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

EIGHTY-NINTH SESSION

***In re* Giordano** **Judgment No. 1990**

The Administrative Tribunal,

Considering the complaint filed by Mrs Grazia Giordano against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 August 1999 and corrected on 14 September, Eurocontrol's reply of 17 December 1999, the complainant's rejoinder of 25 February 2000, the observations submitted by Mrs T. on 13 March at the Tribunal's request, the complainant's comments of 5 April and the Agency's surrejoinder of 14 April 2000;

Considering Articles II, paragraph 5, and VII 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, who was born in 1958 and holds both Italian and Belgian nationalities, joined the Agency in July 1991. In January 1992 she was given a career appointment as a typist 1st class at grade C4. She currently holds a grade B3 post.

On 2 February 1998 the Agency published a notice of competition for an assistant at grade B4/B5 in the Safety Regulation Unit. The complainant applied on 2 April. On 18 May the Selection Board drew up a list of suitable candidates. The complainant was on the list and took the selection tests on 10 June. By a letter of 21 August the Head of the Recruitment and Selection Section told her that the Selection Board's final choice was the candidate with the "most complete profile", namely Mrs T.

By an internal memorandum of 25 November 1998, the complainant filed an internal complaint with the Director General against the rejection of her application. She objected that the decision was not substantiated and that the Agency had discriminated against her in that the aptitude tests were set only in English. The matter was referred to the Joint Committee for Disputes, which concluded at its meeting of 23 March 1999 that the appeal was founded as to her plea of language discrimination. By a letter of 24 May 1999, the impugned decision, the Director of Human Resources told her on the Director General's behalf that her internal complaint was rejected.

B. The complainant has two pleas. First, citing the case law she alleges breach of equal treatment. Since the notice of competition did not specify precedence of English over French, she could legitimately expect to be able to sit the selection tests in either French or English as she chose. French being her mother tongue she should have taken the tests mainly in that language. But English was used for both the reasoning tests, only the character profile test was in French. Interviews, on the other hand, were conducted both in English and French. She states that having been put on the list of suitable candidates by the Selection Board, she can only conclude that the results of the tests were decisive in the rejection of her application. Consequently, because the selection process was conducted almost entirely in English, she suffered discrimination vis-à-vis candidates who were able to take the tests in their mother tongue.

Secondly, she points out that the letters of 21 August 1998 and 24 May 1999 did not state the reasons for her rejection, in breach of the Staff Regulations governing officials of the Eurocontrol Agency and the case law.

The complainant asks the Tribunal to quash the decision of 24 May 1999, as well as the rejection of her application for the post of assistant and the appointment of Mrs T. She claims 100,000 Belgian francs in costs.

C. In its reply the Agency submits that the complaint is irreceivable because the complainant failed to lodge her internal complaint within the statutory time limits. She filed only on 25 November 1998, whereas the decision she challenged was taken on 21 August 1998, so the time-limit for appeal ran to 21 November 1998. Furthermore, on 1 June 1999 the complainant was appointed to a post as an assistant at grade B3 as the result of another competition. Consequently, she no longer has a cause of action.

In subsidiary pleas the Agency denies breach of equal treatment. It had to choose between applicants of more than twenty-eight nationalities and in the interests of uniformity decided to set the tests only in English. It did respect equality of opportunity: the results were weighted according to whether or not the candidate's mother tongue was English. It points out that the successful candidate's mother tongue is not English.

Although the decision of 21 August 1998 explained only in general terms why she was turned down, the complainant was given detailed reasons during a talk she had on 28 August with a representative of the Recruitment and Selection Section. She was told that her application had been discarded only because of her character profile test and interview, which had shown that she was apt to lack self-confidence and was not always in control of her emotions. The reasons given in the letter of 24 May 1999 were worded "more neutrally" because it was the Agency's consistent practice to avoid recording in documents to be placed in staff members' personal files any information that might "undermine [their] future chances".

The Agency asks the Tribunal to award all costs against the complainant.

D. In her rejoinder the complainant alleges that the decision of 21 August 1998 was notified to her only at the end of the month. Her internal complaint was therefore not out of time. She maintains that she does have a cause of action: the post she wanted affords better career prospects than the one she now holds. She adds that she was appointed to her present post one year after the post she wanted was given to Mrs T. During that time she has continued to be paid as a grade C3 employee.

She contends that the selection procedure established in Article 30 of the Staff Regulations and in Rule of Application No. 2 was not respected. According to those rules, it is the Director General who chooses a candidate from a list drawn up by the Selection Board. But the Board carried out no selection test and the final choice was made by a "Selection Committee", of which there is no mention in the Regulations. To establish such a committee, the Agency should have adopted a rule to amend the Regulations and their Rules of Application after consulting the staff unions in accordance with the Agreement on consultation, conciliation and arbitration procedures concluded by Eurocontrol and the Trade Union Organisations on 9 January 1992. Having failed to do so, it has abused its authority and breached the Agreement.

In the complainant's view, to apply the same treatment to different situations amounts to discrimination. And that is what occurred: candidates of different languages all had to sit most of the tests in English. Having to use English caused her "additional stress and difficulty", which had a negative impact on her results.

She was never given clear and specific reasons for the rejection of her application. The Agency mentioned the alleged lack of self-confidence for the first time in its reply.

E. In her observations Mrs T. states that she fails to see any cause of action: the grade of the complainant's present post is higher than that of the one she initially sought. Being Dutch-speaking and having received part of her higher education in French, she considers that she had no advantage over the complainant in the selection tests conducted in English.

F. In her comments the complainant says that she understands Mrs T.'s reaction but does not share her point of view.

G. In its surrejoinder Eurocontrol presses its plea that the complaint is irreceivable for want of a cause of action. The complainant and Mrs T. both have the possibility of being appointed to a grade B1 post one day, and in that respect the complainant has an undeniable advantage since she is already at grade B3. Furthermore, the complainant may not plead financial injury in that Mrs T.'s salary at grade B5, step 1, amounted to only 64 euros more per year than the complainant's salary at grade C3, step 3.

It denies breach of the selection procedure: the Selection Board drew up a list of suitable candidates and they took the tests and had an interview conducted by a "panel" appointed by the Director General. It was he who chose

Mrs T., not the panel, which was "inappropriately" referred to as a "Selection Committee" in the letter of 21 August 1998.

CONSIDERATIONS

1. The complainant, an Italian citizen, spent her childhood in Italy then emigrated to Belgium at the age of ten. She currently holds Belgian nationality as well and deems herself bilingual in Italian and French. She completed secondary education and had further education in English and computer studies. She joined Eurocontrol on 1 July 1991 and was given an indefinite appointment on 23 January 1992 as a grade C4 typist 1st class.

She applied for a number of category B posts that were put up for competition.

The Agency published notice of competition HQ-98-BA/014 for a post of assistant at grade B4/B5 in the Safety Regulation Unit. The notice specified:

"Applicants must have a good knowledge of English or French, and a working knowledge of the other. During their career, they will ordinarily be called upon to be able to work in both these languages.

...

An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited to take part in a final selection phase consisting of assessments and interviews. Further details will be given to candidates who are invited to participate."

The complainant applied for the post on 2 April 1998. In her application form she indicated her dual nationality, her native languages (French and Italian) which she rated as "fluent", and her knowledge of other languages which she rated as "very good" for English and Dutch and "good" for German.

A Selection Board was set up to consider the eighty-three applications received and to draw up a list of suitable candidates for the post. The complainant was down as an internal candidate on the list, which is dated 18 May 1998.

On 9 and 10 June a "Selection Committee" - appointed by the Director General and composed of two members representing the relevant departments - interviewed the five candidates (two Belgian, one Dutch, one British and one Irish) whose names were on the list. The candidates then took three assessment tests: the first was a verbal reasoning test given in English; the second, a numerical reasoning test, also in English; and the third, a character profile test, to be taken in a language chosen by the candidate - the complainant chose French. The interviews were carried out in English and French. After consideration of the results of the tests and interviews, the Agency decided to offer the post to another internal candidate whose profile was deemed to be better (Mrs T.).

The complainant was informed that she had been unsuccessful by a letter dated 21 August 1998 and signed on the Director General's behalf. It said that the Selection Committee's final choice had been the candidate "with the most complete profile" and that if she wanted further information, she should contact section HR 1.2.

There is doubt as to the date on which the complainant received that letter - 21 August according to the Agency, at the end of the month according to the complainant.

She took up the offer of further information on the results of the competition. The discussion lasted for one hour and a quarter.

2. On 25 November 1998 the complainant appealed to the Director General against the rejection of her candidature on the grounds that she was not given the reasons for it. She pleaded discrimination: the tests were conducted solely in English, so she was not on a par with the English-speaking candidates. She sought the quashing of the successful candidate's appointment.

The case was referred to the Joint Committee for Disputes, which concluded that there had been discrimination because the final selection tests had been conducted almost exclusively in English. In its opinion, the oral explanation given to the complainant met the minimum obligation to provide reasons, but that in no way prejudged the soundness of the explanation.

The Director of Human Resources nevertheless rejected the appeal on the Director General's behalf, giving the following explanation:

"contrary to your contention, the English language tests were not decisive in the decision not to appoint you; account was taken of the entire final selection process, which also comprised an interview in the two languages the result of which was not entirely satisfactory.

As to the explanation for the rejection of your candidature, it was consistent with the principles established by the case law of the ILO [Administrative Tribunal] concerning the need for restraint."

3. The complainant is asking the Tribunal to set aside the decision of 24 May 1999 rejecting her appeal, to quash the rejection of her candidature and the appointment of Mrs T. and to order the Agency to pay the legal costs. She puts forward the same pleas as in the internal procedure.

The Agency asks the Tribunal to dismiss the complaint as irreceivable on two counts: the internal appeal was out of time and the complainant has no cause of action because, since filing her internal complaint, she has been promoted to a B3 post, which is a grade higher and better paid than the post at issue in the present procedure. On the merits, it submits that the complainant's pleas are unfounded.

In her rejoinder the complainant asserts that the complaint is receivable. She maintains that the selection process comprising the consideration of her application by a Selection Board, then by a "Selection Committee" and lastly by the Director General is in breach of Article 30 of Staff Regulations. The decision to appoint a "Selection Committee" is also in breach of the Agreement on consultation, conciliation and arbitration procedures that Eurocontrol and the Trade Union Organisations signed on 9 January 1992, with the result that the decisions are of no legal weight.

In its surrejoinder the Agency leaves it to the Tribunal to determine the receivability of the complaint in the light of the time limit for the filing of the internal appeal. As to the complainant's interest in obtaining the post in question, the Agency is of the opinion that her chances of promotion are just as good now as they would have been if her application had succeeded, with the advantage that she is starting off from a higher position. On the merits it submits that the selection process was consistent with Articles 30 and 45 of the Staff Regulations, as the Tribunal acknowledged in Judgment 1689 (*in re* Montenez No. 2). The term "Selection Committee" was simply a misnomer, and in any case it is the Director General who takes the decision. It is in fact a "panel appointed by the Director General ('interview board') comprising representatives of the departments concerned". According to the Agency, the interview board was compatible with the Staff Regulations and the Rules of Application. The reports of the interview board which were substantiated and contain assessments of the tests of Mrs T. and Mrs Giordano along with recommendations to the Director General, are appended to the surrejoinder. The board was composed of Mr B. of Bureau EMS.1 and Mr S. of the Human Resources Directorate. The defendant considers that equal treatment was applied in the selection process and that the interview board substantiated its choice.

4. The complainant pleads failure to account for the decision rejecting her application.

A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say (see Judgment 1817, *in re* J., under 6). Where a post has been put up for competition, the case law says that when notifying to a serving official the reasons for the rejection of his application, an organisation must be wary of damaging his career prospects (see Judgments 958, *in re* El Boustani No. 3, under 17, 1355, *in re* Suprapto, under 8 and 9, 1390, *in re* More, under 25, and 1787, *in re* Gramegna, under 5).

The letter rejecting the complainant's application was very brief. The Agency nonetheless offered to give her any further information she wanted. The complainant took up the offer and was given details of how the tests were conducted and how she had fared. The Agency has in any case confirmed that information in the course of this complaint, giving the complainant the opportunity to respond if she so wished.

The decision was explained adequately enough for the complainant to challenge it and for the Tribunal to ascertain

whether it was lawful.

The plea fails.

5. (a) The Tribunal has already observed that Eurocontrol's appointment and promotion procedure is not inconsistent with the Staff Regulations (see Judgments 1689 and 1771, *in re* De Riemaeker No. 4). It sees no reason to depart from that precedent.

(b) Discounting the precedent set in Judgment 1689 the complainant asserts that:

"in order to set up a Selection Committee, insofar as the Staff Regulations and its Rules of Application needed to be amended the Agency should have adopted a rule after consulting the Trade Union Organisations, in accordance with the framework agreement signed by the defendant and the Trade Union Organisations on 9 January 1992 ... (see Judgment ... 1712 of 29 January 1998, *in re* Aelvoet No. 6 ...)."

The Agency denies misapplying the statutory provisions on the procedure for filling vacancies. In Judgment 1689 the Tribunal found the selection procedure to be consistent with the rules. Besides, what was perhaps inappropriately called "Selection Committee" is not a new body but a meeting between officials representing the departments concerned, whom the Director General appoints with a view to ensuring that his decision - which is discretionary - will be an informed one.

What the Agency misnames "Selection Committee" or interview board is not a statutory body (Staff Regulations Article 9, and Article 30 as regards the Selection Board) or even an advisory body, but a meeting between officials appointed by the Director General pursuant to the first paragraph of Article 7 of Rule of Application No. 2, concerning the procedure for assignment to a post in accordance with Articles 7, 30, 31 and 45 of the Staff Regulations, according to which:

"The Director General shall select from this list the person(s) he appoints to the vacant post(s). The selection shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned."

The sole duty of the few (in this case two) officials concerned is to assist the Director General in coming to the decision he has to take (Article 2 of the Staff Regulations) by providing him with the "reasoned opinion" of the "unit concerned". Such an opinion would appear to be essential for the appointing authority to ascertain the needs of the unit and the candidates' suitability, and thus determine where the Agency's interests lie.

The conclusion is that the selection process was consistent with the rules and that the Director General did not create a new body, which, according to the complainant, would have implied the adoption of a new rule after a consultation procedure in accordance with the Agreement of 9 January 1992.

The plea fails.

6. According to firm precedent, the executive head of an organisation has wide discretion in appointing or promoting staff. As any such decision is subject only to limited review, the Tribunal will interfere only if it was taken *ultra vires* or reveals some formal or procedural flaw or mistake of fact or law or abuse of authority, or if it overlooks essential facts or draws clearly wrong conclusions from the evidence (see for example Judgment 1771, under 6, and the others cited therein).

Here, the complainant pleads a procedural flaw.

Anyone who applies for a post to be filled by some process of selection is entitled to have his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever his hopes of success may be (see Judgments 1497 *in re* Flores, under 5, and 1549, *in re* Lopez-Cotarelo, under 9). An organisation must be careful to abide by the rules on selection and when the process proves flawed, the Tribunal will quash any resulting appointment, albeit on the understanding that the organisation must "shield" the successful candidate from any injury if he has accepted the post in good faith (see Judgment 1477, *in re* Nacer-Cherif, under 10).

7. The basic rules to be respected include the right of all applicants to equal treatment. The organisation may make no distinction between candidates on the basis of criteria - language, for example - which are not referred to in the

entry requirements (see Judgment 1158, *in re* Vianney, under 4 *et seq*).

For the post in question the requirements were "a good knowledge of English or French and a working knowledge of the other", since the successful candidate would "ordinarily be called upon to be able to work in both these languages". The complainant rightly inferred that "French-speaking" and "English-speaking" candidates were to be put on a par in the various tests.

The right to equal treatment requires that situations which are the same or similar be governed by the same rules and that dissimilar situations be governed by rules that take account of the dissimilarity. The second requirement, which is inferred from the right to equality, can be fulfilled in a number of ways. It can be met if the relevant rule of the texts in force or the decision applying it make reasonable provision for the difference in situation. The appointing authority has considerable margin for manoeuvre in determining equivalence where situations are *de facto* unequal, and the Tribunal will not interfere unless the standard chosen exceeds that margin.

In the competition, the English-speaking and French-speaking candidates were not in the same situation, so criteria were needed that took account of the differences. The matter becomes more complex if account is taken of candidates whose mother tongue is neither English nor French. Testing all candidates in their native language would admittedly ensure equality to some extent. But that would make preparing the competition more difficult and in any case it is not the only solution. If the tests were taken at the candidate's choice in one or other of the Agency's two main working languages, there might still be the problem of how to treat candidates of another mother tongue so a "correction factor" might in any case be necessary. Since one of the requirements of the competition - and the post in question - was a good knowledge of the two main working languages, it was not unfair to provide for tests in one language only and apply an adequate correction factor to all candidates who were non-English-speaking. Such a solution redresses the balance and goes some way to ensuring equality between the candidates. Provided that it really is adequate, a correction factor does not impair the right to equal treatment.

The Agency explains that in the circumstances of the case the reasoning tests given only in English were not decisive in the recommendation not to appoint the complainant. It was the third test, relating to her character profile, which was only in French, and the interview in French and English that led the "Selection Committee" to express reservations about her candidature. According to the Agency, account was taken of the fact that three candidates were not of English mother tongue by the application of a weighting system. In fact English was not the successful candidate's native language.

The report forms drawn up by the "Selection Committee" for submission to the Director General, which are produced in the surrejoinder, confirm the Agency's assertions. They show that each test was assessed according to a variety of criteria. Those criteria were carefully chosen.

There is no evidence to suggest that the assessments, which the Director General endorsed, amount to abuse or misuse of the appointing authority's discretion.

The Agency does not claim that the weighting system applied to restore the balance for non-English-speaking candidates has the accuracy of a mathematical rule. It must be inferred that the system was applied by the experts in accordance with the circumstances - in this case to take account of the effect of a lesser knowledge of English on the results of the test. Such a criterion does not appear incompatible with equal treatment.

Nor is there any evidence to suggest that the system was applied arbitrarily.

The complainant alleges that, although she passed the reasoning tests, which were given in English, the fact that she had to take tests in English probably caused her stress. This, she says, accounts for the fact that the results of her character profile test and interview were less good. Furthermore, she had only two hours between the tests in English and the others, as opposed to several days in the case of the successful candidate, who had the added advantage of having worked in the United States, which meant that her English was better.

The Tribunal observes that there being nothing unlawful about the tests in English, the complainant may not object that they caused her difficulties.

She does not contend that her right to equal treatment was breached because she and the successful candidate took tests at different times, and on that score she is right. In competitions where tests are not scheduled for all candidates at the same time (written tests, etc.), such differences, which are hard to avoid, must be taken into

account by the candidates other than in exceptional circumstances, which the complainant does not invoke.

The fact that the successful candidate's English was better than her own is immaterial to the lawfulness of the competition.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, 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 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 28 September 2004.