appear on the reserve list. The broader the definition of "similar", the greater the risk of such occurrences.

The requirements of equal treatment, objectivity and transparency in appointment procedures place the Agency under an obligation to provide a clear and precise definition of the concept of a "similar" post.

In the present case, that did not occur. The Agency, the complainant and the members of the Joint Committee for Disputes interpret the concept in different ways. This is due to the imprecise nature of the concept of a "similar" post. There is little point in seeking to provide an exhaustive definition of the concept. At best it can be said that the adjective "similar" does not imply total identity. Moreover, it is the responsibility of the Agency to specify, in notices of competition, the nature of the posts which can be considered to be "similar" for the purposes of any subsequent use of a reserve list.

Thus, the Agency failed to provide staff members with the required information enabling them to participate in the selection procedure on an equal footing and on the basis of objective criteria.

The procedure must therefore be resumed at the point where it became flawed. Since it is no longer possible to contest the procedure by which the post advertised in notice of competition LX-2000-CA/086 - from which the disputed reserve list originated - was filled, it must be considered that this list could not be used validly, because staff members were not provided with the necessary information concerning the posts that could be filled from the list. Consequently, the only procedure to be resumed, in accordance with the standard rules set out in Articles 30 and 31 of the Regulations, is the procedure to fill the post of Clerk in charge of course bookings in the Institute's Training Division.

The Organisation must shield Ms B., who accepted her appointment in good faith, from any injury that may result from the quashing of the impugned decision.

The moral injury suffered by the complainant is partly remedied by the present judgment. That remedy shall be made complete by an award of 1,000 euros.

Since her pleas succeed, the complainant is entitled to an award of costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay the complainant 1,000 euros in moral damages.
3. It shall also pay her 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet