

The Administrative Tribunal,

Considering the complaint filed by Ms C. d. B. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 15 February 2005, Eurocontrol's reply of 20 May, the complainant's rejoinder of 5 August and the Agency's surrejoinder of 30 September 2005, including the comments submitted by Ms T. in response to the Tribunal's invitation;

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 national born in 1955, joined Eurocontrol on 1 January 1992. She works in the Human Resources Directorate as secretary/shorthand typist 1st class at grade C2. In February 2002 the Agency published an Internal Notice of Competition (HQ-2002-BA/006) for the post of Administrative Assistant in the Regulatory Unit at grade B3/B2. The notice specified that this competition could be used for the recruitment of candidates for similar vacancies until the end of 2003. The complainant applied. The Selection Board initially shortlisted five candidates of equal merit as Group 1, which included the complainant. After interviewing four candidates (the fifth having withdrawn), the Interview Board considered that only the complainant did not fully meet the job requirements and it therefore did not recommend her for the post. Another official, Ms T., was appointed in May 2002 but, although the post had been offered at grade B3/B2, she was transferred at her existing grade, namely grade B5, in accordance with what was then current practice.

On 21 February 2003 Eurocontrol published Office Notice 11/03 modifying the conditions governing eligibility of staff for competitions. The notice indicated in particular that successful candidates would henceforth be appointed at the grade at which the post had been advertised and not at a lower grade. On 28 July 2003 the Agency published an Internal Notice of Competition (HQ-2003-BA/083) that was almost identical to that of February 2002. It admits that this notice concerned the post occupied by Ms T. and that the new competition had been launched with a view to remedying her administrative situation, since she had been one of the last candidates penalised by the aforementioned practice. Both the complainant and Ms T. amongst others applied for the post. The Selection Board ranked Ms T. first by order of merit and two other candidates, including the complainant, equal second. The staff representative, however, refused to endorse the procedure and to sign the report. The Interview Board interviewed the three candidates and recommended appointing Ms T. The case was raised in November 2003 at a meeting of the Central Staff Committee, at which the latter called for competition HQ-2003-BA/083 to be cancelled. This was refused by the Director of Human Resources on 5 January 2004, and Ms T. was appointed to the post concerned at grade B3 on 1 February.

On 14 April 2004 the complainant filed an internal complaint challenging her colleague's appointment. In its opinion of 22 October, the Joint Committee for Disputes unanimously recommended rejecting the complaint, although it noted that "[t]he procedure followed by the Administration [had been] tortuous and [was] open to criticism" and that "lack of communication was the basis for the complaint being lodged". By a memorandum dated 15 November 2004, which constitutes the impugned decision, the Director of Human Resources rejected the internal complaint on behalf of the Director General.

B. The complainant notes that the Administration itself acknowledges that competition HQ-2003-BA/083 was intended solely as a means of remedying Ms T.'s administrative situation. According to her, this constitutes explicit recognition of a breach of the provisions of the Regulations concerning promotion (particularly the minimum period of service required for eligibility) and the competition procedure, the sole purpose of which is to fill vacancies, not to remedy administrative situations. In addition, Notice of Competition HQ-2002-BA/006 stipulated that a reserve list would be compiled. According to the complainant, such a list had to be drawn up – and

to be used in the future – otherwise there would be a breach of the provisions of Article 30(3) of the Staff Regulations governing officials of the Agency. In her view, therefore, there was abuse of process, abuse of authority and violation of the principle of equal treatment. She adds that the second Selection Board committed an obvious error of judgement insofar as it placed her in the second group even though she had been placed in Group 1 at the outcome of the earlier competition. It did not take account, moreover, of the fact that the advertised post was already occupied by one of the candidates, Ms T. Furthermore, the staff representative on the Selection Board who had refused to sign the report, although she had not resigned, was not invited to take part in the Board's subsequent proceedings. The Board's composition was therefore unlawful during those subsequent proceedings, which means that all ensuing decisions were equally unlawful.

The complainant asks the Tribunal to set aside the decision of the HQ-2003-BA/083 Selection Board “not to enter her name in the proper order on the list of candidates considered eligible for the post” concerned and to set aside the Director General's decisions to appoint Ms T. to that post and to reject her internal complaint. The complainant also claims costs.

C. In its reply Eurocontrol points out that in Notice of Competition HQ-2002-BA/006 a reserve list was mentioned as a “possibility and not an obligation” and that the complainant is mistaken in assuming that Article 30(3) of the Regulations creates any such obligation. It points out that it has never denied that Notice of Competition HQ-2003-BA/083 was published solely in order to remedy the effects for Ms T. of a questionable practice which had been abolished by Office Notice 11/03. It adds, however, that since the Interview Board had found during the first competition that the complainant did not meet the job requirements and could therefore not be recommended for the post, she suffered no “adverse effect other than the admittedly unpleasant impression that her participation in the second competition was purely pro forma”. The Agency argues that “[i]t would be exaggerated, nevertheless, to conclude that the outcome was predetermined”. While Ms T. had an undoubted advantage over her competitors owing to the fact that she already occupied the advertised post, the Tribunal in dealing with such situations in the past has raised no objection so long as the advantage is not excessive.

According to the defendant, the second Selection Board did not commit an error of judgement since it was not bound by the findings of the first Board. It explains that the Selection Board and Interview Board have distinct tasks and that their findings are not invalidated by the fact that the staff representative did not take part in their proceedings.

D. In her rejoinder the complainant reiterates that holding a competition for any purpose other than the filling of a vacancy constitutes a breach of Article 30 of the Regulations and is abuse of process. She accuses the Agency of having failed to guarantee the objectivity and transparency of the selection procedure and of having thereby violated the principle of equal treatment. She contends that the real issue in this case is not whether any “adverse effect” warrants compensation but rather whether the decisions taken were lawful. According to her, firm precedent has it that, even if she did not meet the requirements of the Notice of Competition, which was not the case, she would still not forfeit her right to challenge the procedure followed by the appointing authority when making its decision. Lastly, she maintains that not only was no effort made to offset the advantage Ms T. derived from the fact that she already occupied the vacant post, but that same advantage was allowed to become a decisive factor in choosing between candidates who were all capable of performing the duties in question.

E. In its surrejoinder Eurocontrol expresses surprise that the complainant, who considers that there was abuse of process and breach of the Regulations, should ask for the cancellation not of the competition itself but only of its outcome. It submits that it acted legitimately to remedy an injustice. While that procedure may have appeared “tortuous” to the Joint Committee for Disputes, it was not so flawed as to require that it be cancelled. The Agency explains further the difference between a Selection Board and an Interview Board. The Selection Board sorts candidates according to the suitability criteria specified in the Notice of Competition. As far as possible, it ranks the shortlisted candidates in order of merit, often dividing them into groups. The Interview Board then undertakes “a more rigorous selection” in order to “check the qualifications of candidates in more detail” against the job requirements. As a result of this second examination, a candidate shortlisted by the Selection Board may be eliminated if the interviews and tests show that he or she does not have the required qualifications. That was what occurred in the case of the complainant. The defendant does not deny that she has a cause for action since she took part in competition HQ-2003-BA/083, but it points out that it is not sufficient for her to assert that the procedure did not comply entirely with the rules in force, as she still needs to show that she suffered personal hardship as a result. It contends that it acted in the interest of the service and that there was no “reprehensible favouritism” in this case.

In her comments annexed to the surrejoinder, Ms T. states that she both took part in the selection procedure and accepted her appointment in good faith. She asks to be shielded from undue hardship whatever the outcome of the case.

CONSIDERATIONS

1. The complainant, who has been working at Eurocontrol since 1 January 1992, holds the post of secretary/shorthand typist 1st class at grade C2 in the Human Resources Directorate.

2. In February 2002 she applied for the post of Administrative Assistant, at grade B3/B2, advertised in Internal Notice of Competition HQ-2002-BA/006 published on 6 February 2002. On 21 March she was shortlisted by the Selection Board as one of five candidates of equal merit forming Group 1 and on 24 April she was called for interview. The Interview Board recommended the appointment of another candidate, Ms T. who was transferred in May 2002 to the post concerned, keeping her B5 grade, although the post had been advertised at grade B3/B2.

On 28 July 2003 the Agency published Internal Notice of Competition HQ-2003-BA/083, which was almost identical to HQ-2002-BA/006. It in fact concerned the same post of Administrative Assistant in the Regulatory Unit.

The complainant entered this second competition together with other staff members, including Ms T. The Selection Board placed Ms T. at the top of the list of suitable candidates in order of merit, and two other candidates, one of whom was the complainant, in a second group. The representative of the Staff Committee commented in the Board's report that she failed to see the "added value" of the second Notice of Competition, as a result of which she refused to sign the report. In December 2003, having interviewed the three shortlisted candidates, the Interview Board recommended appointing Ms T.

The case was raised at a meeting of the Central Staff Committee, which called for competition HQ-2003-BA/083 to be cancelled. The Director of Human Resources rejected this request on 5 January 2004.

On 1 February 2004 Ms T. was appointed at grade B3 to the post advertised under Notice of Competition HQ-2003-BA/083.

On 14 April the complainant filed an internal complaint against the decision not to appoint her to that post. In its opinion issued on 22 October 2004, the Joint Committee for Disputes found that there had been "a lack of communication, firstly regarding the results obtained in the first competition, and secondly regarding the nature of the second appointment", but concluded that "the results of these two competitions [were] not tainted with mistake and that the complainant's career [had] therefore not really been adversely affected". It unanimously recommended rejecting the complaint as legally unfounded.

The Director of Human Resources, on behalf of the Director General, rejected the complainant's internal complaint by a decision of 15 November 2004, which is impugned in the complaint.

3. The complainant's pleas are outlined under B, above. She argues inter alia that Eurocontrol is guilty of abuse of process, abuse of authority and of breaching Article 30 of the Regulations. In her view, there are clear, significant and corroborating indications that the Agency held the disputed competition not in order to fill a vacancy by appointing the best qualified candidate, but purely in order to appoint a pre-selected candidate with a view to "straightening out" her administrative situation, whereby giving her preference over all other candidates. She contends that it is an established and undisputed fact that the publication of Notice of Competition HQ-2003-BA/083 was "chiefly justified" as a means of remedying for Ms T. the effects of an unfair administrative practice in force since 2002 and abolished by Office Notice 11/03.

In its reply on this point, the defendant acknowledges that the publication of the said Notice of Competition was "chiefly justified as an attempt to remedy for Ms [T.] the effects of a questionable practice". It adds, in its surrejoinder, that if the complainant is convinced that the holding of competition HQ-2003-BA/083 constituted abuse of process and a breach of Article 30 of the Regulations, she should logically call for the straightforward cancellation of the competition. Yet she only asks for the outcome of the competition to be quashed, that is, the final rejection of her candidacy and the appointment of Ms T.

It maintains that the competition had not “adversely affected” the complainant and that, even though the Joint Committee for Disputes found that the procedure followed was “tortuous”, it was not so flawed as to warrant being cancelled. Referring to Judgment 1527, it maintains that it acted in conformity with Tribunal case law.

4. Regarding the Agency’s argument that the complainant suffered no adverse effects, the Tribunal recalls that anyone who applies for a post to be filled by an organisation through a process of selection is entitled to have his or her application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, regardless of the actual likelihood of his or her succeeding (see Judgment 2163, under 1, and the case law cited therein). Finding herself in that same situation, the complainant is perfectly entitled to seek a remedy, by filing an appeal with the appropriate body, for whatever wrong she may have suffered.

5. Article 30 of the Regulations, the French version of which is the authoritative version, states as follows:

“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 [...] on examination or on qualifications and examination [...].”

Under the terms of this article, a competition must be organised to fill any vacancy.

In this case, even the Agency has admitted that the sole purpose of holding competition HQ-2003-BA/083 was to try to remedy the effects of a questionable practice and that the post concerned was that to which Ms T. had already been assigned at the outcome of an earlier competition. It was to this practice that the Joint Committee for Disputes objected when, in its opinion of 22 October 2004, it observed that the procedure followed by the Administration in its effort to remedy the administrative situation of the candidate selected after the first competition was “tortuous and open to criticism”.

It is clear in the circumstances that the defendant used the competition procedure, intended under the terms of Article 30 of the Regulations as a means of filling vacancies, for a purpose other than that specified in that article.

The reference to Judgment 1527 is in the event irrelevant. In the case leading to that judgment, the intention was in fact to fill a vacancy which was occupied on a temporary basis.

6. It may be concluded from the above, without any need to examine the other pleas put forward by the complainant, that competition HQ-2003-BA/083 and all decisions based on the outcome of that competition must be set aside. However, Ms T. must be shielded from any hardship, in accordance with the Tribunal’s case law (see in particular Judgment 2060, under 4).

The complainant is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. Competition HQ-2003-BA/083 and all decisions based on the outcome of that competition are also set aside, as stated under 6 above.
3. The Agency shall pay the complainant the sum of 3,000 euros in costs.

In witness of this judgment, adopted on 9 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 16 February 2006.