

SEVENTIETH SESSION

In re RENDALL

Judgment 1074

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jeffrey Claud Rendall against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 January 1990 and corrected on 5 February, Eurocontrol's reply of 26 April, the complainant's rejoinder of 23 May and the Organisation's surrejoinder of 26 July 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 40, 91 and 92 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a British subject who was born in 1932, was appointed to the staff of Eurocontrol in 1972. He was an electronics technician at grade B3 and did shift work in the Maintenance Division of the Organisation's Centre for air traffic control at Maastricht, in the Netherlands. On 20 February 1978 he wrote to the head of the Division to say that for reasons of health he wanted to be taken off shift work. He was not.

Article 40(1) of the General Conditions of Employment of staff at the Centre provides that "An established servant may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds".

At his request the complainant was granted such leave for one year, from 22 October 1979. On 12 August 1980 he applied for and was granted under Article 40(2) extension of the leave up to 31 December 1980.

Article 40(4)(d)*(*The provision is numbered 40(3)d) in the French version.) reads:

"on the expiry of his leave a servant must be reinstated in the first post corresponding to his grade which falls vacant in his category or service [provided] that he satisfies the requirements for that post."

By a letter which he sent from England on 21 October 1980 the complainant applied for reinstatement as from 1 January 1981. In his reply of 14 November 1980 the Director of Personnel and Administration refused on the grounds that there was no vacancy in which he might be reinstated since he was not fit for shift work.

By a letter of 28 February 1982 the complainant again applied for reinstatement. The Director's reply of 18 March observed that on his own admission he was not yet fully fit and that he had not been qualified for the one vacancy announced since the end of 1980 because it had required shift work.

In a letter of 17 December 1983 to the Director-General the complainant said that he was fit again and able to do shift work and had learned that there were two vacancies at the Centre which would suit him. The Director answered in a letter of 3 January 1984 that there was no post corresponding to his qualifications, experience and grade and no such vacancy was foreseeable.

On 2 May 1989 he applied for a "grade A 5/6/7" post as an instructor in management. In a letter of 30 June 1989 the Head of Personnel informed him that his application had been unsuccessful and explained that pending reinstatement he was on leave on personal grounds but that "after a very long period of absence" it was becoming more and more doubtful whether he could ever be reinstated.

On 11 July 1989 he wrote to the Director-General alleging that over the years posts had fallen vacant for which he had been "more than adequately qualified" and that it had been "in breach of contract" not to appoint him to any of them.

Having got no answer, he filed his complaint on 12 January 1990.

B. The complainant observes that, the Organisation having failed to answer within four months his letter of 11 July 1989 setting out his case, he may infer in accordance with Article 91(2) of the General Conditions of Employment that his claims have been rejected and may challenge the implied rejection under Article 92.

As to the merits he submits that Eurocontrol has acted in breach of its duty under Article 40(3)(d) of the General Conditions by failing to reinstate him in any of the several suitable posts that have fallen vacant. Since he had already performed the duties pertaining to those posts he must have been qualified. One suitable vacancy, for an electronics technician in the Maintenance Division, was announced towards the end of 1980. There is no provision in the rules that gives serving staff members preference for appointment to vacant posts.

Moreover, although the complainant asked the Organisation - for example in letters of 2 May and 21 June 1989 to the Head of Personnel - to inform him of suitable vacancies as they arose so that he might apply for them, it failed to do even that.

He contends that Eurocontrol's letter of 30 June 1989 reveals its intention to discriminate against him "on the grounds of technical competence and age". That it refuses to reinstate him is clear from its doubting his technical ability without even asking what he has been doing since 1980.

He claims an award of damages, in such amount as the Tribunal deems fit, for loss of employment from 1 January 1981 and he seeks immediate reinstatement or else a declaration of redundancy, the Tribunal's ruling to be based on the assumption that he "would have been promoted in the usual way and received all increments in salary and allowances".

C. In its reply Eurocontrol points out that the post which fell vacant for an electronics technician in 1980 and which he says he was fit for was advertised in October of that year. He failed to appeal within the time limit for internal appeal against the failure to appoint him to that post and it is too late for him to do so now. He submitted claims neither to compensation for non-reinstatement as from 1 January 1981 nor to immediate reinstatement, and he lodged an internal appeal neither against the refusal of compensation nor against the denial of reinstatement. His complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

Eurocontrol puts forward subsidiary arguments on the merits. It observes that no post in which he could have been reinstated has fallen vacant since 1 January 1981. He misreads the nature of the Organisation's duty under Article 40. First, that article precludes reinstatement in any post that does not bear his grade. For any post bearing a higher grade - for example in category A - he must compete on a par with the other candidates. Secondly, reinstatement under Article 40 is limited to posts at the Maastricht Centre: for suitable posts at other Eurocontrol duty stations he has to compete along with everyone else. Thirdly, he must satisfy the requirements of the post. The highly technical and constantly changing nature of his field of work makes reinstatement harder. A further restriction was that not until the end of 1983 did he say he was fit again for shift work, and that indeed is why he was not offered the post advertised in October 1980. When he applied for leave to take up a career elsewhere he did not realise the difficulty of reinstatement. It is a pity that no suitable vacancy has arisen, though he is still entitled to reinstatement in any post he is fit for.

D. In his rejoinder the complainant points out, as to receivability, that the reason why he did not appeal against the failure to put him on the post for an electronics technician that fell vacant in 1980 was that he did not know at the time that there was such a vacancy. He believed what the Director of Personnel had told him in the letter of 14 November 1980, namely that there was no suitable vacancy: the Director should have told him that the post was vacant and asked him whether he could do shift work.

In his letter of 11 July 1989 he invited Eurocontrol to comment on his statement that he had no choice but to go to the Tribunal: having got no reply he was free to assume that he had exhausted the internal means of redress.

As to the merits he contends that Eurocontrol has acted in breach of its duty towards him as an employer by failing to inform him of the vacancies that he believes did arise. It did not even ask him what work experience he had gained since leaving. He did not go off to start a new career, but, as the Organisation well knew, to gain experience that would enhance his prospects of advancement on return. Had he been warned that others would be given

preference for suitable jobs or that his age would tell against him, it is doubtful whether he would ever have left at all.

E. In its surrejoinder the Organisation develops the pleas in its reply and seeks to refute the complainant's arguments in his rejoinder. It objects, on several counts, to his version of the facts, which it discusses in some detail. It presses its objections to the receivability of the complaint and enlarges on its subsidiary arguments on the merits.

CONSIDERATIONS:

1. The complainant held a post as an electronics technician (second class) at grade B.3 in the Maintenance Division of the Maastricht Upper Area Control Centre. At his own request he was granted unpaid leave for one year from 22 October 1979. The leave was later extended to 31 December 1980. On 21 October 1980 he applied for reinstatement as from 1 January 1981 but was informed on 14 November 1980 that there were no suitable vacancies in his grade.

2. In reply to a letter of 28 February 1982 from him the Director of Personnel and Administration informed him on 18 March 1982 that since 31 December 1980 there had been only one vacancy at grade level B.2/B.3 at the Maastricht Centre and that it had entailed shift duty. Without going into the qualifications required for the post the Director pointed out that the complainant had stated in 1978 that he was unable to do shift work. He never challenged the decision not to offer him that vacant post.

3. On 17 December 1983 he wrote informing the Director General that he was fit and able to do shift work and was interested in two posts at Maastricht of which he had heard and which had become vacant because of transfer and redundancy. The Director replied on 3 January 1984 that he could not offer the complainant any post corresponding to his qualifications, experience or grade.

4. The complainant has applied unsuccessfully at different times for different vacancies. The last time was on 2 May 1989 and by a letter dated 30 June 1989 the Head of Personnel told him that his application had again been unsuccessful; as had been previously explained, he could be considered for reinstatement only in vacancies at the Centre that carried his grade and were in his "category and service" and for which he satisfied the requirements; pending reinstatement he was to "remain in principle on leave on personal grounds"; and "after a very long period of absence from a highly technical environment as [sic] the Maastricht Centre" it became "more and more doubtful whether a statutory reinstatement could practically be realised". The Head of Personnel concluded by setting out the benefits he would get if he resigned. The letter of 30 June 1989 is identified in the pleadings as the decision impugned.

5. In reply the complainant wrote on 11 July 1989 stating that the letter of 30 June 1989 suggested that his chance of ever being taken back was very slim. He alleged that over the years there had been vacancies in his grade at the Centre which he had been more than adequately qualified to fill. He said that Eurocontrol was in "breach of contract" by not offering him any of those vacancies and that he was apparently to be "permanently excluded". He said he had no choice but to put the matter to the Tribunal but before he did so asked for comments. Eurocontrol made no comments, and the complainant infers rejection of his claim from the absence of reply to his letter. The essence of his case is therefore that there is an implied decision not to reinstate him, and the relief he seeks is compensation for loss of employment from 1 January 1981 and an order for his immediate reinstatement or redundancy.

6. The complainant is subject to the General Conditions of Employment governing Servants at the Centre. Under Article 40(1) an "established servant" may be granted unpaid leave, and under Article 40(3)(d) the employee shall, on the expiry of his leave, be reinstated in the first post corresponding to his grade which falls vacant in his category and service provided he satisfies the requirements for that post.

7. The Organisation agree that, had there been since 1 January 1981 any post in the complainant's category and service corresponding to his grade for which he possessed the required ability he would have had to be reinstated, but that no such post covered by the General Conditions has ever fallen vacant for which he would have qualified.

8. Though the complainant answers that to his knowledge vacancies have arisen at Maastricht for which he did qualify, he is no more specific. In any event he cannot now object to the failure to offer him the post notified on 18

March 1982 because he did not do so at the time. He is in an unfortunate position because the Organisation have never communicated with him about any vacant B.3 post. If they have decided that he did not fulfil the requirements for any such post he has not been in a position to challenge the decision. He is not in competition for any vacancy; he is an established civil servant awaiting a vacancy and, if one occurs and he fulfils the requirements, he is entitled to it whether or not others also fulfil them.

9. But that does not help him in his present case. If it is true that no post corresponding to the complainant's grade, category and service has fallen vacant at the Centre since 1 January 1981 (apart from the one notified to him on 18 March 1982), then there has been no breach of contract. He is unable to point to any one vacant post corresponding to his grade, category and service in which the Organisation have failed to reinstate him. Still less is he able to point to such a series of failures to reinstate him as might raise the presumption of a decision by the Organisation never to reinstate him at all. In the circumstances his claims cannot succeed.

10. That being so, the question of the receivability of specific claims for relief does not arise.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner