

**108th Session**

**Judgment No. 2869**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 9 May 2008 and corrected on 4 July, the Agency's reply of 24 October 2008, the complainant's rejoinder of 30 January 2009 and Eurocontrol's surrejoinder of 11 March 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a Dutch national born in 1949. He joined Eurocontrol in January 1989 as a Senior Administrative Assistant at grade B3. In July 1998 he was promoted to grade B2. He was granted full-time release from his official duties to enable him to pursue his activities as a staff union representative and Staff Committee member from 2002 until October 2007, when he resumed duties as a Security Officer on a part-time basis. During this period no appraisal report was established to reflect his performance.

In July 2007 the Administration published a promotion list showing the names of all staff who had been promoted in the course of that year's promotion exercise. Although the complainant was eligible for promotion, he was not among those promoted. On 11 October 2007 he submitted an internal complaint to the Director General challenging the latter's decision not to promote him. By an e-mail of 18 April 2008 the Secretary of the Joint Committee for Disputes informed him that his complaint had been examined and that the opinion of the Committee would be communicated to him together with the Director General's final decision. The Committee rendered its opinion on 28 April, recommending that the complaint be rejected as unfounded. The Director General decided to endorse that opinion and the complainant was informed accordingly by memorandum of 21 May 2008. In the meantime, on 9 May 2008, the complainant had filed the present complaint with the Tribunal impugning the Director General's implied rejection of his internal complaint against the decision not to promote him.

B. The complainant submits that he was excluded from promotion as a result of his activities as a staff union representative and Staff Committee member, because the Administration was unable to assess his performance. He contends that this was contrary to the Staff Regulations governing officials of the Eurocontrol Agency, the Rule of Application No. 1 of the Staff Regulations and the Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions, according to which "[m]embership of a trade union, participation in trade union activity or the exercise of a trade union mandate may not be prejudicial, in any form or manner whatsoever, to the professional situation or career advancement of those concerned".

He objects to the argument raised by Eurocontrol during the internal proceedings that his work could not be assessed because no appraisal reports were established on his performance in the period from 2002 to 2007. He points out that it was the Administration's

responsibility to address the absence of performance appraisal reports and that the Director General should have given instructions to managers enabling them to assess the performance of staff union representatives. He considers that a possible way to resolve the matter would be to treat staff union representatives as average performers for the purpose of promotion.

He argues that he is among the most senior staff at grade B2 and that as a general rule staff members with average performance are promoted long before they reach his level of seniority. Referring to the promotion of other staff union representatives in Eurocontrol, he notes that it may raise questions of discriminatory treatment, given that the Administration has not explained how their performance was assessed or how they obtained a promotion.

The complainant seeks the quashing of the decision not to promote him and requests that he be promoted or, in the event that he is not, that he be given an adequate explanation of the reasons underlying that decision. He asks that the Administration be ordered to rerun the 2007 promotion exercise to the extent that it concerned him and to introduce rules relating to the career development of staff union representatives. He claims compensation for the loss of income, moral damages and costs.

C. In its reply Eurocontrol states that the Tribunal may not issue injunctions to the Agency in matters such as promotions, in which the Director General enjoys wide discretionary powers.

It dismisses the complainant's assertion that he was excluded from promotion by reason of his staff union activities. It explains that while the provisions of the Staff Regulations and the above-mentioned Memorandum of Understanding aim at protecting staff union representatives from adverse decisions as a consequence of their activity, they should not however be construed as affording them advantages. Staff union representatives are subject to the general rules governing promotions, which provide *inter alia* that promotion decisions are discretionary and that staff members do not enjoy a right

to promotion. Furthermore, promotion exercises are conditioned by budgetary constraints, which may vary from one exercise to the next.

The defendant submits that the promotion exercise was conducted correctly and that the absence of performance appraisal reports did not affect the complainant's chances of obtaining a promotion. It rejects his allegations of discrimination, arguing that the staff union representatives, to whom the complainant refers in his complaint, were not in a situation similar to his; they both served in directorates different to that of the complainant and one was promoted from grade C3 to grade C2, i.e. within a different category, while the other was promoted on the occasion of the 2008 promotion exercise.

D. In his rejoinder the complainant observes that Eurocontrol refuses to explain the reasons for which it has repeatedly denied him a promotion. He reiterates his allegation of discrimination, emphasising that the two staff union representatives referred to in his complaint are subject to the exact same statutory rules as himself. He asserts that, as the absence of performance appraisal reports is interpreted as "zero performance", his chances of being promoted are non-existent for as long as he dedicates a considerable amount of his working time to staff union activities.

E. In its surrejoinder the Agency maintains its position in full.

## CONSIDERATIONS

1. The complainant joined Eurocontrol in 1989 as Senior Administrative Assistant at grade B3 and was promoted to grade B2 in 1998. In 1992 he began dedicating time to his activities as a staff union representative and Staff Committee member, with his involvement progressively increasing over the years to reach nearly 100 per cent of his working time in 2002. This rate did not change through to October 2007. The Organisation has not given any performance appraisal for the complainant since 2002 when his manager considered that he was unable to assess the complainant's

performance given that his duties were solely focused on Staff Committee and staff union issues.

2. The complainant's name appeared on the list of staff members eligible for promotion during the 2007 promotion exercise. However, the promotion list published in July 2007 did not include the complainant's name. The complainant lodged an internal complaint against the decision not to promote him, arguing that the lack of promotion was due to the absence of performance appraisal reports. The Joint Committee for Disputes rendered its opinion on 28 April 2008 recommending that the complaint be rejected as unfounded. On 9 May 2008 the complainant filed a complaint with the Tribunal impugning the implied rejection of his internal complaint against the decision not to promote him. By memorandum of 21 May 2008 he was informed that the Director General had decided to endorse the Committee's opinion. There being no objection, it is convenient to treat the complaint as directed against the decision communicated by the memorandum of 21 May 2008.

3. In its opinion the Joint Committee for Disputes disagreed with the complainant's assertion that the fact that he did not receive a promotion after nine years in grade B2 could evidence that his career prospects had been damaged due to his staff union activities, which he considered contrary to the provisions of the Staff Regulations governing officials of the Eurocontrol Agency, the Rule of Application No. 1 of the Staff Regulations and the Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions. The Committee instead noted that, according to the Tribunal's case law, "[a] promotion decision is a discretionary decision and, as such, it can be challenged only if it bears a serious defect". It also noted that there is no doubt "that no staff member has any right to promotion", stating that "it falls within [the authority of] the Director General to decide who should be granted a promotion, bearing also in mind that satisfactory performance at one grade is not in itself an assurance that a candidate will be able to fulfil the more onerous duties of a higher grade".

4. The Agency argues that in accordance with Article 45 of the Staff Regulations “[p]romotion shall be by decision of the Director General”. Therefore, promotions are discretionary and staff members do not enjoy a right to promotion. It adds that the complainant’s assertion that he was excluded from promotion because of his staff union activities is wrong, as he did not demonstrate that the promotion procedure for the year 2007 was flawed. Regarding the two promoted staff union representatives referred to by the complainant, the Agency submits that they were in different situations from the complainant, therefore there was no breach of the principle of equality.

5. The Tribunal is of the opinion that the complaint is founded. The above-mentioned Memorandum of Understanding provides in paragraph 1 that “[m]embership of a trade union, participation in trade union activity or the exercise of a trade union mandate may not be prejudicial, in any form or manner whatsoever, to the professional situation or career advancement of those concerned.”

Furthermore, Article 8 of Rule of Application No. 1 of the Staff Regulations foresees that “[t]he duties undertaken by members of the Staff Committee shall be deemed to be part of their normal service, and the fact of performing such duties shall in no way be prejudicial to the persons concerned.”

6. The Tribunal notes that by not adopting implementing rules to support the Memorandum of Understanding the Organisation violated that Memorandum as well as the principle of equality and as a result the impugned decision must be quashed. In Judgment 2313 it was stated that if the rules and procedures of international organisations do not ensure adherence to the principle of equality, it is the latter’s duty to initiate procedures that do, whether by way of general rule or some specific procedure for the particular case. That duty was breached in the present case. It was held in Judgment 2704 that “[b]ecause there was no rule to cover the complainant’s situation, it is of no consequence that he did not request an opportunity to have his case considered until after the Performance Review Committee had

made its recommendations with respect to merit promotion for other staff”.

7. Even without considering the Memorandum of Understanding and its relevant requirements, the present situation has the appearance of an abuse of discretion. The complainant’s situation is extreme (i.e. being promoted much less frequently than the average) yet there has been no valid reason given for the continued non-promotion. According to Eurocontrol’s reasoning, without a breach of procedure or obvious flaw, the Agency does not have to explain its decisions. This is not correct. Precedent has it that “there is no rule or principle of law that requires the Director-General to state in so many words just why he has turned someone down for promotion or appointment. What matters is that, if the official asks, the reasons must be revealed. Otherwise the Tribunal may not exercise its power of review and determine whether the reasons are lawful and the decision sound” (see Judgment 1355, under 8).

8. The appearance of abuse of discretion is also sufficient to quash the decision as it is not enough that the decision may be reasonable and in good faith; it must also appear to be reasonable and in good faith. The fact that two other staff union representatives were promoted without clear rules implementing the Memorandum of Understanding, rather than showing a lack of discrimination, as the Organisation submits, makes the decision appear arbitrary. This is especially important to note considering that all decisions regarding the promotion or non-promotion of staff union representatives must be, and must appear to be, made impartially so as to avoid any hint of preference or prejudice.

9. The Tribunal is of the opinion that the Agency has a duty to implement the Memorandum of Understanding through specific rules but considers it inappropriate to require the Organisation to reconsider the complainant’s promotion for the 2007 promotion exercise as “the Director-General would, before he decide[s] on promotions, have [...]

to adopt rules or criteria of which the staff [are] duly informed” (see Judgment 347, under 3; emphasis added).

10. In the present circumstances, the proper course is to award the complainant compensation for the wrongful denial of a valuable opportunity to be promoted in 2007 – a situation which has continued to date – which the Tribunal sets at 6,000 euros. The Tribunal awards the complainant moral damages in the amount of 4,000 euros and costs in the amount of 1,000 euros.

### DECISION

For the above reasons,

1. The decision of 21 May 2008 is quashed.
2. Eurocontrol shall pay the complainant 6,000 euros in compensation for the denial of a valuable opportunity to be promoted in 2007.
3. It shall pay the complainant 4,000 euros in moral damages.
4. It shall also pay him 1,000 euros in costs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet