

Registry's translation, the French text alone being authoritative.

FIFTY-THIRD ORDINARY SESSION

In re TIMMERMANS

Judgment No. 618

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean Marin Timmermans against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) and Mr. Jean-Marie Cosyns on 10 August 1983 and corrected on 8 September, the Agency's reply of 30 November, Mr. Cosyns' observations of 29 November, the complainant's rejoinder of 27 January 1984, Mr. Cosyns' further observations of 2 April and the Agency's surrejoinder of 13 April 1984;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Article 30 of the General Conditions of Employment of staff of the Eurocontrol Agency;

Considering the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a Belgian, was at the material time a grade B.2 assistant in the Office of the Financial Comptroller of the Agency. Early in 1982 the Agency announced a vacancy for a chief accountant at grade A.5, 6 or 7 and invited an application from anyone employed in the civil service of a member State or any Eurocontrol official in category B. The candidates included the complainant and Mr. Cosyns, who is the second defendant and who at the time was in the Belgian Ministry of Communications. On 27 April 1982 the selection board put three candidates in order of preference: first, a British subject; second, Mr. Cosyns; and third, the complainant. On 11 June the Agency informed the complainant and Mr. Cosyns that they were not successful. The British subject was offered the post at grade A.6, but he wanted a higher grade, to which there were financial objections, and on 28 July he withdrew. On 26 August the Agency wrote to the Belgian Minister of Communications enclosing an offer of appointment at grade A.7 to Mr. Cosyns and asking whether he could take up duty by 1 October. On 4 October the Agency wrote to say that, having had no reply, the offer was withdrawn. On 12 October the Minister answered that the offer had only just been passed on to Mr. Cosyns. Mr. Cosyns accepted it. The Agency had second thoughts and on 13 October informed the Minister that Mr. Cosyns might take up duty on 18 October. He did so. On 6 January 1983 the complainant asked the Director General to reverse his decision. In the impugned decision of 27 May the Director General declared the claim irreceivable and in any event groundless.

B. What the complainant says he objects to is that he was not offered the post after the first two candidates dropped out; his internal claim was therefore in time and his complaint

is receivable. As to the merits he contends that a mistaken reason -- that the possibility of recruiting Mr. Cosyns had been reconsidered -- was given for the decision in the letter of 13 October 1982 to the Minister. The withdrawal of the offer was unconditional and lawful and could not be properly revoked because it had conferred a right on the complainant. There was breach of the Agency's independence since it acted under pressure from the Minister. There was inequality of treatment: the Agency preferred an outside candidate to an inside one declared to be qualified. There was breach of Article 30 of the Staff Regulations: against its own interests, since the matter was urgent, the Agency held up recruitment so as to appoint an outside candidate. There was abuse of authority in the various tactics designed to avoid appointing the complainant. He asks the Tribunal to order the production of various items of evidence including the Minister's letter of 12 October 1982; to quash the decision of 13 October and the appointment; to order the correct application of the procedure and his appointment, as the only remaining qualified candidate; and to award him costs.

C. The Agency replies that the complaint is irreceivable. It gives its account of the facts. Since the appointment of

Mr. Cosyns merely confirmed the letter of 11 June 1982 telling the complainant he was not successful, his internal claim was time-barred. Subsidiarily, the Agency contends that the complaint is devoid of merit. The Director-General has discretion in making an appointment and in particular in deciding whether or not to follow the order of preference stated by the board. The Article 30 procedure was correctly observed, there was no abuse of authority, and the decision served the Agency's interests by appointing the best candidate. The Agency had both the right and the duty to cancel the wrongful withdrawal of the offer to Mr. Cosyns, which in any event created no right in the complainant's favour. The Agency freely made the offer to Mr. Cosyns and its subsequent acts were inspired, not by government pressure, but by a wish to correct the administrative errors Mr. Cosyns had been victim of. There was no inequality of treatment since the complainant came third and Mr. Cosyns second.

D. The second defendant, Mr. Cosyns, denies outside interference in his appointment. By a letter to him of 31 October 1983 the Minister confirmed that only for administrative reasons had his case not been dealt with until 12 October 1982.

E. In his rejoinder the complainant points out what he sees as misrepresentation in the Agency's account. He maintains that his complaint is receivable: he is challenging the appointment, which did not merely confirm the letter the Agency wrote him on 11 June 1982. He also enlarges in some detail on his pleas on the merits, in particular expressing surprise at the Agency's pleading the unlawfulness of its own act.

F. In a letter of 2 April 1984 Mr. Cosyns submits comments on various points raised in the rejoinder.

G. In its surrejoinder the Agency develops further its arguments on receivability and on the merits, answering in detail the points raised in the rejoinder.

CONSIDERATIONS:

Receivability

1. The impugned decision of 27 May 1983 was notified to the complainant on 30 May. The complaint having been filed under cover of a letter of 9 August 1983 postmarked 10 August, the latter is the date of filing. On 16 August the Registrar of the Tribunal invited the complainant to correct the complaint, and he did do by submitting a complaint form dated 5 September. But 10 August is the material date, and the complaint was therefore filed within the time limit set in Article VII(2) of the Statute of the Tribunal.

2. In a letter of 13 October 1982 the Director General, having decided to review the position of Mr. Cosyns, said he might take up duty with Eurocontrol on 18 October. On 6 January 1983 the complainant appealed against that decision, and it is the Director General's decision of 27 May 1983 to reject the appeal that is the one he now impugns. He did not appeal against the Director General's decision of 11 June 1982 to reject his application for the post advertised in announcement No. B/1982/AA/9 of 17 February 1982, nor against the procedure followed and the consequences thereof. But that does not make his complaint irreceivable. His appeal against the decision of 27 May 1983 to uphold that of 13 October 1982 does not have the same purpose as would have had a complaint against the decision of 11 June 1982. His omission to challenge the decision of 11 June does not preclude valid appeal against the decision of 27 May 1983 in this complaint.

The merits

3. The impugned decision of 27 May 1983 confirmed the decision of 13 October 1982 to review the possibility of recruiting Mr. Cosyns, from whom the offer of appointment had been withdrawn by the letter of 4 October. The outcome of the review was that Mr. Cosyns was appointed and took up duty on 18 October. The complainant too had applied for the post and would have got it but for the decision of 13 October. Mr. Cosyns' appointment meant that he lost the post.

The material issue is whether the decision of 13 October 1982 was lawful.

On 4 October 1982 the Director General withdrew the offer of appointment in his letter of 26 August 1982 because he had not yet heard from the Belgian Minister of Communications whether Mr. Cosyns would be available and because the vacancy had to be filled promptly. On 12 October the Minister wrote to say that other business had prevented him from replying in time and to ask the Agency to reconsider appointing Mr. Cosyns. This led to the impugned decision, which the Director General conveyed to the Minister in his letter of 13 October.

4. Vacancies at Eurocontrol are filled under special arrangements in which the States parties to the Eurocontrol Convention play an essential part. Article 15(1) of Appendix I to the Convention provides that the Agency may resort to direct recruitment only if the States parties are unable to provide the services of qualified staff. And Article 30 of the General Conditions of Employment reads: "Before filling a vacant post, the Director General shall at the same time inform the Agency staff with a view to inviting applications and the States party to the Eurocontrol Convention, inviting them to put forward candidates in accordance with the provisions of Article 15(1) of the Statute of the Agency."

These arrangements were correctly complied with throughout the complex procedure which followed the announcement of the vacancy.

The offer of appointment was made in the letter of 26 August 1982 but withdrawn in the letter of 4 October; on 12 October the Minister wrote asking for review of the matter; and on 13 October the Director General answered that the decision of 4 October had been reviewed. This sequence of events forms part of the arrangements prescribed in Article 15 of Appendix I to the Convention and in Article 30 of the General Conditions of Employment. The Tribunal concludes that neither the procedure nor the actual decision shows any defect in law.

5. The Director General's letter of 4 October to the Minister cannot be deemed to have conferred any right on the complainant. As a rule the competent authority may alter or reverse any administrative decision unless it is expressly forbidden to do so and provided that acquired rights are safeguarded. In this instance there was nothing to forbid review of the decision, nor had the complainant acquired any right under the decision of 4 October.

6. There is no evidence to support the complainant's contention that the impugned decision and the original decision of 13 October 1982 were tainted with abuse of authority.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner