

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D.-E. (No. 3)

v.

Eurocontrol

120th Session

Judgment No. 3494

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms N. D.-E. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 10 October 2012, Eurocontrol's reply of 17 January 2013, the complainant's rejoinder of 8 March and Eurocontrol's surrejoinder of 14 June 2013;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant challenges the rejection of her candidature for a position in Eurocontrol.

The complainant joined Eurocontrol on 1 April 1999 as a Typist 2nd class, at grade C5.

Between January 2011 and February 2012 she held a post of Advanced Secretary in grade AST5 (former grade C2) in the grade bracket AST2-AST5 in the Network Management Directorate (DNM).

As from 1 March 2012 she held the post of staff union secretary, still at grade AST5.

In pursuance of the “iMOVE” mobility policy which had been introduced by Information Note to Staff No. I.09/05 of 21 September 2009 and which was designed to improve the flexible deployment and accelerate the reallocation of staff, a vacancy for a Technical Contracts Assistant (Administrative Assistant), in the grade bracket AST3-AST6, was published on 5 March 2012 as “iMOVE Opportunity 2012-004”.

The complainant, who applied for this post, was informed the following day (27 March 2012) that her candidature had been rejected because her grade bracket, AST2-AST5, did not match that of the post advertised.

On 25 June 2012 the complainant lodged an internal complaint against the decision of 27 March 2012 to reject her candidature. She requested that this decision be cancelled and that a procedure in accordance with the Staff Regulations governing officials of the Eurocontrol Agency and the Rules of Application thereof be organised with the publication of a vacancy notice. She also requested that the “iMOVE” procedure should not be applied.

Having received no response to her internal complaint, on 10 October 2012 the complainant filed a complaint with the Tribunal under Article VII, paragraph 3, of its Statute, in which she requested the quashing of what she regarded as the implied dismissal of her internal complaint, the quashing of the decision of 27 March 2012 rejecting her application for the post of Technical Contracts Assistant (Administrative Assistant), and the cancellation of the “iMOVE procedure” and of any decision concerning her which had been taken pursuant to it. She asked that Eurocontrol be ordered to pay “20,000 euros in compensation for the injury [suffered by her through] loss of an opportunity for career advancement [...] on account of that fact that she had been deprived of the possibility of moving up to a higher grade bracket”, and “5,000 euros in compensation for the moral injury [suffered]” and costs in the amount of 5,000 euros.

Eurocontrol asks the Tribunal to find the complaint irreceivable and, subsidiarily, it requests the dismissal of all the complainant’s claims as unfounded.

CONSIDERATIONS

1. The complainant challenges the decision to reject her candidature for a job vacancy announced under the new iMOVE mobility policy, because her grade bracket did not match that of the post advertised.

Receivability

2. Eurocontrol challenges the receivability of the complaint on the basis that the complainant did not seek the cancellation of the “iMOVE procedure” in her internal complaint, that the present complaint is without object and that she does not have a “sufficiently real personal cause of action”.

3. It submits, firstly, that in her internal complaint of 25 June 2012 the complainant did not request “the cancellation of the iMOVE procedure” in general, as introduced by Note No. I.09/05 of 21 September 2009, and that her claim to that effect is new and therefore irreceivable.

4. The Tribunal has consistently held that when impugning an individual decision that concerns a staff member directly, the latter may challenge the lawfulness of any general measure forming the legal basis of that decision (see Judgments 1000, under 12, 1329, under 7, 2129, under 7, or 3427, under 29).

5. In the instant case it is plain that in her internal complaint, by requesting in substance that the “iMOVE procedure” should not be applied, the complainant intended to challenge the lawfulness of that procedure.

She cannot therefore be considered to have entered a new claim. In fact, she remains within the bounds of the claims in her internal complaint when, as an incidental claim, she asks the Tribunal to cancel Note No. I.09/05.

6. With reference to the claim that the “iMOVE opportunity 2012-004” competition procedure should be cancelled, Eurocontrol states that this procedure proved unsuccessful and was closed because the suitable candidates withdrew, and that a new “iMOVE opportunity 2012-044” was published, for which the complainant could have applied, as it was in her grade bracket, but she did not do so. It submits that, when the complaint was filed, it concerned a post that no longer existed. Referring to the precedent established by the Tribunal in Judgment 1357, under 11, it asserts that Eurocontrol was “free to withdraw a notice of vacancy at any time”. In its view, the complaint is therefore without object and must be dismissed as irreceivable.

7. The Tribunal considers that, even if Eurocontrol did in fact withdraw the vacancy notice, given that it did so after the complainant had been excluded from the competition procedure and after she had lodged her internal complaint, that complaint did have substance at the time it was filed and the decision to dismiss it produced effects open to review by the Tribunal.

8. Eurocontrol contends that the complainant has no real cause of action to challenge either the selection procedure that was followed or the lawfulness of the “iMOVE procedure”.

9. However, as the Tribunal has consistently held, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever her or his hopes of success may be (see Judgments 1549, under 9, 2163, under 1, or 3209, under 11).

In the instant case, the complainant does indeed have a cause of action in challenging the lawfulness of the procedure followed which, she contends, led to the rejection of her candidature.

10. It may be concluded from the foregoing that none of the objections to receivability raised by Eurocontrol may be accepted.

The merits

11. The complainant challenges the lawfulness of the procedure used to fill the post for which she applied, firstly, because the Principal Director of Resources had no authority to adopt general decisions for giving effect to the Staff Regulations and, secondly, because the procedures applying to a change of duties within Eurocontrol were not respected.

12. She contends that Note No. I.09/05, on which the Administration based the organisation of the recruitment procedure and its rejection of her candidature, “was adopted unilaterally, with no consultation whatsoever and completely unlawfully by the Principal Director of Resources, even though it referred to the Staff Regulations governing officials of the Eurocontrol Agency”. She emphasises that the Director in fact had no authority to adopt general provisions for giving effect to the Staff Regulations, since they may be determined only by the Rules of Application, in accordance with the procedure set forth in Article 100 of the Staff Regulations, which reads:

“The general provisions for giving effect to these Staff Regulations shall be determined by Rules of Application, implementing rules and office notices of the Director General, who, in the case of Rules of Application, shall notify the Provisional Council.

Individual provisions for giving effect to the Staff Regulations shall be decided either by the Director General or, by delegation of powers, by the official(s) responsible for staff management.”

The complainant submits that since Note No. I.09/05 was not an individual decision but a regulatory text, the Principal Director of Resources was not authorised to issue it.

13. The Tribunal observes that the disputed note was signed by the Principal Director of Resources and that it contains general provisions for giving effect to the Staff Regulations which, according to Article 100 of the Staff Regulations, must be determined by Rules of Application, implementing rules and office notices of the Director

General. It is clear from the provisions of Article 100 cited above that only individual implementing decisions may be delegated.

14. On this plea, Eurocontrol replies that in 2009 the internal structure of Eurocontrol was reorganised and that, in accordance with a decision of the Director General which was then in force, the Principal Director of Resources was fully authorised to adopt measures regarding internal staff mobility.

15. The Tribunal finds, however, that the document to which Eurocontrol refers describes the post and duties of the Principal Director of Resources and may under no circumstances be regarded as a valid delegation of power authorising the holder of that post to take general decisions. Moreover, as stated above, Article 100 of the Staff Regulations permits delegation only in respect of individual implementing decisions.

16. In accordance with the Tribunal's case law, in order to be valid, a delegation of authority must have some basis in the rules. Failing that, any action will be *ultra vires* (see, for example, Judgment 1696, under 5, and the case law cited therein).

17. In the present case Eurocontrol has not established that the Principal Director of Resources had received a valid delegation of authority to adopt general provisions such as those contained in Note No. I.09/05. It follows that by issuing that note, which is not an individual decision but a regulatory text defining the procedures applying to a change of duties within Eurocontrol, the Principal Director of Resources acted *ultra vires*. For this reason, Note No. I.09/05 is unlawful.

The decision of 27 March 2012 rejecting the complainant's candidature for the post of Technical Contracts Assistant (Administrative Assistant) and the implied decision dismissing her internal complaint, which were taken on the basis of that note, must therefore be quashed, without there being any need to rule on the complainant's second plea.

18. The complainant asks the Tribunal to order Eurocontrol to pay the sum of 20,000 euros in compensation for the injury suffered owing to the loss of an opportunity for career development, in that she was denied access to a higher grade bracket, in violation of her right to career advancement.

19. The Tribunal will not award the complainant the compensation she claims for loss of opportunity because, under the provisions of the Staff Regulations in force, Eurocontrol officials may not in principle be promoted to a higher grade bracket except through a competition (see Judgment 3404, under 8). However, the Tribunal considers that the unlawful situation noted under 17 above caused the complainant moral injury, for which compensation shall be granted in the amount of 5,000 euros.

20. As the complainant succeeds in part, she is entitled to costs which the Tribunal also sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of 27 March 2012 rejecting the complainant's candidature and the implied decision dismissing her internal complaint against that decision are quashed.
2. Eurocontrol shall pay the complainant 5,000 euros in compensation for moral injury.
3. It shall likewise pay her costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, 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 30 June 2015.

(Signed)

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ