

**SEVENTY-EIGHTH SESSION**

***In re* CLARK**

**Judgment 1396**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Iris Elfi Clark against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 2 March 1994, Eurocontrol's reply of 9 June, the complainant's rejoinder of 21 September and the Organisation's surrejoinder of 4 November 1994;

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. On 8 December 1992 Eurocontrol's Institute of Air Navigation Services at Luxembourg issued a "vacancy notice/notice of competition", No. LX-92-CA/160, for a secretary/shorthand typist at grade C2/C3. Under the title "additional information" the notice said that an external applicant might be appointed at grade C4 or C5 with due regard to the applicant's qualifications and experience and to earlier similar appointments.

On 10 March 1993 the complainant, a German citizen who was born in 1964, made an external application for the vacancy. On 3 August 1993 the Director of Personnel sent her an offer and a letter of appointment which said that she was to be granted step 3 in grade C5 as from 1 September 1993. On 6 August she wrote to the Director unreservedly accepting the offer and sending back the letter of appointment duly signed.

By an "act of appointment", signed by the Director on 31 August on the Director General's behalf, she was assigned under those terms to the Training Division. That is the decision she impugns. On 6 December 1993 she lodged an internal "complaint" under Article 92(2) of the Staff Regulations against the "act of appointment" insofar as it put her at grade C5/3.

In a probation report of 22 December 1993 her reporting officer rated her performance "excellent" and proposed giving her a permanent appointment.

By a decision of 28 February 1994 the Director of Personnel rejected her "complaint" on the Director General's behalf.

B. The complainant cites rulings by the Court of Justice of the European Communities that an official's legal relationship with the administration are governed by staff regulations and not by contract. In her submission Eurocontrol has introduced in its Staff Regulations provisions "akin to those that govern public service in the Communities". So an appointment at Eurocontrol - she argues - must be the result of a unilateral decision by the Administration, and the letter of appointment of 3 August 1993 is just a temporary decision that cannot bind the signatories, especially if it offends against the Regulations. The final challengeable decision is the "act of appointment" of 31 August 1993.

First, Eurocontrol failed to comply with the specifications in the vacancy notice of 8 December 1992. The notice advertised a post for a secretary and shorthand typist at grade C2/C3. The Selection Board found that she had all the qualifications the notice required. By disregarding the Board's opinion and appointing her at a lower grade Eurocontrol clearly misappraised the facts.

It also acted in breach of Article 7 of the Staff Regulations:

"The appointing authority shall, acting solely in the interests of the service, assign each official by appointment or

transfer to a post in his category or service which corresponds to his grade. ..."

By presuming to appoint external applicants at a grade lower than that of the post Eurocontrol is drawing an unlawful distinction between them and internal candidates.

Thirdly, Eurocontrol has failed to meet its obligation under the second paragraph of Article 25 of the Regulations to account for its decision. That obligation is fundamental to the law of the international civil service and discharge of it allows proper review by the Tribunal.

The complainant seeks the quashing of the decision of 31 August 1993 to appoint her at grade C5, step 3, and an award of costs.

C. In reply Eurocontrol cites Judgment 1307 (in re Meyer) in support of its plea that the complaint is irreceivable. The complainant made no reservations on signing the letter of appointment. Article 28(g) of the Staff Regulations states that: "an official may be appointed only on condition that: ... he accepts, in writing, the terms of a letter of appointment". So the essence of relations between the complainant and Eurocontrol is contractual and the reference to the European Communities is immaterial. The impugned decision is mere confirmation of the letter of appointment. In any event the internal "complaint", though it challenged the "act of appointment" of 31 August, was lodged after the time limit of three months in Article 92(2). Lastly, the complainant went to the Tribunal before the four months prescribed for reply by Article 92(2) had expired. Her internal "complaint" was rejected by a decision of 28 February 1994 of which she was apparently unaware when she filed this case. She was given a permanent appointment at grade C5, step 3, by another decision of the same date.

Eurocontrol's pleas on the merits are subsidiary. It denies disregarding the specifications in the notice of vacancy of 8 December. The notice stated that external candidates could be appointed at grade C4/C5; so it was for the appointing authority, not the Selection Board, to decide on grade and step.

There was no breach of Article 7 of the Regulations. The post was advertised at C2/C3 because that is how it is graded in the budget. But it was lawful to appoint the complainant at the basic grade - C5 - that corresponds to the post she was recruited on.

he "act of appointment", which reproduced the terms of the letter of appointment she signed, did not affect her adversely and therefore required no explanation. Besides, had she waited for a reply to her internal "complaint" before going to the Tribunal, she would have found out the reasons for rejection, which are set out in the decision of 28 February 1994.

D. The complainant presses her pleas in her rejoinder. She contends that Judgment 1307 is irrelevant and that her complaint is receivable: the letter of appointment, not being signed by the Director General, was not a challengeable decision. Furthermore, Eurocontrol disregarded the principle that an official may be appointed only on the terms prescribed in the Staff Regulations.

E. In its surrejoinder Eurocontrol maintains that since the complainant's acceptance of its offer of 3 August 1993 bound her in contract her complaint is irreceivable. The offer was quite properly signed by the Director of Personnel, the Director General having delegated to him authority to sign any offer of employment save at grade A2 or A3.

#### CONSIDERATIONS:

1. After competition and by a decision that the Director General of Eurocontrol took on 31 August 1993 the complainant was appointed as from 1 September 1993 to a post at step 3 in grade C5 as a typist. On 6 December she filed a "complaint" against that decision insofar as it put her at C5/3. She contended that in view of her training and experience that grade did not square with the one offered in the vacancy notice/notice of competition issued on 8 December 1992 for a secretary of division, namely C2/C3. Inferring rejection from Eurocontrol's silence, she lodged this complaint on 2 March 1994 seeking the quashing of the decision of 31 August 1993.

2. Eurocontrol raises two objections to receivability. One is that the complainant filed over three months after the date of the challenged "act of appointment", which was mere confirmation of the letter of 6 August 1993; the other, that she may not renege on the formal acceptance of her grade in her signature of that letter, which constitutes a contract.

3. The post that Eurocontrol offered her was put up for competition by a notice of 8 December 1992 announcing a vacancy for a secretary/shorthand typist at grade C2/C3. The notice set out the duties of the post and the qualifications required and went on to say that an outside candidate would be appointed on the strength of qualifications and experience and in line with earlier similar appointments and might be granted C4 or C5.
4. The complainant having been chosen, the Director of Personnel sent her on 3 August 1993 an offer of employment to a "post of Typist 2nd class (Secretary - Subdivision training policy) grade C5, step 3" and gave details of pay. Appended were four copies of a letter of appointment she was asked to sign and return if she accepted the offer. The starting date was to be 1 September 1993.
5. In a letter of 6 August 1993 the complainant said she accepted the Eurocontrol's offer of 3 August and she sent back the four copies of the letter of appointment duly signed. On the Director General's behalf the Director of Personnel added his own signature and signed the decision appointing her at step 3 of grade C5 as from 1 September 1993.
6. She duly completed the period of probation prescribed in her contract and on 22 December 1993 was recommended for a permanent appointment. On 6 December 1993 she had filed an internal "complaint" against the decision to grant her grade C5. She argued that the post she had competed for in accordance with the notice was graded C2/C3. Eurocontrol having failed to answer, she has appealed to the Tribunal against the decision of 31 August 1993 insofar as it put her at step 3 in C5.
7. Her complaint is irreceivable. It appears from the evidence as set out above, that though the offer was of a C2/C3 post that post might be filled at C4 or C5, and that she accepted the offer, before being actually appointed, both by her answer to it and by signing the letter of appointment. She thereby surrendered her right to challenge ex post facto any clause of the contract of service which she freely consented to and which was the prerequisite of her becoming a Eurocontrol official.
8. So it is plain that even supposing her internal "complaint" were in time she could not properly challenge the "act of appointment".
9. Her complaint being irreceivable, her claim to costs fails.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas  
E. Razafindralambo  
P. Pescatore  
A.B. Gardner