

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

W.

v.

Eurocontrol

135th Session

Judgment No. 4594

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 13 December 2018, Eurocontrol's reply of 5 April 2019, the complainant's rejoinder of 19 June 2019 and Eurocontrol's surrejoinder of 2 October 2019;

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

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 seeks the cancellation of a competition in which she took part.

On 2 August 2017 Eurocontrol published internal notice of competition MA-2017-AD/061 for the post of "Head of Finance and Procurement", in the group of grades AD9-12, at the Maastricht Upper Area Control Centre (MUAC). The section of the vacancy notice headed "Required profile" stated that candidates should have "proficiency in finance (budgeting, accounts receivable etc)." The complainant, a Eurocontrol official holding grade AD10, applied for this post on 11 September 2017. By email of 5 October 2017, Ms T., from the Recruitment and Mobility Service, informed the complainant on behalf

of the Selection Board that her application had been rejected, but did not provide any reasons. On 10 October 2017 the complainant had a telephone conversation with the Chairperson of the Selection Board about the reasons for her elimination. On 11 October 2017 the complainant sent an email to the Chairperson of the Selection Board, in which she wrote: “Thank you for taking the time to talk to me yesterday. I understood that it is the experience in budget (strategic budget experience) which was the reason not to invite me for an interview. Is it a correct understanding of what you told me yesterday?”. The Chairperson replied that she was not allowed to provide such information in writing. She also suggested that the complainant should contact the Recruitment Service for more information.

On 18 December 2017 the complainant lodged an internal complaint against the decision of 5 October 2017, in which she requested, *inter alia*, the names of the shortlisted candidates, the names of the members of the Selection Board and a copy of their report, asked for the competition to be cancelled and resumed and also sought compensation for the injury she considered she had suffered, as well as payment of her legal counsel’s fees. By internal memorandum of 19 April 2018, the Head of Human Resources and Staff Administration – Ms D. – confirmed receipt of her internal complaint and informed her that it would be examined by the competent service and transmitted to the Joint Committee for Disputes. That same day, Ms D. sent the internal complaint to the Committee, indicating that a complete file would be provided so that the complaint could be dealt with at the meeting of 18 May 2018.

In its opinion, delivered on 17 August 2018, the Committee unanimously concluded that the complaint was unfounded insofar as the complainant asked for the competition to be cancelled and resumed. However, it recommended that internal candidates in a competition should, on request, be informed of the reasons for their application being rejected. Three members of the Committee found that the complainant’s requests to be informed of the names of the members of the Selection Board and to see those passages from the Selection Board’s report which dealt with the rejection of her application were well founded and

one member recommended that moral damages should be awarded to the complainant for the injury caused by the rejection of her application without sufficient reasons being given therefor.

By an internal memorandum of 3 October 2018, which constitutes the impugned decision, Ms D., acting by delegation of the Director General, rejected the internal complaint to the extent that the complainant asked for the competition to be cancelled and resumed. She also stated, in that memorandum, that the Chairperson of the Selection Board would contact the complainant to provide her with the extracts from the Selection Board's report that dealt with her application but that, for reasons of confidentiality, the names of the members of the Selection Board and of the shortlisted candidates could not be disclosed to her.

The complainant asks the Tribunal to set aside the impugned decision and cancel the competition in question, to order that the competition be resumed at the stage at which her application was rejected or, in the alternative, to award her material damages of 50,000 euros as a result of the lost opportunity to be appointed to the post for which she had applied. In addition, she claims 50,000 euros in moral damages for the injury she alleges to have suffered, 6,000 euros in compensation for the delay in dealing with her internal complaint and 6,000 euros in costs.

The Organisation asks the Tribunal to dismiss the complainant's claims as unfounded. It submits various documents before the Tribunal, including the report drawn up by the Selection Board and an email of 22 February 2019 sending the complainant the extract from the report that related to her. It also supplies the names of the members of the Selection Board and the shortlisted candidates. Having sent the complaint and the rejoinder, at the Tribunal's request, to the person who was appointed as a result of that competition, Eurocontrol also submits the observations of that person, dated 12 August 2019, annexed to its surrejoinder.

CONSIDERATIONS

1. The complainant seeks, primarily, the setting aside of the decision of 3 October 2018 which rejected the internal complaint she had lodged seeking the cancellation of a competition in which she participated.

2. The complainant submits in the first place that the member of the Recruitment and Mobility Service who informed her, by email of 5 October 2017, that her application had been unsuccessful did not have the authority to do so, as the power to take such a decision lay only with the Selection Board.

However, it is clear from the evidence that it was indeed the Selection Board that, at its meeting of 27 September 2017, reviewed the seven internal applications received and decided to reject four of them, including the complainant's, at that stage of the procedure.

The sole purpose of the email to which the complainant refers was to inform her of the outcome of the Selection Board's deliberations. It did not constitute a decision in itself.

The first plea is therefore unfounded.

3. In the second place, the complainant submits that the decision to reject her application, dated 5 October 2017, did not state the grounds on which it was based, in breach of the requirements of Article 25 of the Staff Regulations governing officials of the Eurocontrol Agency. In her rejoinder, the complainant also takes the Organisation to task for the fact that the grounds for the decision to reject her application were only formally communicated to her in writing in the context of the proceedings before the Tribunal, in an email from the Chairperson of the Selection Board dated 22 February 2019.

However, it is clear from the evidence that the Selection Board's decision to reject the complainant's application, taken on 27 September 2017, does state the grounds on which it was based, in accordance with Article 25 of the Staff Regulations. Although it is true that the complainant was only informed in writing of the grounds for that

decision by the email of 22 February 2019, it is also true, first, that she was informed orally of the content of those grounds by the Chairperson of the Selection Board during a telephone conversation on 10 October 2017 and, secondly, that she expressly contested the merits of those grounds in her internal complaint submitted on 18 December 2017, which confirms that she was aware of them.

Even though the provisions of Article 25 of the Staff Regulations were not fully adhered to in the present case, in that the grounds for the decision were not communicated to the complainant at once, the Tribunal nevertheless considers that this is not a serious defect such as would warrant the setting aside of the impugned decision.

4. In the third place, the complainant alleges that the principle of due process was breached in that she was not given access to the “complete file” sent by Eurocontrol to the Joint Committee for Disputes. However, the Tribunal notes that the complainant was notified by the Organisation in a timely manner of its intention to send that file to the Committee and she therefore had the opportunity to ask either the Organisation or the Committee for a copy of it. The Tribunal notes in addition that, in the present case, it appears from the file that the documents sent by the Organisation to the Committee were all known to the complainant, since they were documents annexed to her internal complaint. The plea must therefore be rejected.

5. In her fourth plea, the complainant alleges that the independence of the Joint Committee for Disputes was compromised by the fact that the Secretary of the Committee was a subordinate of the Head of the Human Resources and Staff Administration Service.

The Tribunal notes, however, first, that the appointment by the Director General of a Eurocontrol official as the Secretary of the Committee is expressly provided for in Article 2 of the Annex to Office Notice No. 06/11 on the Functioning of the Joint Committee for Disputes tasked with handling complaints and, secondly, that there is nothing to preclude that official from being a subordinate of that Head of Service. The Secretary of the Committee, who fulfils a purely

administrative role, does not form part of the Committee. In the present case, there is no evidence to suggest that the Secretary overstepped his role, nor, a fortiori, that he attempted to influence the members of the Committee in a way dictated by his superior.

This plea is also unfounded.

6. In her fifth plea, the complainant submits that the various decisions relating to the handling of her internal complaint were taken by the Head of the Human Resources and Staff Administration Service whereas they fell within the competence of the Director General, who had not delegated his authority to the aforementioned Head.

However, the Tribunal finds from the evidence adduced by Eurocontrol in support of its reply that:

- by Decision No. XI/14 (2016) of 1 December 2016, the Director General had delegated power to the Director of Resources to take and sign certain decisions referred to in the provisions of the Staff Regulations, including “decisions and documents relating to the complaint process” (see the eighth indent of Article 1 of that decision);
- under Article 2 of that same decision, the Director of Resources is authorised to transfer all or part of his delegation of signature to officials in the Directorate of Resources;
- that Director had made use of that authority by authorising, by his Decision No. DR/II/01 (2017) of 1 September 2017, the Head of Human Resources and Staff Administration to sign documents falling under her responsibilities and for which the Director of Resources had received delegation of authority to sign according to the aforementioned Decision of the Director General of 1 December 2016.

Since the handling of an internal complaint submitted pursuant to Article 92 of the Staff Regulations falls within the powers delegated by the Director General to the Principal Director of Resources, and since the Principal Director of Resources had sub-delegated his powers to the Head of the Human Resources and Staff Administration, the latter was

indeed competent to take the various decisions relating to the handling of the complainant's internal complaint, including the final impugned decision (see, by analogy, Judgments 3496, consideration 5, and 2495, consideration 7, and, with regard to sub-delegation of powers, Judgments 4283, consideration 4, and 3316, consideration 3). In that regard, contrary to what the complainant maintains, it is irrelevant whether or not the Head of the Human Resources and Staff Administration Service is "in the supervisory line between the complainant and the Director General".

The fifth plea is also unfounded.

7. The complainant criticises the Organisation for having found that her application did not meet the selection criteria on the basis of a criterion that did not appear in the notice of competition. The notice made no mention of a criterion requiring strategic budget experience, yet the use of that criterion was, according to the complainant, the reason why her application was rejected. There was therefore a breach of the principle *tu patere legem quam ipse fecisti*.

The decision to reject the complainant's application, taken by the Selection Board, was based on the fact that she "did not meet the following criteria: budgeting and budget controlling experience (especially at the strategic planning level)".

The Tribunal notes, however, that among the selection criteria mentioned in the competition notice was the following: "Proficiency in finance (budgeting, accounts receivable etc)". In addition, the job responsibilities for the vacant post included "leading and managing the overall cycle of finance and procurement related matters, their execution and monitoring via the development of performance indicators, and initiating improvements of operational processes; [...] acting as Financial MUAC Controller and undertaking specific actions in the area of Finance to support Maastricht management including production of financial progress reports, drafting and contribution to budgetary working and business papers (business plan, annual plan, annual report, budget etc.)" (underlining added).

In view of these factors, the Tribunal considers that the Selection Board was entitled, when assessing the merits of the candidates, to take into account budget controlling requirements, in particular in relation to strategic planning.

Consequently, the plea is unfounded.

8. The complainant considers that, even supposing that it had been possible to assess her application against a selection criterion based on budget controlling experience, in particular in relation to strategic planning, her application could not reasonably have been rejected on the basis of that criterion. She therefore argues that a standard examination of her application should have been carried out “in good faith and completely objectively”.

The Tribunal recalls that, in relation to competitions, it is not its role to replace the assessment made by the competent selection bodies with its own assessment.

In the present case, the Tribunal finds, and in so doing agrees with the opinion of the Joint Committee for Disputes on this point, that the Selection Board did not commit any manifest error of assessment in rejecting the complainant’s application from the outset on the grounds that she was not considered to meet the requirements referred to above.

The plea must be rejected.

9. On a different note, the complainant also complains generally about a lack of transparency throughout the competition procedure. She maintains that, despite her specific requests, the Selection Board’s report rejecting her application, the names of the shortlisted candidates and the names of the members of the Selection Board were not provided to her and that members of staff were not made aware of any official decision regarding the outcome of the competition.

The Tribunal notes, in the first place, that the impugned decision stated that the Chairperson of the Selection Board would contact the complainant and would provide her with the extracts from the Selection Board’s report that dealt with her application. The fact that this

happened belatedly, by email of 22 February 2019, relates to the implementation of the decision and not to its content. Although this situation is, admittedly, irregular, it is not such as to render that decision unlawful.

In the second place, as regards the request to be informed of the names of the candidates shortlisted by the Selection Board and the names of the members of the Selection Board, the Tribunal notes that those names appear in the redacted version of the Selection Board's report submitted by Eurocontrol as an annex to its reply, meaning that the complainant was able to use that information to put together the arguments that she considered beneficial to the defence of her interests before the Tribunal. It should also be pointed out that the complainant did in fact put forward in her rejoinder a plea alleging a conflict of interest on the part of one of the members of the Selection Board which was based on the information in question.

In the third place, it is apparent from the evidence annexed by the Organisation to its reply that the outcome of the competition was indeed brought to the attention of members of staff through publication on the Organisation's intranet.

It follows from all the foregoing considerations that the complainant's arguments alleging a lack of transparency in the competition procedure must be rejected.

10. In her rejoinder and as mentioned above, the complainant, having received the redacted version of the Selection Board's report annexed by the Organisation to its reply, alleges that there was a conflict of interest affecting one of the members of the Selection Board, as that member was the supervisor of one candidate.

The Tribunal recalls that a lack of impartiality, a bias or a conflict of interest on the part of members of a collegiate body such as a selection board may not be presumed. Any allegation of such matters must therefore be supported by tangible evidence (see, inter alia, Judgments 4451, consideration 16, 4408, consideration 22, and 3438, consideration 8). The mere fact, relied on in the present case, that the

supervisor of one candidate was a member of the Selection Board cannot, in itself, be regarded as constituting a conflict of interest. In addition, since the complainant merely makes generalised assertions without adducing any tangible or specific evidence to establish the existence of a conflict of interest on the part of the member of the Selection Board in question, those assertions must be rejected.

11. It follows from the foregoing that the claims for the impugned decision to be set aside must be dismissed.

The Tribunal notes, however, that, as stated in considerations 3 and 9 above, the Organisation failed in some of its duties during the procedure, which warrants an award of moral damages. In the circumstances of the case, fair redress for the injury suffered by the complainant under this head will be made by awarding her compensation of 3,000 euros.

12. Lastly, the complainant complains about what she regards as the excessively long delay in dealing with her internal complaint. While the period of nine months between the submission of the internal complaint that was the subject of the impugned decision and the date on which that decision was delivered undeniably exceeds the period laid down in Article 92.2 of the Staff Regulation by five months, and therefore constitutes a breach by the Organisation of its own rules, the Tribunal considers that the duration of the procedure cannot be regarded as unreasonable in the circumstances of the present case. Moreover, even though that duration breached the applicable provisions, the complainant has not adduced any specific evidence of injury arising from the delay.

It is therefore not appropriate to award the complainant compensation under this head.

13. As the complainant has succeeded in part, she is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. Eurocontrol shall pay the complainant moral damages in the amount of 3,000 euros.
2. It shall also pay her 3,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 17 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ