

EIGHTY-NINTH SESSION

In re Barret (No. 3)

Judgment No. 1982

The Administrative Tribunal,

Considering the third complaint filed by Mr Christian Barret against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 August 1999 and corrected on 30 August, Eurocontrol's reply of 3 December 1999, the complainant's rejoinder of 15 March 2000, the observations submitted by Mr L. on 21 March and the Agency's surrejoinder of 3 May 2000;

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

Having examined the written submissions;

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

A. The complainant, a French citizen born in 1950, joined Eurocontrol on 1 June 1984 as an expert. He was promoted to grade A5 with effect from 1 April 1994.

On 13 November 1995 he applied for the post of Head of Bureau GS.4 (Internal Services) at grade A4, for which the notice of competition had been published on 27 September with the number HQ-95-AA/148. His candidacy was rejected by a letter of 30 November on the grounds that he had not completed the two years in the A5 grade required by the notice. On 8 December 1995, the Director General decided not to continue with the competition as he was about to reorganise the Directorate of the General Secretariat, in which Bureau GS.4 was located. The new structure was published on 15 March 1996.

By a decision of the Director General dated 16 April 1996, Mr L., an expert at grade A5, was called upon to occupy *ad interim* the function of Head of Bureau GS.4 with effect from 1 April 1996. On 27 June, the complainant addressed an internal complaint to the Director General against the "decision" not to publish a new notice of competition and the appointment *ad interim* of Mr L. On 6 November 1996, the Director of Human Resources referred the internal complaint to the Joint Committee for Disputes, although the latter did not issue an opinion.

By a decision of 3 March 1997, the Director General interrupted the *ad interim* appointment of Mr L. as of 1 April in accordance with Article 8 of the Staff Regulations governing officials of the Eurocontrol Agency, which provides that temporary postings shall be restricted to one year. He indicated that a separate decision would determine the functions of Mr L. from that date. According to the complainant, Mr L. nevertheless remained Head of Bureau GS.4, while the Agency claims that this function was henceforth assumed by the Director of the General Secretariat himself and that Mr L. returned to his functions as expert at grade A5 within the Bureau. Contrary to what had been announced, no decision was made indicating Mr L.'s new functions.

On 30 June 1997 the Agency published a new notice of competition with the number HQ-97-AA/016 for the post of Head of Bureau GS.4 ("Logistics and Support Services" as it is now called). The complainant applied on 11 August. The Selection Board reviewed the applications on 21 November 1997. The complainant was placed in the second group, while Mr L. was placed in the first group with another internal candidate. The latter withdrew and only Mr L. was called for an interview. His candidacy was submitted to the ad hoc Promotion Board, which met on 20 January 1998. The recommendation to promote Mr L. was issued on 28 January. By a decision of 3 February the Director General promoted the latter to grade A4 and appointed him to the post as from 1 February 1998.

On 3 March 1998 the complainant submitted a new internal complaint to the Director General seeking the quashing of the above decision for abuse of authority, abuse of process, "substantive flaws", formal flaws, the absence of a reasoned report of the Selection Board, failure to compare the respective merits of the candidates and failure to state the reasons for the rejection of his application. On 16 March, the Director of Human Resources informed him that his application had been rejected. The Selection Board issued a reasoned report on 20 March. In its opinion dated 7 July the Joint Committee for Disputes unanimously recommended the Director General to uphold the internal complaint due to the insufficient information provided to the complainant concerning the rejection of his application and the absence of a reasoned report of the Selection Board before the appointment of the selected candidate. By a letter of 28 July the Director of Human Resources informed the complainant that the Director General was cancelling the appointment of Mr L. By two decisions of 31 July 1998 with retroactive effect from 1 June, the Director of Human Resources, on behalf of the Director General, cancelled the decision to appoint Mr L. and called upon him to occupy *ad interim* the function of Head of Bureau GS.4.

On 9 September the ad hoc Promotion Board recommended Mr L.'s promotion to grade A4 with a view to filling the post of Head of Bureau GS.4. By decisions of 15 September, with effect from 1 October, the Director General brought to an end the temporary appointment of Mr L. and promoted him to the post.

On 14 December 1998 the complainant lodged an internal complaint. On 25 January 1999 the Director of Human Resources informed him that the ad hoc Promotion Board had decided not to recommend him for the above post. On 26 January he sent the complainant a note recalling the procedure which had been followed. In its opinion dated 21 April the Joint Committee for Disputes unanimously recommended the rejection of the internal complaint, but also proposed the award of "some form of financial or other compensation", in view of the "perfectly understandable feeling of frustration" which had arisen in the complainant as a result of the "slowness and lack of administrative rigour ... of the procedure". By a letter of 4 May 1999, which is the impugned decision, the Director of Human Resources rejected the internal complaint on behalf of the Director General.

B. The complainant submits that the note of 26 January 1999 summarising the procedure (hereinafter the summary note) shows that the Selection Board did not meet again after the cancellation of the results of the first competition and that the Director General therefore used the Board's opinion of 20 March 1998, which was unlawful, as a basis for the appointment of Mr L.

He challenges the lawfulness of failing to publish the vacancy notice immediately after the announcement concerning the reorganisation of the Directorate of the General Secretariat on 15 March 1996. The delay in publishing the notice was unlawful insofar as it had been justified by the need to try out the new organisation of the Directorate, since the structure of Bureau GS.4 had not been fundamentally modified. He adds that the successive temporary appointments of Mr L. - including the "*ad interim* appointment in practice" that he held from April 1997 to January 1998 - were unlawful because they violated Article 8 of the Staff Regulations and were intended to enable Mr L. to meet the requirements of the post, which constitutes abuse of authority.

The complainant alleges inequality of treatment on the grounds that, even though he had also been put by the Selection Board on the list of suitable candidates, he was not called for an interview by the Promotion Board. Subsidiarily, he contends that the Agency was obviously mistaken in its assessment of his and Mr L.'s professional qualifications.

The complainant requests that the decisions to promote Mr L., to reject his own application and to dismiss his internal complaint be set aside. He seeks awards of 1,500,000 Belgian francs in moral and material damages caused by the "unlawful nature of the impugned decisions" and, subsidiarily, of 500,000 francs for moral damages as a result of the manner in which the administrative procedures were carried out. He also claims costs.

C. In its reply the Agency argues that the complaint is not receivable insofar as it challenges the "non-publication of the vacancy notice after 15 March 1996 and the temporary nominations" of Mr L. Since the complainant did not pursue his internal complaint dated 27 June 1996, which in any event was irreceivable for lack of any act which injured him, he is time-barred from resubmitting the claims and the pleas set out in his internal complaint.

On the merits the Agency explains that the summary note of 26 January 1999 was "unfortunately incomplete", which "leads the complainant to draw mistaken conclusions". The Agency states that the Selection Board met once again on 30 July 1998 and issued a reasoned report, which it produces as evidence to its reply. It rejects the allegation of abuse of authority, which it says is not proven by the complainant. It denies inequality of treatment

since the complainant, even though included on the list drawn up by the Selection Board, had been classified in the second group by order of merit; there was therefore no obligation to call him for an interview if one of the candidates in the first group met the requirements of the post. Finally, enumerating Mr L.'s qualifications and professional experience, it denies any glaring error in assessing the merits of the candidates.

In subsidiary argument, it submits that the Director General has broad discretionary powers to decide upon the publication of vacancy notices at the time he feels appropriate. Contrary to what the complainant claims, Bureau GS.4 was substantially reorganised. It denies that Mr L. had been given successive temporary appointments: after holding the post *ad interim* for one year, he returned to his duties as an expert. He received his second temporary appointment under different circumstances and there was no "*ad interim* appointment in practice" in the meantime.

D. In his rejoinder the complainant presses his plea that the procedure was unlawful. He says that, in his internal complaint of 27 June 1996, he reserved the right to seek the cancellation of any decision to appoint Mr L. definitively as a result of his temporary appointments, on the grounds that it was this recent experience which enabled Mr L. to win the competition.

The complainant produces documents issued by Mr L. after 1 April 1997, the date on which his first interim appointment officially ended, explicitly indicating him as acting Head of Bureau GS.4. He points to anomalies in the report of the Selection Board dated 30 July 1998, produced by the Agency in its reply, and says that it is a reworked version of the initial report, to which two pages have been added to remedy the failure to provide reasons. He casts doubt on whether the Selection Board met again and calls for the production of the original report of 30 July 1998 and for the members of the Board to be heard. He contends that the rules in force placed an obligation on the Agency, in the context of the final selection procedure, to interview all the candidates included on the list drawn up by the Selection Board and compare their merits, irrespective of their position on the list. He argues that the qualifications described in the Agency's reply to justify the appointment of Mr L. are different from the conditions required in the notice of competition and from the reasons given previously, which demonstrates that the assessment was flawed.

The complainant re-evaluates at 2,000,000 Belgian francs the moral and material injury resulting from the unlawful decisions which he is challenging.

E. In his observations Mr L. argues that the complainant's views on his professional skills are irrelevant and that there can be no doubt on his aptitude to fill the post of Head of Bureau GS.4, since two successive Selection Boards placed him first on their lists. He requests compensation for any injury caused in the event that his appointment is set aside, since he accepted it in good faith.

F. In its surrejoinder the Agency admits that, in view of the evidence produced by the complainant, it "has to make some changes to its presentation of the facts in its reply". It explains that the temporary appointment of Mr L. to the post of Head of Bureau GS.4 did indeed come to an end on 1 April 1997, but that in his capacity as the highest graded expert in the Bureau he was "*de facto*" in the situation of "acting Head", which "had no impact on the lawfulness ... of the procedure which was recommenced to fill" the post in question and does not correspond to successive temporary appointments. Eurocontrol also corrects its reply as to the date on which the Selection Board met: it met on 29 July 1998 to draw up the report dated 30 July. The Agency argues, however, that the anomalies in the report, and other errors which it attributes to the computer system, are neither as important nor as significant as the complainant claims.

The Agency presses its objections to the receivability of several of the claims. It submits that it was only in the interest of the service that it entrusted the challenged interim appointment to Mr L., and this did not constitute abuse of authority. The Selection Board's classification of the candidates by order of merit would be misdirected if the Agency then had to compare the merits of all the persons on the list of suitable candidates.

CONSIDERATIONS

1. The complainant joined Eurocontrol in June 1984 and was appointed expert at grade A7 in the Personnel Directorate (later called the Human Resources Directorate) at headquarters in Brussels. He was promoted to grade A6 in July 1988 and to grade A5 in April 1994. He remained in the same Directorate.

On 27 September 1995 the Agency published a notice of competition with the reference HQ-95-AA/148 with a view to filling the post of Head of Bureau GS.4 in the Directorate of the General Secretariat at grade A4. The notice of competition indicated that internal candidates at grade A5 had to have completed at least two years in that grade. The final date for applications was 27 November. The complainant applied for the post, and was rejected by letter on 30 November 1995 on the grounds that he did not meet the requirement respecting seniority in the grade. However, the Director General decided on 8 December 1995 not to continue the competition procedure. These decisions were not challenged.

On 15 March 1996 the Director General published the new structure of the Directorate of the General Secretariat.

On 16 April, at the request of the Director of the General Secretariat, the Director General appointed Mr L. *ad interim* Head of Bureau GS.4 at grade A4 with effect from 1 April 1996. Starting from 1 July, the differential allowance provided for in Article 8 of the Staff Regulations was paid to him.

On 27 June the complainant lodged an internal complaint to the Director General against the "decision" not to publish a new notice of competition and the temporary appointment of Mr L. to the post with a differential allowance. On 6 November 1996 the internal complaint was referred to the Joint Committee for Disputes, which did not issue an opinion. The case was not followed up.

By a decision of 3 March 1997 the Director General put an end to the temporary appointment of Mr L. as of 1 April 1997, in accordance with Article 8 of the Staff Regulations. The Agency says that Mr L. returned to his functions as expert at grade A5 in Bureau GS.4. However, this is refuted by the complainant, who contends that Mr L. in practice continued to discharge the functions of *ad interim* Head of the Bureau.

On 30 June 1997 a new notice of competition for the post of Head of Bureau GS.4 was published with the reference HQ-97-AA/016.

On 11 August the complainant applied for the post.

The Selection Board examined the nine applications which had been received. Seven candidates were recognised as being suitable and classified according to their merits in four groups. Mr L. and another candidate were placed in the first group, the complainant and a fourth candidate in the second group, and all the other candidates in groups 3 and 4. On 1 December 1997 the other candidate in the first group withdrew his application. The only remaining candidate in the first group, Mr L., was interviewed and his candidacy was submitted to the ad hoc Promotion Board. The Board met on 20 January 1998 and recommended his promotion to the post. By a decision of 3 February 1998, the Director General promoted Mr L. to the post.

On 3 March 1998 the complainant filed an internal complaint against this promotion and the rejection of his own application. The case was referred to the Joint Committee for Disputes, which recommended that the internal complaint should be upheld in view of the insufficient information given on the rejection of the complainant's application and the absence of a reasoned report of the Selection Board. For the latter reason the Director General upheld the internal complaint. Mr L.'s promotion was cancelled on 31 July 1998 with effect from 1 June 1998. By a decision of the same date, under the terms of Article 8 of the Staff Regulations, Mr L. was called upon to occupy the post *ad interim* with effect from 1 June 1998.

The Selection Board met once again on 29 July, re-examined the applications and drew up a report dated 30 July giving its reasons for the classification of the candidates by order of merit. The ad hoc Promotion Board, meeting on 9 September, recommended the promotion of Mr L. The Director General decided on 15 September, with effect from 1 October 1998, to end the interim appointment of Mr L. and to promote him to the post.

On 14 December 1998 the complainant lodged an internal complaint against the promotion of Mr L. and the rejection of his own candidacy. At the same time he requested his promotion to the post in question, with effect from 1 April 1996, or the provisional award of 250,000 Belgian francs in moral and material damages. The case was referred to the Joint Committee for Disputes, which unanimously recommended the dismissal of the internal complaint, while envisaging the possibility of awarding the complainant financial or other compensation in view of the procedural errors and delays from which he had suffered and which were attributable to the Agency. By a decision of 4 May 1999 the Director General dismissed the internal complaint.

2. The complainant filed this complaint with the Tribunal seeking the quashing of that decision. He also requests

that the promotion of Mr L. and the rejection of his own application be set aside, and that he be awarded 1,500,000 Belgian francs in moral and material damages, without prejudice to any subsequent revaluation of the sum. Subsidiarily, he claims 500,000 francs in moral damages, without prejudice to any further increase in the amount. In his rejoinder he raises the amount set in his first financial claim to two million francs.

The Agency calls for the complaint to be dismissed.

The pleas of the parties are examined below.

3. The complainant calls for the production as evidence of the originals of the Selection Board's reports of 21 November 1997, 20 March 1998 and 30 July 1998, as well as the hearing of the members of the Board as witnesses to ascertain whether they met on 30 July 1998 and what they decided. The complainant alleges that the copy of the report of 30 July 1998 contains incoherencies and anomalies, which leads him to believe that the Board reworked the report of 20 March 1998, which is itself a reworked revision of the report of 21 November 1997.

The Agency produces the report of the Selection Board of 21 November 1997 in support of its surrejoinder. It maintains that the report of 30 July 1998 is authentic, even though it contains a number of errors on points which are not decisive. Since it was only the absence of a reasoned report of the Board which was challenged, the Board could use a previous report and attach a statement of its reasons.

The Tribunal does not find it necessary to order further inquiries. The evidence provides no proof that the document submitted is false in either its composition or its content. The copy submitted by the Agency was certified on 3 December 1999 by the responsible Director as corresponding to the original. Moreover, as the Board was invited in the latter stages to produce a reasoned report, in accordance with the fifth paragraph of Article 6 of Rule of Application No. 2 concerning the procedure for assignment to a post, as well as with the case law established in Judgment 1689 (*in re* Montenez No. 2), nothing prevented it from reusing a previous report or reports by adding the reasons which had hitherto been missing, since the procedure had only been cancelled from the stage at which it was flawed, namely from the drawing up of the report which had to include reasons in the form required by the applicable rules. If the Board was able to provide the necessary reasons on the basis of documents it already had, nothing prevented it from making use of them. It is of little importance that the Board reached the same conclusions as in its first examination of the candidates, which had been undertaken in the context of the same competition. Certain discrepancies in the report alleged by the complainant on secondary matters which are not decisive are not such as to cast doubt on the authenticity of the report (see under 5 and 10 below).

4. The complainant has certain pleas which are not directed against the final decision in the competition, but against earlier measures or decisions, namely, the failure to put the post up for competition more rapidly and the various temporary appointments of Mr L.

For the Agency these pleas are not receivable on the grounds that internal complaints on these matters had not been lodged or pursued and that these acts caused no injury to the complainant.

The complainant specifies that he is not challenging these earlier acts as such. He refers to the case law, as set forth in particular in Judgment 1000 (*in re* Clements and others), and relies on the possibility of challenging "the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for" the impugned decision.

In any event, the conditions for the application of this case law are not fulfilled in the present case. The delay in putting a vacant post up for competition and the decisions concerning the temporary appointments to the post, as provisional measures, do not constitute "general or prior decision[s] ... that [afford] the basis for" the decisions to promote one employee and reject the application of another. The redress sought by the complainant would undermine the authority and stability of administrative decisions not challenged in the required form or time-limits (see, for example, Judgments 1934, *in re* Saunders No. 19, and 1935, *in re* Fabiani No. 4).

However, in connection with the claims against the final selection, and particularly the plea of abuse of authority, the Tribunal will examine all the circumstances of the competition procedure.

5. With a view to shedding light on the issues at stake, certain principles applicable to competition procedures will be recalled, as well as their application in the present case.

(a) The competition opened in 1995 was interrupted by the Director General before it had been completed and after the complainant's application had been rejected.

The complainant was right not to challenge the authority of the Director General to do so.

Precedent has it that, in the interests of the organisation, a chief executive may interrupt a competition, even in order to change the requirements of the post (see Judgment 1771, *in re De Riemaeker* No. 4, under 4(e), and the judgments cited therein).

He may even decide not to proceed to any appointment or promotion if he concludes that none of the candidates meets the specified requirements (see Judgment 1771, under 4(c)).

(b) The temporary appointment of an employee to a vacant post may correspond to the interests of the organisation. As such, it cannot be criticised. Moreover, such a measure is envisaged by Article 8 of the Staff Regulations.

If the person appointed *ad interim* is or could also be a candidate for the post open to competition, the temporary appointment may enable the candidate to acquire more easily than his or her rivals the experience or seniority required for definitive appointment to the post. Such an appointment may thereby give the impression that the organisation wishes to favour that candidate. In this respect, there is a certain contradiction between the concern to ensure that the post is immediately operational and respect for the principle of equality between the various rivals. The organisation has at one and the same time to ensure its own proper functioning and to respect its employees without causing them any prejudice. It therefore has to take the necessary measures in so far as possible to minimise any such disadvantages in cases where it decides that a temporary appointment is justified, when it determines the conditions for it and when it takes steps to fill the post (see, for example, Judgment 1771 above, under 4(f), 6 and 7).

The question of whether these conditions were fulfilled here is examined below.

(c) In Judgment 1689, under 8, the Tribunal recalled that the fifth paragraph of Article 6 of Rule No. 2 required the list of suitable candidates established by the Selection Board to be accompanied by a reasoned report, without which there can be no promotion or appointment.

The Director General was therefore right to cancel the first decision to promote Mr L., which was based on a list of suitable candidates not supported by a reasoned report, and to invite the Selection Board to resume the procedure from the point at which it had been flawed.

(d) The Tribunal's case law has it that it is not necessary to take up the whole procedure when it is easy to determine the point at which it began to be flawed. In Judgment 1771, *in re De Riemaeker* No. 4, under 4(b), it found that where a short list drawn up by the Selection Board had to be corrected because one candidate did not meet one of the required conditions, the corrected list should be transmitted to the ad hoc Promotion Board without any further measures.

In the present case the flaw was the absence of a reasoned report of the Selection Board. If the latter had previously recorded its reasons and was able to correct the short list in this regard, it only needed to add this information and transmit the corrected short list to the ad hoc Promotion Board (see under 3 and 10).

6. The complainant argues that the Agency committed abuse of authority by delaying the competition (and by making a temporary appointment to the post). He says that this made it possible to favour the candidacy of Mr L., who would not otherwise have been able to meet the requirement of completing two years' service in the grade within the time-limit for submitting his application. Indeed, Mr L. had obtained the grade A5 on 1 December 1994 and could not therefore apply for the post before 1 December 1996.

Abuse of authority presupposes that a procedure is used for a purpose for which it was not intended. The Agency has provided convincing reasons for its delay in putting the post up for competition, namely so that it could manage the reorganisation of the services concerned more effectively. There is no serious proof that it acted in such a way as to favour one candidate to the vacant post to the detriment of another. The delay in opening the competition perhaps allowed employees to complete the necessary period of seniority, but this was a normal consequence of the measure, not its purpose. The complainant was also able to complete the required period as a result of the first rescheduling of the competition for the post of Head of Bureau GS.4. The possibility that the delay might have this

effect was not such as to prevent the Director General from exercising his discretionary authority in the interests of the Organisation in choosing the date on which the post would be put up for competition.

The plea is therefore devoid of merit.

7. The complainant has also criticised the fact that the Director General did not put the post up for competition as soon as it fell vacant.

But he cannot directly challenge a failure to act which he did not contest at the outset or in respect of which he did not pursue an internal complaint that he had already filed. He may only invoke it as an element of an alleged abuse of authority.

The same applies to the temporary appointment. There is no serious proof that in so doing the Director General wished to favour Mr L. in an untoward manner without taking into consideration the interests of the Agency.

The absence of any such intention does not mean, however, that the Agency could keep a post vacant for an unlimited period with the corresponding functions being discharged on a temporary basis by other employees (see under 8 below).

8. Article 8 of the Staff Regulations reads as follows:

"An official may be called upon to occupy temporarily a post in his category or service which is higher than his substantive post. From the beginning of the fourth month of such temporary posting, he shall receive a differential allowance equal to the difference between the remuneration carried by his substantive grade and step and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.

Temporary postings shall be restricted to one year except where their purpose is, directly or indirectly, to replace an official seconded to another post in the interests of the service, called up for service in the armed forces or absent on protracted sick leave."

The complainant alleges that the Agency did not apply this provision correctly. His claim may be examined in relation to the considerations set forth under 4 above.

(a) In the first place, the complainant challenges the explanation provided by the Agency that the temporary appointment which started on 1 April 1996 ended on 31 March 1997, in accordance with the above provision. The Agency indicates that when the decision was taken to bring an end to the temporary appointment, it was envisaged that Mr L. would be given a new assignment. Although there was no written decision on this, Mr L. did return to his former functions as expert at grade A5 in the Bureau GS.4, the direction of which was entrusted to the Director of the General Secretariat.

The complainant disproves this statement by producing two documents issued later than 31 March 1997 - they are both dated 9 September 1997 - and signed by Mr L. in his capacity as acting Head of the Bureau. One even contains an organisational chart in which Mr L. is designated as such.

In its surrejoinder the Agency states that, as from 1 April 1997,

"formally, the Director of the General Secretariat himself assumed the responsibilities of Head of Bureau, even though Mr L., as the highest ranking expert in the Bureau GS.4, was *de facto* most frequently in the situation of 'acting Head'."

In its view this was admissible. It says that Article 8 of the Staff Regulations is intended solely to determine the status of employees called upon to occupy a post temporarily and does not confer any rights on other employees, and particularly on any candidates to the vacant post, with the result that any alleged breach of Article 8 could not prejudice the complainant.

It would therefore appear that in practice the temporary functions were discharged for more than one year.

(b) The complainant infers that the first temporary appointment in fact lasted until 1 February 1998, the date on

which Mr L. was promoted to the post in question.

(c) He adds that when the Director General cancelled the decision to promote Mr L. on 31 July 1998 with retroactive effect to 1 June 1998, the consequence was that the functions he had carried out since 1 February 1998 were not covered by the decision to promote him, and that they must therefore also be considered as having been exercised *ad interim* from 1 June, and even logically from 1 February when the appointment came into effect. As a result, the first temporary appointment lasted from 1 April 1996 to 31 July 1998.

(d) In formal terms, the second temporary appointment covered the period from 1 June to 1 October 1998, when the new decision to appoint Mr L. came into effect. The complainant alleges that the temporary appointments followed one another and that there was in fact only one temporary appointment.

The precise scope of Article 8 of the Staff Regulations may be debated under different heads.

As for its purpose, the complainant contends that it is essentially an organisational provision intended to prevent posts from being left vacant, in the interests of the Organisation and of the employees concerned. In the view of the Agency, the provision is exclusively intended to protect employees called upon to occupy a post on a temporary basis. However, as explained below, the case does not turn on this point.

As for the calculation of the one-year time-limit, the requirement to respect it should not be interpreted too restrictively. Where two temporary appointments follow one another, but are decided upon for totally different reasons, they may also be treated as being totally independent and the requirement of a maximum time-limit of one year may be applied to each period separately. Furthermore, where an appointment or promotion is cancelled, the period for which an employee has carried out his duties cannot subsequently be considered as being a temporary appointment under the terms of Article 8 of the Staff Regulations.

It therefore follows that the first and second temporary appointments, which were decided upon for different reasons, each set off a different time-limit. Further, the time-limit envisaged in Article 8 does not apply to the period when Mr L. discharged his functions after being appointed to the post, even if the decision to promote him was subsequently cancelled.

9. The complainant argues that he was not called for an interview before the appointing authority took its decision. He sees this as a violation of Article 7 of Rule No. 2 and of his right to equality of treatment.

The Agency denies any such violation.

Article 7 provides that the selection by the Director General "shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned". Paragraph 3, last indent, of office notice 25/94 of 8 December 1994, which amends Rule No. 2, states that:

"Candidates shortlisted will 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."

Article 45(1) of the Staff Regulations also provides that promotion shall follow "consideration of the comparative merits of the officials eligible for promotion and of the reports on them".

These provisions do not indicate precisely when an interview is necessary. They cannot be interpreted as obliging the authorities concerned to interview all candidates. Such an interpretation would not be within the meaning of these provisions. Indeed, in the case of candidates who from the outset are not in contention, such an interview would have little meaning. While an interview is necessary to classify candidates found to be *ex aequo* by the Selection Board, it would not appear to be essential for candidates who are not placed in the first group if the appointing authority decides to follow the order of priority in the Selection Board's short list.

Nor did the Agency's bodies misuse their discretionary authority in the present case in refraining from calling the complainant for an interview.

As he was not in the same situation as the successful candidate, who was classified in the first group and who was interviewed, nor can it be considered that the complainant was the victim of any unequal treatment.

10. The complainant expresses doubts as to the lawful nature of the last competition procedure. In his view it is doubtful that the Selection Board's reasoned report bearing the date 30 July 1998 is authentic, or even that the Board met on that date and adopted the report, which appears to be no more than a reworking of earlier reports.

The Agency has produced a copy of the short list of suitable candidates and the Selection Board's reasoned report, signed by the members of the Board on 30 July 1998, which was certified by the responsible Director on 3 December 1999 as corresponding to the original.

The Tribunal has no reason to doubt the authenticity of this document.

The Selection Board may have, and is even likely to have, reused certain documents drawn up during the first part of the procedure. This gives rise to no criticism if the Board was in possession of the elements enabling it to affirm the accuracy of its list of suitable candidates and its reasoned report. From this point of view, it is of no importance that it based its final decision on its first examination of the applications, rather than the second, nor that the report contains some discrepancies which have no bearing on the case (see under 3 and 5 above).

The claim is therefore without merit.

11. The complainant sees a legal flaw or an evident error of judgment in the fact that the Director General and the bodies on whose opinion he based his decision committed an abuse of their discretionary authority in giving preference to the candidacy of Mr L. rather than his own, and in not taking into account the fact that the alleged superior experience of his rival had been improperly acquired as a result of his temporary appointments. With regard to his own experience, he describes his education and the important posts he occupied with their incumbent responsibilities.

In its report of 30 July 1998 the Selection Board sets out in an annex its selection criteria, verifying for each candidate whether he fulfilled these criteria. In its comments it explains its reasons and how it drew up four groups based on the suitability of the candidates.

In its reply the Agency also explains in detail the reasons for which it gave its preference to Mr L.

The information provided on this point by the Agency has not been contested as such by the complainant and may therefore be held to be established.

(a) The manner in which the Selection Board weighed the merits of the candidates cannot be considered to be flawed. The organisation is the judge of its own needs. It was certainly reasonable to consider that the post to be filled required particular strengths in the fields of organisation and management (see Judgment 1771 cited above, under 6, and the case law referred to therein). It was also entirely justifiable, taking into account the problems and technical advances, to view recent experience as being preferable (and more certain), with the result that preference was given to the candidacy of Mr L.

(b) It therefore follows that, the Agency gave preference to Mr L., not because of the experience he had acquired in discharging his temporary functions, but exclusively or mainly because of his work for Eurocontrol in the General Secretariat.

The temporary appointments did not therefore have a decisive influence on the selection for the post. The evidence provided by the Agency disproves the contrary opinion expressed by the Joint Committee for Disputes, which did not, however, conclude that the competition procedure was flawed. In this regard, it should be noted that the two decisions concerning the temporary appointments were not in themselves unlawful, and that only the *de facto* extension of the first temporary appointment might appear to be debatable.

(c) The complainant cites as precedents certain judgments by the Tribunal and the Court of First Instance of the European Communities, in which a temporary appointment was challenged as such and set aside on the grounds of abuse of authority because the person appointed did not have the necessary qualifications. This is not the point at issue in the present case, and those precedents are therefore not pertinent.

12. The complainant requests that Eurocontrol be ordered to pay him various amounts in compensation for the injury he suffered resulting, firstly, from the unlawfulness of the impugned decision and, secondly and subsidiarily,

the manner in which the administrative procedures were carried out. On the first point, his claims to have the decision quashed cannot succeed and his claims to compensation for the unlawful nature of the impugned decision must therefore also fail. On the second point, there is no evidence to show that the manner in which the procedures were carried out resulted in any injury to the complainant which would justify compensation.

13. The complaint, which is devoid of merit under all heads, must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet