

NINETIETH SESSION

In re van der Kraan (No. 2)

Judgment No. 2005

The Administrative Tribunal,

Considering the second complaint filed by Mr Pieter van der Kraan against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 January 2000, Eurocontrol's reply of 28 April, the observations submitted by Mr R. on 9 June at the Tribunal's request, the complainant's rejoinder of 8 August and the Agency's surrejoinder of 6 October 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Dutchman born in 1940, was recruited by Eurocontrol as an expert at grade A6 in 1972. At the material time, he held grade A4.

On 7 December 1998 the Agency issued a notice of competition, under reference HQ-98-AT/068, for the grade A3 post of Head of the Surveillance Unit for the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP). In 1999 this programme became the European Air Traffic Management Programme (EATMP).

The complainant applied for the above post on 3 February 1999. In a letter of 7 May the Head of the Recruitment, Selection and Staff Development Section informed him that his candidature had not been retained for the final selection process, since other candidates were more qualified than he for the post. He added that the Section was at his disposal if he wanted more detailed information. In a letter of 12 May the complainant asked him the reasons why his candidature was rejected. He received no reply. On 23 June he filed an internal complaint with the Director General pleading failure to substantiate the decision rejecting his candidature and obvious misappraisal of the facts. He sought the quashing of the above decision and the reopening of the selection procedure. The internal complaint was not submitted to the Joint Committee for Disputes for an advisory opinion, and went unanswered. On 1 December 1999 Mr R., the candidate selected through the competition, took up his duties as Head of the EATMP Surveillance Unit. On 21 January 2000 the complainant lodged the present complaint challenging the implied rejection of his internal complaint.

B. The complainant states that the Agency is in breach of Article 4 of the Annex to office notice 6/95, establishing the Joint Committee for Disputes, because it failed to obtain the Committee's opinion before dismissing his internal complaint. Citing Judgment 1768 (*in re Bodar*), he maintains that this flaw must result in the quashing of the implied rejection of his internal complaint and the resumption of the competition procedure at the point at which the breach occurred.

The complainant also alleges several violations of Article 6 of Rule of Application No. 2 of the Staff Regulations governing officials of the Eurocontrol Agency, concerning the selection test procedure. First, he contends that the Selection Board did not establish objective criteria for the assessment of the candidates' qualifications, or else was in breach of those criteria. In this connection, the complainant asks Eurocontrol to produce all documents relating to the competition process, in particular those concerning the work of the Selection Board. Secondly, the Board had "gone beyond its mandate" in considering that the complainant did not fulfill the qualifications required by the

vacancy notice as well as the other candidates. Thirdly, the Board failed to submit a reasoned report to the Director General, or else its reasons regarding the complainant were insufficient. He also alleges breach of Article 25 of the Staff Regulations in that the rejection of his candidature was not properly accounted for. Subsidiarily, he pleads obvious misappraisal of the evidence.

The complainant requests the Tribunal to set aside the Selection Board's decision "to leave him off the list of suitable applicants [for the post he was seeking] and not to retain him for the final selection process". He also seeks the quashing of the appointment of Mr R. as Head of EATMP Surveillance Unit and of the implied rejection of his internal complaint. He claims moral and material damages, and costs.

C. In its reply Eurocontrol recognises that the complainant's internal complaint was not submitted to the Joint Committee for Disputes and that it was not expressly answered. The appeal procedure thus showed the same flaws as that in the Bodar case. On the assumption that the Tribunal will come to the same decision here as in that case, the Agency explains that, since to await a predictable decision before remedying the flaw would be to prolong these proceedings and needlessly delay settlement of the dispute, it has decided to refer the internal complaint promptly to the Committee and to answer it expressly on receipt of the advisory opinion. Deeming the complainant's moral injury to be partly compensated by this decision, the Agency offers to pay him 1,000 euros in damages. It also undertakes to reimburse the costs he has incurred in filing the present complaint, which, in its opinion, need no longer be pursued.

Eurocontrol asks the Tribunal to record the Agency's decisions to rectify the flaw in the treatment of the complainant's internal complaint and its offer to cover the costs and compensate him for moral injury and, secondly, to note that a ruling is no longer required.

D. In his observations Mr R. states that it was in good faith that he participated in the competition and accepted the offer of employment. He stresses that the complainant did not question his capacity to satisfy the criteria listed in the notice of competition. He seeks protection from any injury should the Tribunal find the selection process flawed.

E. In his rejoinder the complainant explains that the Joint Committee for Disputes issued its opinion on his internal complaint on 25 May 2000 concluding that the complaint was justified by the absence of clear reasons for the rejection of his candidature. In this respect, it recommended in particular that the Director General's decision in response to the internal complaint should redress this "incidental oversight". However, the Committee considered the internal complaint to be unfounded insofar as it suggested that the work of the Selection Board was flawed. The complainant adds that, in a memorandum of 8 June 2000 the Director of Human Resources informed him that the Director General had decided to reject his internal complaint as devoid of merit.

The complainant contends that since the Agency admitted its failure to consult the Committee, it ought to have cancelled or revoked the decision implicitly rejecting his internal complaint, rather than urging him to drop his complaint to the Tribunal. He therefore asks the Tribunal to reject Eurocontrol's claims. He adds that the Committee's opinion and the decision of 8 June 2000 are insufficient to remedy the flaw tainting the decision to reject his internal complaint.

The complainant further contends that the decision to reconsider his internal complaint, far from partly compensating the moral injury has in fact aggravated it. By taking that decision, Eurocontrol has caused him "additional worry" and delayed settlement of the dispute. He considers Eurocontrol's proposed compensation "not nearly sufficient", and states that he has also suffered material injury in that his prospects of promotion have diminished. He explains that Mr R. is in the process of acquiring "useful experience" in the exercise of his new duties, which will allow him to obtain confirmation of his appointment to the post as Head of EATMP Surveillance Unit, irrespective of the outcome of the proceedings. The complainant submits an estimate of the damage he alleges to his career. He claims 150,000 Belgian francs in costs.

F. In its surrejoinder Eurocontrol notes that on 6 September 2000 the complainant lodged a third complaint against the decision of 8 June 2000 expressly rejecting his internal complaint of 23 June 1999. However, he has not withdrawn the present complaint.

As regards receivability, the Agency considers that at the time of filing his second complaint the complainant had a cause of action. Since he has obtained satisfaction from the express reply to his internal complaint, this is no longer

the case so to prolong the present proceedings is pointless.

Eurocontrol further contends that its offer of compensation for moral injury is "more than reasonable" in that the decision to resume the appeal procedure at once at the point where it became flawed has already compensated the complainant in part. It adds that, at the time of his appointment Mr R. already held all the qualifications required to carry out the duties of Head of EATMP Surveillance Unit. The claim to material damages is therefore "unacceptable". Having called on the complainant to withdraw suit, Eurocontrol sees no reason to assume the costs he has incurred in pursuing proceedings which are now devoid of purpose. The defendant presses its claims but withdraws its offer to bear the costs.

CONSIDERATIONS

1. Responding to a notice of competition, reference HQ-98-AT/068, the complainant, a principal expert at grade A4 at the Eurocontrol Agency, applied for the post of Head of the Surveillance Unit for EATCHIP, which in 1999 became EATMP, as indicated under A.

In accordance with the provisions of Articles 30 and 31 of the Staff Regulations, a Selection Board was appointed. It met on 13 April 1999. After examining the qualifications of the fourteen applicants, it retained four. The complainant was informed by a letter of 7 May 1999 that he had not been included in the short list.

On 23 June 1999 he filed an internal complaint against that decision with the Director General. It was not submitted to the Joint Committee for Disputes and therefore received no reply so, according to Article 92(2) of the Staff Regulations, it was rejected by an implied decision.

The successful candidate, Mr R., took up his duties on 1 December 1999.

On 21 January 2000 the complainant put the matter to the Tribunal, requesting the quashing of the implied rejection of his internal complaint and the cancellation of Mr R.'s appointment.

In its reply the Agency admits that the procedure was flawed - as in Judgment 1768 (*in re Bodar*) - by its failure to submit the internal complaint to the Joint Committee for Disputes. Consequently, it says, the Director General decided to refer the internal complaint to the Committee so as to avoid an unfavourable judgment and to stop the present proceedings. The Director General would then take an express decision, which may also give rise to a complaint. Eurocontrol agrees to compensate the complainant for moral injury and pay his costs. It asks the Tribunal to record "the decisions taken immediately to remedy the flaw" and its offer to pay compensation for moral injury in an amount of 1,000 euros, and costs. It requests the complainant to "withdraw the present suit".

In his rejoinder the complainant requests the Tribunal to set the amount of the compensation due for moral and material injury and to grant him 150,000 Belgian francs in costs. He points out that the Joint Committee for Disputes has given its opinion and that his internal complaint was rejected by a decision of 8 June 2000. He contests that his complaint should be considered as being directed against the new decision.

2. The Agency must be regarded as having revoked the implied rejection of the internal complaint. The terms of the reply leave no doubt on that score. Moreover, it was as good as its word since it did refer the case to the Joint Committee for Disputes and subsequently took an express decision on it.

The complainant declined to withdraw suit; he appears uncertain about the scope of Judgment 1768, whereby the Tribunal sent the case back to the Director General for the procedure to be taken up at the point at which the flaw occurred. Obviously, the purpose of so resuming the procedure was to re-establish the position in law that then prevailed regarding the challenging of the rejection of the candidature and the appointment of the successful candidate. The pleas put forward in this regard should have been re-examined, given that the procedure had been resumed. However, at that stage, the material decisions challenged, namely the rejection of the complainant's candidature and the appointment of another candidate, had not yet been revoked.

The complaint therefore no longer shows a cause of action insofar as it challenged the implied decision to reject the internal complaint. Nevertheless, the parties admit that a ruling must still be made, in particular as regards the claims to moral and material damages and to costs.

However, the complaint does not touch on the new decision to reject the internal complaint. Nor did the parties agree that the proceedings should do so.

3. The complainant requests redress for injury in connection with his promotion prospects. This is a question to be addressed, if necessary, in the context of the new decision. For the rest, the complainant does not show that he suffered any injury other than that arising from the present proceedings.

The procedural flaw and the inconvenience it caused affected his personal interests. In this connection Eurocontrol concedes that it must pay compensation for moral injury and proposes an amount of 1,000 euros. The complainant considers this insufficient. The Agency's decision and the present judgment give the complainant satisfaction and redress the injury in part. Compensation of 1,000 euros therefore appears fair.

4. The complainant's principal plea succeeds. He is accordingly entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The Tribunal records that the complaint, insofar as it seeks the quashing of decisions, shows no cause of action.
2. The Agency shall pay the complainant 1,000 euros in moral damages.
3. It shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 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 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet