

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**119th Session**

**Judgment No. 3404**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr B. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 16 October 2012, Eurocontrol's reply of 25 January 2013, the complainant's rejoinder of 2 May and Eurocontrol's surrejoinder of 9 August 2013;

Considering the applications to intervene filed by Ms G. G., Ms J. H., Ms B. M., Ms C. M. and Ms Y. R. on 16 October 2012 and by Mr R. S. on 18 October 2012 and the letter of 25 January 2013 in which Eurocontrol stated that it had no objection to these applications;

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 neither party has applied;

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

A. The lists of Eurocontrol staff members eligible for promotion in 2012 were published on 21 March 2012. As the complainant's name was not on them, he lodged an internal complaint on 11 May. The Joint Committee for Disputes, to which the case was referred, considered that the internal complaint was irreceivable in part and it issued a divided opinion on the merits, with two of its members recommending the rejection of the internal complaint as unfounded and the other two considering that it should be allowed. The complainant was informed

by a memorandum of 18 July 2012, which constitutes the impugned decision, that his internal complaint had been rejected.

B. The complainant submits that, by not including him of the lists of staff members eligible for promotion, although he should have been on them, since he met the length of service requirement and had not reached the last grade in his function group, Eurocontrol breached his right to career advancement and its duty of care. He maintains that he did not enjoy treatment equal to that of colleagues who were considered for promotion. The complainant, who is in the last grade of his career bracket, says that Article 45 of the Staff Regulations governing officials of the Eurocontrol Agency has been infringed in that it does not rule out promotion to a grade in a higher career bracket and that, if the Tribunal were to construe Rule of Application No. 35 concerning job management as prohibiting such promotion, it should declare it to be unlawful. He adds that the criteria for promotion set forth in Office Notice No. 10/12, which announced the holding of the 2012 promotion exercise, unlawfully restricted the scope of that article. In his opinion, his chances of obtaining promotion through reclassification or competition are minute or even non-existent.

The complainant asks the Tribunal to set aside the impugned decision, the lists of staff members eligible for promotion of 21 March 2012 and all the subsequent decisions, including the promotion list for 2012, which was published on 15 June 2012. He also claims damages for moral injury and costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable in part, because the claim that the list of 15 June 2012 should be set aside is tantamount to asking the Tribunal to order it to promote the complainant.

On the merits Eurocontrol draws attention to the Tribunal's case law according to which there is no right to promotion. It emphasises that staff career advancement is achieved through competition and reclassification and that, while promotion to a higher career bracket is not prohibited, it must remain an exception. In this connection, it adds

that Office Notice No. 10/12 merely confirms the restrictions contained in Article 45. Since all staff members are subject to the condition that, in order to qualify for promotion, they must not hold the last grade in their career bracket, there can be no question of any infringement of the principle of equal treatment.

D. In his rejoinder the complainant enlarges on his pleas and explains that the purpose of his complaint is not to have the Tribunal order his promotion.

E. In its surrejoinder Eurocontrol maintains its position.

#### CONSIDERATIONS

1. Facts concerning the complainant's career at Eurocontrol and the relevant provisions of the administrative reform which entered into force on 1 July 2008 are to be found in Judgment 3230, delivered on 4 July 2013.

2. In pursuance of the new provisions which had entered into force the complainant's grade was renamed B\*10.

After the former A, B and C categories had been subsumed under two function groups, Administrators (AD) and Assistants (AST), the complainant was placed in the AST group, at grade AST10 in the AST8-AST10 career bracket.

3. Office Notice No. 10/12 was published on 8 March 2012. In substance it announced that a "procedure for grade promotion [was] being organised for 2012" and that for that purpose "the list of staff eligible for promotion [would] comprise those officials and servants who ha[d] at least two years' seniority in their grade in 2012 and [were] not yet in the last grade of their respective career bracket as determined in the most recent decision concerning their administrative status".

4. The complainant impugns the decision of 18 July 2012, taken at the end of the internal appeal procedure, rejecting as irreceivable in part and unfounded the internal complaint which he had lodged on 11 May 2012 in order to challenge his non-inclusion on the lists of staff members eligible for promotion in the 2012 exercise, which had been published on 21 March 2012.

5. Six applications to intervene have been filed.

The Organisation has no objection to these applications since, in its opinion, all the interveners are in situations in fact and in law similar to that of the complainant.

6. The promotion procedure in Eurocontrol is governed in particular by Article 45 of the Staff Regulations, the first paragraph of which states: “Promotion 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.”

Article 6 of Rule of Application No. 4, concerning the procedure for grade promotion, stipulates that “[o]nly officials entered on the promotion lists previously published in the Agency may be promoted”.

7. The complainant first contends that Eurocontrol has not respected his right to career advancement; in effect, by refusing to put him on the “list of promotion candidates” and by thus automatically denying him any possibility of promotion in 2012, “the Agency [...] breached [his] inalienable right [...] to the prospect of career advancement”.

8. The Tribunal holds that, while every official should have some prospect of advancement within an organisation and may therefore legitimately hope to move up to a higher position one day, there is no automatic right to promotion. This right is limited, on the one hand, by the official’s seniority, qualifications, skills and performance and, on the other, by the Organisation’s administrative structure and budgetary

resources (see Judgments 526, under 4, 3279, under 11, and 3280, under 7, and the case law cited therein).

In the instant case the complainant has not proved that his lack of promotion in 2012 undermines his prospect of advancement within Eurocontrol, even if he had little possibility of moving up to grade AST11 by competition or as a result of the reclassification of his post during the year in question.

This plea therefore fails.

9. The complainant then submits that, for several years, he has met the conditions for promotion in respect of the minimum length of service in his grade laid down in Article 45 of the Staff Regulations; that as he is classed in grade AST10, he has not yet reached the last grade in his function group, which is AST11, and that as he could therefore be promoted to that grade, he should have been included in the lists of officials eligible for promotion in 2012. He also contends that Article 45 of the Staff Regulations has been breached in that neither that article nor Rule of Application No. 4 formally prohibits promotion to a grade in a higher career bracket.

10. The defendant organisation replies that the complainant does not fulfil the three conditions of eligibility for promotion in the year in question. Although he has not reached grade AST11, the last grade in his category, he does not meet one of the conditions laid down in Article 45 of the Staff Regulations, namely that the higher grade to which he aspires must, “as a rule”, be in the grade bracket as defined in the job description, since he holds grade AST10, which is at the top of the career bracket AST8-AST10 to which his post belongs.

11. The above-mentioned Article 45 states that “[t]he next higher grade should, as a rule, be within the grade bracket as defined in the job description”.

12. The complainant submits that the phrase “as a rule” does not mean that promotion to a grade in a higher bracket is prohibited.

13. The Tribunal considers that the aforementioned text must be construed as meaning that the stated principle is the rule, but that it is permissible, in some special cases, to depart from that rule. That text did not, however, prevent the Director General from deciding, as he did in Office Notice No. 10/12, not to depart from the rule in 2012, as this decision applied only to one specific year.

The complainant's argument in this respect is therefore likewise unfounded.

14. The complainant submits that Rule of Application No. 35, concerning job management, should be declared unlawful if it were to be construed as prohibiting promotion to a higher career bracket, as that prohibition would conflict with Article 45 of the Staff Regulations and with the right to career advancement.

15. The Tribunal does not, however, interpret Rule of Application No. 35 as prohibiting promotion to a higher career bracket.

This argument is therefore of no avail.

16. The complainant's final plea is that the principle of equal treatment and the duty of care have been breached since, in his opinion, all officials with a minimum period of two years' service in their grade and who have not yet reached the last grade in their function group are, as a rule, eligible for promotion. He is of the opinion that, by refusing to consider his merits with a view to granting him promotion, if appropriate, Eurocontrol discriminated against him in comparison with his colleagues who did receive such consideration.

17. As the Tribunal has consistently held, the principle of equal treatment applies only to officials in a similar situation in fact and in law. This is not the case here, as the complainant has not provided any example of an official in the same situation as him who was included on the list of officials eligible for promotion in 2012.

18. The Tribunal considers that the duty of care may not be relied upon in the instant case since, as stated above, the complainant

could not lawfully be included in the lists of officials eligible for promotion in 2012 (see, in particular, Judgment 2587, under 10).

19. Since none of the complainant's pleas can be allowed, the complaint must be dismissed, as must the applications to intervene, without there being any need to rule on the objections to receivability raised by the defendant organisation.

#### DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 14 November 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

*(Signed)*

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ