

## NINETIETH SESSION

***In re* Brillet**

**Judgment No. 2020**

The Administrative Tribunal,

Considering the complaint filed by Mr Hervé Brillet on 7 January 2000 against the Customs Co-operation Council (CCC), which in 1994 became the World Customs Organization (WCO), the CCC's reply of 21 February accompanied by the observations submitted by Mr H. at the Tribunal's request, the complainant's rejoinder of 30 May and the Council's surrejoinder of 1 September 2000;

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, a French national who was born in 1947, joined the CCC in 1975 as a translator. He is currently employed at grade LT3 in the Translation Service.

On 28 October 1998 the Organization published Staff Notice No. 33/98 announcing the vacancy of the post of Head of Translation Service at grade LT5. The post was to be filled as of 1 January 1999 by transfer or promotion. The complainant applied for the post in a letter of 5 November 1998. Three other members of the Translation Service, including Mr H., also applied. In its report of 17 November, the Selection Board unanimously recommended appointing Mr H. On 19 November the Secretary General endorsed this recommendation and informed the complainant in writing that his application had not been successful.

By a letter of 14 December, the complainant requested the Secretary General to modify or withdraw his decision of 19 November 1998. The new Secretary General wrote to him on 19 January 1999 to inform him that he would not comply with his request. On 8 February the complainant wrote back asking him to convene the Appeals Board. In its report of 1 October, the Board informed the Secretary General that it considered that the selection procedure had not been flawed by any procedural or substantive error such as to taint the decision to appoint Mr H. to the post of Head of Translation Service. In a letter of 18 October 1999, which is the impugned decision, the Secretary General informed the complainant that he endorsed the opinion of the Appeals Board.

B. The complainant submits that the Staff Manual has rules on competitions and rules on promotion. In this case both applied and should be read together. But the Selection Board and the Secretary General applied only the rules on promotion, so there was a mistake of law and failure to take into account the terms of the notice of competition. He explains that, in the context of a promotion procedure, the Secretary General may freely appoint an official on the basis of a comparative examination of the merits of the candidates in their previous assignment and after consulting an advisory body. However, in the context of a competition procedure, he must appoint the best qualified candidate after an objective examination has been undertaken of the capacity of the candidates to discharge the duties inherent in the post. This examination must consist of comparing the qualifications of the candidates with those set out in the notice of competition and, where appropriate, assessing the results of tests. He alleges that in the present case the Selection Board did not evaluate the candidates' qualifications objectively or, at the very least, gave undue preference to comparing their merits over their qualifications. Furthermore, he says that the Secretary General wrongly considered that he had the discretionary authority to select a candidate on the sole basis of his competence and integrity without being bound by other criteria or the recommendations of the Selection Board. Quoting Mr M., the member of the Selection Board nominated by the Staff Committee, the

complainant alleges that the Staff Regulations were not "taken into consideration". He requests that Mr D., the member of the Selection Board appointed by the Secretary General, be invited by the Tribunal to make a statement on this point.

The complainant also contends that there was breach of Staff Regulation 28(f)(i) because the Selection Board did not establish criteria for the assessment of the candidates' qualifications before proceeding to examine them. In this respect, he cites the case law of the Court of First Instance of the European Communities and criticises the fact that technical criteria prevailed over the applicants' managerial capacities, which were reflected mainly in their grades and seniority. He also says that Staff Rule 11.3(d) was violated because the Selection Board did not take into consideration the candidates' annual reports. He considers that he was particularly injured by this flaw as his own last two performance reports proposed his promotion to grade L4. Lastly, he submits that obviously wrong conclusions were drawn from the evidence since Mr H.'s qualifications were not comparable to his own.

The complainant asks the Tribunal to set aside the decision of 18 October 1999 as well as the decisions he challenged in his appeal of 8 February 1999 - i.e. the rejection of his application and, implicitly, the appointment of Mr H. - and to order the Council to pay him 150,000 Belgian francs in costs.

C. In its reply the Council explains that, since Mr M. was invited to comment in the present case, it seemed proper for it to include in its report the observations made by Mrs T., who chaired the Selection Board, and by Mr D.

The Council adds that the Tribunal may exercise only limited review over the decision to appoint Mr H. Under Staff Regulation 11(a) and the case law, the Secretary General has broad discretionary authority to fill a vacant post and is not bound by the recommendations of the Selection Board.

It considers that the complainant has misread the applicable regulations and rules and points out that the rules on appointment and on promotion are the same. Quoting Mrs T., the Council also contends that there was no breach of the Staff Regulations as the members of the Selection Board are expected to be familiar with the Staff Manual. The Council also has difficulty in understanding the distinction drawn by the complainant between "merits" and "qualifications". The qualifications which are to be examined by the Selection Board, in accordance with Staff Regulation 28, cannot be understood in the very narrow meaning which the complainant appears to give them. In a competition - in this case a competition "on the basis of qualifications" - the Selection Board is invited to take all relevant factors into consideration. The Council affirms that the Selection Board, as well as the Secretary General, made a full and impartial assessment of the merits and qualifications of the candidates for the post of Head of Translation Service and that no mistake of law was made.

The Council submits that, even though they were to the advantage of Mr H., the criteria on which the Selection Board made its recommendations were established lawfully and in the interests of the Organization. It recognises that those criteria were probably not determined before interviewing the candidates, but Staff Regulation 28 does not require them to be pre-established. It considers that the case law cited by the complainant is "of little relevance".

The Council adds that no provision of the Staff Rules requires it to provide the members of the Selection Board with the annual reports of candidates for promotion or appointment. The members of the Selection Board could have asked to see these reports, but did not do so since the reporting officer of the four candidates, Mr D., was a member of the Board.

Citing the case law, the Council contends that the complainant has not proved that his "undeniable" qualities were manifestly superior to those of Mr H. Lastly, it expresses its conviction that the appointment of the latter best serves the interests of the Organization.

In his observations Mr H. briefly summarises his career and responsibilities in the Organization and emphasises that in 1997 his performance report described him as the "linchpin of the English Section". He states that, since his appointment, he has performed his duties as Head of Translation Service to the satisfaction of his colleagues and the management.

D. In his rejoinder the complainant submits first that the observations of Mr H. raise no new aspects of the case.

He also contends that the distinction he draws between qualifications and merits is perfectly justified since the two concepts cover distinct issues. Nevertheless, he considers that the merits of the candidates can also constitute "a

qualification for the performance of the duties". He also recognises that the Staff Manual does not oblige selection boards to take into account the annual reports of candidates for a promotion. However, he considers that such an obligation must exist, otherwise the rules on annual reports would be voided of most of their meaning.

Lastly, the complainant alleges that Mr H.'s qualifications are better than his only in areas not covered by the requirements for the post of Head of Translation Service. The notice of competition was therefore not respected.

E. In its surrejoinder the Council maintains that the procedure to be followed with a view to filling a vacancy is "unique and unequivocal". It is set out in Staff Regulation 28 and was observed on all points. The Council considers that the complainant tends to exaggerate his own merits and to "undervalue" those of Mr H. and that no blatantly wrong conclusions were drawn from the evidence.

## CONSIDERATIONS

1. On 28 October 1998 the WCO announced a competition for the post of Head of the Translation Service at grade LT5. Candidates were to be assessed "on the basis of qualifications and, where appropriate, tests".

Four of the eight members of the service applied: Mr G. and Mr N., revisers at grade LT4, and Mr H. and the complainant, translators at grade LT3.

A Selection Board was convened to examine the applications. It was composed of a chairperson, Mrs T., Head of Administration, and two members: Mr D., who was appointed by the Secretary General and was Head of the Translation Service at the time, and Mr M., appointed by the Staff Committee. After interviewing the candidates, the Selection Board put the complainant and Mr H. on a short list, deeming them to be the best qualified for the post. In its report to the Secretary General, the Board unanimously recommended appointing Mr H. The Secretary General endorsed that recommendation and informed the other candidates that their applications had been unsuccessful.

The complainant filed an internal appeal challenging his rejection and the appointment of Mr H. The Secretary General dismissed it by a decision of 18 October 1999.

The complainant is now challenging that decision as well as the rejection of his application and by implication the appointment of Mr H. to the post of Head of the Translation Service.

2. The complainant applied to the Tribunal for the hearing of Mr D. as a witness. After the complaint was filed Mr D. sent in a written submission. Since subsequently the complainant has not expressly confirmed that request and since such a hearing is not necessary to the Tribunal's ruling, his application is disallowed.

3. The complainant alleges procedural flaws and blatant misappraisal of evidence by the appointing authority.

(a) Whether or not to appoint someone is a discretionary decision taken by the appointing authority. A steady line of precedent has it that such a decision is subject to only limited review and that the Tribunal will set it aside only if it was taken *ultra vires*, shows some formal or procedural flaw, if there was a mistake of fact or of law, if essential facts were overlooked, if there was misuse of authority or if an obviously wrong inference was drawn from the evidence (see, for example, Judgment 1689 *in re* Montenez No. 2, and the others cited therein).

(b) Candidates for a post to be filled by competition are entitled to have their applications considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that all applicants must enjoy, whatever their hopes of success may be. The rules on selection and appointment must be scrupulously followed and when the process proves flawed, the Tribunal will quash the appointment it gave rise to, on the understanding that the organisation must shield the successful candidate from any injury that may result from the quashing of an appointment accepted in good faith (see Judgment 1990, *in re* Giordano, under 6, and the others cited therein).

4. The complainant's first plea is that the Council made "a mistake of law and failed to take account of the notice of competition, in that both the Promotion Board and the Secretary General saw fit to apply only the rules for promotion and not the rules for competitions, and thus compared the candidates' merits in their past performance and not their qualifications in the light of the requirements of the vacant post". At all events, he says, in comparing

the candidates they "gave undue precedence to their merits over their qualifications".

The Council demurs.

The complainant's arguments stem from the meaning he gives to the words "qualifications" and "merit", and are based on the unproven and unlikely assumption that, when he endorsed the Selection Board's recommendation, choosing the most suitable candidate for the vacant post was not the Secretary General's uppermost concern.

There is no evidence to suggest that either the Board or the Secretary General so neglected the interests of the Council. The plea therefore fails.

5. Regulation 28, entitled "Selection Board", says:

"(f) ... the Selection Board shall draw up a list of candidates who meet the requirements set out in the notice of competition.

(i) ...

Where the competition is on the basis of qualifications, the Selection Board shall, after determining how candidates' qualifications are to be assessed, consider the qualifications of the candidates appearing on the list provided for in [(f) above] ..."

The complainant's second plea is breach of the above regulation: the Selection Board failed to set criteria for assessing the applicants' qualifications before considering them.

Although the evidence shows that the Board did not formally establish criteria before considering the candidates' qualifications, its three members were obviously at pains to select the candidate best qualified for the post. Besides, before making their choice they considered how much weight should be given to seniority and concluded that age would not be decisive if the youngest candidate proved to be the best.

So the Board did set criteria before adopting its recommendation, at least by implication if not formally. The complainant does not dispute that fact.

He does, however, appear to allege that the Board adopted the wrong criteria in that it gave preference to "merit", i.e. how the candidates had discharged their duties hitherto, rather than "qualifications", or how suited they were to the duties of the vacant post.

There is no evidence that the complainant's assertion is anything but mere speculation. The plea therefore fails.

6. The complainant's third plea is that the Council failed to make the candidates' annual reports available to the Selection Board. In support he cites Rule 11.3(d) of the Staff Rules which is about the drawing up and use of annual reports.

In rebuttal the Council observes that neither the Staff Rules nor any other written provisions require reports to be produced automatically when staff members apply for competitions. Although they may be of use to a Selection Board in some instances, in this case the Board did not ask for reports but was given information by one of its members, Mr D. (the supervisor of the complainant and Mr H.) who, as their reporting officer, was able to comment on their performance.

The Council has therefore broken no written procedural rule, and no implied rule exists on the subject. In the event, the Board was not deprived of any elements essential to a fair assessment of the candidates since Mr D. provided information and the Board members could have asked to see the reports had they seen fit.

For the same reasons, the precedents cited by the complainant to show that when international officials apply for a competition their annual reports should be made available on file, are not relevant here.

The plea fails.

7. The complainant's last plea is that the Selection Board and the Secretary General clearly misread the evidence

because they failed to attach the necessary importance to the positive elements of his application. He stresses his organisational and personnel management skills and his experience, and sets out his ideas and objectives for the Translation Service. He refrains, however, from criticising the successful candidate.

In rebuttal the Council explains why it chose Mr H. rather than the complainant, though it recognises the latter's worth as a staff member and a candidate. It points out in particular that the Translation Service is fairly small and that the duties of whoever is appointed Head will involve more than just personnel management. The time and effort Mr H. has invested in his work, and his exceptionally high standard and output, augur well for the future. He has a better grasp of information technology tools and a wider knowledge of languages. (In addition to English, French and Spanish he speaks German, Dutch and Greek.) These facts are not disputed.

The burden of proof is on the complainant (see Judgment 1827, *in re* Ochani, under 6) to show that he was better qualified than Mr H. and that by rejecting his application the Organization drew obviously wrong conclusions from the evidence. He has not done so. The plea therefore fails.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet