

EIGHTY-FOURTH SESSION

***In re* Molloy (No. 4)**

Judgment 1686

The Administrative Tribunal,

Considering the fourth complaint filed by Mr. Brian Michael Molloy against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 August 1996, Eurocontrol's reply of 18 December 1996, the complainant's rejoinder of 21 February 1997, the Organisation's surrejoinder of 30 April, Mr. Pierre Boland's comments of 24 July, the complainant's observations of 9 September on those comments and Eurocontrol's final brief of 2 October 1997;

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

A. The complainant, a British citizen, is on the staff of Eurocontrol. On 19 May 1995 the Organisation issued a notice of competition, No. CE-95-AT/057, for a post of expert in technical installations at its Experimental Centre at Brétigny-sur-Orge, in France. The complainant applied for the post. By a decision of 11 October 1995 the Director General transferred to it another official, Mr. Pierre Boland. The complainant submitted his candidature for it on 27 October 1995, the last day for applying.

In a report dated 8 December 1995 the Selection Board recommended three candidates as suitable for the position but declared the complainant unsuitable. By a memorandum of 20 December 1995 the head of the recruitment section told him that his application had been unsuccessful.

By a memorandum of 22 January 1996 he lodged an internal "complaint" alleging breach of Article 30 of the Staff Regulations for failure to consider all the candidates in the competition. His "complaint" was referred to the Joint Committee for Disputes, which recommended rejecting it in a report dated 29 May 1996. By a letter of 6 August 1996, the decision he is impugning, the Director of Human Resources endorsed the Committee's recommendation on the Director General's behalf.

B. The complainant submits that the Administration failed to follow the proper selection procedure. The appointment of another official before the competition had run its course shows that his own candidature did not stand a chance.

He wants the Tribunal to set aside the material appointment and order the resumption of the selection procedure with "the original candidates".

C. In Eurocontrol's submission the complaint discloses no cause of action. Only a candidate that the Selection Board deemed suitable would have an interest in lodging a complaint.

On the merits it points out that the Board gave his candidature serious and impartial consideration. The decision to transfer another official to the vacant post was a proper exercise of discretion and there was nothing wrong with keeping the competition open as a "precautionary measure".

D. In his rejoinder the complainant rebuts the Agency's reply and makes an additional claim, to costs.

E. In its surrejoinder Eurocontrol maintains that the competition was not tainted with any fatal flaw. The claim to costs is new and therefore irreceivable.

F. In comments the Tribunal invited Mr. Boland to make on the complaint he observes that his appointment was part of a process of reform whose lawfulness he himself has challenged. He discusses the appointment procedure and explains that his duties go well beyond those that Eurocontrol mentioned in the notice of competition.

G. The complainant points out that Mr. Boland's submissions are in broad agreement with his own. Mr. Boland's actual duties being far greater than the ones Eurocontrol advertised, the post is so "different" that the complainant sees no need for the Tribunal to quash the appointment: it would suffice to free his post for one of the original candidates.

H. In its final brief the Agency points out that Mr. Boland's actual duties and those announced in the notice are not "radically" different. It alleges "collusion" between the complainant and Mr. Boland, whose grievances the present complaint is, it believes, intended to support.

CONSIDERATIONS

1. The complainant joined the staff of the European Organisation for the Safety of Air Navigation (Eurocontrol) on 1 April 1968. Since 1 April 1992 he has been assigned to Eurocontrol's Experimental Centre at Brétigny-sur-Orge as a senior technical assistant at grade B2.

2. On 19 May 1995 Eurocontrol issued a notice of competition, No. CE-95-AT/057, to fill a post for a category A expert in technical installations at the Centre. The complainant applied on 27 October 1995.

3. In January 1996 he learned that before the closing date the Agency had appointed to the post someone who had not even applied. In the context of reforms the Director General had, on 11 October 1995, transferred Mr. Pierre Boland to the post, for which Eurocontrol had announced the competition.

4. The Administration did not tell any of the applicants but went ahead with the competition. A Selection Board met on 8 December 1995 and the complainant was told by a memorandum of 20 December 1995 that he had been unsuccessful.

5. On 22 January 1996 he submitted a "complaint" to the Director General saying that to his knowledge the decision to appoint to the post someone from the Institute of Air Navigation Services, in Luxembourg, had been taken before the closing date for applications. In his submission the appointment was therefore unlawful.

On 6 August 1996 the Director General rejected his "complaint" and on 27 August he came to the Tribunal. He seeks the quashing of the decision of 11 October 1995 to appoint Mr. Boland to the post and an order that the process of selection be resumed "in due form".

The cause of action

6. Eurocontrol argues that the complainant can show no cause of action on the grounds that the Selection Board rejected him: only someone the Board deemed fit for the post would have a cause of action.

The plea fails. The material issue is not whether the Board made the right choice, but whether it was right that the competition should continue after 11 October 1995, the date of the decision to appoint Mr. Boland. So the complaint does disclose a cause of action.

Eurocontrol's conduct

7. Though Eurocontrol announced the competition on 19 May 1995 it put Mr. Boland on the post on 11 October, before the closing date for applications. Mr. Boland had not even applied. Under the material rules it was free to fill the post by competition, direct selection or internal transfer. But it was not free to apply two of those methods at the same time, any more than it was to appoint two people to one and the same post. In applying two methods it ran the risk of incurring inconsistent obligations. It has failed to give any valid explanation of what it did. It merely says that its own interests required filling the post as soon as possible and it did not want to stop the process of selection as long as it had doubts about what Mr. Boland was going to do.

The failure to stop the competition

8. As was said in 3 above, Eurocontrol filled the advertised post on 11 October 1995. Instead of telling the candidates so and acting responsibly it let the competition run on. It went on accepting applications up to 27 October 1995 and on 7 December called the Selection Board. The evidence is that the Board made a short list of three but there is no knowing what happened then. The competition does not seem to have culminated in any decision at all.

The conclusion is that the Agency acted improperly. Though knowing full well that the vacancy had been filled, it let the competition go on to no obvious purpose.

Relief

9. The complainant seeks the quashing of Mr. Boland's appointment. The Organization made that appointment in proper exercise of its discretion, and the decision shows no flaw that warrants setting it aside. But Eurocontrol did go ahead with a competition which, for want of a vacancy, could not come to anything. Though free under the rules to cancel the competition, it failed to do so. By letting the competition go ahead it made itself accountable to the candidates and in the circumstances Eurocontrol must be held liable to the complainant in moral damages and in costs.

DECISION

For the above reasons,

1. The claim to the quashing of the appointment of Mr. Pierre Boland on 11 October 1995 to post CE-95-AT/057 is dismissed.
2. Eurocontrol shall pay the complainant 600 United States dollars in moral damages.
3. Since his complaint succeeds in part it shall pay him 400 dollars towards costs.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Julio Barberis
Seydou Ba

A.B. Gardner