

116th Session

Judgment No. 3279

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs M.J. A. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 31 May 2011 and corrected on 20 June, Eurocontrol's reply of 23 September, Mrs A. M.'s rejoinder of 2 December 2011 and Eurocontrol's surrejoinder of 9 March 2012;

Considering the second complaint filed by Mr G.C. D. against Eurocontrol on 28 March 2011 and Eurocontrol's reply of 22 August 2011, Mr D. having chosen not to file a rejoinder;

Considering the fifth complaint filed by Mr J. W. against Eurocontrol on 28 March 2011 and corrected on 17 May, and Eurocontrol's reply of 22 August 2011, Mr W. having chosen not to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

A. Article 45 of the Staff Regulations governing officials of the Eurocontrol Agency provides that, subject to availability of budgetary

funds, the Director General can award a promotion to officials who have completed a minimum period of two years in their grades, after consideration of their comparative merits, and that their new grade “should, as a rule, be within the grade bracket as defined in the job description” of the officials concerned. The criteria and precedence for promotion are set out in Rule of Application No. 4 of the Staff Regulations.

As a result of the administrative reform implemented in Eurocontrol between 2008 and 2010 the complainants were assigned to the highest grade of their bracket. Mrs A. M. and Mr W. challenged this assignment before the Tribunal (see Judgments 3275 and 3278, also delivered this day).

On 21 September 2010 Eurocontrol’s Board, chaired by the Director General, decided not to organise a promotion round for that year, primarily because of the difficult budgetary situation and of the fact that a 3.7 per cent salary increase had been approved by the Member States. Furthermore, the implementation of a reduced promotion round in 2009 had already had a negative impact on both staff and managers. Each of the complainants submitted to the Director General an internal complaint against that decision: Mrs A. M. on 3 January 2011, and Messrs D. and W. on 29 October 2010. In the absence of any decision from the Director General on 31 May 2011 for Mrs A. M. and on 28 March 2011 for Messrs D. and W., they each filed a complaint with the Tribunal challenging what they deem to be an implicit decision rejecting their internal complaints.

B. Firstly, the complainants allege that the decision not to hold a promotion round in 2010 constitutes a violation of the Staff Regulations since the promotion procedure set out in Rule of Application No. 4 was not carried out.

Secondly, they argue that Eurocontrol’s Board did not provide adequate reasons for its decision of 21 September 2010. According to them, the 3.7 per cent salary increase was wrongly invoked as being a constraining financial factor since the cancellation of the promotion

round in effect reduced the budgetary impact of that increase. They add that the reduced promotion round implemented in 2009 cannot provide any justification for the decision not to hold a promotion round in 2010.

Thirdly, they allege that the decision is discriminatory since the “balance” existing between promotions allocated to operational and non-operational staff has now been upset as promotion rates have been drastically reduced for the latter category, to which the complainants belong.

Fourthly, they contend that the decision violated the “spirit of the administrative reform and the promises made in the run-up to it” inasmuch as one of the aims of the reform was to base advancement more on merit (through promotion) than on length of service (step advancement within a grade).

Messrs D. and W. both assert that the decision was also taken without due regard for staff careers as the 2010 promotion round constituted the last chance for some of the staff to be rewarded for their work before they left under the early termination of service scheme.

Mr W., who was a staff representative at the material time, alleges violation of the Memorandum of Understanding (MoU) Governing Relations Between Eurocontrol and Three Representative Trade Unions. He stresses that the Tribunal, in Judgment 2869, considered that Eurocontrol had violated that MoU insofar as it had failed to adopt implementing rules in that respect, which, he points out, it has still not adopted. He adds that the Tribunal also quashed the decision not to promote him in 2007 but that he is “further away than ever from promotion”, given that he is at the top of his grade bracket. He emphasises that he will now have to succeed in two cases before the Tribunal in order to be promoted with effect from 2010 and that, since he will retire in May 2014 at the latest, “[a]ny later promotion would be of limited usefulness”.

All three complainants allege that the decision deprives them of the possibility of receiving specific rewards, and Mr D. also states

that he was deprived of the “opportunity to discuss [his] career development”.

The complainants ask the Tribunal to quash the challenged decision and to order Eurocontrol to carry out the promotion procedure for 2010. Mrs A. M. further requests that the question of her promotion be considered for that year, whilst Mr W. makes the same request for the years 2007 to 2010. They all claim damages. Mrs A. M. and Mr W. also claim costs.

C. In its replies Eurocontrol informs the Tribunal that, having been apprised of the opinion of the Joint Committee for Disputes of 28 April 2011, the Principal Director of Resources, acting on behalf of the Director General, decided on 5 July 2011 to reject the three internal complaints as irreceivable and legally unfounded.

Considering that the complainants do not appear to have the “concrete interest” required to file a complaint before the Tribunal, Eurocontrol challenges the complaints’ receivability. It stresses that the complainants’ interest is purely theoretical since they were at the top of their grade brackets and would therefore not have been considered for promotion in 2010. It adds that Mr W.’s claim ordering the reconsideration of his promotion is receivable only insofar as it concerns 2010.

On the merits, Eurocontrol submits that the appropriations entered in the annual budget constitute the maximum authorised expenditure, not amounts which must be spent. It indicates that, as the staff had been duly informed by an e-mail of 26 February 2010, in the course of the autumn of 2010 the Director General decided, in the exercise of his discretionary power under Article 3(1) of the Statute of the Agency, not to organise a promotion round for that year. It stresses that this decision was taken in order to avoid frustrating the staff by holding a round even more limited than the one held in 2009, and in light of a particularly difficult budgetary situation due to a reorganisation process and the implementation of the early termination of service scheme. It argues that in the absence of any allocation of budget to a promotion round, Rule of Application No. 4 did not apply.

Eurocontrol rejects the complainants' allegation of discrimination since operational and non-operational staff are two separate categories governed by different rules, including with regard to promotions. It further denies that the "spirit of the administrative reform" was violated, as the rules and conditions relating to the awarding of promotions have remained the same.

Regarding the argument that the Board's decision was taken without due regard for staff careers, Eurocontrol points out that there is no right to promotion and therefore, that it is under no obligation to promote staff as soon as they are eligible, even when the official is leaving under the early termination of service scheme, which, in any event, is not the complainants' case. It also asserts that Mr W.'s argument relating to an alleged violation of the MoU is irrelevant.

Eurocontrol states that promotion and specific rewards are separate matters, as such rewards fall within the scope of Article 44 of the Staff Regulations and of Rule of Application No. 39. As far as the opportunity to discuss career development is concerned, it falls within the scope of Article 43 and of Rule of Application No. 3.

It asks that the three complaints be joined with another similar complaint presented before the Tribunal.

D. In her rejoinder Mrs A. M. enlarges on her pleas. She contends that the e-mail of 26 February 2010 was not an adequate way to inform the staff of an important matter since it was not detailed enough. She contends that the cancellation of the promotion round for 2010 annihilated any chance that she could be promoted or receive one of the specific rewards that are, in her opinion, included in the promotion budget. She adds that by the very fact of delaying his decision not to hold a promotion round until the autumn of 2010, the Director General violated all the time limits stipulated in Rule of Application No. 4.

E. In its surrejoinder to Mrs A. M.'s rejoinder, Eurocontrol maintains its position.

CONSIDERATIONS

1. The complainants filed nearly identical complaints (dated 28 March 2011 for Mr W. and Mr D., and 31 May 2011 for Mrs A. M.) against the implied rejection of their internal appeals impugning the decision of the Director General not to hold a promotion exercise in 2010. The internal appeals of Messrs W. and D. also impugned the implied decision not to “determine before 31 May each year the maximum number of promotion possibilities for each grade and category” in accordance with Article 4 of Rule of Application No. 4. As they did not receive a response to their appeals, they filed their complaints directly with the Tribunal.

2. The Joint Committee for Disputes (JCD) met on 29 March 2011 and delivered its report dated 28 April 2011 to the Director General for consideration. In the report the JCD unanimously found the appeals “to be founded in that they identify a failing” and recommended “that the DR [Directorate of Resources] acknowledge this failing in order to give satisfaction to the complainants whose complaints are, in the Committee’s opinion, well founded”. Under the deliberations, the JCD considered the appeals timely and receivable and rejected Eurocontrol’s assertion that “only the President of the Staff Committee was able to institute action [...]” as it considered “any member of staff who felt that he or she had been unfairly treated by a decision, or a lack of one, was entitled to submit a complaint”. It went on to state that “the annual promotion round was not entirely at the discretion of the Director General”. The JCD noted that “[a]lthough the decision to award a promotion lay with the Director General, the latter was required to organise an annual promotion round, and the absence of such a round for 2010 constituted an implicit decision adversely affecting staff. [...] [T]he members did not feel that the DR had put forward any arguments on the substance justifying the absence of a promotion round for 2010.” They also criticised the lack of transparency and considered that there was “clear evidence of an administrative failing” but did not feel that the failing justified compensation in respect of moral damages, and they

“acknowledged that remedying the failing in practical terms presented a problem”. The JCD “was therefore of the opinion that acknowledgement by the DR of this failing would reflect its position on the merits of the complaints”.

3. The express decision of the Director General, communicated to the complainants Messrs D. and W. in identical letters dated 5 July 2011, rejected their appeals “as not receivable and subsidiarily as legally unfounded”. In the 5 July letters it was noted that the complainants’ names “did not appear in the list of staff eligible for promotion last year because [they] ha[d] reached the last grade of [their] job bracket[s]” and as they could not be appointed to the next grade, their appeals challenging the decision not to hold a promotion round in 2010 were irreceivable. With regard to the merits, the Director General did not support the analysis and conclusions of the JCD as “there was no violation of the provisions of Rule of Application No. 4 [...] because the staff were properly informed that the decision concerning the process of promotion had been put on hold until the autumn 2010”. It was noted that the discussions relating to the matter of promotions began in January 2010 and that the staff was informed by “an attachment to the DR News bulletin released on 26 February 2010 [that] the final decision as to whether or not to have a round of promotions would be taken in the autumn, taking into account the financial situation, in particular the results of the planned pay increase for 2010 (3.7%), to be presented to the Provisional Council in May 2010”. It was further noted that “[t]he official decision concerning the promotion round was ultimately taken by Board 09/10 in September 2010” which was “immediately communicated to staff through the usual cascading process” and that “there was no justification to start the specific stages of the process applicable to a promotion exercise, as set out by Rule of Application No. 4”, which regards the determination of the maximum number of promotions, the constitution of the promotion boards and the publication of eligible staff, as the “process would have been totally void of purpose”. With regard to the alleged violation of relevant legal provisions, the Director General did not support the statement of

principle made by the members of the JCD which claimed that the annual promotion round was not entirely at his discretion, and that he was required to organise an annual round. The letters noted that:

“Pursuant to the provisions of Article 3 of Annex I to the amended Convention, the Director General enjoys wide discretionary powers in the management of the Agency. The Director General did not abusively exercise the possibilities granted to him by deciding that savings should be made as regards staff expenditure. Article 45 of the Staff Regulations links the possibility of the Director General granting promotions to the existence of budgetary appropriations. [...] The recommendations approved by the Provisional Council on 18.11.09 within the annual budgetary procedure referred to the imperative need to maintain the cost-base at the level of 2008 (536,300K euros). The savings with regard to the costs of a 2010 promotion round (i.e. 1,235K euros) fitted perfectly within this perspective. The Board had indeed felt that allocating half this amount to a round of promotions and other rewards, limited in scope, would only create frustration among staff. [...] The Director General chose to react to the particular financial constraints of the Organisation, and in particular to the obligation to respect the limitation imposed on the cost-base, by using an appropriate means to realise savings. The measures to limit pay increases among the Member States included a total pay freeze. In this context, the temporary suspension for 2010 of a promotion round at EUROCONTROL seems a reasonable and appropriate response to a difficult financial situation.”

Mrs A. M. also received a letter dated 5 July 2011, identical in content to the letters received by Messrs D. and W., but written in French, in reply to her French-language internal appeal contesting the same decision (not to hold a promotion round in 2010).

4. Eurocontrol requests the Tribunal to join the complaints (A. M. No. 4, D. No. 2, W. No. 5, and W. No. 2) “since the grievances and arguments are essentially the same”. In all cases, it disputes their receivability and subsidiarily requests that they be rejected as being legally unfounded and that the requests for moral damages and costs be denied.

5. The complainants request the Tribunal to quash the challenged decision; to order Eurocontrol to carry out promotion exercises for 2010; to order it to reconsider the complainants for

promotion in 2010 (Mr W. requests that he be considered for promotion in one of the years 2007-2010); and to award them moral damages and costs.

6. The shared grounds for complaint are as follows:

- (a) violation of Rule of Application No. 4;
- (b) lack of proper justification for the 09/10 Eurocontrol Board's September decision not to hold promotion exercises for 2010;
- (c) the decision not to hold promotion exercises for 2010 was discriminatory between non-operational staff and operational staff;
- (d) violation of the spirit of the administrative reform and the promises made in the run-up to it; and
- (e) the decision was taken in disregard to staff careers.

Mr W. adds that the decision is a violation of the MoU and that as he retires in May 2014, his union activity will have had rather drastic consequences for his pension.

7. As the complaint by Mrs W. has been filed in French, the Tribunal shall decide on it separately. For the remaining complaints, the Tribunal finds it convenient that they be joined. "The complaints, which contain some common claims and rest in part on the same arguments, are, to a large extent, interdependent, and the Tribunal finds it appropriate that they be joined, notwithstanding the complainant's position (see Judgments 2861, under 6, and 2944, under 19)" (see Judgment 3103, under 5). As the Tribunal finds the complaints to be unfounded on the merits, it is unnecessary to rule on their receivability.

8. With regard to the alleged violation of Rule of Application No. 4, the Tribunal observes that promotions are awarded by the Director General pursuant to Article 45 of the Staff Regulations, which states in relevant part: "[p]romotion 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. [...] A Rule of Application shall lay down the criteria and processes applicable for promotion.” Rule of Application No. 4 specifies inter alia that “[e]ach year, the Director General shall provide Directors and Heads of Service with guidelines regarding the portion of budgetary appropriations allocated to promotions. On this basis, Directors and Heads of Service shall determine before 31 May each year, the maximum number of promotion possibilities for each grade and function group.” The Director General decided to postpone the decision whether or not to hold the promotion round for 2010 until the autumn of 2010. The staff was informed of this decision by an annex to DR News issue 1/2010 – February, under the title “Revisiting the promotions process”. The decision of Eurocontrol’s Board not to hold the promotion round for 2010 was due to budgetary constraints. There was no violation of Rule of Application No. 4 in this case as that Rule is secondary to Article 45 which governs whether or not a promotion round will be held. The Director General decided in a proper execution of his discretionary power, that due to budgetary constraints, there would be no promotion round for 2010. As such, there was no need for Rule of Application No. 4 to be activated as there was no promotion process to regulate.

9. The complainants claim that there was a lack of proper justification for the 09/10 Board’s September decision not to hold promotion exercises for 2010. This claim is unfounded. The Tribunal is of the opinion that the justification of “budgetary restraints” is sufficient to support these decisions. The Board considered that “[t]he promotion round in 2009 ha[d] demonstrated that a limited promotion round, which would have less budgetary impact, [was] not an effective option” as it could prove frustrating to staff members who would be faced with an even more restricted promotion round than the previous year. As such it decided not to hold the 2010 promotion exercises and proposed the relaunch of the promotions process in 2011. This decision was within the proper limits of discretion.

10. The claim that the decision not to hold promotion exercises for 2010 was discriminatory between non-operational staff and operational staff is unfounded. Non-operational and operational staff are two separate categories of staff, ruled by separate regulations.

11. The complainants claim that there was a violation of the spirit of the administrative reform and the promises made in the run-up to it, is unfounded. The Tribunal notes that consistent case law states that staff members are not entitled to promotions, as promotions are discretionary decisions (see Judgments 263, under 2, 304, under 1, 940, under 9, 1016, under 3, 1025, under 4, 1207, under 8, 1670, under 14, 2060, under 4, 2835, under 5, and 2944, under 22). In the present case, the decision was made not to hold a promotion round for 2010 due to the budgetary constraints. The Board proposed the relaunch of the promotion exercises in 2011, as mentioned above. Considering Eurocontrol's intention to hold a promotion round for 2011 subject to the availability of budgetary funds, the Tribunal is of the opinion that the lack of a 2010 promotion round is not unlawful, as argued by the complainants.

12. The complainants also claim that the decision was taken in disregard of staff careers. The Tribunal notes that as the decision was justified and is to be considered a proper exercise of discretion, and as the suspension of promotion exercises was planned for only one year, it is unfortunate that some staff were negatively affected by the decision but recognises that Eurocontrol must decide based on the overall well-being of the Organisation as a whole and cannot base its decisions only on the specific and particular situations of individual staff members. Considering this the Tribunal finds this claim unfounded. Similarly, Mr W.'s claim that the impugned decision constitutes a violation of the MoU, is also unfounded. Judgment 2869 states that the Administration has the duty to implement the MoU in Mr W.'s case. The MoU states that "[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".

Considering the nature of the current impugned decision, which is a general decision immediately affecting a group of employees, the Tribunal notes that it is correct that the decision does not take into consideration individual situations. Individual situations, such as that of Mr W. and the MoU, must be considered by Eurocontrol when adopting a decision that implements a general decision, or when taking an individual decision on its own. As such, there was no need for Eurocontrol to implement the MoU with regard to the current impugned decision.

DECISION

For the above reasons,
The joined complaints are dismissed.

In witness of this judgment, adopted on 7 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Claude Rouiller
Michael F. Moore
Catherine Comtet