

**SEVENTY-SIXTH SESSION**

***In re* MEYER**

**Judgment 1307**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Valérie Meyer against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 September 1992 and corrected on 29 October 1992, Eurocontrol's reply of 28 January 1993, the complainant's rejoinder of 29 March and the Organisation's surrejoinder of 1 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Articles 5, 30(2), 33 and 92(2) of the Staff Regulations governing officials of the Agency;

Having examined the written submissions and disallowed the complainant's application in her rejoinder for the hearing of witnesses;

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

A. On 15 April 1991 Eurocontrol issued a "vacancy notice/notice of competition" for a clerk at grade C2 or C3 to serve as an assistant accountant. Under the heading "Additional information" it explained that any applicant with qualifications and experience that did not fully meet the stated requirements might be considered for appointment to the post at a lower grade, C4 or C5.

The complainant, a French citizen who was born in 1967, applied and was successful. By letter of 17 July 1991 Eurocontrol offered her the post at grade C5, step 1, and treated her reply of 22 July as acceptance. She took up duty on 1 August 1991 at Eurocontrol's Institute of Air Navigation Services in Luxembourg as a category 2 junior clerk at grade C5, step 1. Her letter of appointment, which was retroactive, was dated 2 October. At the end of six months' probation Eurocontrol made her an established official by a decision of 17 February 1992 that confirmed her appointment and grade.

On 11 May 1992 she submitted an internal "complaint" to the Director General under Article 92(2) of the Staff Regulations against his decision to put her at grade C5 on her becoming an established official by the decision of 17 February. By a letter of 25 June 1992, which she got on 7 July, the Organisation rejected that complaint as both out of time and devoid of merit. That is the decision she is challenging.

B. The complainant submits that her "complaint" of 11 May 1992 was in time: the notice of her confirmation, dated 17 February 1992, had reached her on 3 March. The letter of appointment of 2 October 1991 stated in paragraph 3 that her appointment was subject to confirmation on the completion of probation. In her submission the grant of an appointment is a provisional decision. Indeed the standard form for probation reports includes a section for the decision of the appointing authority, where the date of confirmation and the grade then granted are to be entered. So the final decision is the notice of confirmation.

The Director of the Institute of Air Navigation Services promised to have her grading corrected; so she was right to believe that the decision of 2 October 1991 was only provisional and would be put right at the end of probation. Eurocontrol was in breach of good faith in failing to tell her clearly that though her appointment to the vacancy on 2 October 1991 was provisional her grading was already final.

On the merits she submits that the post put up for competition was graded C3 or C2, her training and experience met the requirements exactly and the decision to confirm her appointment at grade C5 was not substantiated. By putting her first equal on its short-list the selection board acknowledged that she was fully qualified. Only if there had been no applicant with all the qualifications and experience required would the Organisation have been right to appoint a candidate at a grade lower than those advertised.

There was clear misappraisal of facts by Eurocontrol: before being appointed she had had fourteen months' experience as an assistant accountant, including six-and-a-half on temporary service with Eurocontrol.

According to Article 5 of the Staff Regulations certificates of secondary education qualify someone for category B. Grade 5 is the lowest for recruitment to category C, and that category requires only standard education anyway. The notice of vacancy advertised the post at C2 or C3 and called for secondary-school certificates - more than the job required - and, worse still, Eurocontrol gave her the lowest category, grade and step though she had a college diploma in management and accountancy.

She seeks the quashing of Eurocontrol's decision of 25 June 1992 to confirm her grading at grade C5, step 1, and costs.

C. In its reply Eurocontrol pleads that the complaint is irreceivable. The complainant was appointed at grade C5 on 2 October 1991. In compliance with the three-month time limit in Article 92(2) of the Staff Regulations she should have lodged her internal "complaint" by 3 January 1992. She did not do so until 11 May 1992. The notice of 17 February 1992 making her an established official set off no new time limit, being the mere confirmation of appointment that Eurocontrol sends at the end of probation to anyone who has come up to standard. Besides, she accepted both the post and grade C5 on 22 July 1991.

In subsidiary argument on the merits Eurocontrol submits that she misconstrues the function of a selection board and of the appointing authority and mistakenly accuses that authority of wrong assessment of her professional experience.

The appointing authority is not bound to endorse the selection board's order of preference. Under Article 33 of the Staff Regulations it appoints staff to "the basic grade corresponding to the posts for which they have been recruited". That was C5 in the complainant's case. Though the notice of vacancy said C2 or C3 because that is how the post is graded in the budget, the successful applicant was not necessarily to get either of those grades. Grade and step are subject to prior acceptance by the official, and Eurocontrol need not substantiate its decision, the less so since the appointing authority endorsed the selection board's order of preference. Article 30(2) of the Staff Regulations requires that reasons be given only "in the event of a selection being made which is not in conformity with the list drawn up by the Selection Board".

The complainant's personal history form shows that she spent less than two years in temporary service in ill-defined junior jobs given to beginners. The Director of the Institute in Luxembourg was consulted before the post was offered to her at C5 to make sure she was being put more or less on a par with other young employees with like experience. When applicants are equally well qualified experience is decisive. There was nothing unlawful about the complainant's appointment and besides, she is now earning much more than before.

D. In her rejoinder the complainant maintains that her complaint is receivable and cites rulings by the Tribunal that a provisional decision is not challengeable. In her submission it would be wrong to expect someone new to file an internal "complaint" while on probation and so run the risk of a bad report.

She enlarges on her pleas on the merits.

She asks the Tribunal to order disclosure of the comments made by the Director of the Institute at the time of her recruitment and of minutes written about her appointment and grading by several directors.

E. In its surrejoinder the Organisation develops its pleas on receivability and on the merits.

#### CONSIDERATIONS:

1. The complainant, an official of Eurocontrol, seeks the quashing of the notice of confirmation of appointment she was given on 17 February 1992 on her completion of probation insofar as it put her at the first step in grade C5. She argues that she was entitled to grade C3 both because of the terms of the "vacancy notice/notice of competition" of 15 April 1991 which prompted her to apply and because of her own qualifications as acknowledged by the selection board.

2. The defendant Organisation raises two preliminary objections to receivability:

(a) that its decision of 17 February 1992, being mere confirmation of the appointment she had been granted on 2 October 1991, set off no new time limit for appeal;

(b) that in any event she consented to grade C5 by accepting appointment and may not therefore properly challenge her grade ex post facto.

#### Receivability

3. The defendant's objections call for the following comment. The notice of 15 April 1991 announced a competition for a vacancy for a clerk at grade C2/C3 to serve as an "assistant accountant". After describing the duties the notice set out the required qualifications but explained that applicants with qualifications and experience that did not fully measure up might be considered for appointment at grade C4 or C5.

4. The complainant having come first equal in the competition, Eurocontrol offered her the appointment in a letter sent on the Director General's behalf on 17 July 1991. What it offered her was "a post for a category 2 junior clerk at step 1 in grade C5" and it gave details of pay. Appended in four copies was a "letter of appointment" which it asked her to sign and return. She was to take up duty on 1 August 1991.

5. By a handwritten letter of 22 July she sent back the copies of the letter without signature or comment. Eurocontrol having treated that as acceptance of its offer, she took up duty on 1 August. When making out her contract the Organisation found that she had omitted to sign its letter and it thereupon asked her to do so so that it could draw up the appointment. She eventually signed on 24 September 1991 and the contract was made out on 2 October with effect from 1 August 1991.

6. After duly completing probation she had her appointment confirmed by the decision of 17 February 1992 and on 11 May 1992 she filed an internal "complaint" against appointment at C5. She pointed out that she had applied in answer to a notice announcing a post at C2/C3 and the selection board's choosing her confirmed that she met all the requirements in the notice.

7. She had her appeal rejected by a reasoned decision of 25 June 1992 which she got on 7 July, and that and the letter of confirmation of 17 February 1992 are the decisions she is impugning.

8. The defendant's objections to receivability are sound.

9. It appears from the foregoing that what the complainant was offered was appointment at C5 and she accepted it, before being actually appointed, 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.

10. So it is plain that she would not have been free to challenge the letter of appointment even if she had filed her internal "complaint" in time. A fortiori she was not free to challenge the decision to make her an established official on the conclusion of probation. Insofar as it related to her grading that decision did no more than confirm the letter of appointment. So her complaint must fail in any event because it is irreceivable

11. For that reason her application for disclosure of evidence serves no purpose.

#### 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. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.