

**SEVENTY-SEVENTH SESSION**

***In re* CASSAIGNAU (No. 4)**

**Judgment 1359**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 September 1993 and corrected on 23 September, Eurocontrol's reply of 15 December 1993, the complainant's rejoinder of 22 February 1994 and the Organisation's surrejoinder of 3 May 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 25, 26, 30, 31, 32 and 45 of the Staff Regulations governing officials of the Agency, office notice 42/77 of 14 June 1977 and office notice 10/89 of 22 May 1989 as amended on 30 January 1990;

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. Facts of relevance to this case appear under A in Judgment 1357 delivered this day on the complainant's second complaint.

On 16 October 1992 the Agency's Institute of Air Navigation Services in Luxembourg issued a "vacancy notice/notice of competition", No. LX-92-AO/143. That notice replaced an earlier one of 2 March 1992, No. LX-92-AO/046, which had advertised a post at grade A4, and it was for a post as an expert at grade "A5/6/7".

The complainant, a grade A5 official, had applied unsuccessfully for the A4 post announced in notice 46. On 21 November 1992 he applied for transfer to the A5 post. But Eurocontrol found none of the inside candidates suitable and began the competition procedure on 2 December. The Selection Board met on 8 December 1992 and put four of the seven applicants on a short-list. Mr. Michel Pistre, who was at the top of the short-list, had been sponsored by the French administration. He was appointed to the post of expert at grade A5, step 1, on 1 April 1993.

By a letter of 25 February 1993 the Director of the Institute had informed the complainant on the Director General's behalf that his application had been turned down. On 8 April the complainant lodged an appeal but the Director rejected it in a letter of 4 June. That is the decision he challenges.

B. The complainant cites first the provisions he relies on in his second complaint and other articles of the Staff Regulations.

Referring to the pleadings on a case before the Court of Justice of the European Communities and to Judgment 1223 (in re Kirstetter No. 2), he submits that when filling a post, even by transfer, the Organisation must compare the merits of all applicants. In his view the only exception is in Article 32 and it affects only officials at grades A1 and A2.

Secondly, he contends that the impugned decision is flawed with obvious misappraisal of the facts since he does have all the qualifications notice 143 required.

Thirdly, the appointing authority infringed the second paragraph of Article 25 of the Staff Regulations by failing to state the reasons for its rejection of his application. That paragraph reads as follows:

"Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

The complainant says that had his services proved unsatisfactory the Director General should, according to Article 26 of the Regulations, have said so in a written report and put it in his personal file. But he failed to do so. The complainant has no inkling of what his shortcomings may be, particularly since his last staff report, written on 14 September 1991, was good and his supervisor has never expressed reservations about him.

He asks the Tribunal to set aside both the rejection of his application for the post announced in notice 143 and Mr. Pistre's appointment to that post, order the Agency to carry out the selection process properly, grant him one ECU in token moral damages, and award him costs.

C. In its reply the Agency invites the Tribunal to consider whether the complainant has any cause of action, his position in law being unaffected by the rejection of his application for transfer, and whether his complaint is therefore irreceivable.

On the merits it denies breach of the Staff Regulations. None of the complainant's pleas is sound: the provisions of office notice 10/89 concern only selection boards for competitions; Judgment 1223 is about a case of promotion and the case before the Court of the European Communities about rules that apply only to the Communities. The material provisions are in office notice 42/77, which the complainant barely mentions.

Citing the case law, Eurocontrol contends that not every decision has to be substantiated. In any case the complainant knew the reasons why his application was turned down; they were explained at length in the decision of 4 June 1993.

Lastly, the Agency denies misappraisal of the facts. The staff report mentioned by the complainant is immaterial since it refers to duties other than those of the post in question. His latest report, which covers 1991-93, does contain criticism of him and he has never commented on it. It reflects his supervisor's opinion. There was therefore no reason to write another report for his personal file. Article 26 of the Regulations requires that only documents about an official's "administrative status" be put in that file.

D. In his rejoinder the complainant presses his pleas. He points out that Judgment 1223 ruled that Eurocontrol might not plead office notice 42/77 to secure release from its obligation under Article 30 of the Regulations to appoint a selection board. So it was wrong to appoint Mr. Pistre to the post announced in notice 143, no independent body having met beforehand.

Only afterwards did the Agency seek his supervisor's opinion, and his report for 1991-93 says, among other things, that he was "a very competent expert, able to perform duties on principal expert level", i.e. at grade A4.

Lastly, he denies that the case law releases the Agency from its obligation to account for decisions: it must make sure they are clear and objective.

E. In its surrejoinder the Agency contends that the complainant has no cause of action. It submits that his application for the vacant post was no more than a "wish to change duties", for which the Regulations prescribe no procedure. So the Director General had no reason to consult any independent body and his choice was governed solely by the Organisation's own interests, which demanded not appointing the complainant.

Judgment 1223 is irrelevant - maintains Eurocontrol - because unlike the complainant Mr. Kirstetter was alleging breach of office notice 42/77. In this case the procedure that notice prescribes was properly followed.

Neither the complainant's qualifications nor his experience met the requirements of the vacant post and there was no misappraisal of the facts. There is nothing in the complainant's latest report to suggest that he is fit for any vacant post, whatever it may be.

Lastly, the Organisation maintains that it did account properly for the impugned decision.

#### CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services in Luxembourg. A "vacancy notice/notice of competition", No. LX-92-AO/143, issued on 16 October 1992 advertised a post for an expert. The complainant applied, was rejected and is challenging his rejection. The notice is much the same as notice 46, which forms the subject of Judgment 1357, also delivered this

day, on Mr. Cassaignau's second complaint save that notice 143 is about a post at grade A5/6/7 subordinate to a group leader.

2. On learning of his rejection for the post advertised in notice 46 the complainant applied for transfer to the vacancy announced in notice 143. Again he was unsuccessful, as the Director General told him by a minute of 25 February 1993. The minute said that his application had been "carefully considered" but he "did not meet all the requirements".

3. On 8 April 1993 he lodged an internal "complaint" seeking reversal of his rejection and challenging the appointment of Mr. Michel Pistre, a candidate sponsored by the French administration who had since been put on the post. In that "complaint" he said that Eurocontrol had failed to observe his right under Articles 30 and 31 of the Staff Regulations to have his application for transfer put to a selection board. He cited, among other texts, Judgment 1223.

4. The answer came in a fully reasoned letter of 4 June 1993 from the Director of Personnel. The complainant thereupon filed this case with the Tribunal, and he has three pleas: flaws in the process of selection, an obvious mistake in rating his qualifications, and failure to account for the decision.

5. Eurocontrol questions the receivability of the complaint in its reply. In its surrejoinder it actually contends that the complainant has no cause of action. It produces a page of its yearbook for 1993 which shows the complainant and Mr. Pistre together at the same grade and in the same sub-division. It argues that the appointment he wanted would have meant neither promotion nor transfer but a mere "change in duties", and for that there is no procedure laid down in the Staff Regulations. In its submission he therefore had no interest in securing the post he claims, let alone in ousting Mr. Pistre.

6. Eurocontrol has argued the issue at a point at which the complainant has not had the opportunity of replying. But the answer to the plea is that Eurocontrol is bound by the terms of notice 143 and the Tribunal will rule accordingly. The notice says that "Agency staff governed by the Staff Regulations who meet the requirements laid down in Office Notice No. 42/77, para. 2.1.2, are eligible to apply". Paragraph 2.1.2 says that those officials, among others, whose grade is the same as that of the vacancy to be filled may apply. The complainant plainly qualified thereunder. Since he has chosen to apply for the vacancy announced in the notice the Organisation may not object ex post facto that he lacks a cause of action on the grounds that he has after all ended up in the same sub-division and with the same grade as the preferred applicant.

7. So whatever his intent may have been and however he may compare with the other applicants the complainant qualified under the wording of the notice and was entitled as a Eurocontrol official to have his application considered and assessed by a process that complied with the rules. As has been shown, it was not, and the breach of his rightful interest affords grounds for this complaint.

8. The complainant sees breach of due process in the Organisation's failure to comply with the Staff Regulations, to be precise, with Articles 30 and 31. He says that yet again the Agency eliminated the inside applicants at the first stage before holding the competition in which a selection board is supposed to compare the inside, national and outside applicants on merit. Though Judgment 1223 declared that approach unlawful, Eurocontrol is still applying a method of selection that offends against the interests of serving staff.

9. Eurocontrol retorts that the two inside applicants had been rated earlier by the Director General with advice from the Director of the Institute, who knew both of them well. It was then - says the defendant - that the complainant was dropped for the reasons he had already been given in the process started by the issue of notice 46; so there seemed to be no need to explain the reasons to him again. The Organisation thereupon started the competition and the upshot was the appointment of Mr. Pistre.

10. Eurocontrol maintains that the whole process of selection complied with office notice 42/77, the "linchpin" of the procedure for filling vacancies. To its mind Judgment 1223, which is about promotion, is irrelevant to this case, which is about transfer, i.e. a mere change of duties at the same grade.

11. The Agency has in the complainant's cases made much of the "teleological" construction to be put on the Staff Regulations. But the ultimate purpose of the process the Regulations prescribe is to get staff of the highest standard who are fit to carry out their duties in full independence and in the common interests of the Organisation's

membership. That is why it is quite proper for the Staff Regulations to allow recruitment from national administrations and elsewhere outside the Organisation besides providing for the career advancement of serving staff. More particularly, there is no denying the benefits of free flow of staff and sound concertation between Agency and national administrations.

12. Yet the conflicts of interest inherent in the process of selection demand strict observance of the stipulations that the Regulations lay down for filling posts. And one consistent requirement is the appointment of a selection board that may consider all applicants - whether inside, outside or from some national administration - who qualify under one and the same notice of vacancy. As was said in Judgment 1223, that formal requirement affords every applicant a basic safeguard of open and objective decision-making, and it holds good whether the applicant wants promotion, transfer or a change of category. Judgment 1223 further ruled in 27 that office notice 42/77, which embodies the distinction that Eurocontrol has consistently drawn between "notice of vacancy" and "notice of competition" for one and the same post, is at odds with Articles 30, 31 and 45 of the Staff Regulations insofar as it fails to provide for any selection board to consider inside applicants.

13. The conclusion is that the procedure Eurocontrol followed in accordance with the office notice and in breach of Articles 30, 31 and 45 was unlawful on account of the very ratio of notice 143. So the resulting decisions - the rejection of the complainant's application and Mr. Pistre's appointment to the advertised post - cannot stand.

14. The case must therefore be sent back to the Organisation for resumption of the selection procedure in keeping with the rules and without prejudice to any category of applicant eligible under the notice.

15. Eurocontrol may of course take steps to ensure that the unit continues to function in the meantime and to protect Mr. Pistre from any injury he might suffer for the quashing of an appointment he accepted in good faith.

16. Since the complainant has succeeded he is entitled to costs, and the amount is set at 100,000 Belgian francs.

#### DECISION:

For the above reasons,

1. The Tribunal sets aside both the decision of 4 June 1993 confirming the rejection of the complainant's application for the post announced in vacancy notice/notice of competition LX-92-AO/143 and the appointment of Mr. Michel Pistre to the post.
2. The case is sent back to Eurocontrol.
3. Eurocontrol shall pay the complainant 100,000 Belgian francs in costs.
4. His other claims are 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