

NINETY-THIRD SESSION

Judgment No. 2157

The Administrative Tribunal,

Considering the sixth complaint filed by Mr P. G. L. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 January 2001 and corrected on 22 March, the Agency's reply of 22 June and the comments provided by Mr A. at the request of the Tribunal on 4 December 2001;

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

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

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

A. Information on the period during which the complainant was in the service of the Agency and on the related disputes is contained in Judgment 2034, on his third and fourth complaints, delivered on 31 January 2001.

On 1 October 1999 Eurocontrol published a notice of competition for a post of expert in resource management. By a letter of 22 November, the complainant wrote to the Director General of Eurocontrol requesting, as his principal claim, his reinstatement into the Organisation in this post and the re-establishment of his career. Subsidiarily, he sought the suspension of the selection procedure while awaiting the judgment of the Tribunal on his third and fourth complaints and applied for the above post as both an internal and an external candidate. The Head of the Recruitment, Selection and Staff Development Section (hereinafter "the Head of Recruitment") replied to the complainant on 1 December that, as he was no longer employed by the Agency, he would only be considered as an external candidate. On 14 December the Director of Human Resources informed him that his request for reinstatement was "irreceivable because its purpose was related to that of earlier actions pending before the Tribunal" and that his complaints to the Tribunal had no suspensory effect. On 17 December 1999 the complainant filed an internal complaint against the decisions of 1 and 14 December.

On 21 January 2000 the Head of Recruitment informed him that he had been included on the list of suitable candidates, but that only those at the top of the list (by order of merit) would be invited to take part in the subsequent stages of the selection procedure. He had been placed lower down the list. On 3 February the complainant sought further information. On 22 February the Head of Recruitment replied that he had been included in the most suitable group of external candidates but that, as priority was given to internal candidates, all the latter had been interviewed and tested before the external applications were evaluated. That evaluation, he added, was about to begin and he was invited to attend an interview on 15 March. On 4 April the Head of Recruitment informed the complainant of the rejection of his application.

In its opinion dated 25 May 2000, the Joint Committee for Disputes considered that the complainant's internal complaint had been submitted in error since he could not lodge one, as he was no longer a staff member of the Agency. By a letter of 9 June, the Director of Human Resources rejected his internal complaint on behalf of the Director General.

On 29 June the complainant filed an internal complaint against the decision of 4 April to reject his application. In its opinion dated 25 October, the Committee once again considered that, as the complainant was an external candidate, no internal complaint could be made against the rejection of his application. The Director of Human Resources rejected the internal complaint on behalf of the Director General in a letter of 31 October 2000. That is

the impugned decision.

B. The complainant has ten pleas. First, the notice of competition specifies that the initial appointment for a period of five years could be followed by an unlimited appointment, whereas the Agency had stated in its surrejoinder to his third and fourth complaints that this type of appointment did not exist in Eurocontrol. Secondly, insufficient reasons were given for the decisions to reject his application and then his internal complaint. Thirdly, there was a violation of the statutory regulations and rules since the "interview board" did not follow the list of suitable candidates drawn up by the Selection Board. Fourthly, an obviously mistaken conclusion was drawn since, he says, he met the requirements of the notice of competition.

Fifthly, the failure to take into account the obligation to reinstate (or compensate) him constitutes an error of law or a failure to take account of essential facts. This obligation is derived not only from the Tribunal's case law - which requires organisations to treat their staff members with respect, not to cause them unnecessary hardship and to protect them from any injury they might suffer from the cancellation of an appointment accepted in good faith - but also from a promise made by the Director General. The complainant says that he should have been given priority for the post and should not have been treated as an external candidate. Sixthly, the Agency should have given him the opportunity to express his views before appointing another candidate. Seventhly, when it rejected his application on 4 April 2000 without awaiting the opinion of the Joint Committee for Disputes or the decision of the Director General on his internal complaint of 17 December 1999, the Selection Board denied him justice and anticipated the rejection of the claim made in his internal complaint for reinstatement or to be given priority. Eighthly, the denial of his candidature as an internal one is an error of law or of fact. Ninthly, as the effects of his third and fourth complaints were in his view known at the time that the appointment was made, the Agency once again committed an error of law or of fact in refusing to take them into account. Tenthly, the notice of competition was unlawful since, in breach of the provisions in force, it did not indicate "the age limits and any extension of the age limit in the case of established staff".

The complainant contends that he suffered very serious moral and material injury. He requests the Tribunal to "set aside any decision covered by the present complaint with all the consequences that this involves for [his] administrative situation ... and the appointment of the selected candidate" and to order the payment of the "salary not received". Subsidiarily, he claims 113,734,473 Belgian francs in compensation for the harm to his career, 3,020,000 francs in material damages for the loss of a more favourable social security scheme for him and his family and 500,000 francs in direct material damages. He also seeks 3,000,000 Belgian francs in moral damages and 125,000 Luxembourg francs in costs.

C. In its reply, Eurocontrol argues that the complaint is irreceivable. It contends that the complainant is out of time to challenge, as he seems to be intending to do, the rejection of his claim for reinstatement dated 22 November 1999. His internal complaint of 17 December 1999 was rejected on 9 June 2000 and this final decision was not challenged within the time limits. Moreover, the issue of his reinstatement was decided by the Tribunal, which found in Judgment 2034 that it was "inadvisable". The present case is therefore confined to the rejection of his application for the post of expert in resource management. When the complainant applied for the above post, he was no longer a staff member and was rightly considered to be an external candidate. As a consequence, the Tribunal is not competent, *ratione materiae*, to hear the complaint.

Subsidiarily, Eurocontrol replies to the ten pleas. It admits first that unlimited appointments do not yet exist in Eurocontrol, but considers that nothing prevented it from informing candidates of this possibility, which would probably arise before the end of the first five-year appointment. Secondly, the decision to reject the complainant's application was supported by sufficient reasons in accordance with the Tribunal's case law, as it indicated that "the candidate with the profile most suited to the requirements of the post" had been selected. Thirdly, as the Tribunal indicated in Judgment 2035 - with regard to the rejection of the complainant's application for another post - 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". Fourthly, Eurocontrol acknowledges that the complainant met the requirements of the notice of competition, since he was classified as suitable by the Selection Board, but another candidate corresponded more closely to the desired profile.

In reply to the fifth and sixth pleas, it submits that, as in his fifth complaint which led to Judgment 2035, the complainant makes a connection with his dismissal following the cancellation of his previous appointments, whereas the purpose of the present complaint is to challenge the rejection of his application for a post of expert. Seventhly, the complainant's claim for reinstatement or priority of his candidature had been dismissed and this

decision did not need to be deferred or suspended in the light of the internal complaint he had filed. Eighthly, it would have been a clear error of fact and of law to have considered the complainant to be an internal candidate. Eurocontrol asserts that the complainant's ninth plea is totally irrelevant since the purpose of the third and fourth complaints was, among others, to determine whether his termination was lawful. Tenthly, the complainant was no longer an established staff member when he applied for the post and is not therefore concerned by the indications relating to this category of staff in the notice of competition.

Turning to the complainant's claims, Eurocontrol asserts that the issue of compensation for damages arising from his termination was settled in Judgment 2034, in which the Tribunal granted him the sum of 220,000 euros awarded *ex aequo et bono* for damages under all heads. Eurocontrol therefore calls upon the complainant to withdraw suit and, if he does not do so, asks him to be ordered to pay costs.

D. In the comments supplied at the Tribunal's request, Mr A., the selected candidate, indicates that he applied for the post, participated in the various phases of the selection process and then accepted the offer of appointment in good faith. He believes that he gives satisfaction in his employment and asks to be protected from any injury in the event that the Tribunal allows the present complaint.

CONSIDERATIONS

1. The complainant was employed by Eurocontrol from September 1995 to January 1999. His career at the Agency is recounted in Judgments 1768, 1870, 1899, 2034 and 2035.

On 1 October 1999 the Agency published a notice of competition for a post of expert in resource management. On 22 November the complainant applied both as an internal and as an external candidate. Eurocontrol told him on 1 December that since he was no longer in its employ it would consider only his external application. The latter was rejected on 4 April 2000.

On 29 June he lodged an internal complaint against that decision which was referred to the Joint Committee for Disputes. In its opinion of 25 October the Committee concluded that as an external candidate he could not challenge the rejection of his application. On 31 October 2000 the Director of Human Resources rejected the internal complaint on the Director General's behalf. That is the impugned decision.

The Agency asks the Tribunal to declare the complaint irreceivable, or else to dismiss it.

2. The Tribunal is competent, *ratione personae*, to hear the complaint since, under Article II, paragraph 6, of its Statute. The Tribunal is open to former staff members. However, Article II, paragraph 5, restricts the Tribunal's competence, *ratione materiae*, to complaints alleging non-observance of the terms of appointment of officials and of provisions of an organisation's staff regulations.

The complainant was separated from the Agency on 31 January 1999. Appeals against decisions to end appointments having no suspensory effect, and the Tribunal having found in Judgment 2034 that reinstatement was inadvisable, the complainant was no longer a member of Eurocontrol's staff when he applied for the post of expert in resource management.

3. Implicit in one of the complainant's pleas is the argument that under the terms of his appointment the Agency was still bound by a contractual obligation to reinstate him or to find him another post, but failed to do so.

Obligations arising out of a contract of appointment (see Judgment 1964) may, in some instances, have effects retroactive to the staff member's entry into service (see Judgment 1526, under 2, on parties' pre-contract duties), or after the staff member's separation from service, even on matters not expressly covered in staff regulations (see, among others, Judgment 2091, under 11 and 12, on post-separation implementation of earlier agreements, and Judgment 2102, under 10, in which the Tribunal noted that "the duty laid on international organisations to treat their staff with due consideration ... may extend beyond the term of their appointment").

As a general rule, a former staff member who applies for a post in an organisation after separation from it may not rely on the rules that governed his contract of appointment and so does not have access to the Tribunal (see, among others, Judgments 1845, under 10 and 1554, under 10). There are circumstances, however, in which an

international organisation may be required to help a staff member leaving its service to find a new job, even after separation, particularly if the notice served was short. Such is the case, for example, when a staff member has applied for a post while still serving but the application is processed after his separation.

Here, the complainant was informed by telephone on 14 January 1999 and in writing on 18 January that his appointment was to be terminated as from 31 January 1999. He applied for the post of expert in resource management on 22 November. There is no evidence that he sought the Agency's help at the time or that the Agency offered him its assistance in finding a new job.

In the absence of any special circumstances, it is doubtful that any contractual obligation the Agency may have had to help the complainant to find new employment was still in force when the latter filed his application. However, for the reasons given below the Tribunal need not rule on this point.

4. As stated in Judgment 2034, under 11, the complainant's reinstatement proved inadvisable because there was no suitable vacancy and the Agency had good reason to have lost confidence in him. The Tribunal sees no reason to rule otherwise in the present case.

Most of the complainant's objections are to the lawfulness of the procedure for filling the post for which he applied.

The Agency being under no contractual obligation to reinstate him, the complainant may not cite breach of his contract of appointment and has no *locus standi* before the Tribunal.

5. The Agency asks the Tribunal to award costs against the complainant.

The Tribunal sees no grounds for allowing the claim. The conclusion is that, in view of all the facts that prompted the dispute, together with the fact that the complainant had not yet seen Judgment 2034 when he filed his sixth complaint, the Tribunal will reject the Agency's counterclaim.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Agency's counterclaim is dismissed.

In witness of this judgment, adopted on 15 May 2002, 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 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

