

The Administrative Tribunal,

Considering the second complaint filed by Mr I. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 31 January 2005, Eurocontrol's reply of 29 April, the complainant's rejoinder of 27 May and the Agency's surrejoinder of 17 June 2005;

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, a Danish national born in 1961, joined Eurocontrol on 16 January 1998 as a Controller 1st class, based at the Agency's Upper Airspace Control Centre in Maastricht, in the Netherlands. He was appointed at grade B3, step 6.

According to Eurocontrol's salary scale, grade B3 is divided into eight steps, as is grade B2, the next highest grade in the scale. The General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre provide for automatic advancement from one step to the next within each grade at two-yearly intervals, subject to satisfactory performance. Through automatic advancement, the complainant reached the last step of grade B3 (step 8) in January 2002. By a decision of 30 June 2004, the Director General promoted him to grade B2 with retroactive effect from 1 April of that year.

Article 47 of the General Conditions of Employment, which establishes a method for determining the salary step to which a staff member shall be assigned upon promotion to a higher grade, relevantly provides as follows:

"A servant appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade.

For the purpose of this provision, each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps. A servant appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade."

At the time of his promotion, the complainant had served more than 24 months in the last step of grade B3. By his decision of 30 June 2004, the Director General placed him in step 4 of grade B2 and credited him with ten months' seniority in that step. The complainant challenged that decision by submitting an internal complaint to the Director General on 20 September 2004. He contended that he ought to have been placed in step 5 with six months' seniority but that, because the Agency had relied on the English version of Article 47, which in his view was incorrectly translated from the original French version, his seniority in his former grade and step had not been taken into account. The matter was referred to the Joint Committee for Disputes, which, in an opinion issued on 22 December 2004, unanimously recommended that the complaint be rejected as unfounded in law. The Committee found no inconsistency between the English and French versions of Article 47. It considered that the purpose of the notional steps referred to in that article was to measure the seniority acquired between two steps. Step 8 being the last step in the grade, there were, according to the Committee, no notional steps between step 8 and another step.

On 31 January 2005 the complainant, who had not yet received an express decision on his internal complaint from the Director General, challenged the implied decision to reject it by filing the present complaint. That same day, however, the Director of Human Resources wrote to inform him on behalf of the Director General that his internal complaint was rejected as legally unfounded for the reasons given in the opinion of the Joint Committee for Disputes "and any other the Agency [might] develop subsequently".

B. The complainant submits that upon his promotion to B2 he should have been placed in step 5 with six months' seniority, because he had accumulated more than 24 months of service at grade B3 step 8, having advanced to that step on 16 January 2002.

He contends that there is "an inconsistency" between the English and French versions of Article 47, and he recalls that under Article 98 of the General Conditions of Employment, in the event of any inconsistency it is the French version that should prevail. In his view, each of the eight steps of grade B3, and not merely steps 1 to 7 as the Agency contends, must be divided into notional steps. He argues that although the English version of Article 47, according to which there are notional steps "throughout the span of the actual steps", may support the Agency's interpretation, that is not the case with the French text, which indicates that there are notional steps "*du premier au dernier des échelons réels*", (literally: "from the first to the last of the actual steps"). In his view, the wording of the French text necessarily includes step 8 and, consequently, his seniority in that step ought to have been taken into account in determining his new step.

He asks the Tribunal to order the defendant to place him in step 5 of grade B2, with six months' seniority, with effect from 1 April 2004. He also claims the difference in remuneration between grade B2, step 4, and grade B2, step 5, calculated from that same date. Lastly, he claims 500 euros "to cover lost interest and costs".

C. In its reply Eurocontrol asserts that the Director General's decision to place the complainant in step 4 of grade B2, with a seniority of ten months, was legally correct. It considers that there is no difference in meaning between the English and French versions of Article 47 that would inevitably lead to different legal interpretations. It states that the meaning of the article is to be found through interpretation of the provision in its context and in consideration of its purpose. Echoing the view expressed by the Joint Committee for Disputes, it submits that the purpose of notional steps is to measure the seniority acquired between two actual steps of one grade, i.e. between two basic salaries within that grade. Thus, it argues, seniority between the actual step 8 of grade B3 and another actual step need not be taken into account, step 8 being the last step in that grade; and since no seniority can be acquired in the last step of a grade, no notional steps are allocated to step 8.

The Agency explains that to proceed from step 8 of grade B3 to any step of grade B2, a promotion by decision of the Director General is required, without which the staff member would remain in step 8 of grade B3 until the end of his or her career. It emphasises that a promotion is fundamentally different from automatic advancement.

D. In his rejoinder the complainant contends that the purpose of notional steps is not to measure the seniority acquired between two actual steps, but to measure the notional seniority in the present grade in order to determine the actual and notional seniority to be attributed in the new grade. He maintains that both the English and the French versions of Article 47 support the view that there are 24 notional steps in step 8 of grade B3.

The complainant also points out that if seniority in step 8 is not taken into account, a controller appointed on the same day as him but to the step below, and who has followed an otherwise identical career path, can be credited with the same seniority as him upon promotion to B2, which, he submits, cannot be intended.

E. In its surrejoinder the Agency maintains its position. With regard to the interpretation of Article 47, it argues that the wording of the article is not decisive on the question of whether the last step of each grade has to be included or not. As for the complainant's example of a controller appointed on the same day as him, it observes that this illustrates the fact that there is no automatic promotion, nor any right to an identical career path between two staff members.

## CONSIDERATIONS

1. Article 47 of the General Conditions of Employment establishes a method for determining the step in which a servant shall be placed upon promotion to a higher grade, its main purpose being to ensure that promotion will not result in a reduction in basic salary for the person concerned. According to that method, each "actual step" is divided into 24 "notional steps", corresponding to months of service within the "actual step". Notional salary levels are calculated for these notional steps so that, for example, although a servant's actual basic salary will be the same whether he has served two months or 22 months at a given step, upon promotion the additional 20 months of service will, in most cases, be reflected in the step in which he is placed in his new grade, which will be determined by reference to his former notional salary level. However, Eurocontrol does not divide the last step of a

grade into notional steps. Consequently, in the case of a promotion from the last step in a grade, such as the present case, the servant's step in his new grade is determined by reference to his actual basic salary at the time of promotion, regardless of his seniority within his former grade and step.

2. The complainant claims that there is a discrepancy between the English and French versions of Article 47 and that, according to Article 98, in such a case the French version should prevail. It follows that the calculation of his salary after his promotion should, as argued by him, be different.

The two texts of Article 47 that he considers at variance respectively provide, in pertinent part:

“each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps”

and

“chaque grade est doté d'une série d'échelons virtuels corrélative à une série d'anciennetés mensuelles et de traitements virtuels progressant, du premier au dernier des échelons réels, à raison d'un vingt-quatrième de l'augmentation biennale d'échelon de ce grade”.

The different interpretation would arise, in the complainant's view, from the meaning of the phrase “*du premier au dernier des échelons réels*” (literally: “from the first to the last of the actual steps”), when compared to “throughout the span of the actual steps”.

3. There is no dispute as to the rendition in both languages of the idea of “notional” as opposed to “actual” steps. In the English version, “notional” corresponds to hypothetical, unreal, or fictional distinctions and calculations; the same meaning is uncontested by the complainant as regards the French version. The rules do not contemplate “real” positions or steps here, just “notional” – imaginary, unreal – ones.

4. It is important to note at this stage – and the Tribunal will elaborate on this later – that Article 46 of the General Conditions of Employment refers to promotion to the “next higher grade” by “selection” and to a “higher category” by “competition”.

Article 47, on the other hand, provides for the manner in which the seniority of a staff member appointed to a higher grade shall be determined. To that end it establishes the distinction, quite analogous in the English and French texts, between “notional” steps, and “actual” or real steps. Further, the system of seniority pay rises by means of notional steps has one built-in limitation: it does not apply to the final real step in each grade.

When a staff member is appointed to a higher grade, as the complainant has been, he will, in accordance with Article 47, have the seniority corresponding to the notional or fictional step “equal to” or “next above” the notional step reached in his former grade plus the amount of the two-yearly increment for his new grade. When there is no actual step above the step reached in the former grade, no further notional step is calculated. The fiction provided for by the rules ends there.

5. An earlier complaint involving the application of almost identical regulations was dismissed by the Tribunal. It held that taking account of notional steps was not an end in itself, but that its purpose was to give effect to the provisions stipulating, on the one hand, that a staff member should in no case be paid a lower basic salary in his new grade than he would have been paid in his former grade and, on the other hand, that a staff member appointed to a higher grade should be granted at least the first step in that grade. Furthermore, it held that the executive head of an organisation has discretionary authority not only to promote someone from one grade to another but also to say what place he shall hold in his new grade (see Judgment 313, under 3). In the circumstances of the present case the Tribunal sees no reason to interfere. Besides, the complainant has not lost in terms of salary, since his basic salary in his new grade is not lower than that which he received in his former grade.

6. Since the existing regulations do not provide for the calculation of seniority in the manner requested by the complainant, he is in effect asserting that the limit of notional steps has been wrongly established as regards the French text, yet not necessarily the English one. The Tribunal, however, finds that the problem of interpretation is the same for the French text and the English translation, as to whether notional steps are mandated or not for the last real step of a given grade. The complainant admits that the system may comply with the English rendition; the Tribunal does not find the French one to be different.

7. Further, there is logic in the system adopted by Eurocontrol. If a staff member has reached the last step of a grade, he acquires no seniority in that step even if he remains in it until the end of his career. The automatic advancement by seniority is not infinite: it ends when the staff member reaches the last step of his current grade; although it will start again if and when he is promoted to a new grade, the staff member in question will not benefit from seniority in terms of notional steps acquired in the last real step in his former grade. This can reasonably be understood to mean that, in addition to advancement by seniority alone, advancement through selection or competition is encouraged, which seems consistent enough with the intent of the system established by Articles 46 and 47, and reasonable as well in a career system.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet