

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. (No. 2)

v.

Eurocontrol

126th Session

Judgment No. 4019

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms L. S. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 12 December 2014, Eurocontrol's reply of 13 March 2015, the complainant's rejoinder of 1 June and Eurocontrol's surrejoinder of 4 September 2015;

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

Having examined the written submissions and decided not to hold proceedings, for which neither party has applied;

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

The complainant challenges the decision not to grant her a promotion in the 2013 promotion exercise.

On 7 February 2013 Eurocontrol published Office Notice No. 1/13, announcing that a procedure for grade promotion would be organised for 2013. The complainant, who was working at the Maastricht Upper Area Control Centre, was eligible for promotion. She sent the Staff Committee a form dated 4 February 2013, asking it to support her promotion before the Promotion Board, but the Staff Committee disregarded it because she had submitted it too late.

On 11 April the complainant's immediate supervisor submitted a proposal for her promotion to her second-level supervisor who, although she forwarded the proposal through the official channels, stated in an email of 24 May that she had been unable to support it because "promotion proposals and discussions had already happened by [the] date [on which she had received it]".

The list of staff members promoted in 2013 was published on 26 June 2013. On 16 July the complainant asked the Director General to explain why her name had not been included on it. On 8 November 2013 he replied that, after a comparison of merit by the Promotion Board, she had not been selected for promotion in 2013.

On 6 February 2014 the complainant, who had retired on 31 December 2013, filed an internal complaint against that decision. She asserted that she had been denied promotion for "unlawful, subjective reasons" and she accused her third-level supervisor of striving for years to "block any promotion" for her, which in her view amounted to moral harassment. She requested, amongst other things, the cancellation of the decision not to promote her.

The Joint Committee for Disputes, to which the case was referred, gave its opinion on 5 August 2014. Three of its members considered that the promotion exercise had complied with Article 46 of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre and Rule of Application No. 20 concerning the grade-promotion procedure, and that the complainant's allegations of moral harassment were insufficiently substantiated and should therefore be dismissed. The fourth member held that the complainant's file had probably not been passed on to the Promotion Board, in breach of Article 7 of the aforementioned Rule of Application. In addition, he regretted that the Administration had not lifted the "administrative secrecy" surrounding the Board's deliberations in order to enable the Committee to give a detailed opinion on observance of the promotion procedure. The majority of Committee members recommended dismissal of the internal complaint as unfounded.

On 1 October 2014 the Principal Director of Resources, acting by delegation of power from the Director General, informed the complainant that, in accordance with the recommendation of the majority of the Committee members, her internal complaint had been dismissed as unfounded. That is the impugned decision.

The complainant requests the setting aside of that decision and an award of compensation in the amount of 20,000 euros, plus interest, to redress the injury resulting from the lost opportunity for promotion, compensation of 20,000 euros for moral injury and 5,000 euros in costs.

Eurocontrol asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 1 October 2014 dismissing the internal complaint which she had submitted to the Director General in order to challenge her non-inclusion in the list of staff members who received a grade promotion in 2013.

2. The Tribunal has consistently held that staff promotions by an international organisation are decisions which lie within the discretion of its executive head. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 2834, under 7, 3006, under 7, or 3742, under 3).

3. Amongst the various pleas entered by the complainant in order to challenge the impugned decision, there is one which falls within the limited scope of the Tribunal's power of review thus defined, since it relates to a procedural flaw, and which is decisive for the outcome of this dispute.

The plea in question is that the examination of the complainant's merits during the deliberations regarding the selection of staff members for promotion was tainted with irregularity.

4. Article 46 of the General Conditions of Employment, in the version applying to this case, specifies in the second subparagraph of paragraph 1 that "[p]romotion shall be exclusively by selection from among servants who have completed a minimum period of two years in their grade, after consideration of the comparative merits of the servants eligible for promotion", and that "[w]hen considering comparative merits, the Director General shall take account of the appraisal reports on the servants".

Under Rule of Application No. 20, concerning the grade-promotion procedure provided for in Article 46, a Promotion Board has been set up which is responsible for drawing up annual "promotion lists" containing the names of servants whose promotion by the Director General is proposed. Article 7 of the Rule states that "[p]romotion lists shall be drawn up on the strength of thorough examination of the professional abilities of the servants who meet the requirements for promotion, notably with respect to length of service and qualifications", while Article 8, paragraph 1, stipulates that "[s]ervants shall be classified in order of merit on the basis of the marks awarded, reports made by their superiors and services actually performed" for the Organisation.

It is evident from the file that the Promotion Board's deliberations are preceded by preliminary consultations at various hierarchical levels, the purpose of which is to prepare the Board's final proposals and which in practice play an essential role in the process of selecting servants for promotion.

5. It is clear from the above-mentioned provisions of Article 46 of the General Conditions of Employment and Rule of Application No. 20, according to which the "appraisal reports on the servants", "the marks awarded" and "reports made by their superiors" are to be taken into account, that the promotion proposals drawn up by servants' superiors constitute a decisive factor when determining how they fare

in the annual promotion exercise. Indeed, Eurocontrol confirms this in its submissions, as it emphasises in its reply, for example, that the “promotion procedure essentially depends on the promotion proposals of the superiors”, and that the “Promotion Board examines the files of staff members who are eligible for promotion [...] on the basis of the marks awarded and reports made by superiors”.

6. In the present case, the evidence in the file shows that on 11 April 2013 the complainant’s immediate supervisor submitted a proposal to promote her, which was couched in very complimentary terms, to her second-level supervisor. However, in an email of 24 May, the latter indicated that, although she had forwarded the proposal through the official channels, she “could not support it due to the fact that the promotion proposals and discussions had already happened by [the] date [on which she had received it]”. It may be inferred from this email that the proposal to promote the complainant received no support in the consultations preceding the deliberations of the Promotion Board, not because her second-level supervisor disagreed with its substance, but because it had been sent too late. In fact, the wording of the email clearly suggests that, had she received it in time, this supervisor would certainly have endorsed the proposal in the context of these preliminary meetings which, as noted above, play an essential role in the process of selecting servants for promotion.

The fact that the proposal to promote the complainant was submitted by her immediate supervisor too late for the scheduled meetings in question was due to an administrative error for which the complainant bears no responsibility whatsoever. As this situation deprived the complainant of the support which the proposal would normally have received from her supervisors had it been forwarded in good time, the procedure followed with regard to her promotion in the disputed promotion exercise was clearly flawed.

7. Although Eurocontrol insists that the proposal of the complainant’s immediate supervisor was in fact forwarded to the Promotion Board, and that the Board itself can directly examine the merits of any staff member, so that it could have recommended the

complainant for promotion even though the proposal had not received her supervisors' support during the above-mentioned preliminary consultations, it points out in its own submissions that, except where a staff member is proposed for promotion by the Staff Committee, which was not the case here, "the Promotion Board considers a servant's promotion only when it is proposed by that person's supervisors". Thus, as stated in the opinion of the Joint Committee for Disputes, a promotion proposal presented with the support of a servant's supervisors at the initial stage of the procedure constitutes a *sine qua non* for granting that person promotion. Aside from the Promotion Board's theoretical power to examine the merits of each servant itself, it is therefore hard to see how, in practice, the promotion proposal of the complainant's immediate supervisor could have had any chance of success given that it could not be supported by her second-level supervisor at the meetings preceding to the Board's deliberations.

8. In response to its request that Eurocontrol forward the Promotion Board's report on the disputed promotion exercise in order that it might examine it *in camera*, the Tribunal was informed that the Board had not drawn up any such reports since 2010. This practice, which is unusual to say the least, makes it impossible for the Tribunal to ascertain whether the complainant's merits were in fact examined by the Board, as the defendant organisation alleges. However, even if this had been the case, which is extremely doubtful in light of the submissions in the file, the examination would have been distorted by the absence of any support for the promotion proposal from the complainant's supervisors during the consultations preceding the Board's deliberations, which was due to the above-mentioned administrative error.

9. This procedural flaw breached the complainant's right to benefit from a fair and informed comparison of her merits with those of other servants who were eligible for the same grade promotion, which renders unlawful the decision taken with regard to her at the end of the promotion exercise.

10. It follows from the foregoing that the impugned decision of 1 October 2014 must be set aside, without there being any need to consider the complainant's other pleas.

11. The setting aside of this decision does not, in itself, imply that the complainant would actually have been promoted if the proper procedure had been followed. Nevertheless, as her immediate supervisor had submitted a very complimentary promotion proposal, which would normally have been supported by her second-level supervisor, the procedural flaw identified above unduly deprived her of a promotion opportunity. This lost opportunity constitutes material injury which, as the complainant rightly submits, entitles her to compensation (see, for example, Judgments 2869, under 10, or 3084, under 21).

However, the submissions in the file show that the complainant's chances of actually obtaining a promotion in the disputed promotion exercise were relatively slight. Indeed, not only did she not have the backing of the Staff Association, which had dismissed her request for its support on the grounds that she had submitted it too late, but her third-level supervisor was evidently not in favour of her promotion. At his level, he would therefore probably not have backed the proposal from his subordinates, although the complainant has not established that this supervisor's assessment of her merit stemmed, as she contends, from discrimination or moral harassment.

In these circumstances, the Tribunal considers that the injury resulting from this lost opportunity may be fairly redressed by awarding the complainant 5,000 euros in compensation.

There are no grounds for granting the complainant's request that interest should be paid on this sum.

12. The fact that the complainant was deprived of due consideration of her merits during the promotion exercise in question and the unlawful nature of the decision dismissing her internal complaint also caused her substantial moral injury which must likewise be redressed. In view of all the circumstances of the case, the Tribunal considers that it is appropriate to award the complainant compensation under this head in the amount of 10,000 euros.

13. As the complainant succeeds for the most part, she is entitled to the 5,000 euros which she requested in costs.

DECISION

For the above reasons,

1. The impugned decision of 1 October 2014 is set aside.
2. Eurocontrol shall pay the complainant 5,000 euros in material damages due to the lost opportunity for promotion.
3. The Organisation shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay her 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 24 April 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ