

**NINETY-SEVENTH SESSION**

**Judgment No. 2336**

The Administrative Tribunal,

Considering the complaint filed by Mr H. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 February 2003, the Agency's reply of 16 May, the complainant's rejoinder of 4 August, Eurocontrol's surrejoinder of 29 September 2003 and the letter dated 16 January 2004 sent by the Head of the Organisation's Legal Service to the Registrar of the Tribunal;

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 Netherlands national born in 1954, joined the staff of the Agency on 1 March 1994 as a second class assistant at grade B3. He was promoted to grade B2 with retroactive effect to that date in June 1997. In July 2000 he was promoted to grade B1 with effect from 1 December 2000. He is assigned to the Flow Management Division of the Central Flow Management Unit (CFMU) as Principal Air Traffic Flow Controller.

From December 1998 the complainant had been assigned supervisory duties in the above mentioned division. On 23 November 2001 Eurocontrol published an internal "invitation for candidature" concerning six posts of Deputy Team Supervisor, at grade B1/B2, in the same division. The successful candidates were to be responsible inter alia for the coordination and supervision of on-the-job training in their team. The complainant applied but the Head of the Flow Management Division informed him by letter dated 6 February 2002 that his application had not been successful.

The complainant lodged an internal complaint against that decision on 22 April. He contended that the provisions of Article 30 and Rule of Application No. 2 of the Staff Regulations governing officials of the Eurocontrol Agency, dealing respectively with the selection procedure in the case of a vacancy and the procedure for assignment to a post in accordance with Article 30, had been disregarded. The Joint Committee for Disputes, to which the matter was referred, gave its opinion on 14 August. It found that the procedure followed by the Agency had been "clumsy and inappropriate". While recognising that the purpose of the invitation for candidature which had been published had not been to fill a vacant post but to identify existing staff members who could "assume extra duties essential for CFMU's development", it expressed the view that the:

"very close similarity between the wording and the type of form used and those of a genuine notice of competition in the meaning of Article 30 of the Staff Regulations gave the impression that a new post was being created, whereas in fact it was a question of adding functions (in replacement of the Supervisor) which currently corresponded to a different basic post, that of Training Officer."

For the above reasons, the Joint Committee recommended reopening the selection procedure.

In a memorandum dated 14 November 2002, the Director General informed the complainant that he could not concur with that recommendation. He explained that the purpose of the procedure had been to "invite staff to volunteer for additional functions, that they would carry out while retaining their normal duties". As no vacancy was advertised for that purpose, there was no need to run a selection procedure on the basis of Article 30. The internal complaint was therefore rejected. That is the impugned decision.

B. The complainant pleads, firstly, that several rules have been breached. He submits that, as the Organisation's

real objective was to fill vacant posts, Article 30 of the Staff Regulations should have been applied. Furthermore, the invitation for candidature failed to take account of the provisions of office notice 4/97, dated 25 February 1997, on grades and career profile of Air Traffic Flow Controllers employed at CFMU. He points out that, while the notice provides for the payment of a function allowance to controllers assigned to training duties, the conditions for the payment of this allowance stated in the invitation for candidature are not the same as those given in the office notice. He also lists various breaches of Rule of Application No. 2 which, in his view, flawed the selection procedure. According to the complainant, the Agency “created” the post of Deputy Team Supervisor, since that post did not appear among the basic posts listed in Annex I to the Staff Regulations.

Secondly, the complainant alleges that the Organisation did not carry out a comparative assessment of applicants’ merits or, at the very least, made a clear error of assessment. He says that he performed the duties of Deputy Team Supervisor for three years “to the full satisfaction of his supervisors”. He therefore feels he was probably one of the applicants best placed to be selected.

The complainant requests that the decision of 6 February 2002, as well as “any related or subsequent decision”, and, if necessary, that of 14 November 2002 be set aside. He also claims 4,000 euros in costs.

C. In its reply Eurocontrol submits that Article 30 and Rule of Application No. 2 did not apply in this case. The terms employed in the documents circulated to staff of the Flow Management Division were possibly misleading insofar as they gave the impression that the intention was to fill vacant posts, which was not the case. In fact, what was carried out was an “internal reorganisation procedure” entailing the assignment of a number of staff members to certain tasks in addition to their existing tasks. The defendant rejects the complainant’s argument concerning the function allowance payable in respect of training duties. According to the defendant, there was no incompatibility between the invitation for candidature and office notice 4/97. The duties of Deputy Team Supervisor, which were additional occasional tasks, did not justify the creation of a new basic post.

Eurocontrol does not deny the qualities of the complainant, but says that in this case “it was important to ensure that the profile of volunteers corresponded to the profile required for the duties” described in the invitation for candidature. As the Tribunal has found on previous occasions, assessment reports cannot give rise to a right to be assigned to tasks for which abilities may have been acknowledged. The Agency requests that the complainant bear all costs of the proceedings.

D. In his rejoinder the complainant reiterates that since the purpose of the invitation for candidature was to fill six vacant posts of Deputy Team Supervisor, the Organisation cannot maintain that it was no more than the first stage of an “internal reorganisation procedure” aimed at assigning staff members to certain additional tasks. Given that the tasks described in the invitation for candidature became the “main priority tasks” of the successful candidates, Eurocontrol should have amended Annex I to the Staff Regulations so as to include a new basic post of Deputy Team Supervisor.

E. In its surrejoinder the defendant maintains its position, arguing that the tasks described in the invitation for candidature were all “occasional or isolated”.

F. At the Tribunal’s request, this complaint was circulated to the six staff members appointed to the disputed posts of Deputy Team Supervisor. In his letter of 16 January 2004, the Head of the Legal Service informed the Registrar that none of the six had returned any comment concerning the complaint.

## CONSIDERATIONS

1. On 23 November 2001 Eurocontrol published an internal “invitation for candidature” concerning six posts of Deputy Team Supervisor. The document gave details concerning the selection procedure and function allowance.

The complainant applied but was informed by letter dated 6 February 2002 that his application had not been successful.

On 22 April he lodged an internal complaint. In an opinion dated 14 August, the Joint Committee for Disputes concluded unanimously that the complaint was both receivable and well founded, and that “an appropriate response would consist in reopening the procedure, if necessary after introducing a statutory modification of the basic posts

listed in Annex I". On 14 November 2002 the Director General of the Organisation rejected the internal complaint as devoid of merit. That is the impugned decision.

2. The complainant asks the Tribunal to set aside the decision of 6 February 2002, as well as "any related or subsequent decision", and, if necessary, that of 14 November 2002. He also claims 4,000 euros in costs.

He argues that in the circumstances the defendant could not select candidates and fill vacancies without applying the provisions of Article 30 of the Staff Regulations and, consequently, those of Rule of Application No. 2 of the Staff Regulations. According to him, in breach of Article 1 of that Rule, the vacancies were not notified to all the Agency's staff and, in breach of Article 2(1) of the Rule, the invitation for candidature, which is equivalent to a notice of competition, was not drawn up by the Director General. The complainant adds that the official who directed the entire selection procedure had not received an explicit mandate to do so from the Director General, despite the fact that the latter, according to Rule No. 2, is responsible for the whole selection procedure. He also notes that the Selection Board was made up of two persons only, in breach of Article 4 of the same Rule, which provides that it must consist at least of a chairman and two or more persons.

He further submits that, in breach of office notice 4/97 of 25 February 1997, the responsibilities which, according to the invitation for candidature, a staff member had to assume in order to be entitled to the function allowance, were not the same as those required in the office notice.

He also accuses the defendant of having created a new post not provided for in Annex I to the Staff Regulations by issuing its invitation for candidature.

The complainant maintains, lastly, that the defendant did not carry out a comparative assessment of applicants' merits or, at the very least, was guilty of a clear mistake of assessment.

3. In rebuttal, the defendant replies that in this case the intention had not been to fill vacancies in accordance with Article 30 of the Staff Regulations and Rule No. 2 governing competitions, but rather to implement an "internal reorganisation procedure" and to assign a number of staff members to certain tasks in addition to their existing tasks. Consequently, it argues that the provisions of Article 30 and Rule No. 2 did not apply.

4. The Tribunal finds that even though, as the defendant maintains, the intention was not to fill vacancies within the meaning of Article 30 of the Staff Regulations, which would have meant applying the provisions of Rule No. 2, the publication of the internal invitation for candidature presupposed that the procedure for selecting candidates would be conducted in compliance with the general principles recalled in the case law and with rules established prior to the invitation for candidature and known to the candidates, such rules being designed to guarantee objectivity and transparency in order to ensure that all candidates stand the same chances.

It does not appear from the evidence that the above mentioned rules were observed.

The selection procedure being therefore unlawful, the Tribunal must quash the decisions engendered by it and order resumption of the procedure with due heed to the rules, on the understanding that the Organisation must shield successful candidates from any injury that may flow from the quashing of an appointment they had accepted in good faith (see in particular Judgment 1477).

5. The complainant is entitled to 2,000 euros in costs.

## DECISION

For the above reasons,

1. The Director General's decision of 14 November 2002 is set aside.
2. The selection procedure is to be resumed as indicated under 4, above.
3. Eurocontrol shall pay the complainant the sum of 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2004, 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 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.