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

EIGHTY-FIFTH SESSION

***In re* Hardy (No. 4)**

Judgment 1757

The Administrative Tribunal,

Considering the fourth complaint filed by Mr. Jean-Lucien Hardy against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 November 1996 and corrected on 22 March 1997, Eurocontrol's reply of 20 June, the complainant's rejoinder of 31 October 1997, the Organisation's surrejoinder of 24 February 1998, the complainant's further submissions of 25 April and the Organisation's final brief of 11 May 1998;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

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

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

A. Facts relevant to this case are to be found under A in Judgment 1615 (*in re* Boland No. 9 and others) of 30 January 1997.

The complainant, a Belgian who was born in 1955, joined the staff of Eurocontrol on 16 June 1991. At the material time he was an expert at grade A6 in the Training Division of the Agency's Institute of Air Navigation Services in Luxembourg.

As was explained in Judgments 1615 and 1685 (*in re* Boland No. 10), the Institute underwent structural reform in 1995 and had to "redeploy" staff. Some of them objected on the grounds that their transfer was unlawful. In Judgment 1615, under 10, the Tribunal held that the complaints lodged by several staff members - of whom Mr. Hardy was one - were irreceivable because there was "no evidence to suggest that redeployment impaired the complainants' status".

On 6 June 1995 the Director General transferred the complainant provisionally to the office of the Director of the Institute as from 1 July 1995. By a notice of transfer of 7 November 1995 the Director General transferred him as from 1 January 1996 to the Agency's Experimental Centre at Brétigny-sur-Orge, near Paris, as an advanced systems expert. By a notice of 17 November 1995 the Director General changed the date of transfer to 1 February 1996.

On 31 January 1996 the complainant lodged an internal "complaint" with the Director General against those two decisions. At its meeting of 2 April 1996 the Joint Committee for Disputes held that the "complaint" was receivable and well-founded. On 29 May it told the Director General of its opinion. The Director of Human Resources sent the Committee's report to the complainant under cover of a letter of 6 August which said that, the cause of action having arisen since the redeployment, the Director General could not take a decision until the Tribunal had ruled on the merits of that exercise. That is the decision he is challenging.

B. The complainant pleads that the process whereby he was transferred to Brétigny had no basis in law. What is more, the text setting out the procedure, which bears no signature, was never disclosed to the staff. So the process offended against the staff's rightful expectations and the principles of sound management. The fact that the Agency paid staff financial compensation on transfer shows how serious is the injury it caused.

Secondly, he contends that the Agency transferred him not because of the structural reform but because it thought his performance below par and was anxious to get him out of the Institute. It failed to show that transferring him was in its interests. It kept his post and gave his duties to someone else; so obviously it no longer wanted him. It therefore committed an abuse of authority. It also discriminated against him: other transferred staff stayed on at the Institute whereas he was sent to another country.

The posts created in the course of redeployment were allotted without any recommendations from selection boards. Yet the Agency was bound under Article 30 of the Staff Regulations to set up a selection board, especially when staff whose posts did not survive the reforms were moved to another duty station.

The Organisation failed to take account of his own and his family's circumstances. It has caused him serious material and moral injury.

He claims the quashing of the Director General's decision of 6 August 1996 and the decisions of 7 and 17 November 1995, material and moral damages, and costs.

C. In its reply the Organisation submits that his claims to material and moral damages and costs are irreceivable since he did not make them in his internal "complaint". His claim to costs is also devoid of merit because he did not engage counsel. His complaint is irreceivable too insofar as he is challenging the process of redeployment, with which Judgment 1615 found no fault.

On the merits the defendant submits that Article 7 of the Staff Regulations allows it wide discretion over structural reform. So it was free to transfer the complainant, whether there was a process of redeployment or not. In subsidiary argument it contends that it did notify the procedure to the staff. The complainant too was told of it in good time and in writing.

It describes as "illogical" his view that its paying him the costs of removal shows how serious was the injury it caused him: the rules already provided for refunding the costs to an official of moving to another duty station.

The purpose of the transfers announced on 6 June 1995 was not to fill vacant posts; so no competitions were required. The sole task of the team of assessors set up for the redeployment procedure was to put suitable staff on fillable posts. Besides, the complainant was offered the posts which were vacant at the end of the procedure.

Eurocontrol says it abolished all of the complainant's main duties but responsibility for one of four training courses. He shows no abuse of authority. The Centre at Brétigny has found his qualifications and experience useful and the reforms at the Institute were the reason for transferring him. His new post is at the same grade as his old one.

The Agency did bear in mind his own and his family's circumstances, but any international civil servant must expect a change of duty stations.

It asks the Tribunal to order the complainant to pay the costs of the proceedings.

D. The complainant rebuts the Organisation's objections to the receivability of some of his claims.

He presses his pleas on the merits and puts forward new ones. He submits that the reforms ordered at the Institute by the Committee of Management provided for no retrenchment of posts. So the Agency did misuse its authority in carrying out redeployment. The procedure was further flawed in that the Agency took too long to announce it. Article 8 of Rule No. 2 is unlawful: to transfer someone without holding a competition is in breach of Article 30 of the Staff Regulations, which requires a competition before anyone is chosen. Being based on Article 8, the transfer of the complainant was unlawful.

He pleads bad faith on several counts. The reasons the Organisation gave him for the transfer were not the real ones. It has harmed his personal and professional dignity and his good name.

E. In its surrejoinder the Organisation presses its pleas. It submits that Judgment 1685 of 29 January 1998 bears out that the complainant's objections to the lawfulness of the whole exercise of redeployment are worthless.

So is his contention that his own transfer to Brétigny was unlawful: it was in his and the Agency's interests. As for what he says in his rejoinder, no harm was done to his dignity and good name.

F. In further submissions allowed by the Tribunal, the complainant points out that Judgments 1615 and 1685 are about only the first three phases of the process of redeployment; so they do not rule on the lawfulness of "redeployment elsewhere in the Agency", the only phase at issue in this case. He pleads abuse of authority on the grounds that the Agency used the reforms as a pretext for "shunting out" staff it no longer wanted at the Institute.

G. In its last brief the Organisation maintains that Judgment 1685 did go into the merits since the ruling that the complaint was irreceivable implied that redeployment was lawful. It rebuts the complainant's other arguments.

CONSIDERATIONS

1. Some of the background to this case is set out in Judgment 1615 (*in re* Boland No. 9 and others), which ruled on an earlier complaint by Mr. Hardy. The gist of the case is that Eurocontrol carried out far-reaching structural reforms at its Institute of Air Navigation Services, which is in Luxembourg. The Institute's terms of reference were changed, and so were the qualifications it required of its staff. Staff in Luxembourg had to be "redeployed" to other jobs either at the Institute or, failing that, elsewhere in the Agency.

The exercise aroused opposition. The complainant, who was an expert in the Training Division, has lodged several complaints on the subject. He withdrew the first two: see Judgment 1598 (*in re* Bisdorff Nos. 1 and 2 and others). His third challenged his provisional transfer to the office of the Director of the Institute pending a possible assignment elsewhere in Eurocontrol, and the Tribunal ruled on that complaint in Judgment 1615.

By a decision of 7 November 1995 Eurocontrol transferred him as from 1 January 1996 to its Experimental Centre at Brétigny-sur-Orge, near Paris, as an "advanced systems" expert, though it later changed the date to 1 February 1996. He lodged an internal "complaint" in protest but the Director General rejected it by a decision of 6 August 1996 that he is now impugning.

When he took up duty at Brétigny his wife, who has a job in Luxembourg, their two children, and his wife's mother and sister, who are from Rwanda, stayed on in that country.

2. His claims are to the quashing of the decision of 6 August 1996, to awards of material and moral damages in unstated amount and to legal and other sundry costs. He pleads failure to explain the decision, the unlawfulness of the process of redeployment, abuse of authority, breach of Article 30 of the Staff Regulations, bad management and breach of his rightful expectations, of good faith and of equal treatment.

The Organisation rebuts his pleas. It submits that all but one are about the process of redeployment. Either the Tribunal disposed of them in Judgment 1615 and they are *res judicata*; or else he should have put them forward in an earlier appeal and so they are out of time. Only the issue of his transfer is still receivable. His claims to damages and costs, including costs he incurred before lodging this complaint, are irreceivable because he has failed to exhaust his internal remedies. Though Article 30 of the Staff Regulations does require competitions to fill vacant posts, he has misread it: it does not apply to transfer ordered by the Director General under Article 7 in the context of redeployment. The transfer of the complainant was in line with the process of redeployment and was in his interests and the Organisation's. Eurocontrol could find him no other suitable employment in Luxembourg, whereas moving him to Brétigny put him on a new post that matched his qualifications and saved him from termination. He knew full well that, working as he did for an international organisation with several duty stations, he might later have to leave the one where he had started.

Receivability

3(a) In the impugned decision of 6 August 1996 the Director General states that there can be no ruling on the internal appeal "until the Tribunal has ruled on the merits". The complainant reads that as implied rejection, and the Organisation does not demur.

There is no need to determine whether that decision rejected his appeal or stayed proceedings. The ruling on the merits that the Director General had in mind is of course Judgment 1615 of 30 January 1997. The Tribunal will entertain the arguments the parties have put forward on the merits in the present case.

(b) The complainant contends that his transfer meant far-reaching, adverse and unlawful changes in his working conditions and so caused him injury. On that score his complaint is receivable.

(c) Judgment 1615 ruled on a case between the same parties. The Tribunal there held that the process of redeployment was not unlawful, and neither was the provisional assignment of the complainant to the office of the Director of the Institute pending something more lasting, though he might still challenge any future transfer or apply for posts put up for competition. Those issues are *res judicata*. Even if only the issue of the complainant's

provisional assignment is deemed to be *res judicata*, the Tribunal sees no reason to depart from what it said on other matters in Judgment 1615.

(d) Several decisions taken in the context of the redeployment have either gone unchallenged and so become final, or else been upheld by the Tribunal and become *res judicata*. Any complaint that now challenged them would be too late. The gist of the complainant's case is that, being flawed, those decisions are unlawful and so indefinitely open to challenge. He is wrong: only if a flaw is particularly serious will it be fatal; and the flaws he pleads are not so serious as to warrant the quashing of the decisions.

One plea he makes is that the appointment or reassignment of other staff in Luxembourg was flawed because no competitions had been held. The plea fails because on that score he has failed to exhaust his internal remedies, as Article VII(1) of the Tribunal's Statute required him to do.

(e) The Organisation submits that the complainant has failed too to exhaust those remedies as to his claims to damages and costs.

Those claims were corollaries of his main one, fall within the general scope of his internal appeal and are therefore receivable.

The merits

4. A strong line of precedent has it that transfer is at the Director General's discretion and the Tribunal will interfere only if the decision shows some formal or procedural flaw or mistake of fact or of law, or is *ultra vires*, or overlooks some material fact, or draws an obviously wrong conclusion from the evidence, or amounts to abuse of authority.

In processing, ordering and notifying transfer an organisation must heed the staff member's dignity and good name and not cause undue injury. And the decision must follow proper inquiry: see Judgment 1496 (*in re* Güsten) under 7 and 8.

5. The complainant contends that the Organisation has failed to explain its decision on his internal appeal.

Transfer is such an important decision that it must be properly accounted for. For one thing, that helps the staff member to make up his mind about what to do, for example lodge an appeal; for another, it allows review of the lawfulness of the decision. Yet the reasons need not be stated in the actual text notifying transfer: they may have been conveyed beforehand or later, even in the course of internal appeal proceedings.

The two notices sent to the complainant did give him a meaningful explanation for transfer. As to the rejection of his appeal - if rejection indeed it be - he must already have gathered the reasons from those two notices and from information given in the context of redeployment. Besides, he knew the Director General's and the Administration's position full well from the Organisation's pleadings in its reply to his complaint.

In Judgment 1685 (*in re* Boland No. 10), which ruled on a similar case of transfer from Luxembourg to Brétigny, the Tribunal held, in 7, that the reasons for the transfer were well known. It has no reason to rule otherwise here: the complainant cannot in good faith plead ignorance of the reasons for his own transfer; and his plea therefore fails.

6. For the foregoing reasons the Tribunal ruled in Judgments 1615 and 1685 that the process of redeployment was lawful and not in breach of any acquired right.

It has no reason to rule otherwise here. Although the texts do not expressly deal with redeployment, the Organisation was free to opt for any expedient that met its own needs and those of its staff. The procedure it did follow was intended, among other things, to help staff whose posts had gone to find suitable other employment in the Organisation. Even though that procedure is not in the Staff Regulations, Article 7 of the Regulations allows for it: see 11 below. It was duly notified to everyone concerned, and even though it was not published throughout the Agency the complainant did not in any event suffer injury as a result.

7. The complainant submits that the authority delegated to the Director of the Institute allowed him only to reform the Institute, not to impose the transfer of someone on some other part of the Organisation such as the Centre at

Brétigny.

He is wrong: the Director of Human Resources signed the notices of transfer on the Director General's behalf under a general delegation of authority, which was duly announced.

8. The complainant pleads breach of the rule against retroactivity: not until 5 April 1995 did the Director General delegate authority to the Director of the Institute to carry out reforms, and staff were told on 20 April. In his submission the delegation of authority may not be backdated and any prior decisions are therefore null and void.

Retroactivity must be distinguished from the later endorsement of an act allegedly performed *ultra vires* at the time.

In this instance authority was in any event duly delegated before the decisions challenged by the complainant were taken. As it has already explained, the Tribunal will not rule on the lawfulness of prior decisions. Besides, as was said in 7, the Director of Human Resources signed the notices of transfer on the strength of a duly published delegation of authority by the Director General.

This plea too must fail.

9. The complainant argues that before reducing the number of posts at the Institute from 95 to 76 on the grounds of changes in its terms of reference the Director General ought to have consulted the Committee of Management. Observing that 16 of the original 95 posts were vacant, he contends that had all the posts survived he could have been kept on in Luxembourg on one of them; that the Organisation therefore misused its authority; and that because of redeployment the functions of various units changed, and that too required authorisation by the Committee of Management, besides running counter to the Agency's interests.

The complainant has failed to show that the Director General acted *ultra vires*. There is every reason to suppose that the Committee of Management was told of the reforms and it is neither alleged nor proven that it was opposed to them.

The plea cannot be sustained.

10. The complainant contends that the Agency failed to warn him promptly that his transfer was being mooted and to tell him what exactly it had in mind: see Judgment 1496, cited above.

The argument is devoid of merit. For one thing, the time that went by from the dates of the notices of transfer - 7 and 17 November 1995 - and the date at which it took effect - 1 February 1996 - was long enough to let him make arrangements. For another, he had known since the spring of 1995 that he could expect transfer. Since he had not been put on any of the vacant posts after the reforms and since he was sent to Brétigny on 6 September 1995 he must have foreseen that he might be transferred there. Besides, he had several opportunities of speaking his mind before the decision was taken.

11. He pleads breach of Article 30 of the Staff Regulations, which requires the holding of a competition before filling a vacancy and - in clause (3) - allows one for the purpose of "constituting a reserve for future recruitment". Article 32 allows waiver of the requirement for appointments at grades A1 and A2. But the Regulations say nothing about a process of redeployment that entails transfers. The complainant submits that the post he was transferred to should have been put up for competition, and he assumes that in all likelihood he would not have won since he did not even want it. The Organisation replies that there is no such thing as a "vacant post" in the event of a transfer it orders in the context of redeployment: in such cases Article 7, which says in its first paragraph -

"The appointing authority shall, acting solely in the interests of the service, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade."

allows the Director General to transfer someone without competition when the Organisation's interests so require.

Judgment 1686 (*in re* Molloy No. 4) said that the transfer of another Eurocontrol official, Mr. Pierre Boland, from Luxembourg to Brétigny, showed no fatal flaw. Judgments 1223 (*in re* Kirstetter No. 2) and 1359 (*in re* Cassaignau No. 4), which speak of Article 30 of the Staff Regulations, have nothing to do with redeployment caused by

reforms. Though the connection between Articles 7 and 30 is not obvious, the intention seems to be not to treat a transfer in the context of redeployment as the filling of a "vacant post" within the meaning of Article 30. The purpose of redeployment is to help anyone whose post has fallen foul of reforms. To hold a competition to fill a post that would suit someone in that plight would make the whole process unduly awkward and might actually bar the placement of people deserving special protection. In this context at least Article 8 of Rule of Application No. 2 which says:

"When the requirements of the service so demand, the Director-General may, notwithstanding the provisions of Article 1 to 7 ... assign an official, in accordance with Article 7 of the Staff Regulations, to a post corresponding to his grade, without initiating a competition procedure."

seems to be in line with the Staff Regulations: see also Judgment 1358 (*in re* Cassaignau No. 3) under 7 to 9.

The plea is devoid of merit, there being no need to say whether it is receivable.

12. In sum the complainant gives several reasons why he wants to stay on in Luxembourg. His wife works there, and he can put up his mother-in-law and sister-in-law. He does not want to commute between there and Brétigny or to move house. He believes that the Agency could have found him a suitable job and that his old one was never really abolished but given to someone else. He would like, too, to carry on his work as a trainer: it is not in his or the Agency's interests to take him off the work he knows and set him to technical tasks he is not fit for.

The Organisation demurs. It points out that the Institute has a new job to do, mainly the training of air traffic controllers. In its submission posts and staff have been thoroughly assessed but it failed to find the complainant a suitable post at the Institute after the reforms. He is fit to give coaching in computers, but has neither training nor experience in air navigation. Though his new job at Brétigny involves no teaching, it does match his technical skills and he can adapt to it. In accordance with the Regulations and Rules the Organisation is willing to help him to remove to Paris. Few were in like case; that is why few had to leave Luxembourg.

Undoubtedly he finds it tiresome having to change work, losing the teaching job he has university qualifications for, changing duty stations, and either moving house or commuting to a workplace far from home. Yet all those are lesser evils than losing his employment altogether, and his new job lets him broaden his experience and knowledge. Besides, no suitable post having turned up at the Institute, it was in the Agency's interests to set him to useful work, even if that meant transfer.

The complainant objects to the process of assessment: the assessors were not fit to say how good he was at teaching or what he knew of air navigation, and his supervisors wished him ill.

Yet there is no evidence to suggest that the Organisation's assessment or main findings were wrong. Assessing the skills of staff and the requirements of posts is a matter at an organisation's discretion, and the Tribunal will interfere only on the limited grounds set out in 4 above. Eurocontrol's assessment and the conclusions it drew therefrom must stand. Indeed in Judgment 1685 the Tribunal made the same ruling about Mr. Boland's transfer.

13. The complainant pleads abuse of authority.

The burden is on him to prove it. In support of the plea he observes that the Organisation's purpose in transferring him was to dodge the procedure it has to follow when it finds performance below par, as indeed it had said it found his. He makes out that it never really did away with his post but spread his duties among others at the Institute, the reforms being just an excuse to get him out.

The defendant retorts that he had neither the qualifications nor the experience that the Institute's new mandate called for. Yet the Organisation remained free to carry out the reforms and redeploy its staff accordingly: that is indeed how the transfer of the complainant came about.

Eurocontrol rebuts his contention that his post survived the reforms. It explains that the Institute no longer needed to offer the kind of training he had given and that the kind it did need to offer he could not give. Again, it is up to an organisation to say which skills it needs and which its staff can offer, and the Tribunal will not replace the organisation's views with its own. Besides, the complainant has utterly failed to prove that his old duties have survived, or that any extraneous factors prompted the decision to transfer him.

14. He argues that he was discriminated against: others were not transferred.

Only those who are in like case may claim like treatment. The Tribunal sees no reason to reject the Organisation's plea that unlike those who stayed on in Luxembourg the complainant was not fit for any available post. Indeed he has not challenged any of those other appointments, which are no longer subject to review.

15. He pleads bad faith.

One thing that good faith ordinarily requires of an administration is that it keep its word. But the complainant's contract does not say that Luxembourg is his only possible duty station; merely that at the outset he will work there. The Organisation never gave him any express or implied promise to keep him there for evermore. Anyone who joins an international organisation with duty stations in several places or countries must of course anticipate the risk of transfer. Indeed that is just what the Staff Regulations say. Nor has the complainant proved any other sort of bad faith.

16. The complainant pleads "poor management and breach of his rightful expectations", mainly on the grounds that it would have been in the Organisation's interests to keep him on in Luxembourg. But the Organisation is the best judge of its own interests, and there is no reason to suppose that redeployment or transfer was alien to them. Besides, since it acted in good faith it cannot have ignored his "rightful expectations".

17. The complainant submits that his transfer to Brétigny was an unlawful interference in his private life because it prevented him from being with his family: he has to work and live in Brétigny during the week, while they are still in Luxembourg. He cites Article 8 of the European Convention on Human Rights.

As the Organisation points out, transfer is just a consequence of his choice of a career in an international organisation with several duty stations in any one of which it may call on him to serve. If his family stay on in Luxembourg the choice is theirs, not a dictate by Eurocontrol. Again as the Agency says, there should be no difficulty over their moving nearer to where he works.

18. The Tribunal disallows the Organisation's counter-claim to an award of costs against the complainant.

DECISION

For the above reasons,

The complaint and Eurocontrol's counter-claim are dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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