Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

V. d. S. (No. 5)

v.

Eurocontrol

130th Session **Judgment No. 4283**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. V. d. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 8 March 2017 and corrected on 15 March, Eurocontrol's reply of 30 June, the complainant's rejoinder of 19 September 2017 and Eurocontrol's surrejoinder of 17 January 2018;

Considering the applications to intervene filed by Mr G. A., Mr R. B., Mr R. D., Mr L. G., Mr C. L. R., Mr A. O. and Mr N. P. on 10 July 2017, and Eurocontrol's comments thereon of 18 August 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 13 of its Rules;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to cancel a competition in which he was a candidate.

On 3 October 2014 Eurocontrol issued vacancy notice NM-2014-FCO/062 to fill nine posts of Deputy Technical Supervisor in the Network Technical Systems Division. The complainant submitted an application. On 15 December 2014 the Principal Director of Resources approved the list of 10 candidates who had been found suitable by the selection board, the first nine of whom were to be offered the advertised posts. The complainant was ninth on the list. The Principal Director of Resources

requested the Recruitment and Mobility Service to proceed with the recruitment process.

At the beginning of January 2015, several candidates participating in the competition met their head of unit, who informed them that, as the Director Network Manager was concerned that some of the candidates found suitable had not received adequate training, the recruitment process could not be completed and consideration was being given to cancelling the competition.

By e-mail of 13 March 2015, Mr T., Head of People and Finance Operations, acting for the Director General and by delegation, informed the complainant that it had been decided to cancel the competition. He stated that, after an analysis of the needs of the service, and on the basis of the conclusions of the selection board, it was apparent that the profile of the position of Deputy Technical Supervisor, as advertised in 2014, did not properly reflect all the supervisory requirements and that, consequently, it would be revised. The vacancy notice would be re-issued as soon as possible.

On 24 March 2015 the complainant asked the Director General to advise him under what rule or regulation Mr T. had cancelled the competition and whether he had a "due and proper delegation" [*] to take such a decision; to publish the list of candidates who had been found suitable by the selection board; and to give him reasons why he had not been appointed. Alternatively, he requested that he be appointed to one of the disputed posts. The Principal Director of Resources responded to the complainant's claims by internal memorandum of 1 June 2015. The complainant alleges that he did not receive the memorandum at the time.

In July 2015 the Organisation issued the new vacancy notice for the nine posts of Deputy Technical Supervisor. The complainant's application for this second competition was rejected in December 2015.

In the meantime, on 29 September 2015, the complainant had lodged an internal complaint against the implied decision to reject his claims submitted on 24 March 2015. On 12 October 2016 the Joint Committee for Disputes delivered a divided opinion on the merits of the complaint, but a majority of its members considered that the complainant should be awarded moral damages. By memorandum of 13 December 2016, the Director General notified the complainant that he had decided to

[*] Registry's translation.

dismiss his complaint on the ground that it was unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and all the previous decisions. He requests that Eurocontrol be ordered to appoint him as Deputy Technical Supervisor with retroactive effect from 13 March 2015 and to pay him the resulting salary arrears. He seeks compensation of 25,000 euros in moral damages and 10,000 euros in costs, including 5,000 euros for costs incurred in the internal proceedings.

Eurocontrol asks the Tribunal to dismiss the complaint as irreceivable, on the ground that it is time-barred, and unfounded. In its surrejoinder, Eurocontrol requests the Tribunal to disregard the matters of law and fact set out in the rejoinder insofar as they are based on the situation of the interveners.

CONSIDERATIONS

1. The complainant impugns the decision of 13 December 2016 by which the Director General of Eurocontrol dismissed his internal complaint seeking, in essence, to challenge the cancellation of the competition opened on 3 October 2014 with a view to filling nine newly created posts of Deputy Technical Supervisor in the Network Technical Systems Division.

The complainant submits that the cancellation of that competition, in which he was ranked by the selection board as ninth on the list of 10 candidates found suitable for the posts in question, unduly deprived him of an appointment to one of those posts, given his lack of success in the new competition opened in July 2015 to fill those same posts.

Seven applications to intervene have been submitted by officials who consider that they are in a legal and factual situation similar to that of complainant.

2. According to the Tribunal’s settled case law, the executive head of an international organisation may cancel a competition in the interests of the service if, among other reasons, it becomes apparent that the competition will not enable the post concerned to be suitably filled, and the opening of such a procedure does not therefore imply that a candidate will necessarily be appointed to that post (see, for example,

Judgments 791, under 4, 1771, under 4(e), 1982, under 5(a), 2075, under 3, 3647, under 9, or 3920, under 18, and 4216, under 3).

3. According to the same case law, the decision not to fill an advertised post – like any decision to appoint an official in the opposite case where an appointment is made – falls within the discretion of the executive head of the organisation and is therefore be subject to only limited review by the Tribunal (see, in particular, aforementioned Judgment 791, under 4, or aforementioned 1771, under 6). However, it is within the Tribunal's purview to verify whether that decision was taken in accordance with the rules on competence, form and procedure, whether it involved an error of fact or of law, whether it failed to take account of material facts, whether it drew clearly incorrect conclusions from the evidence or whether it constituted misuse of authority (see, for example, Judgments 1689, under 3, 2060, under 4, 2457, under 6, 3537, under 10, or 3652, under 7, and aforementioned 4216, under 4).

It is in the light of that case law that the complainant's submissions to the Tribunal will be considered.

4. Disputing, first, the procedural legality of the decision to cancel the disputed competition, the complainant submits that that decision, which took the form of an e-mail sent on 13 March 2015 by Mr T., Head of People and Finance Operations, was taken without authority.

The Tribunal notes that, although there can be little doubt that that e-mail, in which Mr T. stated that he was acting "[f]or the Director General and by delegation", merely notified the complainant of an administrative decision taken beforehand, there is no evidence to show that the decision in question was formalised in any other manner, so it must be found that the competition was cancelled as a result of that e-mail. It must therefore be ascertained whether the author of the e-mail had a delegation of the power of signature authorising him to adopt such a measure.

In this case, however, the objection raised by the complainant on that point is unwarranted. The evidence shows that, pursuant to a decision of the Principal Director of Resources of 1 August 2014, Mr T., in his capacity as Head of People and Finance Operations, was granted sub-delegation of authority to sign, on behalf of the Director General, "all documents that fall under his responsibilities". Moreover,

pursuant to a decision of 1 April 2014 on the internal organisation of the Directorate of Resources, the People and Finance Operations Unit has, among other responsibilities, the task of "ensuring the administrative management of recruitment, mobility and careers", which, contrary to what the complainant contends in his rejoinder, clearly includes taking decisions concerning a competition such as that at issue here. Since Mr T. thus acted within the scope of his authority and, consequently, within the limits of the sub-delegation of the power of signature which he held, the plea that the author of the decision of 13 March 2015 lacked authority has no factual basis.

The complainant's further argument that that decision contradicted a message dated 15 December 2014 in which the Principal Director of Resources, to whom Mr T. reported, had initially instructed him to proceed with appointing the first nine candidates on the list of suitable candidates drawn up by the selection board, is likewise unfounded. Since the decision of 13 March 2015 cancelling the competition was taken on the Director General's behalf, it obviously took precedence over any position previously taken in relation to the competition by any other senior official of the Organisation, even if that person was the signatory's supervisor.

5. The complainant further submits that insufficient reasons were given for the decision of 13 March 2015. He contends that in stating that the decision to cancel the competition had been taken owing to "business needs", the author of that decision had used an "empty formula, devoid of meaning, justification and foundation"*.

However, although the Tribunal's case law does not regard generic references of that kind as sufficient to provide the reasons for an administrative decision (see Judgments 1231, under 23, 3617, under 6, or 4259, under 12), an examination of the impugned decision in this case shows that, far from merely referring in an abstract manner to the interests of the service, it contains a detailed statement of the reasons for which it was taken. It states that "[a]fter a thorough analysis of the business needs, and on the basis of the conclusions of the selection Board, it was concluded that the profile [required of candidates], as advertised in 2014, did not reflect correctly all requirements of this supervisory function", that "in particular relevant soft skills were missing",

* Registry's translation.

and that "[t]he profile will therefore be revised and a new competition will be advertised as soon as possible".

That statement of reasons was undoubtedly sufficient to acquaint the complainant with the reasons for that decision and to enable him to act on it accordingly, in particular with a view to potentially exercising his right of appeal against it. It was also sufficient to enable the competent authorities to verify whether the decision was lawful and to allow the Tribunal to exercise its power of review. It thus satisfied in every respect the requirements laid down by the Tribunal's case law as regards the statement of reasons for administrative decisions (see, for example, Judgments 1817, under 6, abovementioned 3617, under 5, or 4081, under 5).

The complainant's contention is therefore manifestly unfounded.

6. Nor will the Tribunal uphold the plea – which, moreover, is barely outlined in the complaint – that the complainant should have been heard by the Administration before the competition was cancelled. The general principle that an official has the right to be heard before an individual decision that adversely affects her or him is taken plainly cannot be applied to an impersonal decision which is collective in scope, such as the cancellation of a competition.

7. The complainant next disputes the impugned decision on substantive grounds, submitting that Eurocontrol breached its own rules by cancelling the disputed competition before the candidates proposed by the selection board could be appointed and deciding to open a new competition with a revised vacancy notice. He contends that, since the initial selection procedure was validly conducted in accordance with the applicable rules, in particular Article 30 of the Staff Regulations governing officials of the Eurocontrol Agency and Article 15 of Rule of Application No. 2, the Organisation could not refrain from completing that procedure without infringing those provisions.

However, this argument disregards the fact that, as stated in consideration 2 above, the executive head of an international organisation is always entitled to decide to cancel a competition procedure in the interests of the service. Although the principle *tu patere legem quam ipse fecisti* requires that the selection and appointment of candidates in a competition must be carried out in accordance with the applicable rules,

it does not prevent the cancellation of a competition which the organisation does not wish to pursue. Indeed, those same rules are deemed to allow such a cancellation, even when the competition concerned has been properly conducted.

In this case, in deciding to cancel the initial competition, on the ground that it would not have allowed the posts to be filled appropriately, and to organise a new competition with a revised vacancy notice, the Director General did not, therefore, breach the abovementioned provisions.

8. The complainant challenges the assessment made by Eurocontrol in deciding to cancel the disputed competition and open another for the purpose of selecting candidates whose profile better suited, in its view, the role of deputy technical supervisor.

The Tribunal points out, however, that, under its case law referred to in consideration 3 above, it can only interfere with the decision to cancel the competition on the ground of such an error of judgement if that error is manifest. Plainly, the same applies to the decision to open a new competition, which, since it also falls within the Director General's discretion, is also subject to limited review in that regard. However, an examination of the written submissions does not support a finding that those decisions involved a manifest error of judgement.

As reflected in the statement of reasons for the decision of 13 March 2015 quoted above, it was decided to cancel the initial competition particularly in view of the selection board's observation in its report that "[a]ll of the candidates could improve soft skills, e.g. communication, supervision skills, etc.". Even though the selection board had included 10 candidates on the list of suitable candidates for the posts in question, stating in the same report that they possessed "technical knowledge, skills and experience as requested in the vacancy notice", it commented that the candidates nevertheless exhibited shortcomings in terms of soft skills. Such shortcomings could appear all the more critical since the posts to be filled were supervisory. The Tribunal notes, moreover, that the abovementioned report referred to the candidates' weaknesses in the area of "supervision skills" in bold type.

It is perfectly understandable that, in the light of the selection board's findings that the requirements set out in the vacancy notice were ill-suited to ensuring that the posts in question would be filled in a manner that met the needs of the service, the Organisation cancelled the

initial competition so that it could open a new one to select candidates whose profiles would better fit those posts.

To that end, the vacancy notice for the second competition included, instead of the cursory reference to the requirement for "good [r]elational and communication skills" which appeared in the initial vacancy notice, a reference to a number of soft skills in the areas of "[l]eading", "[m]anaging people", "[d]ecision making", "[a]nalytical thinking", "[p]roblem solving", "[c]ommunication" and "[m]anaging stress" respectively. The complainant submits that those new references are "meaningless" and their addition to the requirements listed in the initial vacancy notice, which leads to an overly subjective assessment of the candidates' merits, is thus completely unlawful.

The Tribunal disagrees. On the contrary, it considers that the various skills listed have exact meanings and the comparative assessment of the candidates' merits was likely to be rendered more objective, in the light of the requirements of the advertised posts, by their specific consideration. Moreover, even assuming that the relevance of the reference to any of those skills were debatable, the Tribunal cannot, in any event, reasonably consider, given the circumstances set out above, that the decision to replace the initial competition with a competition opened on those new bases involved a manifest error of judgement.

9. The complainant submits that the cancellation of the first competition and the subsequent organisation of the second involved a misuse of authority.

According to him, the initial competition was in fact "cancelled for reasons of partiality, with the sole purpose of appointing officials who were to the Agency's *liking*"*, and the selection board's abovementioned observation concerning the candidates' shortcomings in terms of soft skills was merely a "pretext" used by the Organisation "to prevent the candidates being appointed"*.

However, as the Tribunal has repeatedly stated, misuse of authority may not be presumed, and the burden of proof is on the party that pleads it (see, for example, Judgments 2116, under 4(a), 2885, under 12, 3543, under 20, 3939, under 10, or aforementioned 4081, under 19).

* Registry's translation.

It must be noted that the complainant has not produced any evidence to corroborate his allegations. The circumstance, put forward by the complainant, that he was unsuccessful in the second competition even though he had been placed on the list of suitable candidates in the first one and that the same was true of other candidates plainly cannot, in itself, constitute such evidence.

In this regard, the Tribunal wishes to point out that, contrary to what the complainant appears to consider in his written submissions, the fact that the vacancy notice for the second competition was drawn up with a view to filling the posts at issue with officials with a potentially different profile from that stated in the initial vacancy notice cannot be regarded as inherently constituting a misuse of authority. That would only be the case if that choice stemmed from considerations extraneous to the needs of the service and, in particular, if its real reason was to favour or exclude particular candidates *intuitu personae*.

In this case, it is evident from what has been said above that the cancellation of the initial competition and the opening of a new competition were based on the lawful justification of consideration of the needs of the service. From that point of view, the complainant is wrong, in particular, to criticise his head of unit and the Director Network Manager for having stated, in January 2015, that they doubted the advisability of appointing the candidates initially selected and, consequently, for having broached the possibility of a new competition. There is nothing unlawful in managers seeking to ensure that the profiles of their future colleagues match the requirements of the posts to which they are to be appointed.

Moreover, the complainant does not prove that there was any personal bias against him, nor any intention to favour any other specifically identified candidate which could have played a role in the disputed decisions.

In these circumstances – and even though the Tribunal observes that, according to the opinion of the Joint Committee for Disputes dated 12 October 2016, certain members of that committee cast doubt on the Organisation's good faith in this case – the misuse of authority alleged by the complainant has not been established.

10. Finally, although the complainant calls into question the impartiality of the selection board in the second competition, that plea is in any event irrelevant in this case since the decision of 13 December

2016 does not concern the validity of the outcome of that competition, which, moreover, the complainant has not challenged.

11. It follows from the foregoing that the complaint must be dismissed in its entirety, without there being any need to rule on the objections to receivability raised by Eurocontrol.

12. The applications to intervene must, as a consequence of the outcome of the complaint, also be dismissed, without it being necessary to rule on Eurocontrol's objection to the receivability of some of them.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 30 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ