

EIGHTY-SEVENTH SESSION

In re Boivin

Judgment 1870

The Administrative Tribunal,

Considering the complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 July 1998, Eurocontrol's reply of 23 October, the complainant's rejoinder of 26 November 1998 and the Agency's surrejoinder of 5 March 1999;

Considering Article II, paragraph 5, 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, who is of dual Belgian and French nationality and was born in 1966, applied for the post of head of Accounts Payable at the Directorate of Finance in Brussels, the headquarters of the Organisation. His application for the post did not succeed, but he was appointed, as of 1 September 1995, to a post as an expert at the Institute of Air Navigation Services in Luxembourg, for which there had been no notice of competition. Mr Jean Guillaume Bodar, also an unsuccessful internal candidate for the post of head of Accounts Payable, challenged the above appointment. On 4 March 1996, the Director of Human Resources communicated to the complainant the decision of the Director General to cancel his nomination as of 31 August 1996.

On 1 March 1996, Eurocontrol issued a notice of competition No. LX-96-AA/022 to fill the post of head of the Accountancy and Personnel Office in Luxembourg. The complainant submitted an application as an internal candidate on 26 March and as an external candidate on 23 April. Not finding it possible to categorise his candidature, the Selection Board included the complainant's name in the list of suitable candidates as both an internal and an external candidate. Subsequently, the Legal Service Department deemed that he should be considered as an external candidate. The complainant was selected and, by a letter of engagement of 19 July 1996, the Director of Human Resources requested him to take up his duties on 1 August, although the complainant requested and obtained the deferral of his entry into service until 1 September 1996.

In view of the period of service already completed at the Agency, the complainant was dispensed with the probationary period and 1 September 1995 was considered as the effective date for the purposes of pension entitlements and seniority in grade.

In the meantime, the complainant had lodged an internal complaint on 28 March 1996 against the cancellation of his nomination. In view of the outcome of the above competition, no action was taken to follow up that complaint.

Mr Bodar had also applied for the post of head of the Accountancy and Personnel Office. He was informed by a letter of 31 May 1996 of the rejection of his candidature and filed an internal complaint on 4 September against the appointment of Mr Boivin. The implicit rejection of this complaint was set aside by the Tribunal on the grounds that it had not been referred to the Joint Committee for Disputes: see Judgment 1768 (*in re Bodar*). The Tribunal invited Eurocontrol, in its reply on the case, to give Mr Boivin the opportunity to express his point of view. Mr Boivin used the services of a legal counsel, who submitted comments supported by an expert opinion from a graphologist contending that Mr Bodar had falsified documents.

On 2 September 1997, Mr Boivin requested Eurocontrol to reimburse him the costs incurred in the Bodar case and to pay him 100,000 ECUs in moral damages. The Director General rejected his claim by a letter of 25 September, against which the complainant lodged an internal complaint on 18 December 1997. The Joint Committee for Disputes heard the complainant on 1 April 1998 and issued its opinion on 16 April. It recommended the rejection of that complaint but suggested that the Director General might compensate the complainant, as an entirely discretionary measure, for the stress under which he had been placed. On 13 July 1998, the complainant lodged the

present complaint against the implicit decision to reject his internal complaint. By a letter dated 16 July 1998, the Director of Human Resources informed the complainant of the opinion of the Joint Committee. He explained that a definitive response would be made to his internal complaint once the Organisation had received the text of Judgment 1768, delivered in public on 9 July 1998.

B. The complainant accuses the Agency of falling short of its obligations to assist and inform him and respect his dignity. He also accuses the Agency of vexatious measures, misuse of power, discriminatory treatment, the violation of his rights under the regulations and of breaching the principles of legitimate trust and good management. Citing the case law of the Tribunal, he contends that the Agency had an obligation to compensate him for the injury caused by the cancellation of his first nomination.

He argues that Mr Bodar acted on behalf of another staff member of Eurocontrol who had been transferred and wished to return to a post in Luxembourg. He accuses the Agency of collusion with Mr Bodar. He says that the Director of Human Resources made every effort to remove him in the interests of the third staff member in order to bring an end to the complaints which had been filed following the restructuring of the Institute in 1995. The negligence of the Agency in its defence in the Bodar case and its slowness in examining the written submissions obliged him to have recourse to legal counsel and a graphologist. He submits that the Agency must be held responsible for the moral and material injury suffered by his family and the resulting anxiety.

In support of his claims, the complainant asks for several staff members of the Institute to be heard. He asks for the impugned decision to be quashed; for 183,224 Luxembourg francs with interest for the costs incurred in "his defence" in the Bodar case; for 100,000 ECUs for moral injury and 150,000 Luxembourg francs in costs.

C. In its reply, Eurocontrol admits that the complainant has been subjected to "particular stress" in recent years, but denies having failed in its obligations. It emphasises that the complainant provides no proof of his allegations, some of which are defamatory, and fails to demonstrate any flaw for which the Agency should be held responsible.

It submits that it did inform the complainant of the possible decision to terminate his contract and of the complaint made by Mr Bodar and recalls that it maintained the complainant in service until the outcome of the second recruitment procedure, which was organised rapidly. It adds that during the whole period the complainant received, in addition to his salary, daily allowances in compensation for his precarious status. According to the Agency, the decision to have recourse to legal counsel and an expert was a personal choice of the complainant the cost of which he must bear while the moral and material injury which he claims to have suffered is not the fault of the Agency, but is a result of the inappropriate attitude that he adopted in the difficult situation which he faced.

D. In his rejoinder, the complainant indicates that, by a decision dated 11 November 1998, the Director of Human Resources, on the instructions of the Director General, cancelled his second nomination on the basis of a "procedural error". In his view, this is additional proof that the Agency deliberately committed such errors so that it could dismiss him. He insists that witnesses should be heard to prove certain facts. He submits that the daily allowances which he received were in compensation for the costs incurred by his precarious status and not the injury suffered. Finally, he reproaches the Agency for not having undertaken "a disciplinary investigation" against Mr Bodar, even though it admitted in its surrejoinder to the latter's complaint that he was guilty of falsifying documents.

E. In its surrejoinder, the defendant contends that the decision of 11 November 1998 is not material to the present case and cannot be taken into account by the Tribunal. It states that it was obliged to cancel the complainant's first nomination, but that it has compensated him for any injury. It submits that the financial risk incurred by the "prolongation of the period of uncertainty ... regarding his professional future" was amply covered by the maintenance of the daily allowances and that the complainant is endeavouring to take financial advantage of the events. Finally, it considers that he is in no position to comment on the veracity of the accusations of falsifying documents, on which the Tribunal was silent.

CONSIDERATIONS

The principal facts

1. This case is related to the facts examined by the Tribunal in Judgment 1768 (*in re* Bodar), delivered on 9 July 1998. It is not, however, the direct consequence of that case, since the implicit rejection of Mr. Boivin's internal

complaint was prior to the date of that judgment and the present complaint to the Tribunal was filed before Mr. Boivin knew the outcome of Mr. Bodar's complaint.

2. On 20 March 1995, Eurocontrol put up for competition a post of head of Accounts Payable at its headquarters in Brussels. Mr. Boivin was among the applicants, but was not selected for the post. Shortly afterwards, a post requiring similar skills also became available at the Institute of Air Navigation Services in Luxembourg. Eurocontrol did not consider it necessary to issue another notice of competition for this post, since there was a reserve list of candidates from the selection process for the Brussels post. After a new examination of the applicants, the recruitment of Mr. Boivin was recommended. In a letter of 6 September 1995 he was appointed to the post at grade A7, step 1, for a period of five years with effect from 1 September 1995, subject to confirmation after a probationary period of nine months. On 30 November 1995, Mr. Bodar lodged an internal complaint against this appointment, alleging several procedural flaws, and particularly the failure to issue a notice of competition. Deeming the pleas well-founded, the Agency decided to allow the internal complaint and set aside the appointment. Mr. Boivin was informed of the decision on 4 March 1996 by a letter from the Director of Human Resources; the reasons for that decision had been communicated to him verbally. Without being confirmed in a post, Mr. Boivin remained temporarily on the staff of the Agency, without prejudice to his remuneration. He also retained the possibility of entering the competition for the post. Mr. Boivin challenged the decision, but his complaint lost all cause of action when he was reappointed.

3. Mr. Boivin submitted his application under the new competition procedure. He was selected and was appointed on 1 September 1996. Mr. Bodar lodged an internal complaint against that decision, which was implicitly rejected. He then filed a complaint with the Tribunal. Among other pleas, Mr. Bodar contended that the matter had not been referred to the Joint Committee for Disputes. In Judgment 1768, the Tribunal upheld the plea and ordered the procedure to be recommenced from the time at which the breach of due process had occurred.

4. While the case was before the Tribunal, Mr. Boivin successively consulted two lawyers to submit evidence to the Tribunal in his capacity as an interested third party.

On 2 September 1997, under the terms of Article 92, paragraph 1, of the Staff Regulations, Mr. Boivin sought from Eurocontrol: (1) reimbursement of his legal costs (for the case before the Tribunal), consisting of the amounts of 78,000 and 16,595 Luxembourg francs for the cost of legal counsel and of an expert respectively; and (2) an award of 100,000 ECUs in compensation for moral injury, because he had subsequently learnt that the first cancellation of his appointment had been "at the instigation of two Eurocontrol officials". The internal complaint was rejected by the Director General on 25 September. The complainant lodged an internal complaint against that decision on 18 December 1997, in which he pressed the same claims, except for the fact that the costs of legal counsel had then risen to 83,000 Luxembourg francs. At a meeting on 1 April 1998 the Joint Committee heard the complainant and issued its opinion on 16 April. It admitted that there had been a procedural flaw attributable to Eurocontrol in the first appointment; that the Agency's subsequent reaction had been appropriate, since it had reacted rapidly; that the complainant had suffered a period of hardship, but not over a long period. There was no evidence that the Agency had endeavoured to prejudice the second appointment and the Agency appeared to have taken normal steps to defend its decision and the interests of Mr. Boivin. In view of what had happened previously, it was nevertheless understandable that he had wished to make use of the services of a legal counsel. The Joint Committee recommended dismissing the complaint. However, since the new procedure had been arduous for the complainant, it advised that compensation be awarded to him for the stress caused by a situation which had lasted intermittently from the end of January 1996, when he was informed of the first internal complaint, until mid-July 1996, when the second appointment was announced, and from the beginning of June 1997, when he became aware of the complaint lodged by Mr. Bodar, until July 1998, the date of delivery of the judgment. On 16 July 1998, the Director General made it known that he would reach a decision once he had received a copy of the Tribunal's judgment.

By that time, Mr. Boivin had already filed the present complaint with the Tribunal. In it, he challenged the implicit decision to reject his internal complaint and pressed the same pleas. He added that he had filed a second complaint concerning "compensation for other prejudicial acts" and invited the Tribunal to rule on whether the two cases should be joined.

5. The Agency claims the present complaint should be dismissed. It does not comment on the question of joining the two cases. Conforming to requirements established by precedent, it took the necessary measures to protect the complainant from any prejudice. In its surrejoinder, it cites its letter of 16 July 1998, in which it informed the complainant that it preferred "to await the judgment of the ILOAT of 9 July 1998 in order to respond to his

complaint in a global and definitive manner".

Receivability and object of the complaint

6. The dispute was submitted to the Tribunal in an unusual manner, which does not allow it to make a global ruling on all the consequences of the dispute between the parties, as would have been desirable in their common interests. Instead, with regard to material damages, compensation is only sought under certain heads (cost of legal counsel, cost of expert opinion), while the complainant claimed additional costs in a second complaint to the Tribunal which is not yet ready to be judged. Moreover, the present complaint was filed before the complainant knew the result of Judgment 1768. In contrast, the claim for moral damages is not tied to the terms of that judgment.

By referring in this present case to the outcome of Judgment 1768, the parties have implicitly admitted that the Tribunal may take that case into account. In this respect, the requirement that internal remedies be exhausted has therefore been respected, thereby allowing the Tribunal to base its decision on the outcome of that judgment in respect of material damages (cost of legal counsel and the expert opinion) and compensation for moral injury.

However, there is no similar agreement on his second claim, for damages, which is outside the scope of the present case. The same applies to compensation for any future damage.

The Agency also rightly considers that, as a result of Judgment 1768, the complainant is no longer bound by his implicit decision not to challenge the cancellation of his first appointment, since his second appointment is no longer definitive.

The complainant's version of the causes of the dispute and the calling of witnesses

7. The complainant suspects that the origins of the dispute lie in a collusion between Mr. Bodar and another staff member designed to enable the latter to obtain the post to which the complainant was appointed.

There is no serious proof to support this claim, at least as regards the participation of the Agency in such collusion. Indeed, the Agency has on several occasions shown its desire to appoint Mr. Boivin. The evidence shows that the procedural flaws it committed were the result of negligence, since the Agency had no interest in creating grounds for the cancellation of the decision. The other official was transferred to Brétigny-sur-Orge in the context of the restructuring of the Luxembourg Institute, because the Agency did not have a post in Luxembourg suited to his profile (see on this subject Judgments 1615, *in re* Boland No. 9 and others; 1685 *in re* Boland No. 10; 1686 *in re* Molloy No. 4; and 1757 *in re* Hardy No. 4). In Mr. Bodar's case examined by the Tribunal, the Agency also contested his pleas.

There are therefore no grounds for ordering measures of investigation into any collusion. Moreover, since the written submissions are sufficient in themselves, the hearing of witnesses is superfluous.

The merits

8. The only material issue in the dispute is to determine, for the appointed official, the consequences of the two illegal decisions concerning his appointment, resulting from procedural flaws imputable to the Agency.

According to precedent, the quashing of an official's appointment by reason of the action of another official results in the obligation for the Organisation to protect the official from any injury he may suffer from the setting aside of a decision which he has accepted in good faith (see Judgment 1359, *in re* Cassaignau No. 4).

9. In the material case, the Agency protected the complainant against any loss of income by granting him remuneration equivalent to that which he would have earned as an official confirmed in his post. In this regard, he suffered no material damage.

The costs for legal counsel and an expert opinion were incurred by the complainant as a preventive measure to defend his position in the case concerning the cancellation of his second appointment. However, costs cannot be claimed unless they are costs which the official had good reason to believe necessary for the sound defence of his cause. As regards the costs of legal counsel, he was right in principle because, after the cancellation of his first appointment and the new claims pressed by Mr. Bodar, he could have serious reasons for fearing a further

cancellation, despite the reasons put forward by the Agency. However, the complainant has not justified the need to change legal counsel. The complainant also seeks reimbursement of the costs incurred in consulting an expert in graphology to prove that the letter of 31 May 1996 had been received by Mr. Bodar on 3 June, and not on 8 June 1996. But the Tribunal has found the point to be immaterial, because Mr. Bodar had in any event acted in time (see Judgment 1768 under 4). Although the present complainant could not be sure in advance of this ruling, the steps he took were not necessary since, when expert opinion is required, it is for the Tribunal to order it on its own motion or on the application of another party (Article 11 of the Rules of the Tribunal). Mr. Boivin should therefore have confined himself to submitting the question to the Tribunal, which would have judged the pertinence of the matter and the validity of the proof supplied. The costs which he incurred in obtaining an extra-judicial expert opinion, which cannot replace a judicial expert opinion, were not therefore necessary.

10. The Agency opposes compensation for moral injury. It contends that it committed no fault and minimised the harm suffered by the complainant. But it is mistaken.

According to the case law, where the impugned decision is not unlawful, compensation is due only in exceptional circumstances, such as where the wrong is especially grave. On the other hand, where the decision is unlawful, the injury suffered need not be especially grave for moral damages to be awarded: it is enough for it to be serious (see Judgment 447, *in re* Quiñones under 11).

In the present case, the two flaws relating to the appointment of Mr. Boivin are imputable primarily to the negligence of the Agency: on the first occasion, the omission to publish the notice of competition and, on the second occasion, the failure to refer the matter to the Joint Committee for Disputes.

The personal interests of the complainant have therefore clearly been harmed and there is no reason to doubt the indications provided by him concerning the stress occasioned by these decisions. The prejudice is grave in view of the duration of the uncertainty in which he was placed concerning the stability of his employment. This uncertainty commenced when Mr. Bodar challenged the first decision (the end of November 1995) and has not entirely ceased since. It will only come to an end when a definitive decision is taken concerning his application. Even though the stress claimed by the complainant probably has various causes, the prejudice is in any case partly attributable to the administrative flaws committed by the Agency.

Adequate compensation is required. It is of little import in this regard that the Agency did not act in bad faith with the intention of harming the complainant.

The complainant is entitled to compensation of 8,000 euros in moral damages and the prejudice under all heads covered by the present complaint.

11. The complaint is allowed and the complainant is entitled to costs, which are set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay the complainant 8,000 euros in damages and compensation for moral injury, under all heads, subject to the findings in 6.
3. The Agency shall pay the complainant 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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