

NINETIETH SESSION

In re Boivin (No. 5)

Judgment No. 2035

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 November 1999 and corrected on 26 November 1999, Eurocontrol's reply of 3 March 2000, the complainant's rejoinder of 26 May and the Agency's surrejoinder submitted on 11 August 2000 together with observations sent by Mrs B. at the Tribunal's request;

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. On 15 May 1998 Eurocontrol published a notice of competition for a post as "expert - financial analyst" in the Finance Directorate. It bore the reference HQ-98-AA/044. The complainant applied for the post as an internal candidate on 11 June. Previously, his appointment as an expert at the Agency's Institute of Air Navigation Services in Luxembourg had been cancelled as from 31 August 1996 and a subsequent appointment as Head of the Accountancy and Personnel Office of the Institute had been challenged (see Judgments 1768, *in re* Bodar, of 9 July 1998 and 2034, *in re* Boivin Nos. 3 and 4 delivered this day). The Selection Board put him on the short list on 16 September. On 25 September he underwent aptitude and personality tests, as a result of which he was ranked in the second group. Only one applicant, Mrs B., an external candidate, was ranked in the first group. On 7 December four members of the Finance Directorate, including the Director, interviewed the complainant. In their report of 15 December they recommended not appointing him. By a letter of 23 December 1998 the complainant was told that another candidate - Mrs B. - had been selected.

Meanwhile, his appointment as Head of the Accountancy and Personnel Office had been quashed by a decision of 10 November 1998 as from 1 February 1999, and on 22 December 1998 a new Selection Board had found him unfit for the post. On 14 January 1999 he was told that his employment at Eurocontrol would end as from 31 January 1999.

On 16 March 1999 the complainant filed an internal complaint with the Director General against the decision of 23 December 1998 rejecting his application. In its opinion of 5 August 1999 the Joint Committee for Disputes recommended rejecting the complaint. By a letter of 9 August 1999, the impugned decision, the Director of Human Resources on the Director General's behalf, endorsed the recommendation but invited the complainant to negotiate a settlement.

B. The complainant contends that the decisions of 23 December 1998 and 9 August 1999 were not properly reasoned. In his submission, the interview board went back on the decision of the Selection Board, which found him suitable. Furthermore, the letter of 23 December said that the "interview board's final decision fell on the candidate whose profile was best suited to the requirements". But such a decision lies with the Director General, not with the interview board. He asserts that the board disregarded the criteria in the notice of competition and made an obvious error of judgment about his qualifications. According to the Staff Regulations governing officials of the Eurocontrol Agency, the Agency must first look for a qualified candidate among its own staff or in national administrations before opening up the competition to external candidates. The Agency was bound to reinstate him, not only to protect him from the injury caused by the quashing of an appointment he had accepted in good faith but

also because of a "promise" made by the Director General. But that duty, and the Agency's liability in the cancellation of his previous appointment have not been taken into account. As in his third and fourth complaints (Judgment 2034), he accuses the Director of Human Resources of abuse of authority. Lastly, the Agency acted in breach of good faith by denying him a say before it rejected his application.

The complainant considers that he was entitled to a "full career" at Eurocontrol and has therefore suffered very serious moral and material injury. He seeks "compensation for all injury of all kinds and from all sources, be it past, present or future, known or as yet unknown, arising from the rejection of [his] application ... and the subsequent termination of [his] career and the various consequences and situations that it ... will cause". More specifically, he claims: the quashing of the impugned decision; reinstatement in the post of financial analyst or another post provided that it is "acceptable to him"; payment of the "salary he would have received ... plus interest on arrears" without deduction of any income earned elsewhere, and an award of 4,500,000 Luxembourg francs in moral damages and of 500,000 francs in "direct material damages". Failing reinstatement he claims 107,507,260 francs for the damage to his career and 640,000 francs "for the loss of social security coverage more advantageous than the national scheme". He also claims 250,000 francs in costs.

C. Eurocontrol replies that it did give proper reasons for the decision of 23 December 1998. The interview board did not contradict the Selection Board's findings but refined its assessment of the complainant. The Agency concedes that the letter of 23 December was inappropriately worded but points out that "the Director General did sign" the letter of appointment, of which it produces a copy. It denies that the interview board made an obvious error of judgment or added to the selection criteria and points out that internal candidates are given preference only if they are as well qualified as external ones. The results of the complainant's tests were less good and the interview had revealed serious shortcomings. Eurocontrol acknowledges that it was bound to look for another post for the complainant following the cancellation of his first appointment, but not to the detriment of its own interests. It denies abuse of authority and breach of good faith.

Noting that the complainant's monetary claims are related to his third and fourth complaints and not the present one, Eurocontrol responds with the same arguments as it put forward in Judgment 2034.

D. In his rejoinder the complainant contends that, in view of the position he was in, Eurocontrol ought to have taken particular care in substantiating its decision. He accuses the Agency of inconsistency: it is now attempting to minimise the importance of the Selection Board's findings yet it took them as the basis for its decision to cancel his appointment to the post he held at the Institute. He presses his plea that the interview board's conclusions contradicted those of the Selection Board and asserts that he had no difficulty in answering the few technical questions put to him at the interview. He observes that his application for another post was also rejected. He asserts that the Joint Committee for Disputes failed to examine all the pleas he made in his internal complaint.

The complainant increases his monetary claims to a total amount of 118,266,453 Luxembourg francs.

E. In its surrejoinder the Agency submits that the complainant may not challenge any decisions subsequent to the filing of his complaint, such as the rejection of his application to another post. It observes that the Joint Committee for Disputes, which is an advisory not a judicial body, noted that it had already dealt with many of the complainant's arguments in the context of earlier internal complaints.

F. In her observations Mrs B. states that she accepted the appointment in good faith and asks to be protected from any injury if Mr Boivin's complaint succeeds.

CONSIDERATIONS

1. Facts relevant to the disputes between the parties are to be found in Judgments 1768 (*in re Bodar*), 1870 (*in re Boivin*) and 1899 (*in re Boivin No. 2*) and in Judgment 2034, delivered this day, in which the Tribunal ruled on Mr Boivin's third and fourth complaints.

The salient points are as follows. The complainant was appointed to a post as expert at the Institute of Air Navigation Services in Luxembourg. That appointment was quashed having been challenged by another staff member. His second appointment, as Head of the Accountancy and Personnel Office having also been challenged, the complainant applied on 11 June 1998 for a post as "expert - financial analyst" in the Finance Directorate.

On 21 September 1998 he was informed that, on the strength of his professional qualifications and experience, the Selection Board had put him on the short list at its meeting of 16 September.

On 25 September he attended an assessment session, which was the next phase of the competition and consisted of a number of tests, which he passed. He was accordingly invited to take part in the final phase of the selection procedure: an interview carried out by a board comprising four members of the Finance Directorate, including the Director. The interview took place on 7 December 1998.

On 23 December the complainant was informed that in its report, which it had drawn up on 15 December following the last phase of the competition, the interview board recommended appointing not the complainant but another candidate - Mrs B. - "whose profile was best suited to the requirements".

That decision came after the one of 10 November 1998 to cancel the complainant's appointment as Head of the Accounting and Personnel Office on grounds of a procedural flaw, and after the Selection Board's decision of 22 December 1998 not to put him on the short list for that post (see Judgment 2034).

2. On 16 March 1999 the complainant lodged an internal complaint against the rejection of his application for the post of financial analyst. In its opinion of 5 August 1999 the Joint Committee for Disputes recommended rejecting the complaint. The Director of Human Resources endorsed the recommendation on the Director General's behalf and so informed the complainant in a letter of 9 August 1999.

That is the decision that the complainant is now impugning in this complaint lodged on 8 November 1999.

3. He asks the Tribunal, among other things:

"Before ruling: to order ... the hearing of witnesses ...

In the first instance:

... to award him compensation for all injury of all kinds and from all sources, be it past, present or future, known or as yet unknown, arising from the rejection of [his] application ... for the post of financial analyst and the subsequent termination of [his] career and the various consequences and situations that it ... will cause."

The Tribunal need not entertain all eight of the complainant's pleas. It will examine only those that are material to the purpose of this complaint, which is to challenge the rejection of his application for the post of financial analyst.

As the Agency rightly points out, the complainant may not impugn in the present proceedings any decisions taken since he filed his complaint.

4. The complainant submits that the Agency was in breach of Article 25 of the Staff Regulations because the decisions to turn down his application and to reject his internal complaint were not properly substantiated as that Article requires. He refers, in particular, to the second paragraph which reads as follows:

"Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

Eurocontrol replies that it based its decision to turn down his application on valid reasons, that there were documents such as the reports of the selection and interview boards giving more detailed explanation and that, in any event, the subsequent internal complaint and the reply of 9 August 1999 gave it the opportunity to enlarge on the initial reasons.

According to the case law, when the result of a competition is announced and, more broadly when, as here, a choice is made between candidates the reasons for the choice need not be notified at the same time as the decision (see Judgment 1787, *in re* Gramegna, under 5).

The conclusion is that all the relevant information was given to the complainant later. Before coming to the Tribunal he had full particulars of the results of the competition. His plea of inadequate substantiation therefore

fails.

5. He further pleads that the Agency acted in breach of Article 30(2) of the Staff Regulations and Articles 5 and 7 of Rule of Application No. 2 in that the interview board contradicted the Selection Board's decision that the complainant fulfilled the requirements of the notice of competition. The plea is devoid of substance. There is no evidence that the interview board disregarded the Selection Board's decision regarding the short list. The interview board was set up pursuant to the first paragraph of Article 7 of Rule No. 2 which says:

"The Director General shall select from this list the person(s) he appoints to the vacant post(s). The selection shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned."

The interview board merely selected the successful candidate from the short list established after the preliminary phases by the Selection Board, and did not call into question the latter's conclusions.

6. The complainant submits that there was an obvious error of judgment in that his qualifications did indeed meet the requirements in the notice of competition.

The plea fails. There is no evidence that the interview board made a clear mistake of assessment. Its job was to facilitate selection of the successful candidate by carrying out direct interviews and thus refining and completing the information gleaned from the examination of the selected candidates' qualifications, taking into account the general criteria set in the notice of competition and the results of their tests.

Nor does the complainant prove that the interview board added criteria which were not in the notice of competition.

7. The complainant alleges that by appointing an external candidate in preference to an internal one the Agency infringed Articles 30 and 31 of the Staff Regulations.

Those articles 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."

The Tribunal finds no breach of those articles. There 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 do establish a preference for internal applicants, it comes into play only in the event of the candidates being equally qualified, bearing in mind that according to Article 27 of the Staff Regulations "Recruitment shall be directed to securing for the Agency services of officials of the highest standard of ability, efficiency and integrity ...". Furthermore, the Agency's observations show that it did take account of the complainant's specific position.

The plea therefore fails.

8. The complainant contends that the Agency used the procedure for filling the post of financial analyst for unlawful purposes, namely to exclude him from the management of the Agency which, he says, amounts to an abuse of authority.

The Agency rightly points out that abuse of authority may not be presumed but must be borne out by relevant and clear evidence that the impugned decision was taken for purposes other than the ones stated.

The process for filling the post of financial analyst was proper and fair to all candidates including the complainant. Furthermore, it is plain on the evidence that the only reason for not appointing the complainant was the interview board's negative opinion of him. Since the complainant offers not a shred of evidence to support his allegation of abuse of authority, the plea fails.

9. The complainant pleads breach of the rules of good faith and the duty of international organisations to treat their staff with respect, in that he was confronted with a *fait accompli* in which he had had no say.

He submits that the decision not to appoint him to the post of financial analyst was detrimental to his rights and legitimate interests because the rejection of his application led to his dismissal. The Agency therefore ought to have informed him "that it had no intention of appointing" him and also to have allowed him to express his views and defend his interests in the context of the appointment procedure before he was dismissed. Instead it confronted him with a *fait accompli*.

The Tribunal observes that the complainant is merging the present issue with his dismissal following the quashing of his earlier appointments on grounds of procedural flaws, whereas the purpose of this complaint is to challenge the decision to reject his application for the post of financial analyst that was to be filled by way of competition.

As the Tribunal stated above, it may not entertain pleas which are immaterial to the complaint under examination.

As to the competition process for the post of financial analyst, nothing in the evidence suggests that the complainant was treated differently from the other candidates. He was properly informed of the results of the examination of his qualifications, tests and interview. He was eliminated at the last stage of the competition because of the interview board's assessment of his performance. There is no evidence that at any stage of the competition process the Agency acted in breach of good faith or of its obligation to treat him with respect. The plea therefore fails.

10. The complainant alleges an error of law or of fact in the consideration of his internal complaint by the Joint Committee for Disputes and the decision to reject it.

He submits that not all the pleas put forward in his internal complaint were considered and it is not clear whether the Committee examined his arguments in accordance with the adversarial principle.

The plea cannot succeed. The Joint Committee for Disputes is not a judicial body but an advisory body whose opinions are not binding on the Director General, as stated in Article 1 of the annex to service note No. 6/95 of 1 March 1995 creating the Joint Committee for Disputes.

Furthermore, the principle of adversarial proceedings was observed: in his internal complaint and related submissions the complainant was able to put forward his views to the Committee; and he has had ample opportunity to enlarge on them in his complaint to the Tribunal.

The plea therefore fails.

11. For the above reasons, the Tribunal cannot allow his plea that the Agency committed an error of law or overlooked essential facts by not taking account of the need to reinstate him.

His arguments on that score are not relevant to the purpose of this complaint.

12. It follows that the complaint must be dismissed, there being no need for a hearing of witnesses.

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 Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet