

NINETY-FOURTH SESSION

Judgment No. 2194

The Administrative Tribunal,

Considering the complaint filed by Ms M. N. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 December 2001, Eurocontrol's reply of 22 March 2002, the written observations of Ms D.-M. of 23 May, the complainant's rejoinder of 3 June, and the Agency's surrejoinder of 23 August 2002;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, who was born in 1966 and is a national of both Luxemburg and the Netherlands, joined Eurocontrol in 1994. At the material time she was employed as a clerk at grade C3 at Eurocontrol's Experimental Centre at Brétigny-sur-Orge (France). On 4 September 2000 she applied for the post of "Assistant - Human Resources", grade B4/B5 in the "Human Resources Development" of the Experimental Centre. The Selection Board, which was responsible for drawing up lists of suitable candidates, ranked the complainant equal second among internal candidates. By a letter of 13 November 2000, the complainant was informed that she had been short-listed by the Board. She was to be exempted from taking the assessment tests for this competition, having already taken similar tests within the previous two years in connection with another application, and she was invited to attend an interview. However, on the day of the interview, she was asked to take the tests again. On 22 January 2001 the Head of the Recruitment, Selection and Staff Development Section informed her that the post had been offered to another person. Ms D.-M, an external candidate, was appointed on 1 April 2001.

On 20 April the complainant filed an internal complaint against this decision. In its opinion of 20 July the Joint Committee for Disputes unanimously considered her complaint to be "legally unfounded". By a memorandum of 3 August 2001, which constitutes the impugned decision, the Director of Human Resources, acting on behalf of the Director General, dismissed the internal complaint.

B. The complainant submits four pleas.

First, by organising a competition that was open to both internal and external candidates, Eurocontrol breached Articles 30 and 31 of the Staff Regulations governing officials of the Eurocontrol Agency. These provisions state that competitions can only be opened to external candidates if the search for internal candidates has proved unsuccessful. Moreover, the selected candidate had taken the test and was called to interview before the complainant.

Secondly, Eurocontrol disregarded the terms of the notice of competition, since the selected candidate was given only one of the seven tasks listed in it. In addition, the selected candidate did not match the desired profile as described in the notice of competition, particularly as regards the "desired age", "knowledge of computer tools" and "drafting skills". The complainant adds that the Selection Board overlooked a large part of her experience. Thus, there was an obvious error of judgment.

Thirdly, the complainant argues that the selection procedure was flawed and that she was discriminated against.

Indeed, she was obliged to take reasoning and personality tests from which she ought to have been exempted, having already taken these tests a few months earlier. She adds that the tests were in French, which is a foreign language for her but the mother tongue of the selected candidate. Furthermore, the tests were organised by a private company and the results were modified at Eurocontrol's request before being submitted to the Selection Board. Lastly, the Selection Board breached its duty of confidentiality, since numerous information leaks occurred throughout the procedure. The complainant states that an individual designated as a reference on Ms D.-M.'s application maintained regular contact with members of the Selection Board at the time of the interviews.

Fourthly, she criticises Eurocontrol for failing to state the reasons for its decision, given that the opinion of the Joint Committee for Disputes, to which the impugned decision refers, is very succinct.

The complainant asks the Tribunal to quash the decision rejecting her application, and likewise the disputed appointment and the decision rejecting her internal complaint, and to award her 200,000 Belgian francs in damages for material and moral injury and 100,000 francs in costs.

C. In its reply Eurocontrol refers to Judgment 2035, in which the Tribunal held that:

"[t]here is nothing to prevent Eurocontrol from recruiting directly by means of a competition open to both internal and external candidates. And even if Articles 30 and 31 [of the Staff Regulations] do establish a preference for internal applicants, it comes into play only in the event of the candidates being equally qualified [...]"

In response to the complainant's second plea, the defendant submits that it is entitled to organise its departments and allocate tasks amongst staff members as it sees fit. Ms D.-M. in fact performs five of the seven tasks described in the notice of competition. Regarding the desired profile, it points out that the age range that was indicated was not a binding requirement and that the selected candidate could rapidly acquire the computer skills she lacked. Lastly, Eurocontrol asserts that the complainant's human resources experience was gained, for the most part, in the field of training and that there was no obvious error of judgment.

Eurocontrol explains that all candidates were made to take the tests to ensure that they would receive equal treatment, and that an external company was engaged because by virtue of their functions, certain candidates, including the complainant, were liable to be familiar with Eurocontrol's tests. The results were modified at Eurocontrol's request so as to obtain a more objective presentation. However, these results were merely a "decision-making aid" and were not a decisive factor. It adds that an excellent knowledge of the two working languages of the Agency, namely English and French, was essential to the post and that the complainant had indicated in her application that French was one of her two mother tongues: she therefore suffered no discrimination. Lastly, although leaks may have occurred, it has not been established that they flawed the selection procedure.

Regarding the reasons for the decision, Eurocontrol points out that the Tribunal accepts that these may be provided only at a later stage. As for the Joint Committee for Disputes, since it considered that the applicable procedures had been complied with, its opinion did not need to be more detailed.

D. In her written observations submitted at the Tribunal's request, the selected candidate - Ms D.-M. - states that she participated in the selection process in good faith and asks to be held harmless from all injury in the event that the complaint is allowed. Regarding the person designated as a reference in her application, she states that she is shocked to learn that a confidential item of information "has been used for personal ends".

E. In her rejoinder the complainant maintains that Articles 30 and 31 of the Staff Regulations allow the Agency to recruit external candidates only insofar as it proves impossible to identify a suitable internal candidate.

She asserts that up to the date when she filed the present complaint, Ms D.-M. had performed only one of the tasks described in the notice of competition. She notes that the Organisation acknowledges the extent of her own professional experience, which invalidates the recommendation of the Selection Board that ranked her second.

Regarding the holding of tests, the complainant states that she had no prior knowledge of the questions that were asked, and points out that equal treatment could have been achieved by making the other candidates take the same tests she had already taken. She also expresses surprise at the fact that the Agency took such care over these tests if they were not a "decisive factor". She states that she has heard that the selected candidate in fact failed the tests. She points out that her first language is Dutch and accuses the Selection Board of contravening Article 6 of Rule of

Application No. 2 of the Staff Regulations, which provides, inter alia, that "[t]he proceedings of the Selection Board shall be secret".

The complainant maintains that she was not properly informed of the reasons for rejecting her application and her internal complaint. She considers that the explanations provided in the course of the proceedings before the Tribunal are belated.

She asks the Tribunal to hear a number of colleagues as witnesses before ruling on the merits, to corroborate her allegations, particularly regarding the allocation of tasks, and to order Eurocontrol to produce both versions of the test results.

F. In its surrejoinder the defendant explains that Ms D.-M. directly performs one of the seven tasks described in the notice of competition and supervises the work of a colleague for three other tasks. Of the remaining tasks, one has been eliminated, one has been given to another staff member, and the last one has been transferred to a different unit. The Organisation categorically rejects the complainant's allegations concerning the selected candidate's drafting skills.

It observes that "[t]here is nothing discriminatory in making all candidates take the same tests, or in choosing a set of tests different to those which certain candidates might have been familiar with by virtue of their functions". It adds that none of the candidates obtained convincing results.

CONSIDERATIONS

1. At the material time the complainant was employed as a grade C3 clerk at Eurocontrol's Experimental Centre.

On 22 August 2000 a notice of competition for the post of "Assistant - Human Resources", grade B4/B5, was published. The competition was open to internal and external candidates and the complainant applied.

A Selection Board was convened to draw up lists of suitable candidates. The Board short-listed four internal candidates, including the complainant, who was ranked equal second. It also short-listed six external candidates, including Ms D.-M.

On 13 November 2000 the complainant was informed that she had been short-listed and that she was therefore to attend an interview. She had already taken assessment tests less than two years earlier, in the context of a different application. It was nevertheless decided that all candidates were to take the same tests. These tests were supplied by a private company. In its report of 15 January 2001, the interview panel recommended only two candidates and Ms D.-M. was ranked first. On 22 January the complainant was informed that the post had been offered to another person. Ms D.-M. was appointed to the post on 1 April 2001.

On 20 April the complainant filed an internal complaint against this decision. By a memorandum of 3 August 2001, the Director of Human Resources, acting on behalf of the Director General, rejected her internal complaint in accordance with the opinion of the Joint Committee for Disputes. That is the impugned decision.

The complainant asks the Tribunal to quash the decision rejecting her application and likewise the disputed appointment and the decision rejecting her internal complaint, and to award her 200,000 Belgian francs in damages and 100,000 francs in costs.

2. 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* or reveals some formal or procedural flaw or mistake of fact or law or abuse of authority, or if it overlooks essential facts or draws clearly wrong conclusions from the evidence (for a precedent see Judgment 2060, under 4, and the cases cited therein).

The complainant's pleas can therefore only be examined within that limited framework.

3. 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."

4. The complainant's first plea is that Eurocontrol breached the above provisions by opening the competition simultaneously to internal and external candidates. She considers that under Articles 30 and 31, before a competition can be opened to external candidates it must first be opened exclusively to internal candidates in order to determine whether the post can be filled by one of them.

The Agency disputes that interpretation and points out that its practice of direct recruitment by means of a competition open to both internal and external candidates was upheld by the Tribunal in Judgment 2035.

In the present case, the Tribunal has no reason to decide otherwise. In Judgment 2035 the Tribunal interpreted Articles 30 and 31 in conjunction with Article 27, which aims to secure for the Agency services of officials of the highest standard of ability, efficiency and integrity. This implies that an appointment under Article 30 cannot be made without considering whether the purposes of Article 27 are not better served by the appointment of an external candidate. Consequently, the Tribunal has inferred from the above-mentioned provisions that where candidates are equally qualified, preference should be given to an internal candidate.

The complainant's argument that it is not possible to open a competition to both internal and external candidates simultaneously, and that the selection of an internal candidate should not necessarily involve ascertaining whether a better external candidate exists, is contrary to the precedent cited above.

Consequently, the plea is unfounded.

5. The complainant's second plea is that the administration breached the terms of the notice of competition and committed an obvious error of judgment.

(a) The complainant accuses the Organisation of assigning only one of the seven tasks described in the notice of competition to the selected candidate. The Agency asserts that it is entitled to organise its departments and allocate tasks amongst staff members as it sees fit, first because the needs of the Organisation evolve and it must be able to adapt, and secondly because staff members are generally not given all the tasks envisaged in the notice of competition at the start of their contract.

These explanations are convincing. In any case, the complainant has failed to explain how these facts, which occurred after the appointment, could constitute flaws in the appointment procedure.

It is therefore unnecessary to examine in detail the differences which may exist between the duties described in the notice of competition and those actually performed by the selected candidate after her appointment.

(b) The complainant considers that the selected candidate did not have the desired profile and draws attention to the following contradictions:

(i) in the notice of competition, the Agency had indicated a desired age range of 25 to 35 for external candidates, yet the selected candidate was 45 years old;

(ii) a good knowledge of computer tools was desired, yet Ms D.-M. was not familiar with one of the software programmes which was essential for carrying out the tasks described in the notice of competition;

(iii) the ability to draft various types of documents was also a desired skill, yet it would appear that the selected candidate was not satisfactory in this regard.

The Agency observes that the specified age range was not a binding requirement, and that the computer skills which the selected candidate lacked were not part of the essential criteria and could be acquired very rapidly. Concerning the selected candidate's drafting skills, the Agency categorically rejects the complainant's allegations.

It should be noted that the wishes expressed by the Agency in the notice of competition are not essential conditions without which an application has to be rejected. If, from an overall perspective, the selected candidate appeared to be the best candidate, that assessment is not altered by the fact that she did not have all the "desired" attributes.

(c) The complainant criticises the Selection Board for overlooking a large part of her experience and ranking her only second on the list of suitable internal candidates on the grounds that she was specialised in only one field, namely training. In so doing, the Selection Board committed an obvious error of judgment. The complainant emphasises that she also had experience in organising and supervising recruitment and in project analysis.

The Agency submits that several members of the Selection Board knew the complainant well and were familiar with her work. Thus, the Board did not base itself solely on her application form. Moreover, most of the complainant's work did in fact concern training.

In her rejoinder the complainant accuses the Selection Board of relying on "incomplete information".

In its surrejoinder, the Agency observes that the ranking established by the Selection Board was not final, since the selection was made after interviews and tests. At the end of that process, only two external candidates remained and all internal candidates had been eliminated. According to the defendant, the ranking of the internal candidates could only have been relevant if an internal candidate who was ranked higher than the complainant had been appointed to the post, which was not the case.

The Tribunal cannot substitute itself for the appointing authority to assess the candidates' respective merits. On this issue, the complainant's arguments could only succeed if she were able to establish that, from an overall perspective, she was a better candidate than both the selected candidate and the other candidates who were ranked higher than her on the list of suitable candidates. This cannot be established on the basis of the Selection Board's findings, given that the selection was ultimately based on the results of the interviews and tests which occurred after the short-listing by the Selection Board.

The plea is therefore unfounded.

6. The complainant's third plea is that the selection procedure was flawed and that she suffered discrimination.

(a) She considers that she was discriminated against in that she was obliged to retake reasoning and personality tests despite the fact that the results of these tests are valid for two years, that she had already taken them a few months earlier and that she had initially been informed that she would not have to retake them. According to the complainant, the discrimination lies in the fact that the Agency imposed similar conditions on candidates who were in different situations.

The Organisation explains that it asked the complainant to retake the tests to ensure that all candidates would receive equal treatment.

The right to equal treatment requires that situations which are the same or similar be governed by the same rules and that dissimilar situations be governed by rules that take account of the dissimilarity. The authority, which is required to give equal treatment to dissimilar situations has a broad discretion in adopting rules that take into account that dissimilarity (see Judgment 1990, under 7). In the present case, the Agency was entitled to consider, in the exercise of its discretion, that the fact that a candidate had previously passed tests in the context of a different application did not place her in a situation sufficiently dissimilar to that of the other candidates to warrant the adoption of a rule exempting her from taking the tests again. The absence of an exemption could be justified by the desire to put all candidates in an identical position, particularly given that these tests were new in relation to those used previously by the Agency; this enabled the Agency to compare the candidates more easily and to select the best candidate in accordance with Article 27 of the Staff Regulations.

(b) The complainant considers that the fact that she was made to take the tests in French, which is a foreign language to her but the mother tongue of Ms D.-M, was also discriminatory.

The Agency points out that the complainant had indicated in her application that her mother tongues were Dutch and French. Furthermore, the notice of competition stated that an excellent knowledge of English and French was essential.

The complainant has failed to establish that she was placed at a disadvantage by the use of French.

(c) The complainant sees further discrimination in the fact that, at the Agency's request, the private company which organised the tests modified and adapted the results.

The Agency explains that it asked the said company to present the results in a more objective manner than it had done initially.

The complainant suspects that the defendant did so in order to favour Ms D.-M, whom the initial results allegedly showed as having failed the tests.

The Agency submits that the meaning and weight to be given to the test results were matters for the Agency to decide, and that is why it requested a more objective presentation.

The complainant seeks the disclosure of both versions of the test results.

The Agency's request that the private company present the results more objectively was inherently justified because, as stated by the Tribunal in Judgment 1787, under 10, the criteria for assessing the fitness of candidates for one and the same post must be objective and clear. The Agency states that all the candidates who took the tests obtained average results which were not conclusive. Consequently, it does not appear to be essential to know the initial results. Indeed, there is no compelling evidence of any abuse of authority in favour of Ms D.-M.

(d) Lastly, the complainant asserts that the obligation resulting from Article 6 of Rule of Application No. 2 which provides that the proceedings of the Selection Board shall be kept secret, has been breached, and that this "certainly may have affected the results". She alleges that during the selection process many candidates received information regarding the names on the Selection Board's short list, the test results and the Selection Board's discussions. The person designated as a reference in Ms D.-M.'s application is suspected by the complainant of having intervened on behalf of the selected candidate, since that person was seen "regularly with certain members of the Selection Board at the time of the interviews".

The Agency submits that it is only the proceedings of the Selection Board that are secret, and not the results of those proceedings. It adds, that whilst leaks of information may have occurred, it has not been established that they invalidated the selection procedure. As for the fact that the person designated as a reference by Ms D.-M. was seen in the company of certain members of the Selection Board, that does not mean that that person was intervening on behalf of the selected candidate. Even if that had been the case, there is no reason to believe that the members of the Selection Board would have allowed themselves to be influenced.

Without ruling on the merits of the defendant's comments, the Tribunal can only observe that the complainant has failed to substantiate her allegations.

In view of the foregoing considerations, the plea is unfounded.

7. The complainant's fourth plea is that the Agency did not give sufficient reasons for its decision, since the opinion of the Joint Committee for Disputes, to which the impugned decision refers, is very succinct. Indeed, the Committee's opinion covered only the breach of Articles 30 and 31 of the Staff Regulations in conjunction with Article 27, and briefly at that. The complainant relies on Article 25(2) of the Regulations, which stipulates that "[a]ny decision adversely affecting an official shall state the reasons on which it is based", and also on the Tribunal's case law, which confirms that the duty to state the reasons for a decision exists, inter alia, to enable the right of appeal to be exercised.

For its part, the Agency refers to a line of precedent establishing that where the reasons accompanying a decision are only brief, the Tribunal accepts that they may be supplemented at a later stage. It points out that in her internal complaint, the complainant invoked a breach of Articles 30 and 31 of the Staff Regulations, and this issue was addressed by referring her to the opinion of the Joint Committee for Disputes, which had cited the Tribunal's case law.

In her rejoinder the complainant asserts that her internal complaint was also based on an obvious error of judgment, and that this issue was not addressed.

The case law to which the complainant refers does not have the scope that she attributes to it, yet the answer to the questions raised emerges clearly from the judgments she cites. The reasons for a decision may be provided by reference to the opinion of a consultative body (for a precedent see Judgment 1817, under 6, and the cases cited therein). Furthermore, an organisation must exercise restraint in announcing the rejection of an internal candidate's application, so as not to compromise his or her chances of success in future applications (see Judgment 2060, under 7(a), and the cases cited therein). The Tribunal's case law also establishes that the duty to state the reasons for a decision, which exists, inter alia, to enable the right of appeal to be exercised, does not imply that the reasons for a choice between several candidates must be disclosed at the same time as the decision (see Judgments 1817, under 6, and 2035, under 4); they may be disclosed or supplemented at a later date, in the context of a subsequent appeal, for example (see Judgment 1590, under 7, and the cases cited therein).

In the present case, the appointing authority has referred to the opinion of the Joint Committee for Disputes and has provided further explanations, in its reply before the Tribunal, concerning the points raised by the complainant in her internal complaint.

This criticism by the complainant is all the more surprising for the fact that her internal complaint was confined almost exclusively to the issue of a breach of Articles 30 and 31 of the Staff Regulations, to which the Agency replied by referring to the Tribunal's case law; apart from that issue, the internal complaint mentioned an obvious error of judgment, but since the nature of that flaw was not specified, a brief response, such as that of the Committee, was perfectly legitimate.

Consequently, the plea is wholly unfounded.

8. Since the pleas examined above fail in their entirety, so too do the complainant's claims for redress.

DECISION

For the above reasons,

The complaint is 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

Updated by PFR. Approved by CC. Last update: 13 February 2003.