

NINETY-THIRD SESSION

Judgment No. 2122

The Administrative Tribunal,

Considering the complaint filed by Mrs M.-J. A. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 17 October 2001, the Agency's reply of 21 December 2001, the complainant's rejoinder of 7 February 2002, and Eurocontrol's surrejoinder of 15 March 2002;

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

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

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

A. The complainant, a Spanish citizen born in 1964, joined the staff of Eurocontrol at grade C5 on 16 November 1991. She was promoted to grade C4 on 1 November 1994; she held this grade at the material time. Since January 2001 she has been President of the Local Staff Committee.

In October 2000 the complainant submitted her candidacy for competition HQ-2000-BA/067 for the post of legal assistant in Legal Services. Under the section applicable to internal candidates the notice of competition indicated that:

"• Established staff will be eligible if they meet one of the following sets of grade and seniority requirements:

* B.2 or B.3,

* C.1, C.2, C.3, B.4, B.5 with two years' seniority from the date of establishment or promotion."

It was further indicated in the notice that "initial selection will be made on the basis of a first assessment by the Selection Board of the qualifications and experience of all candidates". The complainant was informed by a letter of 14 November 2000 from the Head of the Recruitment, Selection and Staff Development Section that since she did not fulfil the eligibility conditions for the competition her application would not be taken into consideration.

On 14 February 2001 the complainant filed an internal complaint with the Joint Committee for Disputes, arguing that Article 30 of the Staff Regulations governing officials of the Eurocontrol Agency had been breached and that Rule of Application No. 2 (concerning the procedure for assignment to a post in accordance with Articles 7, 30, 31 and 45 of the Staff Regulations) could be used to interpret, but not change, the Staff Regulations. In its opinion dated 18 June the Committee found that there was no contradiction between the provisions in Staff Regulation Article 30 and Rule of Application No. 2. The Agency was correct to specify a seniority requirement in the notice of competition. The Committee unanimously recommended rejecting the internal complaint. In a memorandum dated 12 July 2001 the Director of Human Resources informed the complainant, on the Director General's behalf, that her internal complaint had been rejected. That is the impugned decision.

B. The complainant makes two pleas. First, she argues that setting eligibility conditions for competitions breaches the Agreement on consultation, conciliation and arbitration procedures between Eurocontrol and the Trade Union Organisations (signed on 9 January 1992) because only the Staff Committee - but not the unions - had been consulted. These conditions were added on the basis of Rule of Application No. 2, which had been amended on 8 December 1994 after consultation with the Staff Committee and announced by Office Notice 25/94; she questions

the legality of the amendment procedure. She notes that her candidacy was rejected without an examination of her qualifications. Therefore, she questions whether eligibility conditions are a criterion of admission to the competition or of selection within the competition. She contends that if only the Staff Regulations were applied she would have been admitted to the competition and her qualifications would have been examined. She wants the Tribunal to examine the legality of imposing conditions on competitions which have no basis in the Staff Regulations.

Secondly, the complainant submits that these conditions are pointless, contrary to Eurocontrol's recruitment policy, and discriminatory. She contends that one of the unions has been unsuccessfully requesting their removal, or that a good justification for their existence be given. She states that their real effect is to preclude suitable candidates or even to eliminate the best candidate. Additionally, these conditions are discriminatory against internal staff members.

She claims the quashing of the competition and that it be restarted without an eligibility requirement. She also claims the rescission of the amendment of 8 December 1994 to Rule of Application No. 2 and of the office notice that announced it to staff. She asks for moral damages and costs.

C. The Agency replies that the complainant appears to be making a political challenge by a staff representative rather than defending her individual interests.

The complainant is wrong to assert that there is no basis in the Staff Regulations for setting eligibility conditions. The implementation of the competition principle is found in Rule of Application No. 2 and its legal basis is found in Articles 30, 45.2 and 100 of the Staff Regulations. It was and is appropriate to specify seniority requirements in notices of competition. There was no breach of the Agreement of 9 January 1992 during the amendment process of Rule of Application No. 2; it was amended after consultation with the Staff Committee on 5 September 1994, and no subsequent request for consultation was introduced at that time by the unions. Furthermore, Eurocontrol points out that the previous version of Rule of Application No. 2 also contained seniority requirements. The exclusion of candidates who do not fulfil the requirements in a notice of competition is fully justified and cannot be regarded as having the effect of eliminating the best candidate, as the complainant has tried to argue. Nor does it create discrimination against internal staff.

The successful candidate provided his observations on the complaint, noting that the complainant has challenged the selection procedure but not his qualifications for the post.

D. In her rejoinder the complainant states that although there might not have been any requests for consultation on the amendment to Rule of Application No. 2, the Staff Committee nevertheless protested at the time against improper consultation. She submits that an individual's grade should not be seen as a necessary nor sufficient condition for having the required qualifications: it does not prove the presence or absence of professional qualifications. She believes that it would be easy to verify the necessary qualifications without barring an application on the internal grade alone. By not doing so Eurocontrol has discriminated against internal candidates over external candidates.

She takes issue with the Agency's accusation that her complaint is a means of political challenge by a staff representative. Notwithstanding the fact that she is an officer in the Staff Committee, she has the right to follow up on career opportunities on her own rather than waiting for the Director of Human Resources and the unions to finish their "interminable discussions".

E. In its surrejoinder Eurocontrol agrees with the complainant that seniority does not necessarily prove competency, but says that she is incorrect to try to assimilate competency and qualifications. The term "qualifications" in the context of Article 30 means the set of all conditions necessary to qualify for a post; this includes, among other things, age, current grade, and seniority. Furthermore, the seniority requirement is a mandatory condition for promotion of internal staff and it can be found in the Staff Regulations and the Rules of Application. It reiterates that all relevant texts have been adopted following the correct procedures.

The Agency notes that the complainant has misunderstood its comments about staff representatives and points out that eligibility conditions are equally applied to all candidates, regardless of staff representative status.

CONSIDERATIONS

1. The complainant joined Eurocontrol in November 1991 at grade C5. In November 1994 she was promoted to C4, the grade she held at the material time. Since January 2001 she has served as President of the Local Staff Committee.

2. On 1 September 2000 the Agency published notice of competition HQ-2000-BA/067 for a post of legal assistant.

In October the complainant applied for the post. In a letter of 14 November 2000 she was informed that her application would not be taken under consideration because she did not meet the eligibility conditions for the competition. On 14 February 2001 she lodged an internal complaint against that decision.

In its opinion on her internal complaint the Joint Committee for Disputes recommended rejecting that complaint.

By a memorandum dated 12 July 2001 the Director of Human Resources informed the complainant, on the Director General's behalf, that her internal complaint had been rejected.

That is the decision she is challenging before the Tribunal.

3. The complainant wants the competition process to be resumed from the stage at which it became flawed (i.e. from the beginning). She also seeks the rescission of the amendment of 8 December 1994 to Rule of Application No. 2 and of Office Notice 25/94 by which the amendment was notified to staff, which will have the effect of eliminating eligibility conditions for future competitions. She claims moral damages and costs.

The gist of her arguments is that in rejecting her application the Agency looked only at the eligibility conditions set in the notice of competition. It failed to consider her qualifications for the post.

Her main plea is that the eligibility conditions were unlawful: they breached the Staff Regulations and the Agreement of 9 January 1992. As a subsidiary plea she contends that they are pointless, contrary to the rules on recruitment and discriminatory against candidates who are already staff members.

The lawfulness of the eligibility conditions

4. The complainant observes that the current basis for the setting of eligibility conditions in notices of competition is Rule of Application No. 2(1)c), which was amended on 8 December 1994 by Office Notice 25/94 after consultation with the Staff Committee. However, in Article 30(1) of the Staff Regulations it states in its second paragraph that the "selection of candidates shall be based on qualifications".

In her submission Eurocontrol rejected her application without considering her qualifications, in breach of Article 30(1). It worded its rejection in the following way:

"Please kindly note that you do not fulfill the eligibility conditions required for this particular competition.

Therefore, we can not take your application into consideration."

The question arises, says the complainant, of whether the eligibility conditions pertain to admission to the competition or to selection during the competition. If the former, then Article 28 of the Staff Regulations does impose conditions "other than professional qualifications", but they apply to recruitment onto the staff and she is deemed to satisfy them being already a staff member. If the latter, Article 30 of the Staff Regulations provides for selection only on the basis of qualifications.

She submits that in either case the Staff Regulations themselves would have permitted her to enter the competition and to have her qualifications considered in accordance with a principle which the Tribunal has upheld in many judgments. She accordingly asks the Tribunal whether a notice of competition may impose on staff eligibility conditions for which there is no basis in the Staff Regulations.

She observes that the setting of eligibility conditions in notices of competition pursuant to Rule of Application No. 2 has excluded whole categories of staff who would otherwise have been allowed by the Staff Regulations to

take part in competitions.

5. Eurocontrol rebuts her assertion that eligibility conditions have no legal basis in the Staff Regulations: Articles 30 and 45.2 lay down competition rules; and pursuant to Article 100 the Director General sets general provisions for the implementation of the Staff Regulations in rules, instructions and office notices.

The Agency argues that for any competition, whether based on qualifications or tests, selection criteria and conditions have to be set in advance in the light of the requirements of the post to be filled. Accordingly, when the Director General organises a competition - on the basis of either qualifications or tests - he may, and indeed must, determine the necessary qualifications. Consequently, in this context the word "qualifications" does not, as the complainant seems to think, refer only to paper qualifications but to the whole set of conditions that applicants must meet in order to be eligible for a particular post, such as age, language abilities or professional experience, which itself includes seniority.

6. Asked by the Tribunal for his comments, the successful candidate for the post of legal assistant observed that he had participated conscientiously and in good faith in the various steps of the recruitment procedure. He asks the Tribunal to protect him from any consequential harm should it decide to allow the complainant's claims.

7. The material rules cited by the parties are:

- Article 30 of the Staff Regulations

"1. Before filling a vacant post, the Director General shall inform the Agency staff and the States party to the EUROCONTROL Convention.

The selection of candidates shall be based on qualifications or, for certain posts provided for in Article 28, paragraph d), on examination or on qualifications and examination in accordance with the conditions laid down in paragraph 2 below.

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

The Director General shall decide which of these candidates to appoint to the vacant posts.

..."

- Article 45(2)

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

- Article 100

"The general provisions for giving effect to these Staff Regulations shall be determined by Rules of Application, instructions and office notices of the Director General, who, in the case of Rules of Application, shall notify the Provisional Council.

..."

- Article 2 of Rule of Application No. 2

"1. Notices of competition shall be drawn up by the Director General after consulting the unit(s) concerned.

They must specify:

...

c) the diplomas and other evidence of formal qualifications or the degree of experience required for the posts to be filled and, in particular, the conditions of seniority required of officials of the Agency;

..."

- Office Notice No. 25/94 of 8 December 1994

"Subject: New Rule of application no. 2 concerning the procedure for assignment to a post

...

3. Summary of amended provisions contained in Rule No 2

...

• Details of the vacant post (including the *job description and the requirements with regard to education, experience, etc.*) and the stipulations concerning *eligibility* to participate in the competition are to be set out in the Notice of Competition.

..."

8. In its report of 6 July 2001 the Joint Committee for Disputes found no contradiction between the provisions of Staff Regulation Article 30 and those of Rule of Application No. 2. The Tribunal endorses that finding.

Contrary to what the complainant appears to suggest, the fact that Article 30(1) of the Staff Regulations says that the "selection of candidates shall be based on qualifications" does not preclude the setting of eligibility conditions.

Pursuant to Article 100 the Director General acted quite lawfully in making provision in Rule No. 2 for the implementation of Article 30 of the Staff Regulations.

The eligibility conditions provided for in Rule No. 2 offend against no provision of the Staff Regulations. And the notice of competition, which sets conditions as to grade and seniority, is not unlawful, since it was established in accordance with Rule No. 2 which specifies that notices of competition must give full particulars of the post to be filled and the conditions of eligibility.

It is common ground that the complainant did not meet all the conditions set in the notice of competition, and the Agency was therefore right to reject her application.

All other objections are immaterial, in particular the complainant's objections that her qualifications were overlooked and the eligibility conditions were discriminatory and excluded staff from applying.

The lawfulness of the procedure applied in adopting the amendment to Rule of Application No. 2 and Office Notice No. 25/94

9. The Agreement of 9 January 1992 between Eurocontrol and the staff unions says that where any general measure is taken to give effect to the Staff Regulations there must be consultation. The complainant pleads breach of that Agreement in that the amendment to Rule of Application No. 2 and Office Notice 25/94, which sets conditions for eligibility, i.e. a general measure applying provisions of the Staff Regulations, were adopted without prior consultation. She asserts that, although the Staff Committee was consulted, the unions were not. The amendment of 8 December 1994 to Rule No. 2 and Office Notice 25/94 are accordingly unlawful in the light of the precedent set by the Tribunal in Judgment 1712.

10. Eurocontrol replies that it complied with the amendment procedure, and the draft Office Notice was submitted to the Staff Committee on 5 September 1994 in accordance with Articles 10 and 10(a) of the Staff Regulations, which state:

- Article 10

"1. The Staff Committee shall represent the interests of the staff vis-à-vis the Agency and maintain continuous contact between the Agency and the staff. It shall contribute to the smooth running of the service by providing a channel for the expression of opinion by the staff.

It shall bring to the notice of the competent bodies of the Agency any difficulty having general implications concerning the interpretation and application of these Staff Regulations. It may be consulted on any difficulty of this kind.

..."

- Article 10a

"The Agency shall fix the time-limit within which the Staff Committee or the Joint Committee must give the opinions requested of them. This time-limit may not be less than fifteen working days. If the comments are not given within the time-limit, the Agency shall issue its decision."

Eurocontrol adds that after that date there were no requests for consultation from the unions.

Besides, staff fared better on the whole under the proposed amendments of the recruitment procedure; and in any case the previous version of Rule No. 2 already contained a seniority condition.

11. The complainant rejoins that the Staff Committee did object to the lawfulness of the consultation procedure and that one of the unions sought, in March 1995, the opening of a conciliation procedure under the Agreement of 9 January 1992.

In her view, Eurocontrol seems to think that the proper application of this Agreement consists of Eurocontrol amending the rules unilaterally and the unions seeking thereafter to set matters right by requesting consultations under the Agreement.

12. The Agency retorts in its surrejoinder that the request for conciliation submitted in 1995 had nothing to do with the draft amendment to Rule No. 2

13. The Tribunal is unable to determine the purpose of the request for conciliation made in 1995 since neither party provides any evidence in support of the reasons they have adduced. In any event, the circumstances of this case are not the same as those that prompted the Tribunal's decision in Judgment 1712.

The Tribunal observes that the amendment in question has brought no substantive changes to Rule No. 2. It has simply specified more clearly the procedures governing participation by internal and external candidates in competitions. As to the seniority requirements, these were already in the previous version of this rule, and had never aroused any objections.

In addition there is no doubt that the Staff Committee, which ensures continuous contact between Eurocontrol and its staff pursuant to Article 10 of the Staff Regulations, had been consulted, and that staff did have the opportunity to request, had they so wished, a consultation between the Agency and the staff unions.

The conclusion is that the objection to the lawfulness of the procedure for adopting the amendment to Rule No. 2 is unfounded.

14. As to the complainant's plea that the system now in place is unfavourable to internal candidates and prevents the best candidate from being chosen, the Tribunal is of the view that there has been no breach of the Agency's duty to comply with the principle of equal treatment, and that the eligibility conditions are not at variance with the Agency's objectives.

15. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2002, 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 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet