

EIGHTY-EIGHTH SESSION

In re De Riemaeker (No. 5)

Judgment 1926

The Administrative Tribunal,

Considering the fifth complaint filed by Mrs Irène Eugénia Luppens, née De Riemaeker, against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 February 1999 and corrected on 24 March, Eurocontrol's reply of 9 July 1999 and the complainant's waiver of her right to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. Some of the material facts are set out in Judgments 1595 of 30 January 1997 and 1771 of 9 July 1998 on the complainant's third and fourth complaints.

Following Judgment 1595, setting aside the appointment of Mr Rutherford as head of the Translation and Interpretation Division, competition HQ-94-LA/080 was resumed and declared unsuccessful. Mr Rutherford was appointed acting head. A new notice of competition for the same post, with the code HQ-97-LA/031, which the Staff Committee did not endorse, was published on 28 November 1997. The requirement contained in the first notice of competition and which had not been met by Mr Rutherford was no longer present and emphasis was placed on requirements relating to the organisation and management of the service. The complainant and Mr Rutherford were the only two candidates. The members of the selection board met on 22 January 1998, but the representative of the Staff Committee refused to sign the record of proceedings. The Staff Committee appointed another representative and a new meeting was held on 28 January. Only Mr Rutherford was named on the short list of candidates and he was subsequently promoted to grade LA3. In a letter of 17 February, the acting Director of Human Resources informed the complainant of the rejection of her candidacy on the grounds that her "management skills" were not adequate.

On 20 May 1998, the complainant appealed to the Director General against the decision of 17 February. The Joint Committee for Disputes recommended the dismissal of the internal complaint in an opinion dated 15 October. By a letter of 17 November 1998, which is the impugned decision, the Director General dismissed the complaint.

B. The complainant submits that the publication of the notice of competition HQ-97-LA/031 was flawed because the Staff Committee refused to endorse it and the selection of Mr Rutherford had "long been envisaged". She contends that a staff representative on the Joint Committee for Disputes was both judge and party, being a member of the legal service which had defended the Agency in the context of her previous complaints.

The complainant welcomes the fact that the Agency decided not to convene a promotion board after the selection board, which she says is in conformity with the procedure laid down in the Staff Regulations governing officials of the Eurocontrol Agency; but she deplores the Organisation's inconstancy and its arbitrary application of the Staff Regulations.

She argues that the very imprecise reasons given for the decision to reject her candidacy are designed to prevent any control of its lawfulness by the Tribunal. She notes that the first selection board, basing its opinion on a much more precise and demanding notice of competition, recognised her capacity to discharge the functions of the post put up for competition, that her evaluation reports for the period during which she

was acting head of the Translation and Interpretation Division were excellent and that there had been no fundamental change in the structure and functions of the Division between the two competition procedures.

She contends that the misuse of authority, which she already denounced in her previous submissions, is demonstrated by the facts taken as a whole rather than in isolation and confirmed by the "new fact" of the second appointment of Mr Rutherford.

The complainant requests the Tribunal "to order the joinder of the submissions filed in the two previous cases"; order the production of the documents cited in the rejoinder in the case which led to Judgment 1595; hold hearings; set aside the impugned decision and the challenged appointment; and grant her costs.

C. In its reply the Agency asks the Tribunal to rule on the receivability of the complainant's claims which, it says, differ from those set out in her internal complaint.

On the merits, it submits that the practice of transmitting notices of competition to the Staff Committee was for the purpose of informing the staff representatives and giving them an opportunity to make comments; a refusal to endorse a notice or negative comments on it would not prevent its publication. It adds that the staff member of the legal service expresses a personal opinion when representing the staff on the Committee and, if the case is subsequently brought before the Tribunal, the party to the case is the Agency and not that individual staff member.

The Agency adds that an ad hoc promotion board did indeed meet on 3 February 1998 and recommended the promotion of Mr Rutherford to grade LA3. The Agency contends that the first notice of competition "was in fact badly drawn up as regards the future needs of the Organisation" and that it subsequently "emerged" that managerial skills were essential for the post. It points out that the Tribunal held in Judgment 1771 that the complainant could be rejected by the second selection board, even though her evaluation reports recognised her capacities for the organisation and management of a service.

In its view, the complainant has not proved the existence of misuse of authority and the facts cited have already been submitted for review by the Tribunal.

The Agency requests that the complainant be ordered to bear all the costs.

CONSIDERATIONS

1. The material facts are partly set out in Judgments 1595 and 1771 delivered by the Tribunal on 30 January 1997 and 9 July 1998, respectively.

It may be recalled that competition procedure HQ-94-LA/080, opened in 1994 for the appointment of the head of the Translation and Interpretation Division of Eurocontrol, was declared unsuccessful after all the events related in the above judgments. On 28 November 1997, the Agency published a new notice of competition, HQ-97-LA/031, which differed from the notice of the 1994 competition in that, under the qualifications required from the future head of the Division, emphasis was placed on the capacity to organise and manage the Division.

The procedure decided on for the competition was that envisaged in Article 30 of the Staff Regulations, limiting applicants to the staff of the Agency and of national administrations.

The members of the selection board met on 22 January 1998. However, one of them, who had been appointed by the Staff Committee, refused to sign the record of proceedings, thereby making it necessary for the board to meet once again on 28 January 1998 with another member appointed by the Committee.

Only one candidate, Mr Rutherford, was selected for the short list. The ad hoc promotion board recommended his promotion to grade LA3. The Director General followed this recommendation and appointed Mr Rutherford head of the Translation and Interpretation Division.

2. The complainant, who had been informed on 17 February 1998 that she had not been considered suitable to be appointed to the post of head of the Division, filed an internal complaint.

The Director General followed the recommendation of the Joint Committee for Disputes and rejected the internal complaint on 17 November 1998. It is this decision which is being impugned.

The complainant requests the Tribunal to:

- order the joinder of the submissions filed in the previous two cases;
- order the production by the Agency of all the documents mentioned, "particularly in the rejoinder in the case which led to Judgment 1595";
- order hearings;
- set aside the dismissal, dated 17 November 1998, of the internal complaint filed on 20 May 1998 and quash the new appointment of Mr Rutherford confirming him in his position as head of the Translation and Interpretation Division; and
- order the Agency to pay costs.

3. The complainant has four pleas: firstly, the publication of the notice of competition without the prior endorsement of the Staff Committee; secondly, the arbitrary application of the Staff Regulations; thirdly, a flaw in the reasoning for the rejection of her candidacy; and, finally, misuse of authority.

Publication of the notice of competition without the prior endorsement of the Staff Committee

4. The Agency is taken to task for publishing the notice of competition without the prior endorsement of the Staff Committee. In the complainant's view, this constitutes a distortion of constant practice.

The complainant contends that notices of competition have always been submitted to the Staff Committee for its opinion and that the absence of the prior endorsement by the Committee resulted in the non-publication of the notice, or its modification.

In the present case, when the Staff Committee refused to endorse the draft notice of competition, the complainant says that the Administration should have modified the text of the notice, as custom required. Instead, it preferred to go ahead and publish the notice in its initial form.

The Tribunal finds that, although it is not contested that the Agency's practice was to transmit notices of competition to the Staff Committee before their publication, both parties admit that the official endorsement of the Staff Committee was not a prerequisite for publication. The only obligation arising out of the practice invoked by the complainant consisted of submitting notices of competition to the Staff Committee for its endorsement or comments. A refusal by the Staff Committee, as in the present case, to issue an opinion cannot therefore impede or taint the competition procedure, as indicated by the Joint Committee for Disputes.

5. The fact that the Joint Committee, which deemed the complainant's internal complaint to have no basis in law, has amongst its members a staff representative assigned to the legal service of the Agency who sometimes participates in drawing up its submissions to the Tribunal, cannot be held at this stage of the proceedings as being evidence in support of the complainant's case, since she did not raise any objections to the composition of the Joint Committee at the appropriate time.

Moreover, when sitting on the Committee, the staff representative issues a personal opinion. It is the Agency which is the party before the Tribunal and the submissions drawn up by the staff member reflect Eurocontrol's position.

The ad hoc promotion board

6. The complainant argues that the Agency applied the Staff Regulations in an arbitrary manner since, after it successfully defended before the Tribunal the "division" of the recruitment procedure into two parts (selection board followed by a promotion board), it did not respect this practice in the present case.

This plea is mistaken. As affirmed by the Agency, without being contradicted by the complainant, who waived her right to submit a rejoinder, an ad hoc promotion board did indeed meet on 3 February 1998 to examine the possible promotion of Mr Rutherford. The board's recommendation was posted for information.

Flaws in the reasons given for rejecting the complainant's candidacy

7. The complainant contends that the reasons given for the rejection of her candidacy are flawed. She says that the acting Director of Human Resources confines himself, in his letter of 17 February 1998, to explaining the rejection of her candidacy in these terms: "it was considered that the qualifications, and particularly the managerial skills, required for this post were not fulfilled to the desired level by your candidacy". The complainant says that such wording, by its very imprecision, is intended to prevent any review by a judicial authority and that its admission as sufficient reasoning would create an area of non-law in international organisations.

She argues that the first selection board, whose opinion was based on a notice of competition which was much more demanding and precise than the second with regard to the qualifications required by the head of the Division, had recognised her capacity to discharge the corresponding functions. She adds that Mr Rutherford's inability to meet the requirements set out in the first notice of competition had been recognised by the Tribunal.

Finally, she refers to her last evaluation report, dated 20 June 1996, covering a period that included the time she was acting head of the Division, to underscore her capacity to discharge the post covered by notice of competition HQ-97-LA/031.

In its reply the Agency indicates that, after competition HQ-94-LA/080 had been declared unsuccessful, an internal study was carried out of the support services and, taking into account the developments known to the Agency, it had emerged that managerial skills had become essential to direct the Translation and Interpretation Division. A new notice of competition, which differed substantially from the previous notice in the criteria required, was therefore published on 28 November 1997.

The Tribunal ruled that this procedure was valid in Judgment 1771, in which it found that "if a post is vacant and one competition to fill it has failed, the organisation may of course hold another and in doing so change the requirements in the notice of vacancy".

In view of this precedent, the new notice of competition was therefore justified in setting out criteria requiring a high level of competence and proven organisational and managerial skills.

Based on the above, the Tribunal finds that the Agency committed no error in its reasoning when it rejected the complainant's candidacy on the grounds that "following the examination of [her] qualifications and professional experience by the selection board, it was deemed that the qualifications, and particularly the managerial skills, required for the post were not fulfilled to the desired level by [her] candidacy".

Moreover, as noted by the Agency, the recognition of qualities in the complainant by an evaluation report is not binding on the selection board, which has to take into account a series of factors and assess them in accordance with the conditions set out in the notice of competition.

Misuse of authority

8. The complainant contends that, in her various submissions in the previous cases, and particularly in her rejoinder of 16 February 1998 in the case which led to Judgment 1771, she has expounded the reasons which, taken together rather than in isolation, can only demonstrate the existence of abuse of authority in favour of Mr Rutherford's candidacy.

She says that more recent events bear out her arguments. She emphasises that the second appointment of Mr Rutherford is the new fact which undermines the pleas used by the Agency with a view to hiding the truth. She adds that, in its surrejoinder of 27 April 1998 in the previous case, the Agency even concealed

from the Tribunal the appointment of Mr Rutherford as head of the Translation and Interpretation Division, when in fact this appointment had been announced two months previously in a public notice dated 20 February 1998, although she herself had not been informed.

She adds that the confirmation of Mr Rutherford's appointment in February 1998 has to be seen in the light of a very important fact which she had already reported in her complaint of 22 May 1995. In that complaint, she indicated that a staff member of the Agency had reported as early as October 1993 that pressure had been exerted for Mr Rutherford to become head of the Division. More precisely, the competent Director is alleged to have stated to Mr M., reviser in the Translation and Interpretation Division, that Mr Rutherford would be the next head of the Division. This testimony would explain in particular why the appearance of the first notice of competition had been delayed to allow Mr Rutherford to acquire sufficient seniority in his grade to be able to apply and why, what is more, when the above notice was not entirely to his satisfaction, he did not hesitate to criticise it. She says that he was given full satisfaction five years after the above testimony.

The Tribunal observes that the plea of misuse of authority has already been made in the case which led to Judgment 1771. The facts cited in the present complaint as proof of misuse of authority, with the exception of those qualified as new by the complainant, were examined by the Tribunal in Judgment 1771 under 6, to which it explicitly refers and where it gave the reasons for which it found that this plea, supported in the present case by the same arguments, could not stand.

9. With regard to the new facts, the Tribunal holds that the absence of a reference to the new appointment of Mr Rutherford in the Agency's last submission in the context of the case which led to Judgment 1771, which the complainant interprets as a deliberate intention to conceal the appointment from the Tribunal, as well as the supposed link between the appointment and the information that the competent Director is alleged to have conveyed to Mr M., in confidence, concerning the successor to the head of the Translation and Interpretation Division, do not constitute proof of misuse of authority in the present case.

The Agency was not under the obligation to mention the appointment of Mr Rutherford in the context of a case which was confined to the execution of Judgment 1595. And the information intimated to Mr M., even if proved, could not taint the appointment of Mr Rutherford, which is the outcome of a process that the Tribunal found to be lawful in Judgment 1771, in which it held that "there is no reason to suppose that [the Director General] wanted to appoint someone unqualified or depart from due process".

The person appointed meets the requirements set out in the notice of competition and, as indicated above, the competition procedure was not tainted by any flaw.

10. The complaint must therefore fail and it is not necessary to order hearings or any other investigation. Nor is it necessary to rule on the defendant's plea of irreceivability.

11. The counter-claim to an award of costs against the complainant must also fail.

DECISION

For the above reasons,

The complaint and Eurocontrol's counter-claim are dismissed.

In witness of this judgment, adopted on 17 November 1999, 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 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

