

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D.-E. (No. 4)

v.

Eurocontrol

120th Session

Judgment No. 3495

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms N. D.-E. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 November 2012, Eurocontrol's reply of 1 March 2013, the complainant's rejoinder of 6 June and Eurocontrol's surrejoinder of 6 September 2013;

Considering the applications to intervene filed by Mr K. E. and Mr Y. P. on 9 November 2012 and the letter of 1 March 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 may be summed up as follows:

The complainant challenges the fact that she was not promoted in the 2012 promotion exercise.

On 1 July 2008 a wide-ranging administrative reform entered into force at Eurocontrol, the details of which are set out in Judgment 3189. At that juncture, the non-operational B and C staff categories were replaced for a two-year transitional period with the categories B* and C*. On 1 July 2010, at the end of that transitional period, these two categories were merged in the Assistant function group (AST),

which has 11 grades (AST1 to AST11) grouped in several grade brackets. At the material time, the complainant – who had formerly been a category C official – was classed in grade AST5 in the AST2-AST5 grade bracket.

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 [had] 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”.

The list of Eurocontrol staff members eligible for promotion was published on 21 March 2012. As the complainant’s name was not on the list, she lodged an internal complaint on 12 June. She requested the cancellation of the list and the holding of a promotion exercise in which her merits would undergo comparative examination.

When the complainant filed her complaint with the Tribunal on 9 November 2012 she had not yet received any response to her internal complaint. She therefore impugned what she took to be an implied decision to dismiss it. In addition to requesting the cancellation of that decision, she asked for the cancellation of the list of staff eligible for promotion in the 2012 exercise and that of all subsequent decisions adopted during that exercise, including the list of promoted officials. She also claimed 1,500 euros in compensation for moral injury and costs in the amount of 5,000 euros.

In the meantime the complainant’s internal complaint had been forwarded to the Joint Committee for Disputes. The Committee met on 3 October, but did not hear the complainant. In its opinion of 31 October 2012 it unanimously considered that the internal complaint was partly irreceivable, because it was time-barred insofar as the complainant had not challenged the reclassification decisions of July 2008 and 2010 resulting from the implementation of Rule of Application No. 35 concerning job management. As far as the merits were concerned, two members of the Committee recommended that

the internal complaint be allowed in accordance with the “principle of legitimate expectations” and the “right to a career”, whereas the other two members recommended that it be dismissed, since they held that the complainant was not eligible for promotion under Rule of Application No. 4 concerning the procedure for grade promotion provided for in Article 45 of the Staff Regulations governing officials of the Eurocontrol Agency, as confirmed by Office Notice No. 10/12. The complainant was informed by a memorandum of 10 December 2012 that, in accordance with the opinion of the latter two members of the Joint Committee for Disputes, her internal complaint had been dismissed by the Director General. In her rejoinder, the complainant requests that that decision be quashed.

Eurocontrol asks the Tribunal to join this complaint with another case concerning the same issue. It submits that the complaint is irreceivable in part, because the claim that the list of officials promoted in 2012 should be cancelled is in effect a request that the Tribunal order it to promote the complainant. It asks the Tribunal to dismiss the complaint as irreceivable insofar as the complainant alleges that Rule of Application No. 35 is unlawful. It considers all her other claims to be groundless.

In its surrejoinder, Eurocontrol submits that insofar as the complaint seeks the cancellation of all the decisions taken after the publication of the list of staff eligible for promotion and in the context of the 2012 exercise, including the list of promoted officials, it is not receivable, since the complainant must impugn specific acts causing her injury.

CONSIDERATIONS

1. In this complaint, filed with the Registry of the Tribunal on 9 November 2012, the complainant impugns the implied decision to dismiss her internal complaint challenging the non-inclusion of her name on the list of staff eligible for promotion in the 2012 exercise, which was published on 21 March 2012.

2. However, in the meantime, by a decision of 10 December 2012, the Director General explicitly dismissed the complainant's internal complaint after the Joint Committee for Disputes had given a divided opinion. As the complainant has challenged that explicit decision in her rejoinder, the complaint may be regarded as being directed against that decision.

3. Two applications to intervene have been filed.

The Organisation does not object to these applications because, in its opinion, the interveners are in situations in fact and in law similar to that of the complainant.

4. The details of the complainant's career may be found in Judgment 3494 also delivered on this day.

5. The promotion procedure in Eurocontrol is governed mainly by Article 45 of the Staff Regulations, which states in its first subparagraph that "[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."

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

6. Amongst other things, the complainant asks the Tribunal to cancel the list of staff eligible for promotion in the 2012 exercise, which was published on 21 March 2012 following Office Notice No. 10/12 of 8 March 2012, since her name was not included in it, to quash the decision dismissing the internal complaint which she lodged on 12 June 2012 and to order Eurocontrol to pay 1,500 euros in compensation for moral injury, and to bear the full costs of proceedings, which she estimates at 5,000 euros.

7. Eurocontrol requests the joinder of this complaint with another case. This request has, however, become moot since the Tribunal has already ruled on that other case in Judgment 3404, delivered on 11 February 2015.

8. The complainant contends, first, that for several years she has met the minimum conditions of seniority in her grade, as laid down in Article 45 of the Staff Regulations, for receiving promotion; that as she holds grade AST5, she has not yet attained the highest grade in her function group, which is AST11; that as she is therefore eligible for promotion, according to the aforementioned Article 45, she should have been on the list of officials eligible for promotion in the 2012 exercise; and that since her name was omitted from that list, her merits could not be compared with those of other officials. She therefore considers that the decision to exclude her from the 2012 promotion exercise was unlawful.

9. In support of her complaint, she enters several pleas, namely that her right to career advancement was breached, that Article 45 of the Staff Regulations was violated, that Rule of Application No. 35 is unlawful and that the principle of equal treatment and the duty of care have been breached.

10. In her first plea, the complainant submits that by refusing to include her name on the “list of promotable officials” and to consider her candidature for a possible promotion, Eurocontrol breached her right to career advancement.

11. As the Tribunal has already held in a similar case involving Eurocontrol and another official, 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 Judgment 3404, under 8, and the case law cited therein).

In the present case, the complainant supplies no evidence that the fact that her name was not included in the list of officials eligible for promotion in 2012 breached her right to have some prospect of career advancement and deprived her of any opportunity of promotion, since she can still apply to take part in competitions for access to posts in a higher grade bracket or have her post reclassified.

This plea is therefore unfounded.

12. The complainant contends that the impugned decision is unlawful since Article 45 of the Staff Regulations was violated. In her view, the Director General cannot justify the refusal to include her in the list of officials eligible for promotion on the basis of that article, Rule of Application No. 4 or Office Notice No. 10/12 of 8 March 2012. She submits that neither Article 45 nor the Rule of Application formally prohibits promotion to a grade in a higher grade bracket; that the wording of Article 45 suggests that the possibility of promotion to a grade in a higher grade bracket is not ruled out; that while the second subparagraph of Article 1 of Rule of Application No. 4 stipulates that the rule shall not apply “to access to a basic post provided for in Annex I to the Staff Regulations other than that already held by the official”, this does not mean that promotion is barred to officials who have reached the last grade in their grade bracket; that it is therefore wrong to claim that promotion to a grade in a higher grade bracket is prohibited by Article 45 of the Staff Regulations and/or by Rule of Application No. 4; that “[i]f, unaccountably, Article 45 of the Staff Regulations were to be interpreted as barring promotion to a higher grade bracket, this would be contrary to the general principle of law set forth [...] above (right to career advancement) and the wish of the author of the Staff Regulations to do away with the former B and C categories and merge them in a single AST function group, within which a career progresses in a linear manner without any more barriers”; and that by adopting Office Notice No. 10/12 concerning the 2012 promotion exercise, which specified that only officials and servants who were not in the last grade of their respective career bracket were eligible for promotion, the Director General restricted the scope of Article 45 of the Staff

Regulations and Rule of Application No. 4 by means of a decision that is lower in the hierarchy of norms.

13. The Tribunal considers, as it already stated in Judgment 3404, under 13, that Article 45 of the Staff Regulations 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.

It follows from the foregoing that the plea that Article 45 of the Staff Regulations has been violated will not be accepted either.

14. The complainant's third plea is that Rule of Application No. 35 would be unlawful if it were to be interpreted as prohibiting promotion to a higher grade bracket, since such a prohibition would be contrary to Article 45 of the Staff Regulations.

15. However, as already stated in Judgment 3404, under 15, the Tribunal does not interpret Rule of Application No. 35 as prohibiting promotion to a higher grade bracket.

The argument put forward in this third plea is therefore irrelevant.

16. The complainant's last plea is that the principle of equal treatment and the duty of care have been breached because, in her view, all officials with at least two years' seniority in their grade and who have not reached the last grade in their function group are, as a matter of principle, eligible for promotion.

She considers that, by refusing to examine her merits and thus denying her the possibility of a promotion, Eurocontrol discriminated against her in comparison with those of her colleagues whose merits were examined.

17. According to the Tribunal's case law, the principle of equal treatment applies to officials in a similar situation in law and in fact.

That is not the case here, since the complainant has not identified any official in the same situation as her who was included in the list of officials eligible for promotion in 2012.

18. The Tribunal considers that, in the present case, the complainant may not rely on breach of the duty of care, since she could not lawfully be included in the list of officials eligible for promotion in 2012 (see, in particular, Judgment 3404, under 18).

19. As none of the pleas may be accepted, 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 Eurocontrol.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 30 April 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