Registry's translation, the French text alone being authoritative.

EIGHTY-FOURTH SESSION

In re Montenez (No. 2)

Judgment 1689

The Administrative Tribunal,

Considering the second complaint filed by Mr. Philippe Montenez against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 December 1996, Eurocontrol's reply of 21 March 1997, the complainant's rejoinder of 1 June and the Organisa-tion's surrejoinder of 29 August 1997;

Considering Articles II, paragraph 5, and VII 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 who was born in 1944, joined the staff of Eurocontrol at headquarters in Brussels on 1 October 1985 as a translator at grade LA6. On 1 January 1992 he was promoted to grade LA5. From 16 March 1994 to 15 February 1995 he was acting head of the French Language Translation Unit of the Linguistic Division.

On 26 April 1995 Eurocontrol published a notice of competition, No. HQ-95-LA/097, for the post of head of Unit at grade LA4. It said that applicants had to be of French mother tongue or have received their education in French, and have "sound knowledge of English, German and at least one other of the languages used in the Agency". There was to be a preliminary selection, based on assessment of the applicants' academic and other qualifications, and then a final selection from the short list to be made on the strength of further assessment and of interviews.

The complainant applied on 20 June. So did Mrs. Brigitte Vaury, an interpreter at grade LA5. Mrs. Vaury had been with the Agency since 5 October 1970 and in 1988 had been appointed deputy to the head of the Unit. She had been the acting head since 1 April 1995.

On 22 August 1995 the Selection Board decided that the complainant and Mrs. Vaury were the only candidates to qualify and it ranked them on a par. By a letter of 1 September an officer of the Human Resources Directorate asked the complainant to report on 15 September for what he called a "personal development exercise", which was to consist of an interview with a firm of recruitment consultants. Mrs. Vaury too was asked to attend such an interview. On 17 November an ad hoc promotion board, chaired by the Director General and made up of three members of the Administration and two staff representatives, recommended Mrs. Vaury for the post. By a letter of 28 November an official of the Human Resources Directorate told the complainant on the Director General's behalf that his application had been unsuccessful. By a memorandum of 15 December 1995 the Director of the General Secretariat informed the staff of the Linguistic Division that Mrs. Vaury had been appointed head of the Unit as from 1 December 1995.

On 29 February 1996 the complainant submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations against the rejection of his application and the appointment of Mrs. Vaury. The case went to the Joint Committee for Disputes. In its report of 31 July 1996 the Committee said that the "complaint" was warranted because the appointed candidate had neither "a degree in German" nor "knowledge of the level usually required for the duties [of the post], particularly revising translations". In a letter of 23 September 1996 to the complainant - the impugned decision - the Director General rejected the Committee's recommendation.

B. The complainant submits that the process of selection was flawed. It was unlawful to put the matter of

selection in the hands of a private firm at a final stage from which the Selection Board was excluded. The provisions which the Agency relied on to hold the "psychological tests and interviews" are in office notice 25/94 and Articles 6 and 7 of Rule of Application No. 2 on the "selection test procedure". Those provisions are at odds with Article 30(2) of the Staff Regulations, which says that the Director General chooses from a list of suitable candidates submitted by the Selection Board. The complainant also cites Article 30(1), which makes the Selection Board competent for the whole process. So it was unlawful to bring in a sort of ad hoc promotion board. What is more, the promotion board was not independent because the Director General chaired it.

There were several breaches of Rule No. 2. For one thing, the notice failed to say what sort of competition it would be - on the strength of paper qualifications alone or of examinations as well. For another, as the Joint Committee for Disputes observed, the Selection Board gave no explanation of the choice of candidates it put to the Director General.

Mrs. Vaury has neither a degree in German nor enough practical knowledge to make up. So she did not even qualify: the notice declared "sound knowledge" of German to be "an essential requirement". The Selection Board made an obvious error of judgment in putting her technical qualifications on a par with the complainant's. The Director General made another in founding his decision of 23 September 1996 on assessment of the complainant's ability to head a team.

The complainant seeks the quashing of the decisions rejecting his application for post HQ-95-LA/097 and appointing Mrs. Vaury. He claims costs.

C. In its reply the Organisation submits that Rule No. 2, office notice 25/94 and notice HQ-95-LA/097 are not a whit inconsistent with Article 30 of the Staff Regulations. The "personal development exercise" was not a test of the candidates' professional skills but just a means of helping the Director General to choose between two candidates whom the ad hoc promotion board had put on a par. Since the two internal candidates were competing for promotion, Article 45 of the Regulations and Rule No. 4 on the promotion procedure also applied. In any event the complainant may not object to bringing in the promotion board, since it afforded a further safeguard in the process of selection. Its membership was in line with Article 5 of Rule No. 4.

There was no breach of Rule No. 2. The notice said that the competi-tion would be based on qualifications, and the complainant knew full well that short-listed candidates for any management job had to undergo a "personal development exercise". There was no need for the Selection Board to explain its choice since according to the criteria in the notice it had put the two candidates on a par.

Mrs. Vaury does have a diploma in German. Her performance reports show that she has always had to work in German and Spanish. The Selection Board did not err in finding both candidates suitable. According to the case law the Director General has wide discretion in such matters and properly took the view that Mrs. Vaury would make a better leader and manager.

Eurocontrol appended to its reply observations which the Tribunal invited from her. She challenges the finding of the Joint Committee for Disputes and objects to its methods. She produces copies of a diploma she has in German and of several of her performance reports.

Eurocontrol asks that full costs be awarded against the complainant.

D. In his rejoinder the complainant maintains that the "personal develop-ment exercise" did amount to a test of suitability for the post. The Director General is supposed to make his choice only on the strength of a "reasoned report" which, according to Article 6 of Rule No. 2, the Selection Board must submit to him together with the list of suitable candidates. Citing the case law of the Court of Justice of the European Communities, the complainant argues that such "reasoned" report is a substantive requirement and that the lack of one will adversely affect an unsuccessful candidate. The diploma in German produced by Mrs. Vaury is not a university qualifica-tion. Besides, her performance reports rate her only "good" for knowledge of German and Spanish. Seldom has she had to render German into French.

E. In its surrejoinder the Organisation contends that it caused the complainant no injury by convening the

ad hoc promotion board. He himself has no university degree in English. Insofar as he is objecting to the lawfulness of notice HQ-95-LA/097 he should have challenged it in time, but he did not.

CONSIDERATIONS

1. The complainant, a Belgian born on 24 March 1944, has been with Eurocontrol since 1 October 1985. He holds grade LA5.

On 26 April 1995 the Agency issued a notice of competition for the grade LA4 post of head of the French Language Translation Unit in the Linguistic Division. The competition was open to internal and external candidates. The notice declared English and French to be the main working languages, described the duties and called for the following qualifications:

"- University degree or equivalent professional experience.

- Eurocontrol staff must be able to work in a team with persons of other nationalities.

- Age limits: External applicants must be between 40 and 50 years of age.

- At least 10 years' experience of translating and revising work in the legal, technical and administrative fields.

- French mother tongue or language of education.

- Sound knowledge of English, German and at least one other of the languages used in the Agency is an essential requirement.

- Experience of working in a major multicultural international organisation would be an important asset.

- Experience of managing staff.

- Ability to maintain harmonious working relations.

- Familiarity with Word6/Windows would constitute an advantage."

As to procedure the notice said:

"SELECTION

An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited to take part in a final selection procedure consisting of assessments and interviews. Further details will be given to candidates who are invited to participate."

The complainant applied.

On 22 August 1995 a Selection Board met to consider the candidates. It found only two internal ones suitable, the complainant and Mrs. Brigitte Vaury, who was also in the Unit, and it ranked them *ex aequo*.

On 1 September 1995 Eurocontrol invited the complainant to report on 15 September to a firm of consultants known as Acker-Deboeck for a "personal development exercise". He went, the firm made a report, and they let him comment.

Since the grade of both internal candidates - LA5 - was lower than that of the post they had applied for - LA4 - an ad hoc promotion board met on 17 November. It recommended Mrs. Vaury. The Director General agreed and on 11 December 1995 appointed her as from 1 December 1995 with promotion to LA4.

The Administration told the complainant on 28 November 1995 that he had not been successful.

On 29 February 1996 he lodged an internal "complaint" with the Director General challenging the appointment of Mrs. Vaury and claiming the post for himself. The matter went to the Joint Committee for Disputes. The majority recommended allowing his "case" on the grounds that Mrs. Vaury did not have a degree in German or know the language well enough and that the Selection Board had failed to explain the ranking of candidates. The Director General nevertheless rejected his claims.

2. The complainant is impugning that decision. He wants the Tribunal to quash it together with the appointment of Mrs. Vaury and to appoint him instead. His pleas are set out below.

Eurocontrol asks the Tribunal to dismiss the complaint as devoid of merit.

By implication Mrs. Vaury wants the Tribunal to dismiss the complaint. She says that contrary to what the Committee found, she has a diploma in German and knows the language.

3. According to a long line of precedent the executive head of an organisation has broad discretion in making appointments, and his decision is subject only to limited review. The Tribunal will interfere only if the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. See for example Judgments 1436 (*in re* Sala No. 2), 1497 (*in re* Flores), 1654 (*in re* van der Laan Nos. 1 and 2) and the other judgments cited therein.

That is the narrow context in which the Tribunal will take up the complainant's objections.

4. (a) His first plea is a procedural flaw, the inferior rule being, in his view, at odds with the Staff Regulations. In his submission it is against Article 30 of the Regulations to consider candidates at two stages: assessment of technical qualifications by a selection board, and then recommendations by a promotion board to the Director General. That is to confer the competence of the selection board on the promotion board.

Eurocontrol demurs. It says it always has to consult a promotion board when internal candidates are competing for promotion. In this case appointing either candidate meant promotion from LA5 to LA4 and there is nothing in Article 30 to bar application of that rule when promotion is the outcome of a competition.

Article 30(2) reads:

"For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.

The appointing authority shall decide which of these candidates to appoint to the vacant posts.

In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

Chapter 3 of Title III of the Regulations is about reports, advancement in step and promotion. Article 45(2) of that chapter reads:

"An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition."

Rule No. 4, which is about the "procedure for grade promotion provided for in Article 45(1) of the Staff Regulations", stipulates under 3 that "promotion lists shall be finalised by the Director General on the proposal of the competent Promotion Board" and provides under 4 for two promotion boards, of which the first has competence for promotion to LA4.

Those provisions square with Article 30. The job of a selection board is to draw up a list of qualified internal and external candidates so as to keep the procedure impartial and help the Director General. It need not make any recommendation. But appointment to a post at a higher grade is promotion, and so Article 45 applies. The promotion board too is supposed to help the appointing authority by making proposals for promotion on the strength of comprehensive assessment.

The complainant is misreading the precedents he cites. Judgments 1223 (*in re* Kirstetter No. 2) and 1359 (*in re* Cassaignau No. 4) are about the need for a selection board to give effect to the requirements of Article 30. They are not about the need for the promotion board nor about Article 45 and the implementing rule. In Judgment 1477 (*in re* Nacer-Cherif), a case in which another organisation was the defendant, the Tribunal found that there were two stages of selection: first, a panel drew up a list of candidates according to their merit on paper; then the list went to a selection board. The Tribunal held that the selection board was bound by its terms of reference and not free to delegate any of its responsibility to a selection panel, even though

there is no general rule against such division of authority.

(b) In support of his first plea the complainant alleges breach of Article 30: the Selection Board failed to examine the "assessments and interviews" and so overlooked a material fact in rating the candidates.

The Agency replies that the qualifications the Board must assess according to Article 30(2) are the candidates' merits on paper and, if need be, as revealed in tests of their technical skills. But - says Eurocontrol - it is up to the promotion board and then to the Director General to assess temperamental fitness for management.

Its plea stands to reason. So the promotion board did not in this case encroach on the Selection Board's competence.

(c) The complainant sees a further breach of Article 30 in the fact that the Selection Board delegated the task of interviewing the candidates to a private firm of consultants.

It is true - as Judgment 1477, for one, affirmed - that, unless so empowered by a written text, a body may not delegate authority or competence. Yet here the material rules did not actually require the Selection Board to interview candidates itself. So it was free to get expert help in framing questions of a sort that only candidates with particular qualifications could answer, even though it still had to assess their answers itself and make recommendations accordingly.

(d) The complainant pleads that the Director General was not free to go beyond the Selection Board's short list and to heed further information obtained in tests or interviews.

Since there was nothing wrong with splitting up the process of assessment, there was no objection either to following up the rating of candidates' technical skills with whatever psychological tests the Organisation's interests demanded.

The complainant's first plea fails.

5. His second one is that the membership of the promotion board, which included the Director General, offended against Article 30 and the requirement of independence of the Administration.

As has been said, there was no breach of Article 30 in bringing the promotion board into the process of selection. It is not the same body as the Selection Board, and the same rules do not apply to both of them. Nor are the promotion board and the Director General one and the same: they may have different views even if the Director General himself is on the board. The board is supposed to contribute to the impartiality and openness of the promotion procedure and it does.

The second plea fails too.

6. Thirdly, the complainant pleads a procedural flaw, namely breach of Article 2(1)(a) of Rule No. 2, in that the notice failed to say what sort of competition was intended: was it one that assessed paper qualifications only or one that involved tests as well?

The provision does require that a notice should state what the competition is to be based on and set out the process of selection. There are two reasons for that. One is that the process must be explicit enough to be binding on the appointing authority; the other is that people need the information to help in deciding whether to apply and to know what to anticipate.

Here the notice said that the process of selection would start with comparison of the candidates' paper qualifications and of experience but the "final selection" would depend on "assessments and interviews". Do such "assessments and interviews" amount to, or include, "tests"? The staff of Eurocontrol knew the answer from reading office notice 25/94 of 8 December 1994, which, among other things, set out two stages: first the Selection Board would look at the candidates' records and draw up a short list; then everyone on the list would -

"be assessed by means of interviews, which may include tests, and/or other assessment procedures. A recommendation of the most

suitable candidate(s) will be made by the service concerned to the appointing authority."

So the Agency was obviously basing the competition on qualifications, and the complainant could and should have realised as much. And if he was really unsure on that score he had only to ask the Administration. Since he did not do so, presumably he did not need to, and for him to raise the issue now scarcely shows good faith.

His third plea cannot succeed either.

7. Fourthly, he charges the Agency with breach of its duty under Article 2(2) of Rule No. 2 to tell him that he was to be assessed on the strength of "qualifications and tests".

Article 2(2) says that "Where the competition is on the basis of qualifications and tests, the candidates admitted to the competition shall be informed of the nature of the tests".

But it does not apply here: for the reasons just given the competition was to be on the strength, not of "qualifications and tests", but just of "qualifications". Besides, the Agency did give the complainant due notice of the psychological tests he was to take and offered him any information he needed.

So the comment in the last-but-one sentence of 6 above is again apposite.

The fourth plea is devoid of merit.

8. The complainant cites the report of the Joint Committee for Disputes in support of his further plea that the Director General ought not to have taken the Selection Board's short list because there was not the "reasoned report" which Article 6, paragraph 5, of Rule No. 2 required the Board to submit along with its list.

The Agency replies that that provision must be "construed in, and adapted to, the context of each case": where candidates are found suitable and put on a par no explanation is called for, though "a reasoned report would have made sense had the Board put the two candidates in order of preference".

The plea is unsound. It postulates that the complainant was unaffected by the finding that he was as fit for the post as the other candidate, and in any event it overlooks the fact that candidates are in competition. One who is ranked first will have no grounds for objection, but if two are ranked *ex aequo* each may have an interest in contending that the other should have been marked lower, or not put on the short list at all. The "reasoned report" required in Article 6 of Rule No. 2 serves the two purposes of helping the Director General take a decision and of allowing review of it. And as to review, it also answers the requirement of Article 30(2) of the Staff Regulations:

"In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

So if the Director General endorses the Board's recommendations, the reasoned report required of it becomes decisive; whereas if he does not he must give reasons of his own. In any event the final ranking, whether by the Board or by the Director General, must be accounted for. If the Director General follows the Board's rating of the candidates' technical qualifications he need not say why; so the Board at least must say what its reasons are for the rating.

What sort of reasons should be given will turn on the nature of the procedure and the stage it has reached. According to precedent the form in which they are conveyed must not be such as to harm the prospects of unsuccessful candidates, especially internal ones: see Judgments 1233 (*in re* Kirstetter No. 2) under 35 and 1390 (*in re* More) under 26. Likewise, only where a *prima facie* case has been made out for quashing an appointment should there be access to a candidate's personal records: see Judgment 1436 under 6. Again, all that may be expected of the Selection Board is enough explanation for its choice to make sense, though a fuller one may be in order when it puts short-listed candidates on a par or in an order of preference. Ranking two or more *ex aequo* posits a finding that they are on a par; but they may be either equal in all respects or else, despite different qualities in different areas, rated broadly equal: the Director-General and the complainant need to know which.

In this case the Selection Board did not comply with the requirement. Nor did Eurocontrol later remove the flaw. Although the reasons stated for the impugned decision are sufficient and though the complainant's other objections to it fail, it does show a fatal flaw. An organisation that sets up an advisory body and has a duty to consult it must abide by its own rules and keep to the prescribed procedure: see Judgments 1488 (*in re* Schorsack), under 9 to 11; 1525 (*in re* Bardi Cevallos), under 3, and the judgments cited therein.

The plea is allowed.

9. The Tribunal will not take up the complainant's further pleas of fatal flaws in the impugned decision. The Director General will reconsider the case in the light of the reasoned report which the Selection Board must submit to him.

10. The Agency shall resume the process of selection at the point at which the flaw occurred. The Selection Board shall make the reasoned report required under Article 6 of Rule No. 2 and the process shall then go ahead as prescribed. But since the psychological tests are quite irrelevant to the Board's assessment of technical qualifications they need not be repeated.

11. Having succeeded in part, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is sent back so that Eurocontrol may follow the procedure set out under 10.

3. The Agency shall pay the complainant 50,000 Belgian francs in costs.

4. His other claims are dismissed.

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

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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