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

EIGHTY-FIFTH SESSION

In re De Riemaeker (No. 4) (Application for execution)

Judgment 1771

The Administrative Tribunal,

Considering the application filed by Mrs. Irène Eugénia Luppens, née De Riemaeker, on 3 September 1997 for the execution of Judgment 1595, the reply of 5 December 1997 from the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), the complainant's rejoinder of 16 February 1998 and Eurocontrol's surrejoinder of 27 April 1998;

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

Having examined the written evidence;

CONSIDERATIONS

1. The material facts are set out in Judgment 1595, which the Tribunal delivered on 30 January 1997 on Mrs. De Riemaeker's third complaint. Eurocontrol put up for competition the post of head of the Translation and Interpretation Division. The complainant applied. The selection board put to the Director General a short list of only two candidates: the complainant and Mr. Alexander Rutherford. The Director General appointed Mr. Rutherford. She filed her complaint. The Tribunal set aside the appointment of Mr. Rutherford because he failed to meet one of the requirements in the notice of vacancy, namely at least ten years' experience of translation, revision and interpretation: being disqualified, he should not have been on the short list. The Tribunal sent the case back for resumption of the competition at the point where the flaw had occurred and for the making of an appointment by due process.

On 18 February 1997 the Director General cancelled the appointment but made Mr. Rutherford acting head of the division. In answer to an inquiry from the complainant Eurocontrol told her on 26 May 1997 that it had called a selection board. On further inquiry she learned on 6 June 1997 that on the board's recommendation the Director General had decided to appoint none of the candidates, her own "managerial skills" being deemed inadequate. The decision made public on 9 June 1997 was that "no candidate was found suitable".

In her brief filed on 3 September 1997 in support of her present application the complainant asks the Tribunal to quash the decision of 6 June 1997, award her moral damages for the failure to execute Judgment 1595 and order the Agency to pay the costs awarded to her in that judgment plus interest at 10 per cent a year from 31 January 1997. She wants the Tribunal to appoint someone to assess her ability to carry out the duties of the post.

On 29 September 1997 Eurocontrol paid her the award of costs plus interest, a total of 106,000 Belgian francs.

On 28 November it issued a new notice of competition that set new requirements for the post. It dropped the qualification that Mr. Rutherford had lacked and put greater stock in management skills.

In its reply Eurocontrol asks the Tribunal to reject her application.

The parties' pleas are taken up below.

Receivability

2(a) Since Eurocontrol has paid the complainant the amount due in costs under Judgment 1595, plus interest, her application for execution under that head shows no cause of action. Eurocontrol blames the delay on an oversight,

the complainant did not claim payment of the sum before coming back to the Tribunal, and there are no grounds for awarding her damages.

(b) An application of the sort she has made is receivable according to the case law - see Judgments 732 (*in re* Loroch No. 3), 1328 (*in re* Bluske No. 3) and 1668 (*in re* Bardi Cevallos), under 8 - though of course it may not be any wider in scope than the judgment itself. According to the same precedents there is no need to meet the requirement in Article VII(1) of the Statute that the internal remedies be exhausted.

When the Tribunal allows a complaint, sends the case back so that the organisation may resume or continue some procedure, and leaves it a degree of discretion, the new decision will ordinarily be subject to appeal, and in that case the internal remedies do have to be exhausted. But the application for execution may relate only to the terms of the Tribunal's judgment; it is not an opportunity for challenging the content of a new decision (see Judgment 732). The Tribunal has allowed an application for execution where on remand the case was not dealt with as it had ordered: see Judgment 1365 (*in re* Diotallevi No. 2 and Tedjini No. 2). It has also allowed an application on the grounds of the defendant's failure to act, or to act promptly enough: see, for example, Judgments 1328, 1338 (*in re* Manaktala No. 3), 1361 (*in re* Ahmad No. 4), 1362 (*in re* Bluske No. 4), 1365, 1427 (*in re* Sharma No. 5), 1522 (*in re* Bluske No. 5) and 1523 (*in re* Malhotra No. 4).

Here some of the complainant's pleas are about the execution of the terms of the judgment, and some about the process which followed it, but which it did not fully determine. Eurocontrol does not raise the issue of receivability and it argues the merits of her various pleas. The parties have difficulty in telling when the internal remedies have to be exhausted and when they do not. So the Tribunal waives the requirement, which it would in the circumstances be sheer pedantry to enforce.

(c) The complainant applies for an expert enquiry to determine whether she is fit for the duties of the post.

Firm precedent has it that an executive head must be allowed discretion to determine what services the organisation needs and whether someone is able to provide them, and that the Tribunal may exercise only a limited power of review over decisions on such matters.

To allow the complainant's application for expert inquiry would be to assume that the Tribunal might replace the Director General's assessment of her with its own and would be alien to the notion of limited review: see Judgment 1595 under 4. The complainant's application for such inquiry is therefore disallowed. She may of course still offer evidence of such abuse of discretion as she may be alleging.

The merits

The competition

3. The complainant pleads breach of the requirements of Article 30 of the Staff Regulations. In her submission the procedure that Eurocontrol has followed was wrong. When one of its officials enters a competition for a post that would bring promotion a selection board should meet first and then, if need be, the promotion board. She says that only the selection board should have met in this instance.

In Judgment 1689 (*in re* Montenez No. 2) the Tribunal held that it was no breach of the Regulations for both bodies to meet. There being no reason to depart from that precedent, her plea fails.

Compliance of the challenged procedure

and decision with Judgment 1595

4. The complainant pleads failure to execute the judgment.

(a) Appointing someone to act as head of division was not contrary to the Tribunal's order that the process of selection be resumed. Precedents are to be found in Judgments 1223 (*in re* Kirstetter No. 2) under 39, 1359 (*in re* Cassaignau No. 4) under 15 and 1390 (*in re* More) under 26. And there was nothing improper about appointing Mr. Rutherford as acting head.

(b) The resumption of the competition was also in line with the judgment. The selection board having completed its

task by correcting the short list, there was no breach of procedure in consulting the promotion board, which was competent to consider the candidates' skills and, in particular, to call in an expert: see Judgment 1689.

(c) The complainant was the only remaining candidate. The finding that she was not qualified and the decision not to appoint her were not at odds with the judgment. Not only did the Tribunal express no view on her qualifications, but it did not even say that the competition had to result in any appointment.

(d) The conclusion is that it was not contrary to the judgment for the Agency to make no appointment at all as a result of the competition.

(e) Even though the new competition is not directly at issue in this case, holding it was not contrary to the judgment, which said nothing on the subject. If a post is vacant and one competition to fill it has failed, the organisation may of course hold another and in doing so change the requirements in the notice of vacancy. Precedent even allows the suspension of a competition for that very purpose if that is what the organisation's interests demand: see Judgments 1223 under 31, 1686 (*in re* Molloy No. 4) and the others cited therein. Indeed the organisation has all the more reason to change the requirements if one competition has already failed.

(f) The Agency did, however, take too long to execute the judgment. In this particular case the duty it owed its staff to treat them considerately and in good faith called for prompt action and for the appointment of someone within a reasonable lapse of time to head the division for good. The complainant too was entitled to an early decision if the Director General doubted all along her ability to run the division: see Judgments 1338, 1361, 1362, 1365, 1427 and 1523.

Did the Director General then duly execute the judgment?

Compliance with the competition procedure

5. It is a breach of due process for an organisation to require some qualification that is not mentioned in the notice of competition: see for example Judgment 1687 (*in re* Bedrikow No. 2) under 6.

Here the notice said that the successful candidate would be in charge of managing the Agency's language services and have to ensure the best use of the division's staff and other resources. The candidates knew, too, that only an able manager would do to head such an important division.

So the promotion board and the Director General set no new requirement that had not been in the original notice.

The alleged error of appraisal and misuse of authority

6. The main issue is whether the Director General infringed any of the complainant's rights by refusing to appoint her on the grounds that she was not a good enough manager.

According to firm precedent an organisation has wide discretion in appointing staff. Its decision being subject only to limited review, the Tribunal will interfere only if it was taken *ultra vires* or reveals some formal or procedural flaw or mistake of fact of law or misuse of authority, or if it overlooks a material fact or draws some plainly wrong inference from the evidence: see Judgment 1689 and the others cited therein.

The nub of the complainant's case is that she was the only candidate still in the running, had the right skills for management, and so should have got the job. But the Director General is not bound to appoint the only candidate left if he finds that candidate below par. On that score his discretion must be respected.

Here he was looking for someone who was especially good at management. The importance of the division makes that understandable enough. Even though the promotion board acknowledged the complainant's qualifications in its report to the Director General, he had discretion to take the view that the post called for a better manager and therefore to reject her.

The burden is on a complainant to prove misuse of authority, for example by showing that an appointment was made or refused for reasons extraneous to the organisation's interests. It is not enough for the complainant in this case to cite as evidence the Director General's decision to declare the original competition unsuccessful: he was free to take the view that another one might succeed. He was free, too, to change the requirements after the failure

of the original competition: after all, he could have called off that competition altogether for that very purpose.

No doubt the complainant believed the Director General to be set on putting Mr. Rutherford on the post: he had already appointed him once, had declared him acting head after the quashing of that appointment, had rejected her and then amended the requirements - so Eurocontrol says - to match its needs. But there was nothing unlawful about any of that. As to the change in the requirements, the complainant has misread a passage in Judgment 1595, under 10, which said that the qualification which Eurocontrol required and which Mr. Rutherford lacked was "fully warranted by [the Organisation's] desire to get someone with experience of both translation and interpretation". That did not mean that the qualification could not be dropped or amended if need be. Precedent so allows. Nor in general do those steps argue a resolve to achieve some purpose extraneous to the Agency's interests. The Director General says where those interests lie, and there is no reason to suppose that he wanted to appoint someone unqualified or depart from due process.

Whatever the complainant's attributes may be - and in large measure the Agency acknowledges them - she has not shown that it was an improper exercise of discretion to reject her in the original, resumed, competition on the grounds that she was not a good enough manager.

The plea fails.

Her claim to moral damages

7. The delay in executing Judgment 1595 was in breach of her rightful expectations and warrants an award of damages for moral injury.

For the same reason she is entitled to an award towards costs.

DECISION

For the above reasons,

1. Eurocontrol shall pay her 200,000 Belgian francs in moral damages.

2. It shall pay her 50,000 Belgian francs towards costs.

3. Her other claims are dismissed.

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.