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

EIGHTY-FIFTH SESSION

In re Bodar

Judgment 1768

The Administrative Tribunal,

Considering the complaint filed by Mr. Jean Guillaume Bodar against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 March 1997 and corrected on 7 May, Eurocontrol's reply of 22 August, including comments invited by the Tribunal from Mr. Philip Boivin, the complainant's rejoinder of 27 October and the Organisation's surrejoinder of 13 February 1998, including further comments by Mr. Boivin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed Mr. Boivin's application for the hearing of witnesses;

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

A. The complainant is a Belgian who was born in 1951. Eurocontrol employed him at the material time as a second-class assistant at grade B3 and since July 1994 he had served as secretary to the Staff Committee in Brussels.

In September 1995 Mr. Boivin was recruited to a post for an expert at the Agency's Institute of Air Navigation Services in Luxembourg. On 30 November 1995 the complainant lodged an internal "complaint" against the appointment, submitting that Mr. Boivin had been recruited from a reserve list drawn up during the selection process for a post in Brussels. By a memorandum of 29 February 1996 the Director of Human Resources told him that Mr. Boivin's appointment had been cancelled.

On 1 March 1996 Eurocontrol issued a notice of a competition, No. LX-96-AA/022, to fill the post of head of the Accountancy and Personnel Office at grades A5/A6/A7. The complainant says that he applied on 26 April. By a letter of 31 May the Director General told him that he had not been successful. He wrote by hand on the text of the letter "Received 8/6/96". By a decision of 2 September 1996 Mr. Boivin was appointed to the post as from 1 September. By a memorandum of 4 September Mr. Bodar filed a "complaint" with the Director General asking him "to cancel the procedure instigated by notice LX-96-AA/022 and carry out the competition all over again in keeping with the rules". He is impugning the implied rejection of that "complaint".

B. The complainant has four pleas.

The first is that although the letter of 31 May 1996 affected him adversely it failed to explain the reasons for the decision. The Tribunal has often stated what is the very least that such explanation must amount to.

Secondly, he pleads breach of the process of selection. Having been at grade B3 since 1 October 1990, he qualified to enter the competition. The successful candidate did not. Besides, he applied twice: once under Article 30 of the Staff Regulations as an internal candidate and once under Article 31 as an external one.

Thirdly, Eurocontrol committed an abuse of procedure. Though the Administration had cancelled the original appointment of Mr. Boivin, it gave him intensive training and let him go to important policy meetings. That shows the Agency's determination to keep him on and see that he qualified to compete.

Fourthly, the Director General drew obviously wrong conclusions from the evidence.

The complainant asks the Tribunal to quash the process of selection announced in notice LX-96-AA/022 and the decision of 31 May 1996.

C. In its reply the Agency argues that the complaint is irreceivable on three counts. First, Mr. Bodar's "complaint" of 4 September 1996 did not challenge any specific decision but merely sought the cancellation of the whole process and the start of a new one. To be receivable a complaint must challenge an administrative decision, and a competition is not one.

Secondly, his claim to the quashing of the decision of 31 May 1996 to reject him did not form part of his internal "complaint". Being a new one, it is irreceivable.

Thirdly, he has not exhausted his internal remedies as Article VII(1) of the Tribunal's Statute required him to do. He failed to lodge his "complaint" within the three-month time limit in Article 92(2) of the Staff Regulations. Contrary to what he makes out, he must have received the letter of 31 May 1996 by 3 June. Eurocontrol asks the Tribunal to order the complainant to disclose the original text of the letter for the latter to see whether he may have changed the date of receipt *ex post facto* from "3" to "8" June.

In subsidiary argument on the merits the Agency submits that according to precedent it need not explain the reasons for every single decision, particularly rejecting someone in a competition. Such is not its practice. It may give the reasons in proceedings before the Tribunal, if not in the text of the decision. The reason why the Selection Board dropped the complainant was that he did not have the right experience of accounting.

Eurocontrol says it followed the proper procedure in filling the vacancy and there were no flaws. It kept Mr. Boivin until the new competition was over so as not to disrupt the work and, as precedent requires, to spare him injury.

It drew no mistaken conclusions from the evidence.

Mr. Boivin's main contention is that the complaint is irreceivable. He says that the complainant did not apply on 26 April 1996 to enter the competition and missed the three-month time limit for filing his internal "complaint". It was on 3 June 1996, not 8 June, that the complainant got notice of the decision of 31 May 1996 but he changed the "3" to an "8" to avoid the time bar. By way of proof he produces an expert opinion from a graphologist.

Subsidiarily, Mr. Boivin says the complaint is devoid of merit. He makes several claims, including one to order that the complainant pay him 100,000 ECUs in material and moral damages.

D. In his rejoinder the complainant enlarges on his pleas. He says that the official who signed the letter of 31 May 1996 had no authority to do so. He puts forward new claims, including awards of 100,000 Belgian francs in damages and of the same amount in costs.

E. In its surrejoinder the Agency restates its pleas. In its submission the complainant has not answered the arguments in its reply or Mr. Boivin's comments about the date at which he had notice of the letter of 31 May 1996. So he has tacitly acknowledged that he got it on 3 June.

In further comment Mr. Boivin presses his earlier pleas and claims in full.

CONSIDERATIONS

1. The complainant is a staff member of Eurocontrol. Since 1 October 1990 he has been a second-class assistant at grade B3, and since July 1994 secretary to the Staff Committee, at Eurocontrol's headquarters in Brussels.

In September 1995 Mr. Philip Boivin was put on a post for an accountant at the Agency's Institute of Air Navigation Services in Luxembourg. He was already on a reserve list on the strength of evaluation of his application for another post.

On 30 November the complainant lodged an internal "complaint" against that appointment.

The appointment was cancelled from 31 August 1996. The Director of Human Resources so informed the complainant by a memorandum of 29 February 1996.

On 1 March Eurocontrol put up for competition the post of head of the Accountancy and Personnel Office at grades A5/A6/A7 at the Institute. It was open to both inside and outside applicants.

The complainant applied - he says on 26 April 1996 - and so did Mr. Boivin. Being unsure of his status, Mr. Boivin applied twice, once as an outside candidate and once as an internal one on the strength of his appointment of September 1995. Actually Eurocontrol treated him as an outside applicant.

On 15 May 1996 the Selection Board looked at the 23 applications and drew up a short list of five. The complainant was not on it.

On 21 May, the only inside applicant declared by the Board to be qualified, was interviewed, but the Director General did not appoint him. The Board had ranked Mr. Boivin first in order of merit of the outside applicants. The interviewing panel saw him on 28 May and recommended him for the post. By a letter of 31 May 1996 the Director of Human Resources told the complainant on the Director General's behalf that he had been unsuccessful, others having been found more suitable. The letter was sent to him by messenger service. On the photocopy that the complainant has produced appear the initialled words "Received on 8/6/96". He is said to have received the letter on 3 June but changed the "3" to an "8".

On 1 September 1996 Mr. Boivin was appointed to the post.

2. The complainant lodged an internal "complaint" by a memorandum of 4 September 1996 "against the process of selection for post LX-96-AA/022 and the appointment of Mr. Boivin to it". He claimed *in fine* the cancellation of "the procedure instigated by notice LX-96-AA/022" and the holding of "the competition all over again in keeping with the rules". The gist of his case was as follows:

In breach of the fifth paragraph of Article 6 of Rule of Application No. 2 the Selection Board failed to substantiate its report.

It had no basis in law for delegating part of its task to an "interviewing panel". That was in breach of Article 6.

If the Organisation treated Mr. Boivin as an inside applicant it was wrong. He had never had his appointment confirmed and in breach of Article 30 of the Staff Regulations he was given the unfair advantage of priority over outside applicants.

If Eurocontrol treated him as an outside applicant, it again acted in breach of Article 30 by giving him preference over an inside applicant.

He was unduly favoured because Eurocontrol had kept him temporarily in the vacant post and so let him gain experience that the other candidates did not have.

It was obvious from the outset that Eurocontrol was bent on appointing Mr. Boivin; so the competition was a mere sham and an abuse of authority.

The Director General did not answer the "complaint". The complainant says that, having rejected it, he was bound to refer it to the Joint Committee for Disputes. He did not.

The complainant is impugning the implied rejection of the "complaint". He seeks the quashing of the "process of selection" and the "decision of 31/05/96 rejecting him". He has the following pleas:

The Agency failed, in breach of Article 25 of the Staff Regulations, to explain its decision to reject him.

It broke the rules on selection in Articles 27 to 36 and 45 of the Staff Regulations and in Rule of Application No. 2. It gave Mr. Boivin an unfair advantage by letting him file two applications, one as an inside and one as an outside candidate. He did not qualify as an inside one because he had not had his appointment confirmed. And according to Article 30 of the Staff Regulations he should as an outside one have been given

lower priority than an internal one like the complainant. The breach of the rules was the more serious for the Director General's failure to explain the choice in writing.

There was abuse of authority. By keeping Mr. Boivin on after cancelling his appointment the Agency gave him an unfair advantage. It gave him "intensive training" and let him "go to important policy meetings". It was so bent on having him that it waived probation.

The lack of a reasonable explanation in the text of the decision shows how blatant was the error of judgment.

The Director General was bound under office notice 6/95 of 1 March 1995 to summon the Joint Committee for Disputes that that notice set up. He did not.

Eurocontrol asks the Tribunal to declare the complaint irreceivable or, failing that, devoid of merit. It is irreceivable because the claims are vaguely worded and different from the ones in the internal "complaint". That "complaint" was in any event out of time. According to Article 92(2) of the Staff Regulations the complainant should have filed it within three months of getting notice of the decision he wanted to challenge, the letter of 31 May 1996. That letter was sent by messenger service at a time when he was on duty; so he must have got it by 3 June 1996. The photocopy of it he has produced bears the note of acknowledgment he wrote on it by hand. In that note the date was originally 3 June but the "3" was later changed to an "8". Since he got the letter on 3 June his "complaint" of 4 September 1996 was out of time and so he has failed to exhaust his internal remedies.

Eurocontrol's pleas on the merits are subsidiary.

According to precedent - for example Judgment 1289 (*in re* Enamoneta) - it need explain its decision only in answer to the internal appeal. In any case its letter rejecting him did give the minimum explanation required of it.

It did comply with the rules on selection. From the start it treated Mr. Boivin as an outside applicant. In accordance with Article 30 of the Regulations it did give priority to the inside applicants since the Board took them first and at that point in the procedings rejected the complainant. The Board picked only one inside applicant but the Director General turned him down. Only then did the Board take up the outside applications. The choice fell on Mr. Boivin and the Director General agreed.

There was no abuse of authority. After the cancellation of Mr. Boivin's appointment there had to be someone on the post to make sure that the work had to go on. Citing Judgment 1223 (*in re* Kirstetter No. 2) Eurocontrol submits that since Mr. Boivin had accepted the offer of appointment in good faith it had to spare him injury. So it was right to leave him on the job for the time being. It was for everyone's sake that the competition and selection went ahead promptly.

There was no obvious misreading of the evidence.

In a brief invited by the Tribunal Mr. Boivin too asks it to declare the complaint irreceivable or, failing that, devoid of merit. He claims an award of 100,000 ECUs in material and moral damages. In his submission the complainant has failed to prove that he applied for the post in time. Not being a valid candidate, he may not challenge the procedure. His internal "complaint" was out of time, since he had notice on 3 June 1996 of the Agency's decision of 31 May. Relying on a report by a graphologist Mr. Boivin submits that in the handwritten acknowledgement of receipt Mr. Bodar changed the "3" to an "8". The only decision the complainant may challenge is the one to reject him. The appointment of Mr. Boivin never having been challenged, may not be quashed and neither may any earlier part of the proceedings. The reasons Eurocontrol gave in its decision of 31 May 1996 were adequate. There were no procedural flaws. The Organisation treated Mr. Boivin as an outside applicant. It was in line with the case law to keep him for the time being on the post he had been appointed to. There was no breach of Article 30 of the Staff Regulations since the Board looked at the inside applicants first. There was no favouritism. There was no need for any period of probation since the Organisation had already had ample time to assess him.

The complainant presses his pleas in his rejoinder. He submits that the decision in the letter of 31 May 1996 was unlawful because the signatory had no authority to represent the Director-General. So, the first decision

to affect him adversely was the one of 2 September 1996 to appoint Mr. Boivin and he challenged it in time. He maintains his arguments on the merits. In defiance of precedent - and he cites Judgments 1223 and 1390 (*in re* More) - the Organisation made no proper comparison of him and Mr. Boivin and offered him no proper explanation of its rejection of him. The Organisation caused him injury and denied him an internal remedy by failing to put his case to the Joint Committee for Disputes.

In its surrejoinder the Organisation enlarges on its contentions that the complaint is irreceivable because the complainant's internal appeal was out of time and he therefore failed to exhaust his internal means of redress and that his case is groundless. The decision rejecting him gave a clear enough explanation for him to be able to make up his mind about what to do. He lacked qualifications required for the post, namely thorough knowledge and experience of modern accounting. On that score Mr. Boivin fitted the bill. The Selection Board does not itself hold interviews. The reason why the case did not go to the Joint Committee for Disputes was that the Committee stopped work for several months and did not start again until the autumn of 1997. Other cases too were held up.

Receivability

3. Eurocontrol and Mr. Boivin submit that the complaint is irreceivable because of what the complainant is claiming. He seeks the quashing of a process. He ought to have sought the quashing of Mr. Boivin's appointment. Instead he seeks the quashing of the decision of 31 May 1996, a new claim that he did not put in his internal appeal and that is therefore irreceivable.

They are mistaken. The Organisation must interpret a staff member's claims in good faith and read them as it might reasonably have been expected to do. And there is no doubting the complainant's intent in his internal appeal and in this complaint. He wants the Administration to take, and the Tribunal to order, action for the process of selection and appointment to the post to start all over again, and he hopes to get the post for himself. The drift of both internal appeal and complaint is the same: see Judgments 1575 (*in re* Doyle) and 1595 (*in re* De Riemaeker No. 3) under 3. In his appeal he objected to his "rejection for the post" and challenged the appointment of Mr. Boivin, in which the rejection of himself was implicit: see Judgment 1223, under 20. And though his complaint does not expressly seek the quashing of the appointment of Mr. Boivin, consistent precedent says that allowing the unsuccessful candidate's case means quashing the appointment made: see Judgments 1049 (*in re* Dang and others); 1223, under 38; and 1359 (*in re* Cassaignau No. 4) under 13. So here the claim is implied. Nor is the complainant's claim to the quashing of the decision to reject himself a new one since it was at least implicit in his internal appeal.

4. The material issue is whether, to meet the time limit in Article 93(3) of the Staff Regulations, he need challenge only the appointment of Mr. Boivin.

Contrary to what he contends, the decision of 31 May 1996 was not *ultra vires*. But when such a decision of rejection is notified to a candidate before the appointment is announced, does the time limit for internal appeal run from the date of notification of his own rejection or of the actual appointment?

Judgment 1223 says under 20:

"So the staff member has undeniably the right to file an internal appeal or a complaint with the Tribunal if he believes that the appointment to a vacancy he has applied for is improper. He may for that purpose challenge any relevant decision, whether it be the express rejection of his own application or the rejection implied in the appointment of someone else."

Since the unsuccessful candidate may challenge the process of selection of the successful one, it is only reasonable that the time limit for internal appeal should run from the date at which he learned of the appointment. It is immaterial to the present case whether an exception may be allowed to that rule if the sole issue that the appeal raises relates to the unsuccessful candidate: for example, whether he applied too late, or failed to qualify for the post.

The conclusion is that the internal appeal was not out of time. So it does not matter when the complainant got the letter of 31 May 1996, and there is no need to grant the defendant's application for disclosure of the original.

5. In his first brief the complainant merely challenges the offending decisions. In his rejoinder he adds a claim to moral damages. Since according to Article 6(1)(a) of the Tribunal's Rules and the Schedule thereto the "relief claimed" must be stated in the complaint the new claim is irreceivable.

The procedural flaws

6. In both his original brief and his rejoinder the complainant contends that the Director General acted in breach of the annex to office notice 6/95 of 1 March 1995 by failing to refer to the Joint Committee for Disputes - which that notice set up - his "complaint" against the decision to appoint Mr. Boivin.

The Organisation does not take the point in its reply but in its surrejoinder explains that the reason why it did not put his case to the Joint Committee for Disputes was that the Committee had stopped working and was not taking cases at the time.

Article 4 of the Annex setting out the rules of the Joint Committee for Disputes says:

"The appointing authority must seek the opinion of the Joint Committee for Disputes before taking a decision to reject even part of an appeal lodged under Article 1. The Joint Committee shall give an opinion, stating the grounds on which it is based, no later than two months subsequent to receipt of the request for an opinion. This opinion shall be signed by the Chairman and forwarded by him to the appointing authority.

If no opinion is received within this period, the appointing authority may proceed with its decision."

Like Article VII(3) of the Tribunal's Statute, Article 93(3) of the Staff Regulations says that failure to reply to a "complaint" within 60 days implies rejection. The duty of consulting the Joint Committee before rejecting a "complaint" must apply both to express and to implied rejection; else it would be meaningless and the Administration might simply dodge it. The Committee must be consulted even in the event of partial rejection: that shows the intent that rejection of any kind should go to it.

There was no referral of this case to the Committee and there was therefore breach of the rule.

According to a long line of precedent, to take a decision without the required referral to an advisory body or awaiting its report is a fatal breach of due process: see Judgments 1488 (*in re* Schorsack) under 10, 1525 (*in re* Bardi Cevallos) under 3, 1616 (*in re* Echeverría Echeverría and others) under 6, 1696 (*in re* Felkai) and the other rulings cited therein.

The Agency's answer is immaterial to observance of the rule of law. It neither repealed nor formally suspended requirement of referral to the Committee, and for as long as the requirement exists it must comply.

7. The conclusion is that the implied decision must be set aside, with whatever consequences that may have for the rejection of the complainant's candidature and the appointment of Mr. Boivin. The Organisation must start the procedure again at the point at which the breach of due process occurred and the Director General shall make a new decision after referral to the Joint Committee for Disputes.

8. The complainant is entitled to costs, and the amount is set at 50,000 Belgian francs.

9. Mr. Boivin has asked the Tribunal to declare the Organisation liable and to order it to "reinstate" him. Since he is not a party to the dispute the Tribunal will not entertain them. Nor will it entertain his claims to damages from the complainant for and to the imposition of disciplinary penalties on Eurocontrol employees.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case is sent back to the Director General for a new decision after referral to the Joint Committee for Disputes.

2. The complainant's other claims are dismissed.

3. Mr. Boivin's claims are dismissed.

4. The Organisation shall pay the complainant 50,000 Belgian francs in costs.

In witness of this judgment, adopted on 20 May 1998, 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 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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