

**W. (No. 7)**

**v.**

**Eurocontrol**

**122nd Session**

**Judgment No. 3666**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr J. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 March 2013 and corrected on 22 June, Eurocontrol's reply of 27 September, the complainant's rejoinder of 27 December 2013 and Eurocontrol's surrejoinder of 4 April 2014;

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 contests the decision not to promote him in 2012.

Facts relevant to this case may be found in Judgment 2869, delivered in public on 3 February 2010, concerning the second complaint filed by the complainant against the decision not to promote him in 2007, and in Judgment 3278, delivered in public on 5 February 2014, concerning his fourth complaint against the classification of his post as from July 2008. Suffice it to recall that he was granted full-time release from his official duties with Eurocontrol 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. The Tribunal held that Eurocontrol had a duty to implement, through specific rules, the Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions of 16 July 2003 (hereinafter “the Memorandum of Understanding”). According to the Memorandum of Understanding “[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”. The Tribunal considered that by not adopting implementing rules to support the Memorandum of Understanding, Eurocontrol had violated that Memorandum as well as the principle of equality. As a result the Tribunal quashed the impugned decision of 21 May 2008 rejecting the complainant’s internal complaint against the decision not to promote him but it “considered it inappropriate to require [Eurocontrol] to reconsider the complainant’s promotion for the 2007 promotion exercise”. It awarded the complainant 6,000 euros in compensation for the wrongful denial of a valuable opportunity to be promoted in 2007, moral damages in the amount of 4,000 euros and costs in the amount of 1,000 euros.

On 8 March 2012 the Principal Director of Resources issued Office Notice No. 10/12 which provided that pursuant to Article 45 of the Staff Regulations and Rule of Application No. 4 the list of staff eligible for promotion would comprise those who had at least two years’ seniority in their grade in 2012 and were not yet in the last grade of their respective grade bracket. The list of eligible staff was notified to all staff on 21 March 2012; the complainant’s name was not on the list. The list of promoted staff was published in Office Notice No. 14/12 on 15 June 2012; the complainant’s name was not on the list.

On 16 August the complainant wrote to the Director General challenging the decision not to promote him in 2012 through Office Notice No. 14/12. He alleged that Eurocontrol had no intention of respecting Judgment 2869 with regard to the Memorandum of Understanding through implementing specific rules, and no intention of promoting him. The internal complaint was referred to the Joint Committee for Disputes which recommended, in its opinion of 31 October 2012, that it be dismissed as legally unfounded. It emphasised that there was no

statutory right to promotion and that pursuant to Article 45 of the Staff Regulations and Rule of Application No. 4, officials are eligible for promotion provided that they had not reached the end of their grade bracket and that they have accumulated at least two years in the same grade. It considered that the complainant did not fulfil the conditions for being promoted because he had reached the last grade of his grade bracket and that his latest appraisal report for 2011 did not support his claim that he should be promoted in 2012 on account of merits. It considered that there was no evidence of discrimination against the complainant.

By a memorandum of 10 December 2012 the complainant was informed that the Director General had decided to dismiss his internal complaint as unfounded, taking into account the reasons given by the Joint Committee for Disputes. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to quash the impugned decision and to reconsider his promotion in 2012. He also seeks moral and material damages together with costs.

Eurocontrol asks the Tribunal to dismiss the complaint as time-barred and unfounded.

### CONSIDERATIONS

1. The background to this complaint can be found in Judgments 2869 and 3278 (stemming from the complainant's second and fourth complaints respectively). To summarize, in Judgment 2869 the Tribunal found inter alia that by not adopting implementing rules to support the Memorandum of Understanding Eurocontrol had violated that Memorandum as well as the principle of equality; that it was inappropriate to require Eurocontrol to reconsider the complainant's promotion for the 2007 promotion exercise; and that the proper course was to award the complainant compensation for the wrongful denial of a valuable opportunity to be promoted in 2007 as well as to award him moral damages and costs. In Judgment 3278 the Tribunal concluded that the classification of the complainant's post in the highest grade of the

career bracket B\*5-B\*8 and then AST5-AST8 was lawfully made in accordance with the relevant provisions and the complaint was therefore dismissed.

2. In the present complaint, his seventh, the complainant contests the decision not to include him in the list of staff eligible for promotion in the 2012 promotion exercise. He asserts that his ineligibility was unlawful as Eurocontrol had applied Rule of Application No. 4, which does not permit promotions outside the grade bracket to which a staff member is assigned, instead of the superior norm, that is to say Article 45 of the Staff Regulations, which provides that exceptions can be made.

3. Eurocontrol contests the receivability of the complaint but as the complaint fails on the merits the Tribunal shall not treat the issue of receivability.

4. Article 45 of the Staff Regulations provides:

“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.

The principles governing career progression for posts in Group E1 in the CFMU Operational Staff Service are set out in Appendix IIb.

**When considering comparative merits, the Director General shall take account of the appraisal reports on the officials.**

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

Rule of Application No. 4 concerning the procedure for grade promotion provided for in Article 45 of the Staff Regulations provides in its Article 1:

“Pursuant to Article 45 of the Staff Regulations, promotion means that officials are appointed to the higher grade in the category to which they belong, on the basis of an assessment of their merits.

**This Rule shall not apply** either to appointments to the basic grade of the post of Director, or to promotion within the grade bracket relating to the post of Director, or to changes in category, or to access to a basic post provided for in Annex I to the Staff Regulations other than that already held by the official.” (Emphasis added.)

Rule of Application No. 2 concerning the procedure for assignment to a post and recruitment in accordance with Articles 30 and 33 of the Staff Regulations provides under Article 5 on assignment by promotion that:

“Pursuant to Article 30(iii) of the Staff Regulations, the Director General may decide to publish a post to be filled via an ad hoc promotion procedure, under the conditions set out in Rule of Application No. 4 concerning promotion. The vacancy notice shall stipulate that an official may apply only if the career bracket of the vacant post contains only one grade more than his/her current career bracket.”

5. The complainant claims that Rule of Application No. 4 contradicts Article 45 of the Staff Regulations. This issue has already been addressed in Judgments 3404 and 3495. The Tribunal found as follows in Judgment 3404:

“9. The complainant [...] submits that, for several years, he has met the conditions for promotion in respect of the minimum length of service in his grade laid down in Article 45 of the Staff Regulations; that as he is classed in grade AST10, he has not yet reached the last grade in his function group, which is AST11, and that as he could therefore be promoted to that grade, he should have been included in the lists of officials eligible for promotion in 2012. He also contends that Article 45 of the Staff Regulations has been breached in that neither that article nor Rule of Application No. 4 formally prohibits promotion to a grade in a higher career bracket.

10. The defendant organisation replies that the complainant does not fulfil the three conditions of eligibility for promotion in the year in question. Although he has not reached grade AST11, the last grade in his category, he does not meet one of the conditions laid down in Article 45 of the Staff Regulations, namely that the higher grade to which he aspires must, ‘as a rule’, be in the grade bracket as defined in the job description, since he holds grade AST10, which is at the top of the career bracket AST8-AST10 to which his post belongs.

11. The above-mentioned Article 45 states that '[t]he next higher grade should, as a rule, be within the grade bracket as defined in the job description'.

12. The complainant submits that the phrase 'as a rule' does not mean that promotion to a grade in a higher bracket is prohibited.

13. The Tribunal considers that the aforementioned text must be construed as meaning that the stated principle is the rule, but that it is permissible, in some special cases, to depart from that rule. That text did not, however, prevent the Director General from deciding, as he did in Office Notice No. 10/12, not to depart from the rule in 2012, as this decision applied only to one specific year.

The complainant's argument in this respect is therefore [...] unfounded."

Judgment 3495, under 13, provides:

"The Tribunal considers, as it already stated in Judgment 3404, under 13, that Article 45 of the Staff Regulations must be construed as meaning that the stated principle is the rule, but that it is permissible, in some special cases, to depart from that rule. That text did not, however, prevent the Director General from deciding, as he did in Office Notice No. 10/12, not to depart from the rule in 2012, as this decision applied only to one specific year.

It follows from the foregoing that the plea that Article 45 of the Staff Regulations has been violated will not be accepted [...]"

6. The Tribunal finds that, in accordance with the above-cited case law, the complainant's claim against his ineligibility is unfounded. Article 45 of the Staff Regulations allows for exceptions and specifies that "[a] Rule of Application shall lay down the criteria and processes applicable for promotion" and the applicable Rules (Rule of Application No. 2 and Rule of Application No. 4 as cited above) specify the rule in relation to promotions and the conditions for exception to that rule. There is no contradiction between Article 45 of the Staff Regulations and the implementing Rules of Application of the Staff Regulations; the system provides both the rule and the exception. As stated in Judgments 3404 and 3495 the Director General was under no obligation to depart from the rule for that particular year; in the present case the Tribunal adds that the Director General's discretion is limited by the criteria for exceptions as provided in the Rules of Application and since the complainant did not fit that criteria, the Director General could not have made any exception for him.

7. The above considerations are enough to dismiss the complaint but, for the sake of clarity, the Tribunal finds it useful to add that the complainant's claim that the Joint Committee for Disputes (JCD) was incorrect in stating that his performance appraisal report for 2011 could not justify his promotion, is unfounded. Article 45 of the Staff Regulations clearly provides that merit shall be of primary importance in considering eligibility for promotion, and it goes on to specify that the official's appraisal reports shall be taken into consideration when considering comparative merit. However, the Tribunal notes that the complainant's performance appraisal report for 2011 does not show that his merit would justify a promotion. Furthermore, the complainant's criticism towards his 2011 appraisal report cannot be taken into consideration as he did not impugn the appraisal report in accordance with the relevant rules and within the applicable time limits. Therefore the complainant's 2011 appraisal report is immune from challenge.

8. The complainant also raises the issue that Eurocontrol, by failing to implement rules supporting the Memorandum of Understanding, made his promotion impossible and that the JCD's statement on this issue showed bias in favour of Eurocontrol. In its unanimous opinion, the JCD stated in paragraph 3 that "the Memorandum of Understanding merely state[d] in Article 10 of its Annex that union representatives should not be discriminated against other staff because of their trade union affiliation or activities. Of course, [Eurocontrol] must abide by the principle of equality of treatment and ensure that the activities carried out by trade union representatives do not have any prejudicial effect on their career. They should all have a supervisor and their performance be appraised regularly as requested by the Tribunal [in Judgment 2869], which is the case for [the complainant] since 2008." The Tribunal considers this statement to be correct. By assigning the complainant to a post in which 50 per cent of his activity was devoted to the tasks listed in his job description (with the remaining 50 per cent devoted to his trade union activities), he was reinserted into the office hierarchy which allowed for periodic performance appraisals by a line manager. This restored the equality of treatment between the complainant and other staff members

as requested by the relevant provision of the Memorandum of Understanding and by Judgment 2869.

9. In light of the above, considering that the complaint against the complainant's assignment to his current bracket was dismissed in Judgment 3278; that the 2012 promotion exercise was found lawful in Judgments 3404 and 3495; and that the complainant was ineligible for promotion as he was in the highest grade of his bracket and his situation did not qualify for any exception, the complaint must be dismissed in its entirety.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

DRAŽEN PETROVIĆ