

## NINETY-FIRST SESSION

***In re van der Kraan (No. 3)***

**Judgment No. 2060**

The Administrative Tribunal,

Considering the third complaint filed by Mr Pieter van der Kraan against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 September 2000, the Agency's reply of 8 December 2000 together with the observations supplied by Mr R. at the Tribunal's request, the complainant's rejoinder of 9 March 2001 and Eurocontrol's surrejoinder of 20 April 2001;

Considering Article II, paragraph 5, 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 dispute are to be found under A and E in Judgment 2005 of 31 January 2001 in which the Tribunal ruled on Mr van der Kraan's second complaint. That complaint challenged the implied rejection of an internal complaint in which he objected to the Agency's refusal to put him on the short list for a post he had applied for. In this complaint he is impugning the Director General's express rejection of his internal complaint notified to him in a memorandum of 8 June 2000 from the Director of Human Resources.

B. The complainant's first plea is that the Agency should have cancelled or withdrawn the implied rejection of his internal complaint before going to the Joint Committee for Disputes. But it did not - in all likelihood because it feared that there would be repercussions on the decisions to turn down his application and appoint Mr R.

He goes on to observe that he was not given the documents relating to the Selection Board's proceedings. Deeming them to be essential to determining the lawfulness of the rejection of his candidature and Mr R.'s appointment, he asks the Agency to produce them.

Citing the case law, he points out that the attributions of a selection board are limited: in a competition based on paper qualifications, it will base its selection on the candidates' qualifications, not their competence. It will assess only whether they are technically capable of performing the requisite duties and not whether they are individually suited to a management job. In this case the Selection Board "encroached on the attributions of the service concerned and the Director General" by finding that the complainant was less suited to a senior management position than other candidates. The complainant also alleges a clear error of judgment: his paper qualifications were more than sufficient to warrant his inclusion in the short list.

Lastly, he pleads serious material injury: his career has been impaired because he has lost the chance of promotion to the vacant post, and the injury is the more serious as that promotion was the best opportunity he had for ending his career at grade A3. He also alleges moral injury, caused by "a feeling of frustration and injustice" and the affront to his professional dignity.

He again asks the Tribunal to quash the Selection Board's decision "to leave him off the list of suitable applicants [for the post he was seeking] and not to retain him for the final selection process". He also claims the quashing of Mr R.'s appointment to the same post and of the impugned decision. Lastly, he claims moral and material damages and costs.

C. In its reply the Agency first points out that the fact that the complainant's internal complaint was not put to the

Joint Committee for Disputes in a timely manner does not mean that it is bound to succeed, or in other words that both the rejection of the complainant's candidature and Mr R.'s appointment must be quashed.

Secondly, it observes that, though it is not common practice to disclose the records of a selection board's proceedings, it has decided in this case to produce the Board's full report as an attachment to its reply. There was nothing improper about the proceedings since the Board is competent to eliminate any applicants who fall short of the requirements set in the notice of competition, and in this case consideration of managerial qualifications did fall within the Board's attributions. Besides, the Agency never intended to limit the Board's job to an assessment of applicants' technical qualifications on paper. What is more, the members of the Board were particularly well qualified to make an assessment untainted by any obvious mistakes: the complainant was not up to the required standard in terms of "Good interpersonal skills including communication and negotiation at a senior level in a multicultural environment", which is why his application did not succeed.

Lastly, the decision to leave him off the list of suitable candidates showed no flaws, so he has no grounds for claiming compensation on that score. The only injury for which he may rightly seek redress is the moral injury caused by the Agency's improper treatment of his internal complaint. But that has largely been offset by the Director General's decision to resume the internal proceedings at the stage from which they became flawed, by submitting his case to the Joint Committee for Disputes.

In his observations Mr R. states that he took part in the competition and accepted the offer of employment in good faith. He stresses that the complainant cast no doubts on his ability to fulfil the requirements in the notice of competition. He seeks protection from any injury should the Tribunal find the selection process flawed.

D. In his rejoinder the complainant begins by noting that, the Tribunal having found in Judgment 2005 that the Agency was to be regarded as having revoked the implied rejection of the internal complaint, his plea concerning the prior withdrawal of that decision no longer has any purpose.

He submits that the Agency overlooked the fact that a selection board does not have "unqualified" authority to eliminate candidates. It may do so only in the admission phase of the competition and only by comparing the candidates' paper qualifications with those required by the notice of competition. In his view, the decision not to retain his application was not taken within the bounds of that qualified authority. He finds the Agency's statement that a selection board's job may not be limited to an assessment of candidates' technical qualifications on paper to be inconsistent with the case law.

He also alleges breach of equal treatment: the Board did not assess aptitude for management in the same way for external candidates as for internal candidates.

He maintains that the Board did misappraise the evidence or at any rate failed to account fully for its decision. He alleges that he was not informed of the exact reasons for his rejection until 8 June 2000. Lastly, the moral injury he sustained has not been compensated by the damages awarded in the context of his second complaint, because they covered only the injury caused by the Agency's failure to submit his internal complaint to the Joint Committee for Disputes.

E. In its surrejoinder Eurocontrol submits that, provided it makes no obvious misappraisal of evidence, a selection board has a "very large measure of discretion" in examining applications. In doing so, it must base itself on the criteria set in the notice of competition, and if they are essentially technical, it will examine the applicants' technical skills. If, on the other hand, the notice mentions management qualifications, the selection board will indicate whether, in its opinion, the candidates have such qualifications. It may go so far as to declare a candidate unsuitable. Eurocontrol denies any breach of equal treatment between internal and external candidates and maintains that it informed the complainant orally on 12 July 1999 of the reasons for not including him in the short list.

## CONSIDERATIONS

1. The facts that prompted this complaint are set out in Judgment 2005 (*in re van der Kraan No. 2*).

The complainant joined Eurocontrol in 1972 as an expert at grade A6. He currently holds an A4 post.

On 7 December 1998 Eurocontrol published a notice of competition for a post at grade A3 as Head of the Surveillance Unit for the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP), which in 1999 became the European Air Traffic Management Programme (EATMP).

The complainant applied. He was told by a letter of 7 May 1999 that his candidature had not been retained for the final selection phase. On 23 June 1999 he filed an internal complaint with the Director General requesting the quashing of that decision and the re-opening of the selection process. It went unanswered. He then went to the Tribunal challenging the implied rejection of his internal complaint. The Agency conceded in its reply that it had been wrong not to refer the case to the Joint Committee. It accordingly announced that it would do so and would re-open the procedure, which it did. In Judgment 2005 the Tribunal held that the Agency had by implication revoked the impugned decision and that the complainant therefore no longer had a cause of action. It nonetheless awarded him 1,000 euros in moral damages and 1,000 euros in costs.

On 25 May 2000 the Joint Committee for Disputes recommended rejecting the internal complaint. In a memorandum of 8 June 2000 the Director General endorsed that recommendation and expressly rejected the internal complaint. That is the decision the complainant is now challenging.

2. The complainant seeks the quashing of the Selection Board's decision to "leave him off the list of suitable applicants and not to retain him for the final selection process". He also seeks the quashing of Mr R.'s appointment - asking that he be protected from all injury - the quashing of the decision of 8 June 2000 to reject his internal complaint, moral and material damages, and costs.

In his rejoinder, submitted after the delivery of Judgment 2005, he makes only the following pleas. First, the Selection Board unduly "encroached on the competence both of the service concerned and of the Director General" by finding him less suited to be a "senior manager" than the other candidates, in breach of Article 30(2) of the Staff Regulations governing the officials of the Eurocontrol Agency, Article 6 of Rule of Application No. 2 and point 3 of office notice 25/94 of 8 December 1994. Secondly, he pleads breach of equal treatment in that the Board applied different rules in comparing the profiles of internal and external candidates with the requirements set in the notice of competition. Thirdly, the impugned decision shows a clear error of judgment or, at the very least, is not adequately explained.

Eurocontrol says that the Board did have the authority to eliminate any candidate who lacked the managerial skills specified in the notice of vacancy. Furthermore, all candidates were treated on a par. The members of the Board were aware of the complainant's strengths and aptitudes and did not overstep their discretionary authority in finding that he did not have all the managerial skills required.

In his observations Mr R. leaves it to the Tribunal to decide, but states that he meets the requirements set in the notice of competition - which the complainant does not contest - and accepted the appointment in good faith.

3.(a) The complainant rightly concedes that his earlier pleas concerning the Agency's failure to consult the Joint Committee for Disputes have been rendered devoid of substance by Judgment 2005.

(b) Similarly, his claim that he was not given access to the records of the Board's proceedings no longer shows a cause of action because the Agency produced the records as an attachment to its reply and the complainant was able to make unrestricted use of them in submitting his rejoinder. His right to a hearing was therefore observed in the course of the procedure (see Judgment 1815, *in re* Gutiérrez, and the precedents cited therein).

(c) The complainant seeks the quashing of the Board's decision not to place him on the list of suitable applicants.

Article VII(1) of the Tribunal's Statute requires the internal remedies to be exhausted. That means that the decision of the authority of last instance will be the one to be impugned before the Tribunal, which may order the resumption of any procedure prior to that decision when the latter is flawed.

The complainant's claims and pleas may be construed as challenging by implication the decision of the Director General, who is accused of failing to remedy the alleged flaws in the Board's procedure.

4. 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 (see amongst others Judgments 1990 (*in re Giordano*) under 6, 2020 (*in re Brilllet*) under 3, 2040 (*in re Durand-Smet No. 4*) and the others cited therein).

The complainant alleges a procedural flaw in the Board's proceedings.

Candidates who apply for a post to be filled by competition, whatever their hopes of success may be, are entitled to have their applications considered in good faith and in keeping with the basic rules of fair competition. An organisation must be careful to abide by the rules on selection and when the process proves flawed, the Tribunal will quash any resulting appointment, albeit on the understanding that the organisation must "shield" the successful candidate from any injury (see for example Judgments 1990 and 2020 and the others cited therein).

5. The complainant's first plea in his rejoinder is breach of:

- Article 30(2) of the Staff Regulations which says:

"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."

- Article 6 of Rule of Application No. 2, which states:

"After examining these files and establishing the criteria for its assessment of the candidates' qualifications, the Selection Board shall eliminate those candidates who do not meet the requirements set out in the notice of competition.

Where the competition is on the basis of qualifications, the Selection Board shall examine the qualifications of those candidates who satisfy the requirements set out in the notice of competition.

...

On completion of its proceedings, the Selection Board shall draw up the list of suitable candidates ... in order of merit and without distinction of nationality. Candidates of equal merit shall be classified '*ex-aequo*'.

This list shall be forwarded to the Director General, together with a reasoned report by the Selection Board including any comments its members may wish to make.

The proceedings of the Selection Board shall be secret."

- Article 7 of the same Rule of Application, according to which:

"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.

Where an appointment is made by promotion, the provisions of the Staff Regulations (Article 45) and Rules of Application concerning promotion shall apply."

- section 3 of office notice 25/94 amending Rule of Application No. 2 in 1994, which says in part:

"•All internal and external candidates are to be assessed by one Selection Board appointed for this purpose, which will draft a shortlist of candidates deemed suitable, distinguishing between internal and official candidates on the one hand and direct candidates on the other.

•Candidates shortlisted will be assessed by means of interviews, which may include tests, and or other assessment procedures. A recommendation of the most suitable candidate(s) will be made by the service concerned to the appointing authority."

The complainant alleges that the Board discarded his application without authority. It assessed his personal ability to perform managerial duties whereas, according to Eurocontrol's practice and the case law, it should have considered only his technical skills, leaving it to the relevant service - represented in this case by the Selection Committee - and the Director General to assess his personal abilities.

The Organisation retorts that the Board was competent to determine whether the technical and personal requirements set in the notice of competition were fulfilled. Furthermore, the members of the Board were entitled to draw on their personal knowledge of candidates, even in a competition based only on "paper qualifications".

(a) The precedents cited by the complainant bear out his assertion that the Agency's practice regarding the attributions of the selection boards - or at least its explanations to the Tribunal of such practice, has varied from one case to another. In Judgment 1689 (*in re Montenez No. 2*), in the light of the Agency's explanations the Tribunal held that the Selection Board was competent to consider only the candidates' technical qualifications whereas the Promotion Board - which must be consulted if promotion is involved - could examine their personal aptitude. The Tribunal held that the Promotion Board had not encroached on the Selection Board's competence by assessing the candidate's personal aptitude for management. In a later case in which managerial ability was one of the requirements set in the notice of competition, a candidature was discarded by the Board on the grounds that this criterion was not met; yet the Board's competence to so decide was not challenged (Judgment 1926, *in re de Riemaeker No. 5*). In yet another case, the Agency used the term "interview board" (made up of members of the relevant service) to refer to a second group of people responsible for considering applications and submitting a reasoned opinion to the Director General (see Judgment 2035, *in re Boivin No. 5*).

Eurocontrol's current practice and its explanations on the matter would not appear to be inconsistent with the provisions cited above. Article 6(1) of Rule of Application No. 2 does provide for the elimination of candidates who do not meet the criteria set in the notice of competition. In this case, the notice specified the following requirements:

"•Sound professional experience as a manager of surveillance projects with a good track record in staff management.

•Extensive knowledge of the existing civil surveillance sensors, data processing systems, surveillance analysis support tools as well as their planned evolution.

•Good appreciation of the organisation of air navigation services in Europe. Detailed knowledge of EATCHIP would be an asset.

•Good knowledge of either English or French and a working knowledge of the other. A knowledge of other ... European languages would be an asset.

Candidates should possess a university degree in a relevant subject or equivalent professional experience.

...

The jobholder will also be able to demonstrate other well developed managerial skills including:

•Good interpersonal skills including communication and negotiation at a senior level in an international, multicultural environment.

•Keen results orientation and cost awareness.

•Flexible management style based on diplomacy, teamwork and staff motivation.

•Strategic insight.

•Political and multicultural sensitivity.

Success in this job will be highly dependent on the:

- Establishment of good working relationships with external and internal parties.
- Initiative to set up innovative surveillance products and services responding to users' requirements.
- Quality and timely delivery of products and services."

So the Board was entitled to discard a candidate on the grounds that he failed to meet one of the specified requirements. Such a procedure is economical, enabling candidates with no chance of succeeding to be eliminated right at the start. At the same time it does not deny a candidate the opportunity to challenge a decision rejecting his application if in his opinion that decision is so flawed as to warrant setting it aside.

In the case at bar the notice of vacancy expressly subjected appointment to the candidate's fitness to perform managerial duties, so the Board was entitled to discard any application not measuring up to that requirement.

(b) The complainant makes a number of observations - which do not appear decisive to the outcome - on the different stages of the process to be followed by the Board in the light of what Article 6 of Rule No. 2 says about competition on the basis of qualifications. After the preliminaries, the Board should decide as to who is admitted to the competition, discarding applications that do not meet at least one of the requirements set. It should then go on to compare candidates solely on the basis of their paper qualifications. Only then may the members of the Board rely on their personal knowledge of candidates in order to assess their profiles with a view to establishing a short list. Citing the Agency's submissions, the complainant asserts that the Board discarded his candidature not at the admission stage or the comparison stage - in that it considered his application and gave him ratings - but later, and therefore encroached on the competence of the service concerned and of the Director General.

Although the above article indicates a logical order of operations, it must be construed with common sense and in the light of the interests to be protected. The Board must have the authority to ascertain - either on the strength of the applicants' files or from its members' personal knowledge of the candidates - whether some requirement in the notice of competition is not fulfilled, and discard a candidate on that ground even if it has already given consideration to whom it might include in the short list.

That being so, there is no need to determine whether the members of the Board ought to be allowed to draw on their knowledge of candidates at the beginning of the process, since if an applicant's file shows that one of the requirements is not met, any further consideration of the candidate's suitability serves no purpose.

In any event the Board did not overstep its authority.

6. The second plea of the complainant's rejoinder is that the Board infringed his right to equal treatment: there was discrimination between external and internal candidates - like himself - in that the procedure allowed for internal candidates to be eliminated on the strength of the Board members' knowledge of them. That was not the case for external candidates since the Board had not yet met them.

As the complainant observes, the right to equal treatment requires that situations which are dissimilar be governed by rules that take account of the dissimilarity. In applying that principle the appointing authority has considerable margin for manoeuvre, and the Tribunal will not interfere (see Judgment 1990).

In this case the decision which must observe the right to equal treatment is the final decision as to the choice of candidate for the post to be filled. Once the Board has carried out its phase of the selection process, the latter must be completed by an examination conducted by representatives of the service concerned, and then by the Director General's decision. At that stage the fact that members of the Board know them better can have negative as well as positive effects for internal candidates. Outside candidates still in the running can sit a test later to assess more precisely their technical and personal fitness for the post. Lastly, at the end of the process candidates who have been discarded can challenge their elimination and the appointment of the successful candidate.

The conclusion is that the process treated the different categories of candidates fairly and shows no breach of equal treatment. The plea therefore fails.

7. The complainant's third plea in his rejoinder is that there was a clear error of judgment or at any rate failure to state adequate reasons.

The gist of his arguments is that he is not incapable of performing the managerial duties of the post advertised. In support he cites his supervisors' excellent appraisals of him and the fact that he has already performed similar duties for Eurocontrol. He objects to the marks the Board gave him against the criteria applied to evaluate his managerial aptitude.

Though it recognises the complainant's worth the Agency maintains its assessment and choice. The post in question requires, as the notice of competition states, "Good interpersonal skills including communication and negotiation at a senior level in an international, multicultural environment; ... Flexible management style based on diplomacy, teamwork and staff motivation; ... Political and multicultural sensitivity." However, Eurocontrol submits that the Selection Board found that, although "a good project chief" the complainant did not have the makings of a head of Division "who needs to bring together different views and people in order to obtain results"; that he was not capable of "motivating a large team ... in seeking balanced and sophisticated solutions and proposals"; and that he was "not sufficiently sensitive to multicultural and political aspects, to which a head of Division must pay the upmost attention".

(a) The complainant alleges that the decision not to shortlist him was not adequately explained. But the plea cannot succeed. Precedent has it that when an organisation informs candidates that they have been unsuccessful, it must take care not to harm their prospects. Moreover, in announcing the results of a competition and, more generally when the administration has to choose between several candidates, as here, the reasons for the choice need not be given at the same time as the decision. It is enough for the reasons to be given in some later procedure (see Judgments 1990 and 2035 and the others cited therein).

In this case the complainant's supervisor and other members of the Board explained to him at length the decision not to shortlist him. The Director General did likewise in his decision to reject his internal complaint. And in the course of the present procedure detailed explanations have been given to the complainant so that he can defend his case.

(b) The burden of proving that the appointing authority misused its discretion by choosing Mr R. rather than himself is on the complainant.

That means, essentially, that he must demonstrate that his own candidacy is of greater worth than that of the appointed candidate or at least of equal worth in the case of a competition between internal and external candidates (see Judgment 2020 and the others cited therein). But he has not even attempted such a demonstration.

Apart from technical skills, managerial duties often require interpersonal skills which candidates who may be technically good do not always have. Many are unaware of the fact and so have difficulty in accepting that they have been unsuccessful (see, for example, Judgments 1689, 1771 and 1926, *in re* Riemaeker Nos. 4 and 5, and 1982, *in re* Barret No. 3).

Performance appraisals, however good, are not decisive, because they are issued by the candidates' supervisors and not the appointing authorities and because they are not drawn up with a vacant post in mind or for the purposes of a competition to determine which of a number of applicants best qualifies for the job (Judgments 1827, *in re* Ochani, 1926 and 2040).

The Tribunal will not substitute its own assessment for that of the appointing authority. The explanations that the Agency has submitted are plausible. Although a conscientious staff member who has served the organisation well is bound to be disappointed, it cannot be inferred from the complainant's arguments that the impugned decision was based on reasons so mistaken as to amount to an abuse of Eurocontrol's discretionary authority.

8. The claim to compensation rests on the assertion that the Agency acted unlawfully.

As the complainant himself concedes, Judgment 2005 afforded relief for the injury caused by Eurocontrol's failure to consult the Joint Committee for Disputes.

He has failed to prove that the competition process was so flawed as to warrant being quashed.

The Agency caused him no injury. The fact that he was not chosen to fill the post was not a dishonour; there was nothing offensive in the way the Agency notified its decision; and the Selection Board's proceedings have remained confidential and have not been disclosed to third parties by Eurocontrol.

The complaint is therefore utterly devoid of merit.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2001, 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 12 July 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet