

EIGHTY-SECOND SESSION

In re Watson (No. 4)

Judgment 1597

The Administrative Tribunal,

Considering the fourth complaint filed by Mr. Jeremy Watson against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 November 1995 and corrected on 4 March 1996, Eurocontrol's reply of 7 June and the Registrar's letter of 14 August 1996 informing complainant's counsel that, the time limit for filing a rejoinder having expired, the written pleadings had closed under Article 9(2) of the Rules of the Tribunal;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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 subject born in 1939, joined the staff of Eurocontrol on 1 January 1965 under a permanent appointment. After serving at the Organisation's headquarters in Brussels and at its centres at Maastricht and Karlsruhe he was transferred on 1 June 1981 to its Institute of Air Navigation Services, which is in Luxembourg. At the material time he was employed as a principal expert at grade A4 in charge of the "Systems Bureau". The background to the dispute is set out under A in Judgment 1615 (*in re* Boland No. 9, Hardy No. 3, Heller No. 3 and others) also delivered this day.

By a letter of 28 March 1985 the Director of the Institute told the complainant that his post would not survive reforms but that an "assessment team" would be interviewing him to see whether there was another job for him at the Institute. On 6 April the team considered whether he was cut out for building coordinator and the very same day the Director told him of its conclusion that he was.

In talks with the Director on 12 May he said he was interested in a post graded A5 for head of Technical Support. In a report dated 17 May the team of assessors said that he was fit for it. On 18 May the Director told the complainant orally that he was recommending for that post someone who already held grade A5 but was backing him for building coordinator, though he had doubts whether the job would survive.

In a letter of 2 June to the Director General the complainant referred to a letter of 19 May he had got from the Director of Personnel and pointed to what he saw as flaws in the exercise of redeployment, namely (1) the loss of his post because of the reforms, (2) the assessment of him for the post as head of Technical Support and (3) the reasons stated for giving it to someone else.

By a notice dated 6 June and signed by the Director of Personnel the Director General transferred the complainant to the office of the Director of the Institute as from 1 July pending a decision on the duties he might be given elsewhere in the Agency. On 28 June he lodged a "complaint" against that transfer.

By a letter of 23 August 1995, which he is impugning, the Director of Human Resources answered on the Director General's behalf the objections in his letter of 2 June.

In a letter of 9 October the same Director told him he was formally "transferred" to headquarters as from 16 October 1995, though he was actually to stay on in Luxembourg, to do a study that would take from six to eight months.

B. The complainant submits that the procedure of redeployment was unlawful. Unlike reforms which were made at the Institute on 1 January 1993 and which led to Judgment 1358 (*in re* Cassaignau No. 3), this time the reforms entailed doing away with some jobs and creating others. So the Director General had a duty under Article 30 of the

Staff Regulations to issue notices of all vacant or new posts, hold competitions and set up selection boards to rate applicants. The "assessment team" was no selection board. Some posts were filled straightaway without any procedure of assessment: that was in breach of equal treatment and counter to the interests of those who lost their posts in the reforms.

The Director General gave no explanation of his decisions not to have a building coordinator -- despite the recommendation by the Director of the Institute -- and to put someone else in charge of Technical Support. The complainant says that he was fully qualified to be head of Technical Support.

He charges the Agency with breach of his rightful expectations and of the principles of proper management. It rushed the redeployment through. The Director General acted in breach of his duty of care by transferring the complainant from Luxembourg in disregard of his individual rights. His son is seriously ill and needs expensive therapy and a life free from disturbance.

The Director General was guilty of misuse of authority by changing the grading of vacancies and the qualifications required for them so that he could either appoint someone picked in advance or else get rid of an official by transferring him to another duty station. The post of head of the Systems Bureau was not really dropped; the duties survived and were reallocated.

He seeks the quashing of the decision of 23 August 1995 rejecting his "complaint" of 2 June 1995 and an award of costs.

C. Eurocontrol replies that the complaint is irreceivable. First, the complainant's letter of 2 June 1995 was no internal appeal either in form or in substance. At the time the Agency had not taken a final decision on the complainant's status since redeployment was not yet over. What he calls an appeal did not make a single claim. Secondly, his sole purpose was to stay in Luxembourg: since he is still living and working there despite his formal "transfer" to Brussels, he has no cause of action.

In subsidiary argument on the merits the Agency submits that, as in 1993, when it reformed the Institute, it began the exercise of redeployment in 1995 by assigning duties within the new structure to the members of the staff while keeping them on the posts they held. That is how it came to transfer the complainant without any change of grade or budgetary post to the office of the Director of the Institute. Notwithstanding the terms of some of the papers about the exercise, there was no question in 1995 of filling any vacancies. So he is wrong to allege breach of Article 30 of the Staff Regulations.

The provisional transfer of the complainant to the Director's office was a proper exercise of the Agency's discretionary authority to determine its own structure.

The Director General took account of the complainant's rights and interests, including his son's illness. He may not rely on any rightful expectation in the absence of any promise from the Agency to keep him in Luxembourg or put him on one of the two posts he wanted.

The Director's purpose in recommending him for the new temporary post of building coordinator, even though he did not much care for it, was to let him stay on in Luxembourg. In any event the recommendation was not binding on the Director General. As for the appointment of someone else to head Technical Support, the Director gave the complainant the reasons when they met on 18 May 1995.

Lastly, there can be no presumption of misuse of authority, and the complainant has failed to show how any change in grading or duties caused him injury.

CONSIDERATIONS

1. The complainant joined Eurocontrol on 1 January 1965 as an expert in category A. Since 1981 he has been stationed at its Institute of Air Navigation Services in Luxembourg. At the material time he was employed there as a principal expert at grade A4 and was in charge of the "Systems Bureau".
2. There have been several bouts of reform at the Institute, the latest approved by the Committee of Management of Eurocontrol in March 1994. The staff had notice in September 1994 of the Committee's decision and the reforms went ahead in 1995.

3. By a letter of 28 March 1995 the Director of the Institute told the complainant that his job would not survive them but an assessment team would be interviewing him to see what he could do at the Institute. After looking into his qualifications and skills the team recommended him for building coordinator. On 12 May he saw the Director and said he was interested in taking charge of Technical Support. On 18 May, however, the Director told him that someone else was to head Technical Support and that there was to be no building coordinator.

4. On 2 June 1995, in answer to a letter of 19 May from the Director of the Institute, he sent the Director General a letter objecting to the decisions he had learned of from the letter of 28 March, to the assessment of him by the team and to the appointment of someone else to head Technical Support. On 6 June the Director General decided to transfer him and thirteen others provisionally to the office of the Director of the Institute.

5. On 28 June he lodged a "complaint" against that transfer. In a letter of 23 August the Director of Human Resources rebutted on the Director General's behalf the objections in his letter of 2 June. That is the "decision" he purports to be impugning.

6. By a decision of 27 October 1995 the Director General rejected his "complaint" of 28 June 1995 and forwarded to him a copy of a report dated 26 July 1995 by the Joint Committee for Disputes.

7. Eurocontrol pleads that the complaint is irreceivable on the ground, among others, that the impugned decision causes the complainant no injury. Its case is that his letter of 2 June 1995, to which the impugned "decision" of 23 August 1995 replied, was no internal appeal either in form or in substance and that not until 28 June 1995 did he lodge one. That appeal went through the prescribed procedure and was rejected by the decision of 27 October 1995, which the complainant has impugned in his fifth complaint, filed on 24 January 1996.

8. Articles 92(1) and (2) of the Staff Regulations set out the procedure of appeal. According to 92(1) anyone to whom the Regulations apply may submit to the Director General a "request" for him to take a decision. If no decision comes in four months rejection is implied. Under 92(2) the staff member may submit to the Director General a "complaint" against an act adversely affecting him, whether the Director General has taken a decision or not. The staff member must submit such "complaint" within three months of the "publication of the act" or the expiry of the time limit for reply to the "request". According to paragraph 4 of the appendix to office notice 6/95 of 1 March 1995 the Director General must consult the Joint Committee for Disputes before rejecting a 92(2) "complaint" in whole or even in part.

9. The decision challengeable before the Tribunal under Article VII(1) of its Statute is the reply that the Director General makes to a "complaint" submitted in accordance with 92(1) and (2) after he has consulted the Joint Committee for Disputes: only when there is such a reply will the complainant have exhausted his internal remedies.

10. The complainant's letter of 2 June 1995 to the Director General did not amount to a "complaint" under 92(2) inasmuch as it was a reply to a letter dated 19 May 1995 from the Director of Personnel, not a challenge to a decision from the Director General. Indeed the terms of his letter to the Director General show that he sent it "in order to assist you in your final decision".

11. Even supposing that the Director General's reply of 23 August 1995 may be treated as the act adversely affecting the complainant, he ought to have lodged a 92(2) "complaint" against it. Before taking his decision thereon the Director General was required, under the new internal procedure, to put the case to the Joint Committee for Disputes. Since the complainant has come straight to the Tribunal to appeal against the reply of 23 August 1995, he is not challenging a final decision because he has failed to exhaust his internal remedies. His complaint is therefore irreceivable, there being no need to rule on the Agency's other objections to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

Michel Gentot
E. Razafindralambo
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.