

FORTY-THIRD ORDINARY SESSION

***In re* MAGER**

Judgment No. 398

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 8 December 1978 by Miss Josée Mager, the Organisation's reply of 20 March 1979, the complainant's rejoinder of 4 May and the Organisation's surrejoinder of 26 July 1979;

Considering the applications to intervene filed by the following:

G. Hody,
P. Klumberg,
H. Kuhnel,
L. Lievens;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 3.3 and 92 of the Eurocontrol Staff Regulations;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Having held a competition to fill a post for a programmer, on 16 December 1974 the Eurocontrol Agency made the complainant an offer of a five-year appointment. She accepted the offer, on 28 December signed the letter of appointment, and was accordingly appointed on 13 February 1975 with effect from 16 February. She was appointed as a first-category administrative assistant at grade B4. On 21 February 1977 she asked the Director-General to cancel her temporary appointment and substitute an appointment without limit of time. The Director-General dismissed that "request" on the grounds that it was unfounded and in any event time-barred. On 7 November 1977 the complainant submitted a "request" to the Director-General to convert her temporary appointment into a permanent one, adding that her request was quite distinct from the original one. In his reply of 6 April 1978 the Director-General said that her new claim merely repeated the original one and that there was therefore no new time limit for filing an appeal. On 2 June 1978 the complainant submitted a "complaint" asking for the conversion of her temporary appointment into a permanent one. On 26 September the Director-General again replied that the "complaint" was irreceivable and unfounded. The complainant is appealing against an implied decision to dismiss her "request" of 7 November 1977. The Director-General did not in fact reply until 6 April 1978, but by 28 February his failure to reply had implied that he had decided to dismiss the "request".

B. The complainant contends that her complaint is receivable on the grounds that she is challenging, not a wrongful decision, but the rejection of the "request" which she submitted on 7 November 1977 under Article 92.1 of the Staff Regulations. In other words, she is asking the Tribunal to quash, not the decision to appoint her in 1974, but the decision to dismiss her request for amendment of her terms of appointment to bring them into conformity with the Staff Regulations. She agrees that by refusing on the grounds of irreceivability to consider any claim for amendment of the terms of her appointment it put an unduly restrictive construction on the term "request" in the Staff Regulations, since the purpose of such a request is actually to prompt a decision against which an appeal may be lodged. As to the merits, she contends that the decision to dismiss her claim should be quashed on the grounds that it was in breach of the Staff Regulation. Article 3.3 of the Staff Regulations should be construed to mean that temporary appointments are to be granted only to officials seconded from a national civil service or to older officials with the highest technical qualifications. The complainant belongs to neither of those categories. Moreover, the Director-General departed from that rule without stating any reason for doing so and exercised the authority which the rule confers on him for purposes other than that prescribed. His decision is therefore tainted

with procedural irregularity and abuse of authority. It is also a breach of the principle of non-discrimination.

C. In her claims for relief the complainant asks the Tribunal to find that the Organisation was wrong to grant her a fixed-term appointment under Article 3.3 and to order it to take steps to reinstate her in a permanent appointment.

D. In its reply the Organisation maintains that the purpose of the "request" procedure is merely to compel the Administration to take a decision on a situation which has not yet given rise to one. In the present case, however, a final decision had been taken to appoint the complainant for a period of five years. That decision ought to have been challenged directly, and the time limit for challenging it expired on 14 May 1975. Moreover, the Administration's replies to the complainant's successive claims were all identical and, since they merely confirmed each other, did not give rise to new time limits for appeal. The interveners are in exactly the same case and their claims became time-barred three months after the date of their appointment. Subsidiarily, the Organisation rejects all the complainant's pleas on the merits. The letter of appointment which both parties signed constituted a contract and was not, as the complainant contends, a unilateral act. There is no text which required the Director-General to give reasons for the terms of her appointment. The charge of discrimination betrays some confusion. There is a prohibition of discrimination in recruitment on grounds of nationality, race, creed and sex, but that does not preclude the existence of different kinds of appointment. Lastly, the Director-General correctly applied the Staff Regulations and did not abuse the authority which they confer on him.

E. In her rejoinder the complainant points out that what she sought by her "request" of 7 November 1977 was immediate amendment of her appointment. The whole purpose of the procedure under which she submitted that "request" is to ensure that any administrative action taken is lawful and that illegality is not perpetuated on the grounds that the time limit for a "complaint" has expired. In point of law the complainant rejects outright the Organisation's argument that the letter of appointment laid exclusively contractual obligations on the parties since an applicant for appointment has no choice but to accept the Staff Regulations and so enters into a non-negotiable standard contract. Hence the Organisation ought to have treated the complainant as a staff member with full entitlements strictly complied with the provisions of the Staff Regulations and refrained from infringing them for the purpose of eluding its obligations towards its permanent staff.

F. In its surrejoinder the Organisation maintains that if the complainant's plea in regard to receivability were allowed staff members could, to suit themselves, postpone the time limit for appeals by making one request after another. It repeats its argument that the complainant was governed by bilateral provision which she freely accepted when she signed the letter of appointment. It asks the Tribunal to declare the complaint irreceivable, to order the withdrawal of the internal papers which the complainant has produced without permission, to dismiss her claims as unfounded and to award costs against her.

CONSIDERATIONS:

Internal means of redress

1. Article 92.1 of the Staff Regulations provides that any person to whom the Staff Regulations apply may submit to the Director-General what is termed a "request" that he take a decision. The Director-General shall give reasons for his decision and notify it to the official within four months from the date on which the "request" was made. If by the end of that period no reply to the "request" has been received, that shall be deemed to constitute an implied decision to reject it.

Article 92.2 further provides that any person to whom the Staff Regulations apply may submit to the Director-General what is termed a "complaint" against an act adversely affecting him, either where the Director-General has taken a decision or where he has failed to adopt a measure prescribed by the Staff Regulations. The "complaint" must be lodged within three months, starting on the date of publication of the act if it is of a general nature or on the date of notification of the decision to the person concerned or the date on which it comes to that person's attention, or, where the "complaint" concerns an implied decision to reject a "request", on the date of expiry of the period prescribed for reply. The Director-General shall again give reasons for his decision and notify it to the official within four months from the date on which the "complaint" was lodged. Failure to reply within that period shall be deemed to constitute an implied decision to reject the "complaint".

2. The scope of Article 92.1 is limited by that of Article 92.2: A "request" may be made only where a "complaint" may not. Any other construction would make it pointless to lodge a "complaint". More particularly, the three-month

time limit for lodging a "complaint" set in Article 92.2, would serve no purpose if at any time a "request" might be submitted to the Director-General instead.

Any application challenging a decision must therefore be described and treated as a "complaint", whatever it may be called, and so it will be receivable only if submitted to the Director-General within the three-month time limit. By an application challenging a decision is meant any application for the quashing or amendment of a decision solely on the grounds of the facts underlying that decision.

The validity of the complaint and the applications to intervene

3. On 7 November 1977 the complainant submitted a "request" to the Director-General to convert her temporary appointment into a permanent one. In other words she sought amendment of the decision of 13 February 1975 to grant her a five-year appointment as a first-category administrative assistant at grade B4. She did not rely on any fact subsequent to that date but merely argued points of law which she could have raised at that time and which in any event the Organisation and the staff representatives had discussed in 1974. What she filed was not a "request" within the meaning of Article 92.1 but a "complaint" within the meaning of Article 92.2.

That "complaint" was therefore not receivable unless it was filed within three months from the date on which the appointment was notified to her. Since that time-limit had obviously expired, the Director-General's decision of 6 April 1978 to declare the application time-barred and refuse to consider the merits was correct. When she filed a further "complaint" on 2 June 1978, the Director-General was again right, on 26 September 1978, to uphold his earlier decision. The present complaint impugns that decision, or else the implied decision to reject which was confirmed by that decision, and must therefore be dismissed.

It is immaterial that the complainant seeks amendment of her legal status, not from the date of her appointment, but from the date on which the Director-General rejected what she calls her "request". What she is in fact seeking is amendment of the decision to appoint her.

4. Since the complaint must be dismissed, so too must the applications to intervene, and there is no need to consider whether they are admissible.

The withdrawal of documents filed by the complainant

5. Relying on Articles 17 and 19 of the Staff Regulations, the Organisation seeks the withdrawal of items of evidence which the complainant has filed without prior permission from the Director-General. Since the Tribunal dismisses the complaint on the grounds that the internal appeal was not filed in time, that matter need not be settled: the items in question relate to the merits, and not to the Director-General's conclusion that the appeal was time-barred.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

