

NINETY-FIFTH SESSION

Judgment No. 2243

The Administrative Tribunal,

Considering the complaint filed by Mr A.R. J. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 May 2002 and corrected on 10 June, the Agency's reply of 13 September, the complainant's rejoinder of 19 December 2002 and Eurocontrol's surrejoinder of 4 April 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a French national born in 1937, joined the staff of Eurocontrol in 1968 as a technical assistant at grade B3. He was promoted to grade B2, as a first-class assistant, on 1 October 1970 and remained at that grade until 31 December 2001, when he retired.

At the beginning of 2001, the Administration prepared lists of staff meeting the length of service requirement for promotion that year; the complainant's name, together with those of eight other grade B2 staff members, appeared on the list drawn up for the Safety, Airspace, Airports and Information Services Directorate (hereinafter "DSA"). In Office Notice 09/01 of 11 May 2001, the Director General determined the maximum number of officials per grade and budgetary section to be entered in the promotion lists. For DSA, there was only one possibility for promotion to grade B1. On 25 June the Promotion Board drew up the promotion list for submission to the Director General. The complainant's name did not appear on that list. In a decision of 9 July, the Director General adopted the final list of promotions for 2001.

On 9 October the complainant lodged an internal complaint against the decision not to include him on the list of staff proposed for promotion in 2001. In an opinion dated 19 December 2001, the Joint Committee for Disputes noted that the complainant had never been strongly supported by his supervisors for promotion, despite the many "laudatory assessments" appearing in his appraisal reports. In view of the wide discretion which the Organisation has for assessing the merits of candidates, the Committee found no obvious flaw in the procedure and therefore recommended rejecting the complaint as unfounded. It added, however, that the Administration should try to make up for the lack of public recognition of the complainant's merits and suggested the possibility of attributing an honorary rank, as provided for in Article 54 of the Staff Regulations Governing Officials of the Eurocontrol Agency. In a letter of 21 February 2002, which constitutes the impugned decision, the Director General dismissed the internal complaint. He added that "the Agency regretted not having been in a position to give [him] the appropriate recognition that [his] high-quality and conscientious work deserved".

B. The complainant says that he is quite aware that promotion lies at the discretion of the Director General and that the Tribunal's power of review in that respect is limited. He contends, however, that he is entitled to a "normal career".

He submits that the impugned decision is flawed because it was not properly reasoned, noting that it expressly refers to the opinion of the Joint Committee for Disputes, where it is stated that the omission of his name from the promotion list submitted to the Director General is based on "the candidate's merits", and not on the "comparative merits of the officials eligible for promotion and of the reports on them", as provided for in Article 45 of the Staff

Regulations. The effect is that either the omission of his name from the list shows a formal or procedural flaw, or there was a mistake of fact or of law, or essential facts were overlooked, or there was misuse of authority, or clearly mistaken conclusions were drawn from the evidence.

According to the complainant, Eurocontrol did not treat him with the consideration he deserved in view of his exemplary career and caused him significant moral and financial injury.

He seeks the annulment of the impugned decision, as well as the decision not to include him on the promotion list submitted to the Director General, an award of 300,000 euros in damages under all heads and 3,000 euros in costs.

C. In its reply, the defendant notes that the only decision the complainant can challenge is that of the Director General dated 9 July 2001 publishing the list of promotions for 2001.

On the merits, Eurocontrol contends not only that the reference to the opinion of the Joint Committee for Disputes in the decision rejecting his internal complaint was valid, but also that the decision itself was properly reasoned. It adds that according to current rules, the promotion list is drawn up on the basis of both objective criteria, such as length of service, and subjective criteria, such as eligibility for promotion, the proposals of supervisors and appraisal reports. The staff member promoted to B1 grade in 2001 was the only one put forward by his supervisors and the only one having the necessary qualifications and experience to work at grade B1. The fact that the complainant was not included in the promotion list for 2001 was therefore based on legitimate reasons and the procedure was correctly followed.

With regard to compensation for alleged injury, the Agency recalls that promotion lies at the discretion of the Director General and in no way constitutes a right. Therefore the absence of promotion cannot give rise to compensation.

D. In his rejoinder, the complainant specifies that his complaint challenges "the decision of the Promotion Board not to include him on the list of persons proposed for promotion to grade B1 on the 2001 list, the Director General's decision not to promote him that same year and the Director General's decision of 21.02.2002" dismissing his internal complaint.

He submits that "[r]egardless of whether the appeal [...] is well founded or successful, the damage to the complainant's career cannot reasonably be denied". In his view, reducing the issue of a remarkable though unrewarded career, as Eurocontrol does, to that of the Director General's discretion regarding an individual promotion is contrary to the spirit of the Staff Regulations. The Agency should have recognised his merits by offering him a real chance of promotion. He adds that he was denied promotion because he was too old and notes that the Joint Committee for Disputes expressed surprise that such a criterion had been applied.

The complainant changes his claims. He now also seeks the annulment of the decision not to promote him and raises his claim for costs to 7,500 euros.

E. In its surrejoinder Eurocontrol leaves the assessment of the receivability of the complaint to the Tribunal. It considers that in his rejoinder the complainant asks the Tribunal to consider the alleged damage to his career resulting from the lack of promotion over a long period of time. The complainant did not challenge annual promotion decisions in due time, however, and cannot therefore avail himself of the present complaint to claim damage due to earlier decisions.

Eurocontrol refers to Judgment 1827, according to which a "good performance record and satisfactory appraisals are almost always a necessary precondition to promotion but the fact that a candidate has them is obviously not a guarantee that he or she is the most qualified candidate", and to Judgment 1388, in which the Tribunal considered that "any grant of promotion at the time of retirement is inherently contrary to the Organisation's interests". Even though, at the outset of a career, a staff member may legitimately entertain hopes of promotion, he should never consider he has an automatic right to obtain one. It concludes that even though the complainant may have been an excellent staff member, who perhaps did not end his career as he might have wished, that fact does not imply that the Agency was in any way at fault.

CONSIDERATIONS

1. The complainant was recruited by the Eurocontrol Agency on 1 April 1968 at grade B3. He was promoted to grade B2 on 1 October 1970 and retired on 31 December 2001, still at grade B2. He challenges the fact that he was not included on the list of persons proposed for promotion to grade B1 in 2001.
2. In order to appraise the receivability and merits of the complaint, it is necessary to establish the circumstances in which the complainant's rights to promotion were examined. He did fulfil the requirements for promotion and, on 12 February 2001, was named with eight other staff members of the DSA of the same grade on the list of staff members eligible for promotion. In an office notice dated 11 May 2001, the Director General, in accordance with the provisions of Article 7 of Rule of Application No. 4 of the Staff Regulations Governing Officials of the Eurocontrol Agency and Article 6 of Rule No. 20 Applicable to Staff Governed by the General Conditions of Employment, determined the maximum number of officials to be entered in the promotion lists. For DSA there was only one possible promotion to grade B1. After considering the merits of the officials eligible for promotion, the Promotion Board drew up the promotion list on 25 June for submission to the Director General. The complainant's name was not on the list. On 9 July 2001 the Director General adopted the final list of promotions for 2001.
3. On 9 October the complainant lodged an internal complaint against the decision not to include him on the list of persons proposed for promotion in 2001. The case was brought before the Joint Committee for Disputes, which examined the complainant's last appraisal report and heard his case. In its opinion of 19 December 2001, it expressed regret that the "laudatory assessments" contained in the appraisal reports had not led in the course of time to a promotion. Noting, however, that the Organisation has wide discretion in the matter of staff promotions, it considered that no obvious error had been committed. The Joint Committee therefore recommended rejecting the complaint. It added, nevertheless, that the complainant had never been strongly supported by his superiors and that, as he was about to retire, it might be worth trying to make up for this lack of public recognition of his merits, for example by awarding him an honorary rank.
4. In a decision of 21 February 2002 the Director General dismissed the complaint, arguing that there was no such thing as a right to promotion and that he could only promote to the next grade officials shortlisted by the Promotion Board. He also said that "the Agency regretted not having been in a position to give [him] the appropriate recognition that [his] high-quality and conscientious work deserved".
5. The complainant asks the Tribunal to set aside "the decision of the Promotion Board" and that of the Director General of 21 February 2002 dismissing his internal complaint, and to award him compensation of 300,000 euros under all heads. When the defendant expressed doubts regarding the nature of the impugned decisions and the receivability of some of the claims, the complainant rejoined that he challenged the "decision" of the Promotion Board not to include him on the list of persons proposed for promotion to grade B1, the Director General's decision not to promote him and the decision of 21 February 2002 to dismiss his internal complaint.
6. The receivability of the complaint before the Tribunal is not in doubt insofar as it challenges the Director General's decisions of 21 February 2002 dismissing his internal complaint and of 9 July 2001 determining the final list of promotions, on which the complainant's name did not appear. However, the complainant's request to set aside the proposals submitted by the Promotion Board to the Director General is irreceivable. Under Article 3 of Rule of Application No. 4 of the Staff Regulations:

"Promotion lists shall be finalised by the Director General on the proposal of the competent Promotion Board."

The effect of this provision is that the only decision taken in this respect lies with the Director General and that the Promotion Board has no power to decide. Therefore the complainant cannot ask for a so-called "decision" by the Promotion Board to be set aside, although in challenging the Director General's decisions he may seek to establish that the procedure followed by the Promotion Board was flawed or that its recommendations were unlawful.
7. On the merits, the complainant recognises that promotion decisions lie within the discretion of the administrative authority, subject only to limited review by the Tribunal, but he considers, in presenting a single plea based on a "failure to provide reasons" in the decision of 21 February 2002, that this decision, which refers to the opinion of the Joint Committee for Disputes, does not provide reasons as required in Article 92 of the Staff Regulations. In its opinion, the Joint Committee asserted that "the Administration is left wide discretion in the appraisal of a candidate's merits" whereas, according to Article 45 of the Staff Regulations, it is the comparative merits of officials eligible for promotion which should be considered, which has not been shown to have been the case. The

complainant argues that "[i]f the decision not to include [him] had been based on consideration of comparative merits, as required in the Staff Regulations, the opinion would have said so". He alleges that his promotion was turned down on account of his age, as suggested in the first paragraph of a memorandum dated 13 July 2001 by the Senior Director of the European Air Traffic Management Programme (EATMP).

8. The Tribunal considers that the impugned decision of 21 February 2002 is sufficiently reasoned, on the grounds that it refers to the opinion issued by the Joint Committee for Disputes, which had found no obvious error of appraisal in the consideration of the complainant's promotion entitlements. The decision also makes it clear that there is no such thing as a right to promotion and that the Director General could not order that the complainant's name be added to the promotion list. These reasons show no error of law or of fact, although the complainant appears to doubt whether the Promotion Board really considered the comparative merits of all officials eligible for promotion. On this point, the fact that the Joint Committee referred in its opinion to the wide discretion exercised in the appraisal of the merits of the candidate may be explained by the circumstances in which the case had been brought before the Committee, which only had to rule on the appeal of the complainant - who considered that his merits had not been sufficiently taken into account - and in no way implied that the Promotion Board had failed to consider comparative merits, as required when several candidates are eligible. The file shows that the Promotion Board duly received the DSA's list giving the names of nine officials eligible for promotion to grade B1, and there is no evidence that it did not consider the comparative merits of the candidates before shortlisting the one finally chosen by the Director General. The complainant's objection that his promotion was refused on account of his age cannot at any rate be founded on the memorandum of 13 July 2001, in the first paragraph of which the Senior Director of EATMP merely expressed regret "that it has not been possible in recent annual promotions to upgrade certain highly considered and valuable members of staff like [the complainant]", without making any reference to his age.

9. Since the complainant's claims for annulment cannot succeed, his claim for compensation for material and moral injury must likewise fail, subject to the remark that the complainant's objections to the way he was treated by the Agency throughout his career are not receivable in the present case.

DECISION

For the above reasons,

The complaint is dismissed.

DISSENTING OPINION BY JUDGE RONDÓN DE SANSÓ

Regretfully I must disagree with the majority opinion dismissing the present complaint.

The Tribunal considered that the Director General's decision of 21 February 2002, rejecting the complainant's internal complaint of 9 October 2001, was sufficiently reasoned, on the grounds that it referred to the opinion issued by the Joint Committee for Disputes, which had found no obvious error of appraisal in the consideration of the complainant's promotion entitlements. It also considered that there was no such thing as a right to promotion and that the Director General could not order that the complainant's name be added to the promotion list. According to the judgment, those reasons showed no error of law or of fact, although the complainant appears to doubt whether the Promotion Board really considered the comparative merits of all officials eligible for promotion. On this point, the fact that the Joint Committee referred in its opinion to the wide discretion exercised in the appraisal of the candidate's merits may be explained by the circumstances in which the case had been brought before the Committee, which could not rule otherwise on the internal complaint of the complainant, who considered that his merits had not been sufficiently taken into account.

In my opinion, this did not prevent the Promotion Board from proceeding with the necessary examination of the comparative merits of several candidates. The Tribunal concluded from the submissions, however, that the Promotion Board had duly received the list of nine staff members eligible for promotion to grade B1 and that "there is no evidence that it did not consider the comparative merits of the candidates before shortlisting the one finally chosen by the Director General".

I believe the complaint should succeed for the following reasons:

- Article 92 of the Staff Regulations Governing Officials of the Eurocontrol Agency stipulates that the authority's decision must be reasoned. The decision of 21 February 2002 refers to the opinion issued by the Joint Committee for Disputes.

- Articles 92 and 45 of the Staff Regulations read as follows:

"Article 92

1. Any person to whom these Staff Regulations apply may submit to the Director General, a request that he takes a decision relating to him. The Director General shall notify the person concerned of his reasoned decision within four months [...].

2. Any person to whom these Staff Regulations apply, may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where he has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. [...]

The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. [...]"

"Article 45

1. Promotion shall be by decision of the Director General. It shall be effective by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

[...]

2. An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition."

In this case, the question is whether the Director General's decision in his letter of 21 February 2002 was based on reasons of which the complainant was informed and whether those reasons were valid.

In that letter, the Director General stated that:

"There is no right to promotion to which staff members are entitled. It is essentially a discretionary act. Moreover, in my capacity as Director General, I must abide by the rules of procedure contained in Rule of Application No. 4. According to that Rule, promotion to the next grade above may be granted by the Director General only to officials included on the promotion lists drawn up by the Promotion Board."

Articles 2 and 3 of Rule of Application No. 4 of the Staff Regulations read as follows:

"Article 2

The power to award promotions shall be vested in the Director General. Officials shall be selected for promotion by the Director General from the promotion lists drawn up each year in accordance with the procedure defined below."

"Article 3

[...]

Promotion lists shall be finalised by the Director General on the proposal of the competent Promotion Board."

It is thus clear that it is for the Director General to select officials for promotion from the list prepared by the Promotion Board. According to the case law, the Director General is not bound by the Promotion Board's recommendations and in particular need not appoint the candidate the Board has ranked first, especially in the

event that the comparative merits of eligible officials have been considered. In the exercise of his discretion the Director General must ensure that his choice is not tainted with any mistake of law or fact and, to allow the Tribunal to exercise its power of review, he must state the reasons for his decision (see Judgment 1355, under 4). I note that the Director General is not bound by the Promotion Board's recommendations and that he was therefore at liberty to have the complainant's name entered on the promotion list for 2001.

The Director General also stated that:

"As the Joint Committee pointed out, no obvious error was made in your case in the annual promotion procedure. In the circumstances, I cannot order that your name be added to the lists so as to accede to your request for promotion to the higher grade."

In its opinion, the Joint Committee for Disputes pointed out that:

"While it is not responsible for reviewing administrative procedures such as the promotion procedure, it tries to ensure that no obvious error of appraisal has been committed. In the case in hand, where the administration exercises very wide discretion in the matter of the candidate's merits, it detected no obvious error, but considered that [the complainant's] case was never strongly supported by his superiors [...]."

It appears clear to me that the Director General's reasons, which he bases on the opinion of the Joint Committee, are not quite correct, since the Committee expressly states that it did not detect any obvious error of appraisal, and above all that no procedural error had occurred. The reasons given by the Joint Committee are not the same as those referred to by the Director General, according to whom the Committee did not detect any obvious error in the annual promotion procedure concerning the complainant. But if that was also what the Committee had intended to say, it is worth pointing out that the letter of 21 February 2002 contains a decision based on a factual situation of which there is no evidence and which also serves as the basis for the reasons attributed by the Agency to that act.

Contrary to the opinion of the majority of the members of the Tribunal, according to which "the impugned decision of 21 February 2002 is sufficiently reasoned" and "there is no evidence that [the Promotion Board] did not consider the comparative merits of the candidates before shortlisting the one finally chosen by the Director General", I take the view that the presumption of legality attached to an administrative act does not extend to all activities leading up to that act. The impugned decision should therefore have been set aside.

According to the case law, even though the Director General and the Promotion Board enjoy wide discretion in making their choice, the Tribunal nevertheless has the power to review the process leading to the disputed decision and to look into questions raised by the complainant, such as incomplete consideration of the facts or failure to respect elementary principles of justice (see Judgment 1729, under 10).

I note that the complainant retired on 31 December 2001 at grade B2, step 8 (the highest step in the grade). He was included, together with eight other staff members at the same grade, on the list of officials eligible for promotion drawn up on 12 February 2001 for the Safety, Airspace, Airports and Information Services Directorate (DSA), where he was working at the time. And yet, according to Office Notice 09/01 of 11 May 2001 concerning the promotion list, there was only one promotion slot available at grade B1 for DSA. The Promotion Board should have taken account of the fact that the duties performed by the complainant had been well above those of the post he had occupied since January 2000 for the ACAS project. Instead of that, after considering the merits of the DSA officials listed, on 25 June 2001 the Board drew up the list of promotions for submission to the Director General and recommended an official born in 1964, holding grade B2, step 3, with six years' service in that grade, for promotion to grade B1.

The discretion exercised by the Director General in granting or refusing promotions is subject to review by the Tribunal, which decides whether the decisions taken comply with the rules (see Judgment 1204, under 4). In the circumstances, the Agency should have compared the merits of all the officials listed. It could be considered that the defendant committed an error of law, in trying to justify the promotion of the only recommended official after discarding the eight other eligible candidates on account of the merits of the one selected, whereas there is nothing in the file to show that the recommended candidate was promoted in preference to any of the other eligible officials on the list of 12 February 2001 in the light of a detailed comparative appraisal.

In my view, the selection process reveals certain flaws, such as the failure to conduct a comparative review of the

officials' merits, as required under Article 45 of the Staff Regulations and Rule of Application No. 4, when choosing the person entitled to the only available promotion slot for grade B1.

Even though the Tribunal will be especially wary in its review since it may not replace the Organisation's rating of the merits of the official concerned with its own (see Judgment 1556, under 5), had a comparative evaluation duly been made, in the event of equivalent qualifications the Agency could legally have taken account of such factors as length of service, the candidates' appraisal reports and the performance of duties above their grade in making the final choice among eligible candidates.

Since the complainant has now retired, the Tribunal can no longer order the Agency to include him on a future promotion list. Therefore only an award of compensation could offset the complainant's injury. According to the case law, the Tribunal's jurisdiction is limited to the review of administrative decisions. But where such decisions are found to be reviewable and where they have caused injury, the Tribunal has jurisdiction to order reparation thereof. It is for the complainant to show the extent of the injury he has suffered.

The complainant worked out an amount of 164,931 euros, to cover the loss of earnings (*lucrum cessans*) and the injury suffered (*damnum emergens*). In fact, this amount would have been payable only in the event that the complainant had been promoted; the Agency would then have had to pay the difference between pension benefits for grades B2 and B1.

According to the opinion rendered by the Joint Committee for Disputes on 19 December 2001, the procedure followed was not tainted with any obvious flaw. It also appears that the complainant never enjoyed the strong support of his supervisors, and that the Promotion Board at its annual meetings never had the opportunity to consider his case, since he was never shortlisted for promotion. It is unfortunate that over a period as long as 30 years spent in the same position at grade B2 the complainant was never offered at least one real chance of promotion.

In the light of the above, I consider that the complainant suffered moral injury, which should have been remedied by the judgment.

In witness of this judgment, adopted on 20 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet