

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**116th Session**

**Judgment No. 3280**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs C. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 25 March 2011, Eurocontrol's reply of 20 July, the complainant's rejoinder of 24 October 2011 and Eurocontrol's surrejoinder of 27 January 2012;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. The complainant entered the service of Eurocontrol in 2001 at grade C4. In 2005, after taking part in a competition, she was appointed to a post at grade B5. This grade was subsequently renamed AST5.

Article 45 of the Staff Regulations governing officials of the Eurocontrol Agency provides that, subject to availability of budgetary funds, the Director General can award a promotion to officials who have completed a minimum period of two years in their grades, after consideration of their comparative merits, and that their new grade

“should, as a rule, be within the grade bracket as defined in the job description” of the officials concerned. The criteria and procedure for promotion are set out in Rule of Application No. 4 of the Staff Regulations.

On 21 September 2010, Eurocontrol’s Board, which is chaired by the Director General, decided not to hold a promotion round for that year, primarily because of the difficult budgetary situation and of the fact that a 3.7 per cent salary increase had been approved by the Member States. The complainant was sent a summary of the key points discussed at that meeting by an e-mail of 6 October 2010.

On 26 October 2010 the complainant submitted an internal complaint to the Director General against the decision of 21 September. She alleged that he had failed to honour his obligations under the Staff Regulations by not implementing the promotion procedure and that he had deprived her of her “right to be considered for promotion”, as provided for in the Staff Regulations. She requested that the promotion round for 2010 be held by 31 December 2010 and she claimed 2,500 euros in compensation for the injury which she considered she had suffered. On 25 March 2011 she filed a complaint with the Tribunal, impugning the implied decision to reject her internal complaint.

B. The complainant states that, as her grade – AST5 – was within the AST3-AST6 bracket, and as she had held it for more than two years, in 2010 she fulfilled the conditions for promotion required by Article 45 of the Staff Regulations, which has therefore been breached. Referring to Eurocontrol’s actual expenditure on staff remuneration for 2010, she contends that it did have sufficient financial resources to hold a promotion round that year. She taxes Eurocontrol with not carrying out any of the implementing procedures set forth in Rule of Application No. 4, although all the conditions for conducting a promotion round were met.

The complainant cites Judgment 365, according to which “the rules on promotion create an acquired right in so far as they offer the

prospect of advancement". In her opinion, by doing away with the promotion round for 2010, Eurocontrol breached her right to career advancement and, more specifically, her acquired right to have her merits considered with a view to possible promotion. She argues that Eurocontrol also breached its duty of care by ignoring the individual interests of its serving staff members.

The complainant asks the Tribunal to set aside the decision of 21 September 2010 and, if appropriate, the implied decision rejecting her internal complaint. She also claims damages in the amount of 2,500 euros to redress the injury which she considers she has suffered and 5,000 euros in costs.

C. In its reply Eurocontrol informs the Tribunal that, having been apprised of the opinion of the Joint Committee for Disputes of 28 April 2011, the Principal Director of Resources, acting on behalf of the Director General, decided on 5 July 2011 to reject the complainant's internal complaint as irreceivable and legally unfounded. It asks the Tribunal to examine the receivability of the complaint in light of the fact that the complainant appears to have no cause of action in this case.

On the merits, Eurocontrol points out that annual budgetary appropriations constitute maximum authorised expenditure and not expenditure obligations. It submits that the Director General's decision not to hold a promotion round in 2010 lay within his discretion under Article 3(1) of the Statute of the Agency. This decision was taken so as not to aggravate staff frustration by holding a promotion round even more limited than the previous one and because Eurocontrol was facing a particularly difficult situation – which led to restrictions in other areas – during restructuring. In this connection, Eurocontrol underscores the impact of the 3.7 per cent pay rise on the general budget for 2010. It also submits that, as there were no funds for holding a promotion round that year, the procedure set forth in Rule of Application No. 4 could not be applied. In its opinion, the fact that the complainant did not obtain the promotion for which she was

eligible does not signify that the applicable provisions were breached. Furthermore, the disputed decision did not harm the complainant's prospects of advancement; indeed, she was promoted in the 2011 promotion round.

D. In her rejoinder the complainant maintains her position. In her view the promotion which she obtained in 2011 has no bearing on the unlawful nature of the decision not to hold a promotion round the previous year. She submits that she does have a cause of action to have the decision set aside because, by adopting it, Eurocontrol deprived her of a chance of promotion in 2010. The complainant adds that provision had been made in the budget for the salary increases and Eurocontrol has not proved that it was impossible to hold a promotion round in 2010. She argues that, although Article 3(1) of the Statute confers wide discretion on the Director General with regard to the use of financial resources, it does not authorise him not to apply Article 45 of the Staff Regulations.

The complainant asks the Tribunal to set aside, if appropriate, the decision of 5 July 2011.

E. In its surrejoinder Eurocontrol reiterates its position. It asks for the joinder of this complaint with three other complaints pursuing the same claim.

## CONSIDERATIONS

1. The complainant entered the service of Eurocontrol on 1 February 2001, when she joined the Institute of Air Navigation Services in Luxembourg as a typist 1st class, at grade C4, step 2. After taking part in a competition, on 1 November 2005 she took up duties at grade B5, which corresponds to grade AST5 on the new scale. At the time of filing her complaint, she had reached the third step in that grade.

On 21 September 2010 the Director General decided not to hold a promotion round for 2010 on account of a difficult budgetary situation

exacerbated by the costs resulting from a 3.7 per cent adjustment in salaries and pensions approved in May by the Member States. He announced that a compensatory round, comprising promotions, early step advancement and financial bonuses, would be held in 2011.

On 26 October 2010 the complainant submitted an internal complaint against this decision, in which she asked for the holding of the promotion round for 2010 and the payment of compensation for moral injury.

2. On 25 March 2011 the complainant filed a complaint with the Tribunal against the implied decision to reject her internal complaint.

In its opinion rendered on 28 April 2011, the Joint Committee for Disputes concluded that the internal complaint was well-founded insofar as it challenged the decision not to hold a promotion round in 2010. It considered that this decision was unwarranted and that the procedure was opaque.

On 5 July 2011 the Director General nevertheless rejected the internal complaint, emphasising that the decision at issue was consistent with the applicable rules, which granted him a wide margin of discretion.

The complainant was promoted to the position of administrative assistant at grade AST6, step 1, on 1 July 2011.

In her rejoinder of 24 October 2011 the complainant asks the Tribunal to set aside, if appropriate, the explicit decision rejecting her internal complaint of 26 October 2010.

3. Eurocontrol disputes the receivability of the complaint on the grounds that the complainant shows no cause of action, since there is nothing to prove that in 2010 she would have been promoted to her current grade.

This objection to receivability is irrelevant, since Eurocontrol acknowledges that in 2010 the complainant was eligible for promotion within her grade bracket on account of her length of service in that

grade. Since her promotion was conceivable, the complainant plainly lost an opportunity for obtaining it at the end of the round which would normally have been held that year. Her cause of action in challenging the refusal to hold that promotion round cannot depend on the potential outcome of the round.

4. In September 2010 it was financial reasons alone which led Eurocontrol to forgo the regular promotion round for that year and to cancel the appropriation of a little over 1.2 million euros earmarked for that purpose in the budget adopted on 2 December 2009. That decision was consonant with Article 6 of the Staff Regulations, which stipulates that the budget must contain a provision on availability of financial means for career advancements (promotions and steps). Eurocontrol emphasises that the situation created by added expenditure of some 13.3 million euros – representing 5.4 per cent of the total budget – due to the above-mentioned increase in salaries and pensions, led it not only to cancel that appropriation, but also to make substantial cuts in various other budget headings. It emphasises that, at the beginning of 2010, the staff was duly informed of the exchanges of view within the Board as to whether or not it would be advisable to hold a round of promotions and that a final decision on the matter would be taken in September.

5. The complainant submits that none of the reasons given justified a breach of the acquired rights conferred on her by the provisions governing the regular promotion of Eurocontrol staff and that Eurocontrol has ignored the principle of *patere legem quam ipse fecisti*.

6. Article 45 of the Staff Regulations reads in pertinent part:

“Promotion shall be by decision of the Director General subject to availability of budgetary funds. It shall be effective by appointment of the official to the next higher grade in the function group to which he belongs. The next higher grade should, as a rule, be within the grade bracket as defined in the job description.

Promotion shall be exclusively by selection from among officials who have completed a minimum period of two years in their grade, after

consideration of the comparative merits of the officials eligible for promotion. Merit shall be understood as e.g. performance and long-standing commitment.

[...]

A Rule of Application shall lay down the criteria and processes applicable for promotion.”

Article 4 of Rule of Application No. 4 states:

“Each year, the Director General shall provide Directors and Heads of Service with guidelines regarding the portion of budgetary appropriations allocated to promotions. On this basis, Directors and Heads of Service shall determine before 31 May each year, the maximum number of promotion possibilities for each grade and function group. They shall organise the necessary consultations with the representatives designated by the Staff Committee as provided for under Article 3 above, and take note of their opinion. To this end, the Staff Committee representatives shall receive the list of promotion candidates who fulfil the minimum length of service requirements in their grade. The percentages of officials eligible for promotion, calculated with reference to the budgetary staff complement in the context of the annual funds available in the budget, shall also be communicated. The Directorate in charge of human resources shall centralise and coordinate the proposals made for each directorate or service and send them to the Promotion Board provided for in Article 3 of the present Rule.”

7. The Tribunal must allow the Director General a wide margin of discretion not only when determining the merits of an official eligible for promotion to a higher grade in the function group to which he or she belongs, but also when assessing whether available budgetary resources permit such promotion. The question in the instant case is, however, whether in view of the financial situation of Eurocontrol, which had been worsened by a pay rise granted after the adoption of the budget, the Director General, with the Board’s support, could simply cancel a duly approved budget appropriation and, in consequence thereof, do away with the promotion round for 2010.

The sweeping nature of such a measure is debatable. It was unprecedented at Eurocontrol and no provision is made for it in the above-mentioned Staff Regulations, which require the holding of an annual promotion round and do not contemplate the possibility of

deferring that round for one or more years. The purpose of those provisions is to ensure that each official has some prospect of advancement, in other words he or she may legitimately hope to move up to a higher position one day; to that end it is necessary to examine his or her situation at regular intervals.

However, although it is debatable in principle, the general postponement of a promotion round cannot be ruled out completely when Eurocontrol's financial situation requires it in exceptional circumstances. The explanations furnished by Eurocontrol, the verisimilitude of which the Tribunal does not doubt, show that such circumstances existed in the instant case. Eurocontrol decided to postpone the promotion round for 2010 only after objectively analysing those circumstances and informing the staff, shortly after the adoption of the budget, that such a postponement might occur. It was restricted to one year and the announcement thereof was accompanied by the assurance that a compensatory round comprising promotions, early step advancement and financial bonuses would be held the following year, the year when the complainant obtained the desired promotion. Whether it might have been possible to hold a promotion round small enough to be compatible with the available budgetary resources is open to question but, as the solution chosen was a matter of management policy, the Tribunal will not take Eurocontrol to task for having opted for a general measure on the grounds that the limited round of promotions which it had held in 2009 had caused frustration among the staff concerned.

In view of the foregoing, it must be found that the impugned decision does not breach the principle of *patere legem quam ipse fecisti* or the complainant's acquired rights which comprise the right to have her merits examined regularly with a view to promotion, but not the right to promotion at a given date irrespective of all the circumstances.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo  
Claude Rouiller  
Michael F. Moore  
Catherine Comtet