

SEVENTY-EIGHTH SESSION

***In re* MORE**

Judgment 1390

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Anthony Paul More against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 25 January 1994, Eurocontrol's reply of 8 April, the complainant's rejoinder of 30 June and the Agency's surrejoinder of 29 September 1994;

Considering Articles II, paragraph 5, and VII of the Statute and Article 10, paragraph 3 of the Rules of the Tribunal;

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

The present dispute being about the rejection of the complainant for a post announced in "vacancy notice/notice of competition" RR-92-BA/093, the parties' claims are as follows:

The complainant:

To quash the recruitment procedure and the decisions of 30 March 1993 (announcing the rejection of his candidature) and 25 October 1993 (rejecting his internal "complaint").

The defendant:

1. To declare the complaint irreceivable for want of a cause of action;
2. to dismiss his claims as devoid of merit;
3. to award it costs in full.

Considering that Eurocontrol has applied in its surrejoinder for a stay of proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:0

A. On 31 August 1992 the complainant applied for a vacancy in the Central Route Charges Office (CRCO) which Eurocontrol announced by a vacancy notice/notice of competition. The notice of vacancy was intended for serving officials, the notice of competition for internal and external candidates as well as those presented by national administrations. On 3 September the Director of Personnel and Finance informed the Director of the CRCO that a single official, the complainant, had applied under the notice of vacancy. On 9 September the head of the CRCO's Bureau of General Affairs recommended to the Director of Personnel and Finance that the competition be opened. On 30 March 1993 the Director informed the complainant that his candidature had been rejected. On 10 May Eurocontrol appointed Miss McGrenaghan to the vacant post. On 30 June the complainant lodged a "complaint" with the Director General, who rejected it on 25 October.

B. The complainant alleges that Eurocontrol failed to substantiate the decision of 30 March 1993 and did not properly follow the recruitment procedure. As the only candidate under the vacancy notice he should have got prior consideration. Not until his application - which the Administration considered along with those submitted under the notice of competition - had been rejected was Eurocontrol free to open the competition, and the Selection Board should have examined his candidature. Lastly, he alleges obvious misappraisal of the facts inasmuch as his qualifications matched those required for the post.

C. In its reply Eurocontrol submits that the complaint shows no cause of action and is therefore irreceivable. The complainant's application was considered before those submitted by the participants in the competition. There being

no further opportunities for promotion within the CRCO, all he could have got was transfer at his present grade. So there was no reason to convene the Promotion Board. Eurocontrol says that internal candidates do not get prior consideration, and the complainant's qualifications did not measure up.

D. In his rejoinder the complainant argues that the first stage of the recruitment procedure was rushed and the decision to reject him ultra vires.

E. In its surrejoinder Eurocontrol rejects his allegations and says it is drawing up a new scheme for promotion.

CONSIDERATIONS:

1. The complainant, who is a junior administrative assistant in the general accounts section of Bureau R.5, seeks the quashing of the recruitment procedure set in motion by undated vacancy notice/notice of competition RR-92-BA/093, for the post of senior administrative assistant at grade B2/B3 in the Central Route Charges Office - Bureau R.5 - and, consequently, the decision of 30 March 1993 rejecting his application under the "vacancy notice" as an internal candidate and the decision of 25 October 1993 rejecting the internal "complaint" he filed under Article 92(2) of the Staff Regulations.

2. The evidence shows that the complainant applied for the post on 31 August 1992 in answer to the above notice, which provides for two parallel application procedures:

the procedure announced in the "vacancy notice" for internal candidates who fulfilled the requirements set in office notice 42/77, paragraph 2.1.2 and who applied by 31 August 1992; and

the procedure announced in the "notice of competition" for internal candidates unable to apply under the "vacancy notice", candidates presented by national administrations and other candidates, all of whom had to apply by 30 September 1992.

Under the heading "additional information" the notice said that the successful candidate might in certain circumstances be appointed at grade B4 or B5.

3. After the closing dates set for applications at both stages of the procedure the complainant was the only candidate to have applied under the "vacancy notice", whereas as many as 97 had applied under the "notice of competition".

4. By a letter of 30 March 1993 the Administration informed the complainant that after thorough examination of his qualifications and professional experience and those of the other applicants it had reached the conclusion that he did not fully measure up to the requirements of the post.

5. According to the information supplied by the Agency a Selection Board examined after 5 October 1992 the applications made in response to the "notice of competition". It chose Miss McGrenaghan, who was appointed on 10 May 1993, as from 1 May, as an administrative assistant, second class, at grade B3.

6. On 30 June 1993 the complainant filed an internal "complaint" under Article 92(2) of the Staff Regulations against the decision of 30 March 1993. In it he puts forward two main arguments: the lack of any proper explanation for the decision and breach of the rules of administrative procedure. In the context of the second plea he contends that the decision rejecting his application was not notified to him until six or seven months after the closing date for the submission of his application and in any event after the date - according to him 17 March 1993 - at which Miss McGrenaghan accepted the offer of employment. That, he says, shows that the Agency failed to give priority to the consideration of internal applications and it is borne out by the fact that the letter turning him down said that his application was compared with those of other candidates. Since he was the only internal candidate he must have been compared with candidates who had applied under the notice of competition; yet he was not given the benefit of having his application considered by a Selection Board.

7. In his answer of 25 October 1993 to the "complaint" the Director of Personnel acknowledged that Mr. More was the only inside applicant and explained that the letter turning down his application contained a reference to other applicants because the wrong "standard" letter had been used. He assured Mr. More that his application had been examined separately and not compared with the applications of external candidates. As to the selection procedure the Director of Personnel said that the complainant's first-level supervisor, the head of Bureau R.5, had been fully

aware of his academic qualifications and that it was on his recommendation that the Director of the Central Route Charges Office had decided that he had "neither the qualifications nor the professional experience to work in the highly specialised field of accountancy".

The parties' pleas and claims

8. The complainant filed his complaint to the Tribunal on 25 January 1984. He seeks the quashing of the recruitment procedure and the decisions rejecting in turn his application and his internal "complaint". He has three pleas:

(a) The decisions were unsubstantiated: the rejection of his application was conveyed in a standard letter and the reasons for the rejection of his "complaint" were made up ad hoc after the event.

(b) The Agency failed to observe the recruitment procedures: the appointing authority took a long time to consider his application before turning it down whereas it was quick to choose from among the 97 external candidates; the overlap between the two procedures shows that Eurocontrol did not give priority to examining internal applications as office notice 42/77 requires; lastly, he was applying for promotion, but the Administration failed to call a meeting of the Promotion Board in accordance with paragraph 2.1.5 of the same office notice.

(c) The Agency clearly misappraised the facts: in explaining in its answer to his internal "complaint" why his qualifications and attainments did not measure up to the post it did not apply the criteria set in the vacancy notice.

9. The defendant challenges the receivability of the complaint on the grounds that the complainant has no cause of action and in its claims asks the Tribunal to dismiss the complaint as irreceivable. It contends that when the vacancy was announced the complainant had already exhausted his opportunities for promotion in 1992. So his application had to be treated as an application for transfer within the same department, which would have made him no better off.

10. In answer to the allegation that its decision was not properly substantiated the Agency points out that according to the case law the obligation to account for a decision refusing an appointment may be attenuated in the interests of the applicant himself to avoid harming his career prospects. In the present case the Director of Personnel gave the real reasons in his reply to the internal "complaint". In any event the Tribunal held in Judgment 1289 (in re Enamoneta) that the reasons may still be given during the adversarial proceedings, since the complainant is free to rejoin. So the complainant may not allege that the Agency failed to state its reasons or conveyed them belatedly.

11. As for the selection procedure, the Agency denies that the Regulations confer such priority on internal candidates and that the complainant, as the sole such candidate, had an exclusive right of appointment to the vacant post. In Mr. More's case it complied fully with the rules on internal candidates in office notice 42/77: it considered his application before the external ones. Since the Administration had reserved the right to appoint the successful applicant at grades B2/B3 or B4 or B5, it had "first to decide whether to fill the post by transfer, promotion or competition". In the complainant's case it "first" examined the possibility of transfer. The appointing authority has sole responsibility for appointment by transfer and is not required to hold any consultations. Since the complainant's application was for transfer and not promotion there was no need for the Promotion Board to meet, particularly as the three posts to be assigned by promotion for the current year had already been filled.

12. The Agency denies clear misappraisal of the facts. In its submission the vacancy notice said that the post required thorough knowledge of commercial accounting methods involving the use of computers and experience in the design of accounting systems and procedures. The complainant obviously lacked such qualifications.

13. In its surrejoinder, which was filed after Judgment 1359 (in re Cassaignau No. 4), the Agency states that, following the Tribunal's ruling in that judgment, it is reviewing office notice 42/77 and that pending the outcome of the review it is applying for a stay of proceedings.

14. Lastly, the complainant does not seek an award of costs; but the Agency asks the Tribunal to rule that the complainant shall bear the costs in their entirety.

Receivability and the application for a stay of proceedings

15. The Agency's plea of irreceivability fails for two reasons.

First, it begs the question in that it assumes that all the issues the complainant raises before the Tribunal have been settled, in particular whether the vacancy notice on which the whole recruitment procedure is based was valid; whether the procedure that culminated in the rejection of his application was lawful; and whether the complainant applied for transfer or promotion.

Secondly, even supposing that the complainant applied only for transfer, the Tribunal's ruling in Judgment 1359 means - see under 5, 6 and 7 - that if an official applies for a transfer to a post to be filled by some other procedure he still has a legitimate interest, and any breach of that interest is liable to review and sanction.

16. As for the application for a stay of proceedings, Article 10(3) of the Rules says "the Tribunal ... shall rule on an application by either party for a stay of proceedings ...". The Tribunal holds that no stay of proceedings is warranted in this case. Whatever changes may be made in the procedure for filling vacant posts, the complaint must be reviewed in the light of the rules in force at the material time. Once the proceedings have begun the Tribunal is bound to reach a decision as promptly as possible and will not stay the proceedings pending possible changes in the rules.

The merits

17. The Tribunal will examine the parties' arguments in the light of the requirements of administrative procedure and of the closely linked issues of substantiation and assessment of the complainant's qualifications.

The administrative procedure

18. As the Tribunal held in Judgment 1223 (in re Kirstetter No. 2) and repeated recently in Judgment 1359 (in re Cassaignau No. 4), notice RR-92-BA/093 is fundamentally flawed: the distinction it makes between two procedures termed "vacancy notice" and "notice of competition" has the effect, as the Tribunal has shown in the above judgments, of debarring Eurocontrol officials from any possibility of having their applications considered by a Selection Board in accordance with Articles 30 and 31 of the Staff Regulations governing officials of the Agency. The complainant clearly bore the full brunt since, as the Agency itself admits, his application was considered and discarded by his supervisors before the official selection procedure and in secrecy.

19. The breach of administrative process is the more glaring as the Administration, to achieve its ends, stated arbitrarily that Mr. More had applied for "transfer", whereas in the vacancy notice the post was essentially a grade B2/B3 one and the complainant was therefore obviously applying for promotion.

20. The Agency tries to get round the difficulty by arguing that the quota of promotions for the current year had been exhausted and so there was no need for the Promotion Board to meet.

21. The plea fails. The vacancy notice offered Eurocontrol officials the possibility of specific promotion to an advertised post, as against career promotion, for which there is a set quota. So what was required was a meeting not of the Promotion Board under paragraph 2.1.5 of office notice 42/77 but of the Selection Board in accordance with Articles 30, 31 and 45 of the Staff Regulations, since the complainant was applying for a vacant post.

The assessment of the complainant's qualifications and the reasons for the impugned decisions

22. The complainant is right in protesting that his qualifications were not properly examined and that in any event the reasons given for the decision rejecting his application were implausible. That is borne out by the terms of the vacancy notice and by the handling of the complainant's own application. The following points are relevant in this connection.

23. By advertising the post at grade B2/B3 the Administration was clearly seeking high proficiency in accountancy and data processing. But by reserving the right to appoint someone at grade B4 - the complainant's grade - or grade B5 it showed that it was nevertheless willing to be rather less demanding if need be. In any event it had no reason to turn the complainant down on the grounds that he lacked academic qualifications since the vacancy notice mentioned no such requirement and stated that practical experience would suffice. Nor may it properly contend that he lacked professional experience: he was already working in what the Agency itself terms "the highly specialised field of accountancy". A hierarchy of requirements could have been established only on the strength of strict comparison with the external applications; but the selection procedure that was followed precluded any such

comparison.

24. To what extent must an administration substantiate its decisions? The answer is that it depends on the sort of decision that is to be substantiated. In the present case a distinction must be drawn between the rejection of an external application, particularly where a competition has attracted many candidates, and the rejection of an application by a serving official. In the latter case the Organisation has a duty to maintain the relations of trust it has with the staff member, and although it must remain free to choose how it will notify the reasons to him it must be wary of damaging his career prospects.

25. In the present case Eurocontrol plainly failed in its duty to account for its decisions. First, it sent him a standard letter - and the wrong one at that - which contained no explanation. And the reasons it gave in its reply to his internal "complaint", though more explicit, are in view of the foregoing no more plausible.

26. For all the reasons set forth above the whole selection procedure must be quashed, as must the individual decisions rejecting the complainant's application and internal "complaint" and the decision to appoint Miss McGrenaghan. The procedure must be resumed in such a way as to afford the complainant the opportunity of having his application considered properly, albeit without prejudice to the Agency's assessment of his qualifications. It is not the Tribunal's intent to challenge the outcome of the competition insofar as the ranking of the external applicants is concerned. And the Agency may of course take steps to ensure that the unit continues to function in the meantime and to protect Miss McGrenaghan from any injury she might suffer for the quashing of an appointment she accepted in good faith.

27. The pleas the Organisation puts forward at the last minute in its surrejoinder do not alter the above ruling. There are three of them:

First, the Agency contends that the Tribunal's decisions have failed to take account of the provisions of the Eurocontrol Convention and more particularly of Article 15 of Annex 1, which says that "the Agency shall be empowered to recruit personnel directly only if the Contracting Parties are unable to make qualified personnel available to it". The provision is immaterial to this case. It limits the Organisation's freedom to recruit by giving priority to candidates prescribed by the Contracting Parties over "outside" candidates, but it puts no restrictions on the Organisation's freedom to assess the suitability of applicants, wherever they may come from, nor its right to give serving staff a reasonable opportunity of advancement provided that they are as well qualified as other candidates.

Secondly, the Organisation points out that the procedures reflected in office notice 42/77 were worked out with staff representatives precisely in order to protect the interests of serving staff. Whatever the intent of the office notice may be, the Tribunal has had occasion to point out in several cases that have come before it that the application of it in matters of procedure was harming the rightful interests of the staff.

Lastly, the Organisation states that in its opinion of 23 October 1956 the International Court of Justice recognised that the internal practices of international organisations may have force of law (Digest 1956, p. 18). But those practices must be lawful and must not offend, as they do in the present case, against the internal law of an organisation or the principles of due administrative process. The plea therefore fails.

The costs

28. The complainant does not ask for an award of costs in either the complaint or the rejoinder. The Organisation, however, formally asks that the "costs in full" be borne by the complainant. The Tribunal holds that it need not rule on the point: since the complainant has succeeded Eurocontrol's claim is in this case wholly unfounded.

DECISION:

For the above reasons,

1. The decisions of 30 March 1993 and 25 October 1993 rejecting the complainant's application for the post advertised in vacancy notice/notice of competition RR-92-BA/093 and Miss McGrenaghan's appointment to that post are set aside.
2. Recruitment procedure RR-92-BA/093 is quashed insofar as it puts the complainant on an equal footing with all

the candidates who applied under the so-called "competition" procedure, and the case is sent back to Eurocontrol for resumption of the selection procedure in keeping with the rules.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner

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