

## EIGHTY-SECOND SESSION

***In re Boland (No. 9), Hardy (No. 3)  
Heller (No. 3), Olivier (No. 3)  
Rue (No. 3) and Watson (No. 5)  
Judgment 1615***

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 November 1995 and corrected on 20 November 1995, Eurocontrol's reply of 1 March 1996, the complainant's rejoinder of 19 June and the Organisation's surrejoinder of 27 September 1996;

Considering the third complaints filed by Mr. Joachim Heller, Mr. Lucien Olivier and Mr. Jean-Paul Rue and the fifth one filed by Mr. Jeremy Watson on 24 January 1996 against the same Organisation and corrected on 1 April, Eurocontrol's joint reply of 12 July, the complainants' rejoinder of 23 August and the Organisation's surrejoinder of 18 October 1996;

Considering the third complaint filed by Mr. Jean-Lucien Hardy against the same Organisation on 26 January 1996 and corrected on 8 February, Eurocontrol's reply of 15 May, the complainant's rejoinder of 5 July and the Organisation's surrejoinder of 11 October 1996;

Considering Articles II, paragraph 5, and VII, paragraph 4, of the Statute of the Tribunal and Articles 11 and 16 of its Rules;

Having examined the written submissions and disallowed the applications for hearings filed by Mr. Boland, Mr. Heller, Mr. Olivier, Mr. Rue and Mr. Watson;

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

A. The complainants joined Eurocontrol at various dates from 1965 to 1991 on permanent appointments. At the material time they were at its Institute of Air Navigation Services in Luxembourg.

In March 1994 the Agency's Committee of Management decided to change the Institute's functions, and that meant reforming its units. On 31 January 1995 the Personnel Directorate put out a paper about the procedure for redeploying staff. There were to be four phases: (1) a preliminary one, which consisted in identifying the jobs that the new administrative structure would require, and those for which staff were not needed and in drafting descriptions of vacant posts; (2) a process of assessment of the redundant staff; (3) redeployment within the Institute; and, if necessary, (4) redeployment elsewhere in the Agency. The paper cited Article 7 of the Staff Regulations, which is about assignment by appointment or transfer, and Article 8 of Rule of Application No. 2, which is about competitions and provides that, when the interests of the service so require, the Director General may, under Article 7 of the Staff Regulations, transfer someone to a post at the same grade without a competition.

At a meeting of staff on 24 March 1995 the Director of the Institute gave an account of the procedure and the results of the first phase. By letters of 28 March he told the complainants that their posts were not to survive the reforms but that a team of assessors would be interviewing each of them. In a memorandum of 31 March he issued a list of posts that the reforms had made vacant.

By a decision of 5 April the Director General approved the reforms. The assessors did their work from 5 April to 2 May. By a notice of 6 June signed by the Director of Personnel the Director General transferred the complainants to the office of the Director of the Institute as from 1 July pending decisions on redeploying them within the Agency. By a further decision of 6 June he changed the grading of some of the posts in the new structure. By letters of 14 June the Director of Personnel informed the complainants of the arrangements for their transfer from Luxembourg.

On 28 June the complainants lodged “complaints” with the Director General under Article 92(2) of the Staff Regulations against (1) the decisions of 6 June 1995 assigning them to the office of the Director of the Institute, (2) the decisions not to keep them on at the reformed Institute and (3) the decisions reflected in the Organisation’s “wish” to assign them elsewhere. Their “complaints” went to the Joint Committee for Disputes set up under office notice 6/95 of 1 March 1995. In a report of 25 August the Committee took all the cases together and held that the complainants’ third claim was irreceivable on the grounds that there was no decision affecting them adversely. The majority recommended allowing their other claims on the grounds that the Organisation had acted unlawfully in basing the procedure of redeployment on Article 7 of the Regulations and Article 8 of Rule No. 2 and failing to apply Article 30 of the Staff Regulations as well for the purpose of filling the vacant posts.

By letters of 11 October and 7 November the Director of Human Resources informed Mr. Boland and Mr. Hardy that they were to be transferred as from 1 January 1996 to Eurocontrol’s Experimental Centre at Brétigny-sur-Orge, in France. By a notice of transfer of 17 November the Director told Mr. Hardy that his transfer was to take effect at 1 February 1996. At unspecified dates Mr. Heller, Mr. Olivier and Mr. Rue were informed that they were to be transferred to the Agency’s headquarters in Brussels.

By letters of 27 October 1995 — the impugned decisions — the Director informed the complainants that he had decided on the Director General’s behalf not to endorse the Committee’s recommendations.

B. The complainants submit that the procedure of redeployment was unlawful. Unlike the reforms of 1 January 1993, which gave rise to Judgment 1358 (*in re* Cassaignau No. 3), the new procedure meant both abolishing and creating posts. The Director General was therefore bound under Article 30 of the Staff Regulations to inform the staff of all vacant or new posts, hold competitions and appoint selection boards to consider applications. The team of assessors bore no resemblance to a selection board. Some posts were filled straightaway without any assessment and that amounted to discrimination against staff whose posts failed to survive the reforms. Mr. Hardy pleads unequal treatment on several other counts.

The complainants submit that the Organisation may not by mere reliance on Article 7 of the Regulations evade the requirement in Article 30 of appointing a selection board. Article 8 of Rule No. 2 is unlawful in that it allows the Director General to move someone without a competition to another post at the same grade.

Mr. Boland and Mr. Hardy contend that the decision of 6 June 1995 offends against Article 7 in that it did not assign them to any particular post in the Director's office. The Director General has no authority under the Regulations to order provisional assignment.

The complainants plead breach of trust and improper management. The procedure of redeployment is not provided for in the Regulations and was a hasty and secretive exercise. There is no official version of the paper of 31 January 1995. The Director General disregarded their individual rights.

Lastly, there was breach of due process: the Director General altered the grades of the vacant posts and the qualifications required for them so that he could appoint applicants picked beforehand or remove people from their posts and transfer them away from the Institute.

The complainants ask the Tribunal to quash the decisions of 27 October 1995 confirming the decisions of 6 June 1995; all the decisions putting other staff on posts declared vacant to which they might themselves have been appointed; and the decisions of 14 June 1995 applying to them the fourth phase of the procedure of redeployment. They seek costs.

C. The Organisation replies that the complaints are irreceivable. First, the decisions of 6 June 1995 to transfer them with their jobs did not affect their status in law and so caused them no injury, particularly since at the time Luxembourg was still their duty station. Secondly, their claims to the quashing of alleged decisions appointing other members to vacant posts in their stead are irreceivable because they have not identified any particular decisions of that kind. Thirdly, the letters of 14 June 1995 are not challengeable decisions: they merely stated the Organisation's intention of assigning them outside Luxembourg on completion of the fourth phase of the procedure.

The Organisation's pleas on the merits are subsidiary. As in 1993, when there were reforms at the Institute, in 1995 redeployment consisted in first assigning each staff member with his post to new duties within the new structure. The complainants were transferred to the Director's office but kept their grades and budgetary status. Even though the wording in some documents may have been misleading, vacant posts were not being filled at that stage. There was no breach of Articles 7 and 30; redeployment is an internal measure taken by the Organisation at its discretion for the purpose of restructuring and need not be provided for in the Staff Regulations. The Director General was entitled to assign the complainants provisionally to the Director's office.

The Director General did take account of their individual rights and interests. Their assignment to Luxembourg either on recruitment or later conferred on them no right to remain at that duty station throughout their career at the Agency.

There can be no presumption of abuse of process and the complainants fail to prove that the changes in grades or duties caused them injury.

D. In their rejoinders the complainants rebut the plea that they have no cause of action. The Organisation stripped them of duties and assigned them provisionally and without job descriptions to the Director's office, thus causing them serious moral and professional injury. They did not obtain the remedies provided for in Article 93(4) of the Staff Regulations, which says that a staff member may apply to the Tribunal for a stay of execution of the impugned decision:

application for such stay failed because it was not allowed by the Tribunal's own Statute. Article 93(4) is "indisputably misleading" about the remedies actually available to staff.

Enlarging on their pleas on the merits, they deny that the reforms of the Institute were simply internal measures. Posts were created and notices of competition published for many new vacancies at Luxembourg. So the real purpose of redeployment was to get rid of some staff in order to create vacancies and fill them with new recruits.

They seek moral damages.

E. In its surrejoinders the Organisation maintains that the complaints are irreceivable. Assignment to the Director's office caused the complainants no moral injury. Article 93 of the Staff Regulations is not at odds with the Tribunal's Statute. In its surrejoinders to the complaints of Mr. Boland and Mr. Hardy Eurocontrol argues that, though Article VII, paragraph 4, of the Statute says that the filing of a complaint does not suspend the execution of the decision impugned, the Tribunal may derogate from that rule in exceptional cases and entertain an application for suspension. In any event Article 93(5) of the Staff Regulations is plain: "Appeals shall be investigated and heard as provided in the Rules of Procedure of the Tribunal". Besides, the only decisions subject to suspension were the complainants' transfers away from Luxembourg, and they are not at issue. So the complainants may not allege moral injury on that score.

The defendant presses its pleas on the merits.

## CONSIDERATIONS

1. The complainants, who at the material time were on the staff of the Agency's Institute of Air Navigation Services at Luxembourg, are challenging decisions of 27 October 1995 taken on the Director General's behalf confirming:

- (a) decisions of 6 June 1995 provisionally assigning them to the office of the Director of the Institute;
- (b) decisions rejecting them for posts that had become vacant on the reform of the Institute;

- (c) all appointments made to fill those vacancies;
- (d) decisions of 14 June 1995 applying to them phase 4 of the procedure of redeployment.

2. The background to the case is as follows. There had been several sets of reforms at the Institute, including some in January 1993, and all had fallen short of what was wanted. After a report by an outside consultant the Committee of Management approved in early March 1994 changes in the Institute's functions and consequent reforms in its structure. On 31 January 1995 the Personnel Directorate told the staff about the plans for the Institute; they included a process of redeployment in four phases: (1) preliminary measures, (2) a process of assessment, (3) redeployment within the Institute, and (4) redeployment elsewhere within Eurocontrol. At a meeting on 24 March the Director of the Institute announced the start of the exercise. On 28 March the complainants got notice of decisions relieving them of their duties and saying that they would be having interviews to assess their fitness for new ones. By a memorandum of 31 March the Director issued a list of vacancies, of which the descriptions were also made available, informing them that the first phase was over and the second one — the interviews — was about to begin. After their interviews the complainants learned on 2 May 1995 that the Organisation had failed to find posts for them in the reformed Institute. Before taking final decisions on redeployment the Director General consulted the Staff Committee on 1 June 1995. On 6 June 1995 the Director General decided to transfer 73 officials, including the complainants, whom he assigned provisionally and without change of grade to the office of the Director of the Institute. By letters of 14 June the Director of Personnel told the complainants that the fourth phase — redeployment elsewhere within Eurocontrol — would apply to them and he invited them to a meeting on 22 June to hear more about it.

3. On 28 June they lodged internal “complaints” purporting to challenge the “decisions” dated 6 and 14 June 1995 and the Director General’s “decisions” not to keep them in the reformed Institute. The Joint Committee for Disputes, to which their “complaints” were referred, joined them and reported on 25 August

1995. The majority recommended allowing the complainants' claims in part. By decisions of 27 October 1995, which they are impugning, the Director of Human Resources rejected their "complaints" on the Director General's behalf.

4. Since the complaints rest on the same facts and raise the same issues of law they may be joined to form the subject of a single judgment.

5. Eurocontrol pleads that the complaints are irreceivable on the grounds that the impugned decisions cause the complainants no injury. The effect of the decisions of 6 June 1995 — its argument runs — was to give them provisional assignments in the Director's office within the reformed Institute, without loss of post or detriment to their status; not even their duty station changed. Eurocontrol says that the letters of 14 June 1995 are not decisions at all, let alone final ones, but merely state the Director General's intention of transferring them outside the Institute. And they were signed by the Director of Personnel, not by the Director General.

6. Eurocontrol is right. The letters do not bear the Director General's signature and the gist of them is that the fourth phase is to apply to the complainants and that they may attend a meeting to see where else they can go within the Agency. So none of the letters is a final decision within the meaning of the case law, viz. "an act deciding a question in a specific case" (Judgment 112) or "that has an effect on an official's rights and obligations" (Judgment 1203, *in re* Horsman and others). The complainants may still of course challenge any decision that may be taken to assign them elsewhere.

7. They claim the quashing of the Director General's decisions of 6 June 1995 not to put them on posts declared vacant in the reformed Institute and of all appointments to such posts to which they might themselves have been appointed. Eurocontrol contends that those claims are irreceivable. Again it is right. Insofar as they are objecting to the appointments of other staff their claims are irreceivable because they are challenging the status of unidentified third parties.

8. The Director General's refusal to put them on vacant posts was just the logical outcome of the decisions of 6 June 1995 to



assign them provisionally to the Director's office. So the lawfulness of the refusal hinges on that of the assignment. And, as is said below, the decisions of 6 June 1995 cannot have affected them adversely or warrant internal "complaints".

9. Whether what they are challenging causes them injury depends on the lawfulness of the reforms at issue. Did the reforms afford all the safeguards that the rules required? The complainants submit that they did not since there was no provision in the Staff Regulations for such reforms and the Director General never formally approved them or gave notice of them to the staff; they were — the argument runs — rushed through and constituted misuse of authority and abuse of process.

10. For one thing, structural reform is at an organisation's discretion: see Judgment 526 (*in re Puel*) under 3 and 4. For another, as was said in 2 above, the Committee of Management approved the reforms and the Director of the Institute duly informed the staff on 24 March 1995. Thirdly, there is no evidence to suggest that redeployment impaired the complainants' status.

11. On this last issue Eurocontrol observes that the provisional transfers of 6 June 1995 to the Director's office kept each of them at the same grade and on the same budgetary post. The complainants scarcely challenge what the defendant says on that score. Instead they make much of the creation of posts and the need to fill them as prescribed in the Staff Regulations. Yet by a memorandum of 3 April 1995 the Director announced that any post still vacant once redeployment was over would be advertised and filled in the normal way. So, although Eurocontrol redeployed the complainants along with the others transferred on 6 June 1995, they were still free to apply later for one of the new posts when notices of vacancy went out in keeping with the prescribed procedure. At all events there is no evidence to suggest that the reforms constituted any misuse of authority.

12. The conclusion is that the complainants' provisional transfers observed their prescribed rights and afford no cause of action, and that the complaints are irreceivable.

## DECISION

For the above reasons,  
The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

Michel Gentot

E. Razafindralambo

Egli

A.B. Gardner