

FORTY-FOURTH ORDINARY SESSION

In re DIEWALD

Judgment No. 416

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organisation for the Safety of Air Navigation (Eurocontrol) by Mrs. Marlène Diewald on 1 March 1979, the Eurocontrol Agency's reply of 7 June, the complainant's rejoinder of 13 July and the Agency's surrejoinder of 28 September 1979;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 7, 40 and 41 of the Staff Regulations Governing Officials of the Eurocontrol Agency;

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. The complainant joined the staff of the Eurocontrol Agency in 1973 as a French translator. On 20 April 1977 she asked for, and on 3 May was granted, one year's "leave on personal grounds" from 31 July 1977 so that she could join her husband abroad. On 11 April 1978 she applied for reinstatement in the French section of the Language Branch from 1 August 1978. On 18 May the Director-General replied that there was "at present no post vacant in the French section of the Language Branch", but that she would be informed when there was one matching her grade and skills. In a telegram dated 30 May and confirmed by a letter dated 3 June the complainant stated her view that her reinstatement was compulsory, particularly since no one had replaced her in her own post. The Agency contends that she is mistaken: her duties had been split between the other French translators and the vacant post in the Branch was intended for an English translator. By a letter dated 30 June the Director-General informed her that her established post had been dropped from the 1978 budget and that she did not qualify for the only post which was vacant in the Language Branch. On 8 August she filed an appeal, which was dismissed on 5 February 1979 on the grounds that, there being no vacant post suited to her grade and skills, she could not be reinstated for the time being. That is the decision she impugns.

B. The complainant contends that the Agency has acted in breach of article 40 of the Staff Regulations. That article provides for the grant of leave on personal grounds "in exceptional circumstances". It is a favour which safeguards the staff member's entitlements. He does not "leave" his post: he continues to be a member of the social security scheme; he is not paid the severance grant; and the leave does not constitute "leaving the service" within the meaning of article 86 of the Staff Regulations. The complainant contends that when she applied for reinstatement her former post was still vacant yet had not yet been abolished. There is no predetermined allocation of established posts among the sections of the Language Branch. The Agency ought therefore to have reinstated her in the vacant post. She asks the Tribunal to award her damages against the Agency.

C. In its rejoinder the Agency observes that the complainant is asking, not for the decision to be quashed, but for damages. It takes her claim to be irreceivable because she did not file any internal appeal on the matter and in any event the claim goes beyond the terms of her letter dated 8 August 1978. Moreover, the Agency cannot be held liable unless she proves that it committed some wrongful act and that she suffered prejudice directly therefrom. The Agency puts forward subsidiary arguments on the merits. It argues that, although someone who is granted leave on personal grounds is still a member of the staff, he temporarily forfeits the rights he derives from actual performance of his duties - pay, advancement by step, promotion, security of employment, social benefits, and the like. His post is freed and the Administration may do with it what it likes provided it respects the Agency's interests. According to article 40 of the Staff Regulations, the staff member may be reinstated, not in his former post, but in a "post corresponding to his grade which falls vacant in his category or service provided that he satisfies the requirements of that post". The right to reinstatement is therefore subject to two cumulative conditions: first, there must be a vacant post and, secondly, the staff member must be qualified for it. The post for a translator

which was vacant on 11 April 1978, when the complainant applied for reinstatement, was graded A8/A7, whereas the complainant's grade was A6. Moreover, the announcement of the vacancy stated that it was intended for someone whose mother tongue was English. The Agency therefore maintains that the complaint is irreceivable and, subsidiarily, that it should be dismissed as unfounded. It asks the Tribunal to award costs against the complainant.

D. In her rejoinder the complainant argues that the purpose of article 40 is, when a post is vacant because the incumbent has been granted leave on personal grounds, to keep it available until he returns to work, despite any reductions in the budget, promotions, and other circumstances. The wording of the Article bears that out. According to article 40(4)(d) the staff member "must be reinstated in the first post" that falls vacant. That provision will of course apply when the official has been replaced - a contingency provided for in article 40(4)(e), which reads: "another person may be appointed to the post occupied by the official". In other words, if the incumbent of the post has not been replaced, he may lay claim to the post at the end of his leave. The complainant maintains that her post was still in existence on 11 April 1978, when she applied for reinstatement. The Agency had no right to abolish the post after she had so applied. If the Agency's case were allowed, the grant of leave on personal grounds might be tantamount to "termination of service". Article 47, which relates to such termination, does not give leave on personal grounds as one of the instances of termination, and Article 86 does not prescribe the payment of severance grant to someone who is granted leave on personal grounds. It is wrong to say that her post was abolished because of a need for savings since two calls for candidatures for more junior posts have been made in the same translation branch. The complainant therefore adds the following to her list of claims: reinstatement in post LA/6, the one she held when she went on leave; payment of the allowance due to an official with "non-active status" in compensation for the Agency's wrongful refusal to reinstate her on 11 April 1978, to be calculated in the manner set out in Annex II to the Staff Regulations; and damages amounting to 10,000 Canadian dollars.

E. In its surrejoinder the Agency points out that the claim for an allowance under article 41 of the Staff Regulations and the claim for damages amounting to \$10,000 did not form part of the original internal appeal and are therefore irreceivable. It observes that it is in her rejoinder that the complaint has for the first time stated her claim for reinstatement, and that that was her original claim. Its receivability is therefore in doubt. Moreover, her claims appear to be inconsistent: on the one hand she asks for reinstatement; on the other she asks for the allowance payable under article 41 to staff members declared to have "non-active status". As to the merits, the Agency argues that a staff member on leave on personal grounds no longer holds the post which he has left and cannot be declared to have "non-active status". The most that can be said is that he enjoys priority over others for appointment. It is only when a staff member is seconded (article 39(2)(g)) that he must be reinstated in his post: "when his secondment ends an official shall at once be reinstated in the post formerly occupied by him". The difference between leave without pay and secondment is that the latter is decided in the interests of the Agency. An official on leave on personal grounds leaves his post but keeps his status as a staff member and certain rights, particularly in regard to social security. Even if he has not been replaced in his post, his reinstatement is not automatic, and the complainant's a contrario interpretation of article 40(4)(c) and (d) is untenable. The only material provision is article 40(4)(d). Under that provision the staff member shall be reinstated in the first post to fall vacant after the end of the leave on personal grounds. The complainant's period of leave ended on 1 August 1978. Up to the date of actual reinstatement the staff member continues to be on leave on personal grounds without pay (article 40(4)). The complainant is not entitled to the allowance payable to an official with "non-active" status under Article 41, which is not material to her case. She is mistaken in contending that her post was not abolished by 11 April 1978. It was on 17 November 1977 that, to achieve savings, the Permanent Commission abolished 14 posts, including one for a translator. Of the three posts then vacant one has been abolished, and not necessarily the one formerly held by the complainant. One of the two surviving posts was later filled by the reinstatement of a German translator, and the other had to be filled by appointing an English translator. Lastly, the Agency observes that after joining her husband in Canada the complainant found employment as a translator with the International Civil Aviation Organisation in Montreal. The fact that she was not immediately reinstated in the Agency has therefore caused her no loss of remuneration.

CONSIDERATIONS:

Nature of the claim

1. In her complaint, which is dated 1 March 1979, the complainant asks the Tribunal to order the Eurocontrol Agency to pay her compensation amounting to 10,000 Canadian dollars for the professional and personal prejudice she has suffered on account of the Director-General's decision of 5 February 1979.

The Agency takes the view that the claim is irreceivable, but there is no need to consider the receivability of the complaint since in any event it is unfounded.

The position of a staff member granted leave on personal grounds

2. Leave on personal grounds is covered by article 40 of the Staff Regulations Governing Officials of the Eurocontrol Agency. The material clause is article 40(4)(d), which relates to reinstatement on the expiry of the period of leave, and reads: "on the expiry of his leave a servant must be reinstated in the first post corresponding to his grade which falls vacant in his category or service provided that he satisfies the requirements for that post".

This means that a staff member who is granted such leave is no longer performing the duties of his former post. It is true that he continues to be an official, but the rights arising from the performance of his duties - remuneration, promotion, guarantee of employment and so on - are suspended until he is reinstated. It appears from the letter and spirit of the above clause that the Agency may use the vacant post to suit its own interests.

The right to reinstatement is therefore subject to two cumulative conditions: first, there must be a vacant post and, secondly, the staff member must be qualified for it. The post for a translator was vacant on 11 April 1978 when the complainant applied for reinstatement.

It is clear from the notices of competition published on 10 April and 7 July 1978 that the post was graded A8/A7. The complainant's post was graded A6. Moreover, one of the qualifications required was that the incumbent's mother language should be English since he was to translate from French into English.

The complainant's mother tongue is French and she has always belonged to the French section, whose members translate from English into French. The complainant therefore fails to meet the requirement under article 40(4) that she should be qualified.

Moreover, on 17 November 1977, when the budget was being approved, an LA/6 post was abolished together with 13 others as a consequence of a reduction in the Agency's activities intended to achieve savings. Nevertheless on 1 January 1978 there were still two vacant posts in the Language Branch. But one of them was filled on 1 April 1978 on the reinstatement as translator of a citizen of the Federal Republic of Germany. The other vacancy, for a translator into English, was announced in a notice of competition on 10 January 1978. The reason why the latter post had not been kept free for the complainant on the expiry of her leave on 1 August 1978 was that she did not have the qualifications required, and she herself does not deny that.

By his decision the Director-General refused to reinstate the complainant on 1 August 1978. The impugned decision was therefore taken under the authority which the Director-General enjoys and is not tainted with any mistake of law or any other flaw.

Allowance payable to an official with "non-active status"

3. The complainant is not entitled to the allowance. "Non-active status" is governed by Article 41 of the Staff Regulations. Article 41(1) defines non-active status. It appears from article 41(2) that the budgetary authority is competent to declare such status. It is clear that in law the complainant is relying not on article 41 but solely on article 40. The complainant has overlooked the basic difference between the procedure governing leave on personal grounds and that which applies to non-active status. It is not because she has non-active status that the complainant does not at present hold a post in the Agency; it is because she took leave on personal grounds and on the expiry of that leave there was, as has been said, no post in which to reinstate her.

DECISION:

For the above reasons,

1. The complaint is dismissed.
2. The costs shall be paid by the defendant organisation.

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