

116th Session

Judgment No. 3277

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs K. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 3 March 2011 and corrected on 18 May, Eurocontrol's reply of 22 August, the complainant's rejoinder of 17 October 2011 and Eurocontrol's surrejoinder of 12 January 2012;

Considering the applications to intervene filed by Mr S. B., Ms C. C. M., Mr G. D., Mr J. F., Mr A. G., Mr F. M., Mr S. Ö., Mr G. P., Ms S. P. and Ms M. Z., and the letter of 25 April 2013 in which Eurocontrol stated that it had no objection to these applications;

Considering the applications to intervene by Mr L. B., Mr M.-G. I. and Mr M. E., and the letter of 25 October 2013 in which Eurocontrol stated that it objected to the interventions;

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

Having examined the written submissions and decided not to order 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. Facts relevant to this case are to be found in Judgment 3189, delivered on 6 February 2013.

On 1 July 2008, in the context of an administrative reform aimed in particular at placing greater emphasis on staff members' performance, Eurocontrol introduced a new structure in which the existing staff categories A, B, and C were replaced by categories A*, B* and C*. The grades were grouped together in new career brackets, which were broader than those they replaced and which partially overlapped one another. Thus, some grades appeared in two different career brackets. At the same time, Article 45 of the Staff Regulations governing Officials of the Agency, which deals with promotion, was amended in such a way that officials who had reached the highest step in their career bracket could no longer advance to the next career bracket by means of a promotion in the context of the annual promotion rounds, but only by obtaining a reclassification of their current post to reflect a change in their duties, or by applying for a vacant post in the next career bracket.

One other aspect of the reform should be mentioned. Since 1999, in pursuance of its job management policy, Eurocontrol had been evaluating all jobs within Eurocontrol with a view to defining standard job descriptions and grading each post according to the level of its responsibilities. Although the implementation of the policy had begun several years earlier, it was only when the administrative reform entered into force that the principles of job management were incorporated in the Staff Regulations by the addition of a new paragraph 7 to Article 5, and by the adoption of Rule of Application No. 35, which provided *inter alia* that, as of 1 July 2008, staff would be assigned to a new generic post with its associated career bracket corresponding to their former career bracket. Rule of Application No. 35 was published in Office Notice No. 26/08.

In practice, these changes were introduced in several stages. As a transitional measure, each staff member's grade was converted to its equivalent in the new grade structure on 1 July 2008. The decisions as to which career bracket staff would be placed in were not taken until April 2009. Finally, the nomenclature of grades was modified again

with effect from 1 July 2010, but the career brackets remained unchanged.

The complainant joined Eurocontrol in November 2004 as a Senior Technical Assistant to perform the duties of “Specialist-Scientific Analyst” at grade B3 in Brétigny-sur-Orge (France). She was promoted to grade B2 on 1 June 2008, and on 1 July 2008 her grade was converted to its equivalent in the new grade structure, i.e. B*8. By a decision of 28 April 2009 she was informed that, in accordance with Article 5, paragraph 7, of the Staff Regulations, Annexes I and XIII.1 thereof and Rule of Application No. 35, the Director General had assigned her to the generic post of “Advanced Technical Assistant” within the career bracket B*5-B*8 with effect from 1 July 2008, and that she retained her current grade. She was thus in the highest grade in her career bracket.

In July 2009 she lodged an internal complaint against the decision of 28 April on the grounds that it was procedurally flawed. In January 2010 she was notified that her appeal was accepted and that, consequently, her case had been submitted to the Committee in charge of job management monitoring to examine her assignment to a generic post and provide an opinion thereon; the decision of 28 April 2009 was therefore set aside and a new decision would be taken once the Committee in charge of job management monitoring had given its opinion.

By memorandum of 5 July 2010 the Principal Director of Resources acting by delegation of the Director General, informed the complainant that the Committee in charge of job management monitoring had concluded that the decision assigning her to a new career bracket following the entry into force of the administrative reform on 1 July 2008 was in line with Article 9 of Rule of Application No. 35, and that it was therefore confirmed.

On 5 October 2010 the complainant lodged an internal complaint against the decision of 5 July 2010 contending that her “real functions”, as described in her performance appraisal, had not been taken into account. She also alleged inter alia violation of Article 9 of Rule of Application No. 35, arguing that the Director General’s

decision was based on an erroneous opinion of the Committee in charge of job management monitoring, because the Committee had not consulted her line manager as to the nature of her functions. She also contended that the decision to assign her to career bracket B*5-B*8 deprived her of any possibility of being promoted, as she already held the highest grade in her career bracket. Consequently, she asked that the contested decision be cancelled, that the procedure of assigning her a job title, a generic post and a career bracket be “carried out correctly” in consultation with the Committee in charge of job management monitoring taking into account her “real functions”. She requested that any decision taken with respect to her should have retroactive effect from 1 July 2008 in order to allow her to participate in future promotion exercises. The complainant further asked that her generic post be at least equivalent to her previous one.

As she received no reply from the Administration within the sixty-day period mentioned in Article VII, paragraph 3, of the Statute of the Tribunal, she filed in March 2011 a complaint directly with the Tribunal impugning the implied decision to reject her internal complaint.

On 14 June 2011 the Principal Director of Resources, acting on behalf of the Director General, wrote to the complainant informing her that he had received the opinion of the Joint Committee for Disputes on her internal complaint and that the members of the said Committee could not reach a unanimous decision on her case. He shared the views of the two members of the Joint Committee for Disputes who concluded that the Committee in charge of job management monitoring had correctly verified the transposition of her grade into the new career bracket as required by Article 9 of Rule of Application No. 35, and he had therefore decided to reject her internal complaint as unfounded.

B. The complainant contests the career bracket to which she was assigned in July 2008 following the implementation of the administrative reform. According to her, the opinion of the Committee in charge of job management monitoring and the subsequent decision to assign her to the career bracket B*5–B*8 as from 1 July 2008 did

not take into account her functions and experience. She explains that prior to the reform she held grade B2, which was included in career bracket B2/3. During the transition period of 1 July 2008 to 30 June 2010 she was assigned to grade B*8, which was included in two career brackets, namely B*5-B*8 and B*8-B10. In her view she should have been assigned to career bracket B*8-B10, because her functions corresponded to a generic job description belonging to that career bracket, as evidenced by her performance appraisals, and because she had ten years of experience.

She alleges that the implementation of the administrative reform adversely affected her career prospects, and that Eurocontrol did not keep its promise of “improvement in careers” which it made when developing the job management policy.

She also submits that her duties as a “Specialist” are not fully reflected in either of the two new career brackets. Indeed, she was appointed to perform the duties of “Specialist-Scientific Analyst”, which fell in the previous career bracket B1/2/3, which included grades B1, B2 and B3. Thus, but for the reform, she could have been promoted to a higher grade, i.e. B1 (which became grade B*10 during the transition period and grade AST10 as from 1 July 2010), during the 2010 promotion exercise because by that time she would have spent two years in grade B2. She explains that, prior to 1 July 2008, promotions were made on the basis of grades and did not depend on the career bracket, but following the administrative reform a career bracket operates as a “barrier” to promotion and in her case has deprived her of the possibility of being promoted. In order to retain her career prospects she would have to be placed in a career bracket that includes grade AST10.

The complainant objects to the delay on the part of the Committee in charge of job management monitoring, stressing that it took ten months to make a recommendation on her grade and the career bracket to which it belonged, despite the fact that this required no “intellectual effort”. Indeed, it gave one single opinion concerning approximately 2,400 officials. She points out that, in the three years following the introduction of the administrative reform, 300 officials

requested a review of their classification but only five had their job reclassified in another career bracket, despite the fact that the Administration had invited those who were dissatisfied with their classification decision to request a review of it. She adds that she was given no justification for the fact that she was assigned to career bracket B*5-B*8.

The complainant asks the Tribunal to set aside the contested decision, and to award them moral and material damages as well as costs. She also asks the Tribunal to order that the proper procedure be followed to assign her to a career bracket on the basis of the functions she performs. She further asks to be assigned to “a generic post that includes [grade] AST10”, and that she be allowed to participate in “promotion exercises from 2010 onwards”.

C. In its reply Eurocontrol requests that the complaint be joined with other complaints pending before the Tribunal on the grounds that they serve the same purpose, i.e. contesting the classification carried out following the entry into force of the administrative reform on 1 July 2008.

It contends that the present complaint is irreceivable insofar as she asks the Tribunal to instruct Eurocontrol to classify her in a career bracket comprising grade AST10.

On the merits Eurocontrol indicates that although the complainant may prefer the previous system, Eurocontrol is solely responsible for the management of its resources. It asserts that the complainant’s position was classified in accordance with Rule of Application No. 35 and that she was correctly placed in career bracket B*5-B*8. It explains that, in accordance with Article 9 of Rule of Application No. 35, the Committee in charge of job management monitoring checked that each generic post’s description corresponded to the career bracket assigned to it. For each individual case, it consulted the line managers concerned to obtain their comments on whether or not the generic post and the career bracket to be assigned to an official in the new structure were appropriate. It stresses that Article 9 does not provide that each official’s situation should be reviewed to determine

whether his or her functions in category A*, B* or C* are fully in line with those he or she performed in category A, B or C. A table indicating corresponding grades was annexed to Rule of Application and was prepared taking into account the posts existing prior to 1 July 2008. Eurocontrol asserts that the professional merits of the complainant were taken into consideration, pointing out that she was promoted to grade B.2 on 1 June 2008, one month before the entry into force of the reform. It emphasises that upon recruitment she was assigned to career bracket B3/B2 and that prior to July 2008 there was no career bracket B1/2/3. It adds that the document to which she referred was issued on an experimental basis before the administrative reform was introduced.

Eurocontrol considers that the “right to make a career” still exists following the implementation of the administrative reform. It indicates that, in accordance with Article 6 of Rule of Application No. 35, a description of functions and job evaluation may be re-examined at the initiative of the line management; however, the complainant’s line managers did not take such initiative and there was no reference in her performance appraisals to any inconsistency between the functions she performed and the grade in which she was placed.

With regard to the alleged delay, it indicates that the verification procedure undertaken by the Committee in charge of job management monitoring took some time.

D. In her rejoinder the complainant indicates that, not knowing the details of the other complaints to which Eurocontrol refers, she leaves the decision on joinder “to the discretion of the Tribunal”, but she adds that “personally [she] would prefer not to have the complaints joined”.

With respect to the receivability of her request to be placed in a career bracket including grade AST10, she explains that, according to her job description, prior to the implementation of the administrative reform her job title was “Specialist” and her “Grade Category” was B*1/2/3, and that this should be reflected in her post-reform grading. Accordingly, after the reform she should be placed in career

bracket AST8-AST10. She stresses that she is merely asking to have the same career opportunities that were available to her prior to the implementation of the reform.

On the merits, the complainant contends that Eurocontrol has put forward “theories” without producing any evidence to support them. She points out that Eurocontrol has not produced any evidence of extensive consultation with her line managers between July 2008 and April 2009, and she asserts that, according to them, they were consulted at the very last moment in the spring 2009 on the generic job title to be assigned to her, but not on the decision to place her job within career bracket B*8-B*10. She adds that there is little difference between the functions to be performed by a Senior Technical Assistant in career bracket AST8-AST10 and an Advanced Technical Assistant in career bracket AST5-AST8. She also submits that no reason was given for the delay in taking the decision to place her job in career bracket B*5-B*8. In addition, she indicates that her line managers informally told her that they did not request that her job description and grade be re-examined because reclassification was “frozen” due to budgetary constraints. Lastly, she alleges unequal treatment insofar as operational staff in the Central Flow Management Unit (CFMU), who were in a career bracket similar to hers prior to the reform, were maintained in the same bracket when the reform was implemented.

E. In its surrejoinder Eurocontrol maintains its request for joinder of cases. It also maintains its objection with respect to the receivability of the claim to be placed in career bracket AST8-AST10, explaining that the complainant was not placed in career bracket B3/B2/B1 prior to July 2008 because such a career bracket simply did not exist.

Eurocontrol asserts that the complainant retains her career prospects and may be assigned to a higher career bracket, either by requesting that her job description be reviewed or by applying for a post in a competition. It acknowledges that at present, due to budgetary constraints, no new appointments are normally made when officials separate from service, but it indicates that, since 2008, the Committee in charge of job management monitoring has held nearly

70 meetings during which it has reviewed the functions and grading of officials who disagreed with the career bracket assigned to them following the implementation of the administrative reform. With respect to the situation of officials working in CFMU, it contends that they have specific working conditions and job profiles which justify a different treatment of their career development.

CONSIDERATIONS

1. The complainant impugns the implied decision of the Director General to dismiss her internal complaint which she filed following the Director General's decision of 5 July 2010, confirming the classification of her post in a new career bracket with effect from 1 July 2008 (following a reclassification exercise which transposed the career brackets for posts at Eurocontrol). The complainant's internal complaint was filed in October 2010. Having received no response to it, the complainant filed her complaint before the Tribunal on 3 March 2011. The Joint Committee for Disputes met on 29 March 2011 and presented its report on 28 April 2011. By memorandum of 14 June 2011, the complainant was notified of the Director General's explicit decision to uphold the opinion of the two members of the Joint Committee for Disputes "who fe[lt] that the Committee in charge of job management monitoring correctly verified the transposition of the grades into the new career bracket as provided for in the second indent of Article 9 of [Rule] of Application [No.] 35 [...], and who recommended that [the] complaint be rejected as unfounded". There being no objection, it is convenient to treat the complaint as directed against the decision communicated by the memorandum of 14 June 2011.

Eurocontrol requests the Tribunal to join the present complaint with a series of complaints having the same purpose. The Tribunal is of the opinion that as the present complaint differs sufficiently in fact and in law from the others (see Judgments 3275 and 3278, also delivered this day), it should be considered separately.

2. According to the opinion of the Joint Committee for Disputes, dated 28 April 2011:

“Since the entry into force of the Administrative Reform at EUROCONTROL on 1.7.08, the posts of officials and servants have been subject to the provisions of the service regulations and Rules of Application concerning job management as set out in Article 5.7 of the Staff Regulations and Article 4.5 of the General Conditions of Employment (hereinafter referred to as the service regulations) and also in the corresponding Rules of Application (Nos. 35 [...]).

In accordance with these provisions, each official or servant was, by individual decision, assigned a grade in the new grade structure. Furthermore, the table annexed to Rule of Application No. 35 [...] indicated the correspondence between the job title provided for in Annex XIII.1 and the generic post, and the corresponding grade bracket.

At its meeting on 1.12.09, the Committee considered the complaints of 81 officials and 2 servants against the decision assigning them to a generic post and the career bracket corresponding to that post on the basis of the applicable provisions. The Committee concluded that there had been a ‘*procedural irregularity*’ in the process of determining the generic posts and corresponding grade brackets, and recommended that the Committee in charge of job management monitoring should, in the case of the complainants only, carry out the examination which had not been carried out.

In line with this recommendation, the Committee in charge of job management monitoring met to examine the complainants’ cases. The conclusions of this examination, and a new decision, dated 5.7.10, confirming the classification in the career bracket made on 1.7.08, were sent to the complainants.

Now, 36 officials and 1 servant are contesting the new decision, dated 5.7.10, and are arguing that the Committee in charge of job management monitoring did not examine in detail the applicable classification criteria, as a result of which the generic post and career bracket do not correspond to the nature of the work actually done. They conclude from this that they are suffering financial loss, as a result *inter alia* of the absence of any possibility of promotion to a higher grade.”

The Joint Committee for Disputes concluded:

“The members of the Committee are unable to reach a unanimous decision.

On the basis of the above deliberations, two members feel that the Committee in charge of job management monitoring should have carried out an analysis allowing a possible reassessment of the posts, and that the complaints are therefore well founded.

The other two members, however, consider that the Committee in charge of job management monitoring correctly verified the transposition of grades into the new career brackets as provided for in the second paragraph of Article 9 of [Rule] of Application [No.] 35 [...]. Consequently, in the opinion of the two members concerned, the complaints must be rejected.”

3. The complainant requests setting aside the challenged decision, correct application of the procedure for assigning her to a career bracket based on her functions and taking into account her acquired rights to a generic post which includes AST10, and to be allowed to participate in promotion exercises from 2010 onwards. She claims moral damages, material damages due to past and future exclusion from the possibility of promotion, and costs.

4. The grounds for complaint are:

- (a) the impugned decision puts the complainant in a career bracket below that which corresponds to her functions and previous grade, without basing the decision on any reference to her functions and actual experience, or indicating the precise justification for the allocation;
- (b) the complainant has lost the possibility of a career progression;
- (c) Eurocontrol has broken all promises made to staff regarding careers.

In her complaint, the complainant also contests the decision to place her in career bracket B*5-B*8 on the grounds that prior to the transposition of grades she held grade B2 in the B1*/B2/B3 grade bracket, she has an acquired right to have access to the grade bracket which includes the B1 equivalent (grade AST10 after the transition period) as Eurocontrol claims to have maintained the same opportunities for advancement by promotion that employees previously had, but which in her case would mean that she should be eligible for promotion to B1 AST10 after the transition period. She also raises the grounds that her actual functions, responsibilities, and years of experience are reflected in the job description for the higher career bracket (AST8/9/10) and Eurocontrol has given no

substantiated justification for the fact that she was assigned to the lower career bracket (AST5/6/7/8).

5. Eurocontrol contends that the complainant's claim, that the Tribunal instruct Eurocontrol to classify her post in a career bracket comprising grade AST10 in view of her acquired rights, is irreceivable as it is outside the Tribunal's competence.

6. The provisions which regulate the present cases are: Article 9 of Rule of Application No. 35 concerning job management, the penultimate paragraph of Section 2 of Office Notice No. 26/08, and Article 5 of the Staff Regulations. Article 9 provides as follows:

“With effect from 1 July 2008, the administrative situation of each official in the ‘General Service’ shall be reviewed on the basis of the following principles:

- the grade held on 30.6.08 by each official shall be renamed and converted, as provided for by Annex XIII, Part 2, Article 2, paragraph 1,
- the official shall be allocated a job title, according to the nature of his/her functions, from the job titles set out in Annex XIII.1, corresponding to his grade and professional speciality (General, CFMU, Military Service),
- the official shall be assigned by the Director General, after the latter has consulted the Committee constituted pursuant to Article 7 above, to a generic post as provided for in Article 3 of the present Rule of Application,
- [...]”

Office Notice No. 26/08, states, in relevant part:

“In practice, staff will be assigned with effect from 1 July 2008 to a new generic post with its associated grade-bracket corresponding to their former career bracket.”

Article 5 of Staff Regulations provides:

- “1. The posts covered by the Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in a function group for managers or administrators (hereinafter ‘AD’) and a function group for assistants or other specific functions referred to in Annex I to these Staff Regulations (hereinafter ‘AST’).

[...]

7. A summary table showing the types of posts is given in Annex I.

By reference to this table, the Director General shall define the duties and powers attaching to each type of post and its level expressed in grade(s) after consulting the Staff Committee. He shall do this taking account *inter alia* of the need to harmonise and ensure consistency between the services.

[...]"

7. The Tribunal is of the opinion that the complaint is unfounded. Annex XIII, Part 2, Article 2, paragraph 1, to the Staff Regulations indicates that posts graded B2 shall be renamed B*8 during the transition period. Grade B*8 was then renamed AST8 as from 1 July 2010. The problem arises with the fact that, in the new career brackets, some of the grades (including B*8/AST8) overlap between brackets and that the complainant was assigned to the highest grade of the lower bracket. The initial decision of 1 July 2008 was annulled when the Director General endorsed the Joint Committee for Disputes' finding of "procedural irregularity" in the assessment proceedings, as it was shown that the Committee in charge of job management monitoring had not met prior to giving their opinion to the Director General regarding the content of the job description and the grading of the post in accordance with Article 7 of Rule of Application No. 35. The second decision, dated 5 July 2010 (made after having followed the procedure required of the Committee in charge of job management monitoring), confirmed the initial grading transpositions of 1 July 2008. In her second internal complaint, the complainant again requested clarification and justification for the new grading assignments, particularly as it affected those in grades with overlapping brackets. The Tribunal considers that the decision of 5 July 2010, and the subsequent decision of 14 June 2011, were lawful given that Eurocontrol, in implementing the administrative reform, as the Tribunal pointed out in Judgment 3189, and in Judgment 3275, delivered this day, limited itself to a transposition proceeding in accordance with Annex XIII, Part 2, Article 2, paragraph 1, to the Staff Regulations. Regarding the overlapping grades Eurocontrol

followed the general criterion to classify an official who had already reached the highest grade in her/his career bracket in the previous nomenclature at the corresponding grade but in a career bracket in which that grade was the highest.

The complainant argued that before the reform was implemented she held grade B2 in career bracket B1*/2/3 and based her argument on a document but does not reply to the argument of Eurocontrol which says that the grade B1*/2/3 referred to in the document was only experimental and that effectively grade B2 was the highest grade in the B1/B2 career bracket.

In light of the foregoing considerations the complaint must be dismissed.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 7 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, Mr Seydou Ba, Judge, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Claude Rouiller
Seydou Ba
Dolores M. Hansen
Patrick Frydman
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet