

EIGHTY-FOURTH SESSION

In re Nivelle

Judgment 1675

The Administrative Tribunal,

Considering the complaint filed by Miss Marie-Louise Nivelle against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 27 March 1997, Eurocontrol's reply of 4 July, the complainant's rejoinder of 7 August and the Organisation's surrejoinder of 24 October 1997;

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. The complainant, a Belgian citizen who was born in 1956, joined the staff of Eurocontrol on 1 May 1990 as an administrative assistant at grade C3. She was assigned to the post of secretary to the head of the Operations Division at Eurocontrol's Upper Area Control Centre at Maastricht. The confirmation of her appointment was subject to the six months' probation provided for in Article 36 of the General Conditions of Employment of the Maastricht Centre.

In a probation report of 12 September 1990 the head of the Operations Division, her reporting officer, declared her aptitude for the post and her relations with colleagues to be "good" but her output, behaviour in the service and punctuality only "satisfactory". Her appointment was confirmed as from 1 November 1990.

In a report of 7 February 1992 for the period from 1 November 1990 to 30 June 1991 the quality of her work and her professional conscience were rated "above average" and on the other ten criteria, including relations with fellow officials, initiative and speed, she was marked "average". The reporting officer acknowledged, however, that she had got off to a difficult start and had coped despite a huge backlog. Her second report, for the period from 1 July 1991 to 31 May 1993, spoke of a decline in the quality of work and in her relations with others. In comments of 30 July 1993 she objected and applied for referral to the appeal assessor, the Director of Maastricht. On 3 August the Director endorsed the report and recommended that she look for another job; if she had not found one by 1 February 1994 he would start proceedings to "establish her incompetence" in her post.

By a decision taken on the Director General's behalf on 23 November 1993 the Director of Personnel transferred her to another section of the Operations Division as from 1 December 1993. She was on sick leave because of depression. She took up her new duties half time at 1 December and worked full time from April 1994. According to a report for the period from 1 June 1993 to 7 June 1995 her relations with others and "ability to understand and solve problems" were unsatisfactory. The reporting officer said that efforts to help her had all failed. She was on sick leave again from 28 August 1995 to 30 April 1996.

In a letter of 6 March 1996 the Director General sent her a report that he had endorsed proposing her dismissal for unsatisfactory performance under Article 52 of the General Conditions of Employment. She sent him her comments on 12 March. The case went to the Disciplinary Board, and in a report of 15 July 1996 it declared her "not professionally competent". By a decision of 31 July the Director General dismissed her for professional incompetence as from 1 August 1996.

By a letter of 26 October 1996 the complainant lodged an appeal with the Director General under Article 91 of the General Conditions of Employment. Having got no reply, she filed this complaint on 27 March 1997.

In a report of 16 May, however, the Joint Committee for Disputes, to whom the case had been referred, recommended rejecting her appeal. On 20 May 1997 the Director General told her that he did so.

B. The complainant submits that the Director General has overlooked the fact that, because of a heavy backlog and little help, she got off to a difficult start. The upshot was a bout of depression which the Organisation wrongly puts down to "mental instability".

Secondly, she alleges several breaches of procedure. The report for the period from 1 June 1993 to 7 June 1995 was incomplete. The disciplinary procedure was flawed. Though her counsel was unable to attend the Disciplinary Board's first meeting, Eurocontrol refused his application for adjournment. The Board declined to hear some of her witnesses and to let her answer the evidence given against her. Its opinion was not properly substantiated. Lastly, the Director General ought to have put the matter to the Joint Committee for Disputes. All that goes to show abuse of authority.

The complainant asks the Tribunal to declare the decision of 31 July 1996 unlawful. She claims 2 million Belgian francs in material damages and 500,000 in moral damages. She seeks 250,000 francs in costs. She claims interest on any sums awarded to her.

C. In its reply Eurocontrol submits that she had no more to do than other secretaries in the division. It would have been unfair to find fault while she was settling in, but her unacceptable shortcomings persisted, and she did little better after her transfer.

There were no flaws in the procedure. The complainant failed to challenge her performance reports in time, and besides, the "flaws" she alleges are utterly trifling. The disciplinary procedure complied with the rules. Eurocontrol could not be expected to put up with the consequences of her belated decision to engage counsel. And the other alleged breaches of process are immaterial. As to its treatment of her appeal, Eurocontrol contends that it complied with its own rules of procedure and so her plea is devoid of substance. The Director General did not abuse his authority in dismissing her.

Eurocontrol asks that the complainant bear the costs in full.

D. In her rejoinder the complainant presses her pleas and enlarges on them. To her mind Eurocontrol infringed her right of defence by refusing to adjourn the Disciplinary Board's first meeting. The Director General committed an error of procedure by failing to refer her case to the Joint Committee for Disputes within the time limit of four months set in Article 91(2) of the General Conditions of Employment for answering a staff member's request for a decision.

E. In its surrejoinder Eurocontrol presses its pleas and its counterclaim to costs. It submits that it gave the complainant two-and-a-half months in which to prepare her case and was under no obligation to comply with her counsel's request for adjournment. In any case he did attend the Disciplinary Board's second meeting. Rule No. 12 of the Staff Regulations, which is about disciplinary proceedings, does not require that the staff member be present at the hearing of witnesses. The proceedings were adversarial in that the Board heard both sides and let them see the full case records. The complainant's right of defence did not require "the staging of a full-scale showdown" between them.

CONSIDERATIONS

1. The complainant joined the staff of Eurocontrol on 1 May 1990 as an administrative assistant at grade C3 at its Upper Area Control Centre at Maastricht. On 7 June 1995 her supervisor called her in before writing a report on her performance and warned her that proceedings were to start to dismiss her for professional incompetence.

2. The chairman of the Disciplinary Board was informed of the case on 12 April 1996 and the Board was set up on 30 April. It met several times, held an inquiry as prescribed by Article 6 of Rule No. 12 on disciplinary proceedings, and recommended dismissal. On 19 July 1996 the Director of Human Resources told her that the Director General intended to act on the Board's recommendation but that if she chose to resign instead she might stand a better chance of finding another job. She declined to resign and was dismissed by a decision of 31 July 1996.

3. On 26 October 1996 she filed an appeal against dismissal and it went to the Joint Committee for Disputes in November. Having got no reply by 26 February 1997, she filed this complaint on 27 March 1997 impugning the implied rejection of her appeal. She asks the Tribunal to declare Eurocontrol's decision of 31 July 1996 to dismiss her for incompetence as from 1 August to be improper and unlawful; to order Eurocontrol to pay her "provisional" amounts of 2 million Belgian francs in material damages and 500,000 in moral damages; to award her 250,000 in costs; and to pay interest on any sums awarded to her.

4. She submits, among other things, that the disciplinary proceedings that culminated in dismissal were flawed: Eurocontrol rejected her counsel's application for adjournment of the Disciplinary Board's meeting of 24 May 1996; the Board heard witnesses in her absence; and it did not properly substantiate its recommendation.

5. Eurocontrol does not deny rejecting the application which her counsel made for an adjournment to let him prepare the case. At its meeting on 24 May 1996 the Disciplinary Board held an adversarial "inquiry" of the kind provided for in Article 6 of Rule No. 12 which reads:

"If the Disciplinary Board requires further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry in which each side may submit its case and reply to the case of the other side."

In that inquiry, which it held on 26 June, the Board heard witnesses in the complainant's absence.

6. Eurocontrol pleads that the hearing of witnesses need not be adversarial and that the inquiry will be if the Board hears witnesses called by both sides. The plea is mistaken. An inquiry will be adversarial only if the parties attend, or have at least been duly invited to attend, the hearing of witnesses.

7. The conclusion is that the Board's proceedings were flawed in that the complainant's right of defence was not observed.

8. Having been taken on the Board's recommendation, the decision of 31 July 1996 to dismiss the complainant is therefore unlawful and must be set aside, and the case must be sent back to the Organisation so that the procedure may be properly followed.

9. By way of damages for material injury the complainant is entitled to her full pay from the date of dismissal, less the amount of any terminal entitlements she may have received. Interest is payable at the rate of 8 per cent a year on the sums due.

10. By way of damages for the moral injury the complainant suffered she is entitled to an award of 30,000 Belgian francs. She is also awarded costs.

DECISION

For the above reasons:

1. The Director General's decision of 31 July 1996 dismissing the complainant is set aside and the case is sent back to Eurocontrol so that the procedure may be properly followed.

2. Eurocontrol shall grant her full pay, as set out in 9 above, in material damages.

3. It shall pay her 30,000 Belgian francs in moral damages.

4. It shall pay her 100,000 Belgian francs in costs.

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

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot

**Jean-François Egli
Seydou Ba**

A.B. Gardner

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