

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

105th Session

Judgment No. 2722

The Administrative Tribunal,

Considering the complaints filed, respectively, by Messrs M. A., C. B., G. C., I. D. and J. H., by Messrs H. C. and D. M., by Messrs P. M. and C. R. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 June 2007 and corrected on 18 July, the Organisation's replies of 18 October, the complainants' rejoinders of 27 December 2007 and the Agency's surrejoinders of 14 March 2008;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are Eurocontrol officials who were recruited to work as instructors at the Institute of Air Navigation Services (IANS) in Luxembourg. Messrs C. and M. joined the Agency in 2004 at grade A7. The other complainants had been recruited earlier at grade B2 or B1 and were assigned to category A (at grade A7 or A6) between 1 June 2000 and 1 July 2003. At the material time Messrs M. and R. were course supervisors.

On 22 October 2002 the Director General of Eurocontrol adopted Decision No. VIII/3(2002) stipulating that the posts of instructor and course supervisor at the IANS – which were graded B2 or B1 – were to be reclassified as A6 and A5 respectively as from 1 January 2003. Instructors have been recruited at grade A6 since 1 June 2006.

Between 29 June and 3 July 2006, relying on these new recruitment conditions for instructors and alleging a breach of the principle of equal treatment, the complainants individually requested the Director General to be reclassified to grade A6 as from the date of their recruitment. By internal memoranda of 9 August the Director of Human Resources, acting on behalf of the Director General, informed each of them that their request had been rejected. Between 6 October and 9 November 2006, each complainant lodged an internal complaint with the Director General. On 8 June 2007 they filed complaints with the Tribunal, impugning the implied rejection of their internal complaints.

In the meantime, the internal complaints had been forwarded to the Joint Committee for Disputes. In its opinion of 23 May 2007 the Committee concluded that the internal complaints were well founded on the grounds that the terms of Decision No. VIII/3(2002) had not been observed and that the policy of invariably recruiting instructors at grade A6 as from 1 June 2006 was discriminatory. It recommended that the Director General “rectify their careers in pursuance of the principles of the [above-mentioned] Decision as from the date on which it [took] effect in each individual case”. By letters of 27 July 2007 the Director of Human Resources, acting on behalf of the Director General, informed the complainants that their internal complaints had been rejected. Nevertheless, the complainants who on 1 June 2006 had not yet been awarded grade A6 – Messrs A., C., C. and M. – were retroactively assigned to that grade as from that date. Mr M. was retroactively assigned to grade A5 as from the same date.

B. The complainants state that, although the practice of recruiting instructors and supervisors at grades A6 and A5 respectively since 1 June 2006 is consistent with the terms of Decision No. VIII/3(2002), they are of the opinion that it nonetheless constitutes a “new fact” giving rise to discrimination, since they were not assigned to grade A6 when they were recruited or moved to category A. They emphasise that the recruitment and career conditions of officials in the same category must be identical.

Apart from Messrs C. and M., who request that the Tribunal set aside the decision to recruit them at grade A7

rather than at grade A6, the complainants request the setting aside of the decision not to assign them to grade A6 when they were moved to category A. In addition, they all request the setting aside of the decisions of 9 August 2006 and the implicit decisions to reject their internal complaints. They also ask the Tribunal to order the Agency to reconstitute their career and to pay them the corresponding difference in salary together with interest. Lastly, each claims costs in the amount of 2,500 euros.

C. In its replies the Agency submits that the complaints are irreceivable, because when the complainants lodged their internal complaints in 2006 they were plainly time-barred from challenging their administrative status as determined in 2003, or in 2004 in the case of Messrs C. and M. Moreover, the Agency points out that the claims submitted to the Tribunal by Messrs M. and R. are different to those made in their internal complaints.

On the merits and subsidiarily, the Organisation holds that the recruitment of instructors at grade A6 since 1 June 2006 does not constitute a new fact which should lead to the revision of the complainants' careers, but is a belated application of Decision No. VIII/3(2002). In its opinion the allegations that the principle of equal treatment has been breached are groundless: Mr R. was appointed to grade A5 on 1 May 2006 and Mr M. was assigned to the same grade with retroactive effect from 1 June 2006. It adds that since 1 June 2006 all IANS instructors, including the complainants concerned, have been given grade A6, in some instances in pursuance of the decisions of 27 July 2007.

D. In their rejoinders the complainants explain, with regard to receivability, that they were unable to challenge their grading within category A until the Organisation had applied the new recruitment rules which resulted in their being treated unequally. Even though by 1 June 2006 they had all obtained the grade they were claiming, they consider that discrimination in comparison with newly recruited instructors or supervisors is continuing in terms of career trajectory and the calculation of seniority.

Mr H. amends his first claim in that he now requests the setting aside of the decision not to assign him to grade A5 when he was moved to category A. Similarly, Messrs M. and R. now request the setting aside of the decision not to assign them to grade A5 on 1 January 2003; in doing so, they state that they are correcting a "material error" in their complaints before the Tribunal and bringing their claims into line with those submitted in their internal complaints. In addition they request the setting aside of the decisions of 27 July 2007.

E. In its surrejoinders the Agency maintains its position on receivability; it submits that Mr H.'s claim that he should be reclassified to grade A5 is new and therefore irreceivable. It also maintains its position on the merits.

CONSIDERATIONS

1. The complainants, all of whom are Eurocontrol officials, are either instructors or course supervisors at the Institute of Air Navigation Services in Luxembourg.

By a decision of the Director General of the Agency of 22 October 2002, the jobs of instructor and course supervisor were to be classified at grade A6 and grade A5 respectively as from 1 January 2003. This classification amounted to a substantial upgrading of these jobs. The complainants were not, however, given these grades when they were appointed to their posts. When they obtained the posts, either through a competition organised at the time when the new classification was introduced, or by subsequent recruitment, or by virtue of their previous appointment as training experts, all but one of the instructors were assigned to grade A7, instead of A6, and the supervisors were assigned to grades A6 or A7, instead of A5.

Although – as the Agency acknowledges – they would have been entitled to demand the application of the post classification scale introduced by the above-mentioned decision of 22 October 2002, the complainants did not then see any need to challenge the decisions regarding them within the period of time allowed for that purpose. Consequently, their subsequent career progression has been based on the grade they were assigned under those decisions.

From 1 June 2006, however, Eurocontrol recruited some new instructors who were directly placed in grade A6. Since the complainants considered that this situation created discrimination causing them prejudice, they then requested retroactive reclassification and reconstitution of their career in pursuance of the decision of 22 October 2002. The internal complaints they lodged under Article 92(2) of the Staff Regulations were rejected by implicit

decisions of the Director General. These are the decisions impugned before the Tribunal.

After the complaints had been filed the Director General confirmed the rejection of the internal complaints by express decisions of 27 July 2007, although he announced that “[i]n a spirit of compromise”, for some of the complainants, the date of their promotion to their present grade would be brought forward to 1 June 2006 in order to make it coincide with the appointment of the newly recruited instructors. Decisions to that effect were in fact taken on 2 October 2007.

It should be noted that the Joint Committee for Disputes, which issued its opinion on 23 May 2007, considered that the complainants’ internal complaints were well founded and recommended that their careers be reconstituted as requested.

2. The nine complaints, which were examined jointly, raise similar issues of fact and law and seek the same redress. The Tribunal will therefore join them so as to rule on them by a single judgment.

3. The facts set out above show that the complainants did not lodge a timely appeal against the decisions assigning them to specific grades on appointment to their current posts as instructors or supervisors. These decisions have therefore become final and the complainants may not today challenge them by requesting a revision of their grade with a view to reconstituting their careers.

As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466 and 2463, time limits are an objective matter of fact and it should not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties’ legal relations, which is the very justification for a time bar.

As recalled in Judgment 1466, the only exceptions to this rule that the Tribunal has allowed are where the complainant has been prevented by *vis major* from learning of the impugned decision in good time (see Judgment 21), or where the organisation by misleading the complainant or concealing some paper from him or her has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see Judgment 752). It does not, however, appear from the evidence, nor is it even alleged that the complainants in this case found themselves in either of these situations.

4. It is true that, according to the Tribunal’s case law as established in Judgments 676, under 1, and 2203, under 7, a staff member concerned by an administrative decision may ask the Administration for review either where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or else where the staff member is relying on facts or evidence of decisive importance of which he/she was not and could not have been aware before the decision was taken.

In this case the complainants submit that the recruitment of instructors at grade A6 with effect from 1 June 2006 constitutes a new fact that reopened the time limit for appealing against the initial decisions concerning them.

However, the complainants already knew about the current classification of instructor and supervisor posts in consequence of the above-mentioned decision of 22 October 2002 at a time when they could have lodged such an appeal. It is not alleged that when that decision was taken the requisite formalities regarding its publication were not observed. Moreover, the staff concerned could not have been unaware of its existence, particularly as the competitions organised to fill the posts in question were based upon it.

In choosing to recruit instructors at grade A6 as from 2006, the Agency merely applied the decision of 22 October 2002 – albeit with a regrettable delay. The recruitment carried out after 1 June 2006 should not therefore be regarded as a new and unforeseeable fact, even if one might be tempted to see it as being of decisive importance for this dispute.

It follows that in this case the complainants were not entitled to a revision of the grade assigned to them when they were appointed to their posts as instructors or supervisors.

5. As the initial decisions taken with regard to the complainants had therefore become final, the Director General’s decisions rejecting their internal complaints against these decisions merely confirm them and cannot therefore open a new time limit to file a complaint with the Tribunal.

6. Lastly, as the Tribunal has already held, particularly in Judgments 775, under 1, and 2297, under 13, the fact that the internal appeals body has wrongly heard internal appeals that were time-barred does not mean that the Tribunal should entertain complaints directed against decisions refusing to allow these internal appeals.

7. As the complaints are thus irreceivable, they fail in their entirety, including the claims for costs.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet