

SEVENTY-SEVENTH SESSION

***In re* CASSAIGNAU (No. 3)**

Judgment 1358

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 August 1993, Eurocontrol's reply of 18 November 1993, the complainant's rejoinder of 1 February 1994 and the Agency's surrejoinder of 22 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 30 and 92 of the Staff Regulations governing officials of the Agency;

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. As is stated under A in Judgment 1357 (in re Cassaignau No. 2) also delivered this day, the complainant is a grade A5 expert in Eurocontrol's Institute of Air Navigation Services at Luxembourg.

In September 1992 there began reforms of the Institute. By a notice of reassignment dated 22 December 1992 the Director General informed the Institute's staff of the new structure and of their place in it: from 1 January 1993 three departments which had been sharing responsibility for training and maintenance - known as L1, L2 and L3 - were to make up two new units, the Training Division and the Systems Bureau. The notice said that the former head of L2, Mr. J. Watson, who was a principal expert at grade A4, was to go to the Systems Bureau but it did not explain what he was to be doing there. The complainant was to go, still at grade A5, to the Training Division's subdivision for training policy.

In a notice also dated 22 December 1992 the Director of the Institute informed staff that the head of L3, Mr. J. Sondt, another principal expert at grade A4, was to retire on 1 March 1993 and that Mr. Watson would be taking over as head of the Systems Bureau as from 1 January 1993.

On 26 March 1993 the complainant challenged "the decision to appoint" Mr. Watson as head of the Bureau, saying he had not got notice of it until 8 January 1993. By a decision of 7 May 1993, which he is impugning, the Director General rejected that internal "complaint" as time-barred and disclosing no cause of action.

B. The complainant observes, first, that in the notice of reassignment dated 22 December 1992 the Director General merely announced Mr. Watson's move to the Systems Bureau without saying he was to be head. It was not the Director General as appointing authority, but the Director of the Institute, who on the same day gave staff news of that appointment. The Director General offers no evidence of the date of the decision to make Mr. Watson head of the Bureau or of the date at which the complainant got notice of it. So Eurocontrol was wrong to plead the time bar against his internal appeal.

His second plea is breach of the procedure for filling vacancies and in particular of Article 30(2) of the Staff Regulations which reads as follows:

"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 appointing authority 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."

In the complainant's submission rule-makers and case law alike acknowledge that international civil servants have a "right to career advancement", a basic principle that fetters an organisation's discretion in filling vacancies. So Eurocontrol has a duty to inform staff of any vacancies and to convene a selection board to recommend transfer or promotion. Here it failed both to issue a notice of vacancy and to consider any applicant but Mr. Watson. His appointment to the more responsible post, which was in breach of the rules cited above, shows flagrant misappraisal of the evidence, the worse for his having neither the qualifications nor the experience required.

The complainant seeks the quashing of the decision of 7 May 1993 confirming Mr. Watson's appointment as from 1 January 1993 as head of the Systems Bureau; the resumption of the process of selection for the post in keeping with the Staff Regulations; and costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable on two counts.

First, Article 92(2) of the Staff Regulations says that a "complaint" must be lodged within three months of the date of publication of any measure "of a general nature". In this case the three months started on 22 December 1992, when Eurocontrol issued the decision, not on 8 January 1993, when the complainant says he got notice of it. Since he did not file his "complaint" until 26 March 1993 it was time-barred and he has therefore failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

Eurocontrol's second objection is that Mr. Watson's move to the Bureau was neither promotion nor transfer within the meaning of the Staff Regulations but just a matter of internal organisation that did not affect the complainant adversely.

On the merits the Organisation points out that career advancement is governed by specific provisions of the Staff Regulations, not by the abstract notions the complainant is relying on. For him to win promotion to A4 there would have had to be a vacancy within the meaning of the Staff Regulations. But the notice of 22 December, far from creating a new post, was confined to mere reorganisation. Mr. Watson kept the same budgetary post and the same grade - A4 - even though his duties were somewhat changed. The new Systems Bureau is not a division. The complainant, who had a lower grade, could not have competed with Mr. Watson, who, moreover, had the experience his new duties required.

D. In his rejoinder the complainant maintains that his complaint was filed in time against the individual decision of 7 May 1993 confirming Mr. Watson's appointment as head of the Systems Bureau. Eurocontrol never gave him notice of the decision to appoint Mr. Watson nor, so far as he knows, has it ever published that decision. The notice of 22 December 1992 from the Director of the Institute has no legal force since the Director is not the appointing authority. Though the notice of reassignment of even date did come from the appointing authority it was provisional and was not "an act adversely affecting him".

The Institute's new organisation chart and the Director's minute of July 1992 show that the Bureau is to become a division. So Mr. Watson was indeed transferred to a new post and was taking over from Mr. Sondt, though the Administration did not so much as issue a notice of vacancy or convene a selection board. That was unlawful.

Inasmuch as the complainant was a "head of section" before the reforms it was unfair to take responsibility away from him, especially when his latest performance appraisal says he is fit for promotion to A4.

E. In its surrejoinder the Organisation maintains that the complaint is irreceivable: moving Mr. Watson was part of the general decision of 22 December 1992, not an individual decision altering the complainant's position in law. His "complaint", which was filed on 26 March 1993 - over three months after Eurocontrol had issued the general decision - was therefore out of time. In any event, though entitled to challenge his own reassignment, he might not object to someone else's.

Mr. Watson's reassignment was, the Agency repeats, neither promotion nor transfer and the complainant may not demand a process of selection to fill a post that is not vacant. Not until Mr. Sondt actually retired, on 1 May 1993, was there a vacant post for a principal expert at the Institute, and the Administration announced it on 27 March 1993 in notice LX-93-AT/091. At the time of Mr. Watson's reassignment there were no vacant posts at grade A4. So the complainant is wrong to object to what was merely a question of internal organisation.

CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services at Luxembourg. He is challenging the appointment of Mr. J. Watson as head of the Systems Bureau that reforms of the Institute engendered.
2. The reforms took effect on 1 January 1993. They consisted in the merger of three training departments into two units, a Training Division and a Systems Bureau, and in reassignment of staff, each with the same post as before, within the new structure. A general notice of reassignment dated 22 December 1992 so informed the officials affected.
3. One effect of the reforms was to put the complainant, still at grade A5, in a subdivision of the new Training Division. The head of the new Systems Bureau was Mr. Watson, an A4 official who had been in charge of one of the old training departments.
4. The complainant argues that the Administration should have declared the post as head of the Bureau vacant and applied the ad hoc procedure prescribed in the Staff Regulations for filling it so that he might have stood a chance of promotion.
5. Eurocontrol objects first that the complaint is irreceivable because his internal "complaint" was time-barred: he filed it on 26 March 1993, three days late, against a decision announced on 22 December 1992. Moreover, says Eurocontrol, there was no act that adversely affected him since what he is objecting to, his own reassignment and that of Mr. Watson, were merely transfers of budgetary posts and did not involve creating new ones or filling any vacancies. So, it submits, there was no question of transfer or promotion within the meaning of the Staff Regulations.
6. The issue of receivability turns on the substantive one the complainant has raised. Whether he filed his internal appeal in time and whether there was any act that affected him adversely are questions that hinge on the thrust of the impugned decision in law. Should the reforms of the Institute have entailed the issue of vacancy notices and the process of selection the Staff Regulations prescribe?
7. On that score the Organisation is quite right. As was said in 2 above, the reforms it introduced on 1 January 1993 consisted in a reorganisation by means of reassignment of staff together with their posts in the context of a new structure but without the creation of any new posts. The reforms may have altered the position of some in the hierarchy and their duties but, being brought about by transfer of their posts, did not affect their status under the Staff Regulations.
8. So the complainant is mistaken in pleading that the Agency should have held a competition to fill the vacancy as head of the Systems Bureau.
9. The conclusion is that the complainant, who was reassigned with due regard to his rights under the Staff Regulations, shows no cause of action in objecting to his own position, let alone to the appointment of someone else as head of the new Bureau.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas
P. Pescatore
Michel Gentot
A.B. Gardner

