Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. (No. 5)

v.

Eurocontrol

129th Session **Judgment No. 4216**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr P. C. 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 additional information submitted by Eurocontrol on 4 November 2019 at the Tribunal's request;

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 challenges the lawfulness of the decision to cancel a competition procedure in which he took part.

Details of the complainant's employment history can be found, inter alia, in Judgment 4080, dealing with his fourth complaint. At the material time, the complainant was assigned to the Network Management Directorate. On 17 June 2015 he was appointed as "chargé de l'installation" in that Directorate.

On 21 May 2015 Eurocontrol published a vacancy notice for the post of Team Leader, Exploitation Facilities, in the same Directorate. The complainant applied and, having been included on the short list, he took a technical test, was interviewed by the selection board and, on 31 August, sat assessment centre tests. On 25 September the selection board noted that the assessment centre tests had issued a "negative recommendation" for both the candidates who were still in the running, but it considered that they possessed the technical competencies and the knowledge required for the post. The selection board unanimously concluded that both candidates were suitable, and the complainant was ranked first on the list of suitable candidates. By an email of 7 October, the other person on that list was informed that his application had been rejected because another candidate – the complainant – more closely met the requirements of the post.

In a memorandum of 30 November, the Network Management Director recommended that the Director General close the competition without making an appointment since, in his words, "[t]he selection panel did not reach a unanimous decision" and the results provided by the assessment centre showed that neither candidate possessed all the competencies required. The Director General approved that recommendation in an email of 7 December 2015. By an email of 11 December, the Recruitment and Mobility Service advised the complainant that "the selection board [had] decided not to proceed further with [his] application". On 10 March 2016 the complainant lodged an internal complaint against that decision. He requested that the decision be set aside, that he be appointed to the post in question and that his legal costs be reimbursed. He also asked for the list of suitable candidates drawn up by the selection board to be disclosed to him.

The Joint Committee for Disputes, to which the case was referred, issued its opinion on 12 October 2016. It found that the Director General's decision to close the competition procedure was based on "incorrect information" provided by the Network Manager given that the selection board had found the complainant to be suitable for the post and had even ranked him first on the list of suitable candidates. Two members of the Committee recommended that the complainant be

appointed to the advertised post, while two others recommended that the Director General take a new decision taking account of the findings of the selection board.

By memorandum of 13 December 2016, the Director General informed the complainant that he had decided to dismiss his complaint as partly unfounded. While the Director General acknowledged that the selection board had found the complainant suitable, he nevertheless agreed with the two members of the Committee who had, according to him, recommended that his "request to be appointed to the post in question should not be granted"[*]. However, he told him that a representative of the Network Management Directorate would meet him to explain the reasons for the competition being cancelled. That is the impugned decision.

The complainant requests that the Tribunal set aside that decision and order his appointment – with all legal consequences that this entails – to the post in question with retroactive effect from 11 December 2015. He also seeks compensation of 80,000 euros for the moral injury that he considers he has suffered, 5,000 euros in costs, and an additional award of 5,000 euros for the costs relating to the internal appeal proceedings and to disciplinary proceedings that were brought against him.

Eurocontrol submits that the complaint should be dismissed as groundless.

CONSIDERATIONS

1. The complainant impugns the decision of 13 December 2016 by which the Director General of Eurocontrol dismissed, for the most part, his internal complaint challenging the cancellation of the competition procedure advertised on 21 May 2015 to fill the post of Team Leader, Exploitation Facilities, in the Network Management Directorate.

[*] Registry's translation.

The complainant considers that the cancellation of that competition procedure, in which the selection board had ranked him first on the list of suitable candidates, unduly divested him of a likely appointment to the post in question.

2. It should be noted at the outset that the complainant wrongly considers that the initial administrative decision to end the competition procedure in question was embodied in the email of 11 December 2015 by which the Recruitment and Mobility Service informed him that his application had been rejected. The written submissions show that the decision to close the competition procedure without appointing any candidate was taken by the Director General on 7 December 2015 in an email endorsing the recommendation to that effect made by the Network Manager in a memorandum addressed to him on 30 November 2015. The aforementioned email sent to the complainant on 11 December merely advised him of how that decision affected his own situation by notifying him that his application had not been successful.

The Tribunal notes, however, that the complainant's error in this regard may be attributed to the Organisation's actions insofar as, very oddly, the email of 11 December 2015 did not mention the Director General's decision that it was supposed to apply, nor was that decision provided to the complainant at the time.

3. The Tribunal has consistently held that the executive head of an international organisation may cancel a competition in the interest of the organisation if, for example, 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, consideration 4, 1771, consideration 4(e), 1982, consideration 5(a), 2075, consideration 3, 3647, consideration 9, and 3920, consideration 18).

4. According to the same case law, the decision not to fill a post for which a competition procedure is opened – like any decision to appoint an official in the opposite case that an appointment is made – is a matter for the discretion of the organisation's executive head and is

therefore subject to only limited review by the Tribunal (see, in particular, aforementioned Judgments 791, consideration 4, or 1771, consideration 6). The Tribunal must, however, ascertain whether that decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1689, consideration 3, 2060, consideration 4, 2457, consideration 6, 3537, consideration 10, and 3652, consideration 7).

5. One of the pleas entered by the complainant in support of his complaint, being based on an error of fact and the failure to take account of essential facts, falls within the limited scope of the Tribunal's power of review thus defined and is decisive for the outcome of this dispute.

It is the plea that the decision to cancel the disputed competition without appointing a candidate to the post in question was taken on the basis of a misrepresentation of the findings of the selection board.

6. As stated above, that decision, dated 7 December 2015, took the form of an email from the Director General endorsing the recommendation submitted to him by the Network Manager in an internal memorandum of 30 November 2015 to cancel the competition.

According to that memorandum, this recommendation was based on the fact that "[t]he selection panel did not reach a unanimous decision" and that the results provided by the external assessment centre which the selection board had decided to use showed that neither of the shortlisted candidates possessed all the competencies required for the post in question. The aforementioned email of the Director General, which was sent in reply to the said memorandum and which merely stated "OK with me", indicates he made the impugned decision solely on the basis of the information provided by that document in support of the recommendation that it contained.

However, as the Joint Committee for Disputes correctly observed in its opinion of 12 October 2016, the way in which the competition file was presented in the memorandum did not accurately reflect the

substance of the selection board's discussions. The report on those discussions, which is in the materials before the Tribunal, shows that the selection board, which examined the applications in two stages, had, during its first meeting, unanimously found, on the basis of the interview and the written tests completed by the candidates, that two of them, including the complainant, were suitable for the post advertised, subject to the forthcoming results of the external assessment procedure, and had ranked the complainant first. Although it is true that the results provided by the assessment centre were not satisfactory overall for either of the shortlisted candidates, the selection board still considered during its second discussion that, for the reasons set out in detail in its report, there was no need to change its initial assessment. It then confirmed, still unanimously, that both candidates were capable of carrying out the duties relating to the post in question and again ranked the complainant first.

Consequently, by indicating that the selection board had not been able to reach unanimous conclusions, which was materially inaccurate, and by passing over the fact that the selection board had, despite the results of the external assessment, declared both shortlisted candidates suitable for the advertised post and had specifically recommended that the complainant be appointed – which were essential facts – the aforementioned memorandum led the Director General to take his decision on the basis of incorrect and incomplete information. It follows that the lawfulness of that decision was fundamentally flawed.

7. The Tribunal further observes that the email of 11 December 2015, in which the Recruitment and Mobility Service advised the complainant that his application had been rejected, likewise contained a gross inaccuracy, owing, it would seem, to the use of a template that was not appropriate in this case. The complainant was told that "the selection board ha[d] decided not to proceed further with [his] application". However, that statement fundamentally distorted the true substance of the selection board's conclusions since, as stated above, it had on the contrary declared the complainant suitable for the advertised post and had ranked him first.

8. The decision of 13 December 2016 by which, having examined the complainant's internal complaint, the Director General confirmed his decision of 7 December 2015 is obviously flawed as a consequence of the unlawfulness of that initial decision.

Moreover, it may be observed that the decision of 13 December 2016 involved another error of fact. In that decision, the Director General stated, as justification for dismissing the complainant's claims, that he "agree[ed] with the two members of the [Joint] Committee [for Disputes] who [had] recommend[ed] that, although the selection board [had] declared [him] suitable for the post, [his] request to be appointed to the post in question should not be granted". However, the opinion of the Joint Committee for Disputes shows that, after the Committee had determined unanimously that the Director General's initial decision was flawed, the two committee members in question did indeed consider, in contrast to the two others, that that finding did not automatically entail the complainant's appointment to the advertised post, but they did not express the opinion thus ascribed to them. In fact, they "recommend[ed] that a new decision be issued by the Director General on correct grounds and taking into account the findings of the selection board". They had hence intended that the complainant's application for the post in question be re-examined and not – as the Director General evidently wrongly considered – that the complainant not be appointed to it.

As the Director General thus misconstrued the purport of the recommendation which he endorsed, his decision was tainted with a further flaw in addition to the one identified above.

9. It follows from the foregoing that the decisions of the Director General of Eurocontrol of 13 December 2016 and 7 December 2015 must be set aside, without there being any need to examine the complainant's other pleas.

10. Contrary to what the complainant submits, the setting aside of those decisions does not in itself imply that the Director General was obliged to appoint him to the aforementioned post following the

competition procedure. Under the case law cited in consideration 3, above, the Director General had a discretion to decide, in the interest of the organisation, not to act on the proposals of the selection board. The complainant's claims for an order to appoint him retroactively to the post in question from December 2015, with all the legal consequences that this entails, must therefore be dismissed.

It is true that the Tribunal could have considered making such an order if, as the complainant submits, the refusal to appoint him was in fact explained by a desire to undermine or exert pressure on him in the context of the disciplinary proceedings brought against him during the same period following a workplace accident at Eurocontrol's premises. The Director General's decision would in that case have involved an abuse of authority warranting exceptional redress. However, the evidence in the file does not enable the Tribunal to conclude that those disciplinary proceedings – referred to in Judgment 4080 on the complainant's fourth complaint – played a part in the process that culminated in the decision impugned in these proceedings.

11. At this stage in its findings, the Tribunal would normally remit the case to the Organisation for the Director General to take a new decision concerning the disputed competition procedure, this time basing his assessment on a consideration of the exact substance of the findings of the selection board.

However, the response to the Tribunal's request for further information shows that the complainant retired on 1 January 2019. Since the issue of his possible appointment to the post in question has become moot, it is not advisable to remit the case to Eurocontrol, but the Tribunal will award the complainant compensation for the various injuries caused to him by the contested decisions, as foreseen by Article VIII of the Statute of the Tribunal in cases of this type.

12. The complainant, who, as stated above, was ranked first on the list of suitable candidates drawn up by the selection board for the competition, was deprived, by the flaws in the decisions in question, of a valuable opportunity to be appointed to the advertised post, the loss

of which constitutes material injury. That appointment would have entailed his promotion to a higher grade and thus a pay rise from December 2015 or January 2016 until his retirement, a period of around three years.

13. Moreover, the failure to appoint the complainant following the competition, for reasons stemming from an error of fact and the failure to take into account essential facts, and the incorrect information provided to the complainant regarding the selection board's supposed rejection of his application whereas, on the contrary, the selection board had in fact ranked him first on the list of suitable candidates inevitably aroused feelings of frustration and injustice that caused moral injury.

14. Having regard to the above matters, the Tribunal finds that the various injuries suffered by the complainant as a result of the unlawfulness of the decisions discussed above will be fairly redressed by awarding him compensation in the amount of 25,000 euros under all heads.

15. As the complainant succeeds for the main part, he is entitled to costs for the proceedings before the Tribunal, which, as he requests, will be set at 5,000 euros.

However, there are no grounds for awarding him costs for the internal appeal proceedings. Under the Tribunal's case law, costs of this kind may be awarded only in exceptional circumstances (see, in particular, Judgment 4156, consideration 9). Such circumstances are not evident from the written submissions in this case.

Finally, for the same reason the complainant is not entitled to reimbursement of the fees of his legal counsel for the aforementioned disciplinary proceedings, which, as previously stated, cannot be regarded as having a direct link with this case.

DECISION

For the above reasons,

1. The decisions of the Director General of Eurocontrol of 13 December 2016 and 7 December 2015 are set aside.
2. The Organisation shall pay the complainant compensation of 25,000 euros under all heads.
3. It shall also pay him costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2019, 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 in public in Geneva on 10 February 2020.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ