

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

H.

v.

Eurocontrol

130th Session

Judgment No. 4281

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. H. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 15 March 2017 and corrected on 6 April, Eurocontrol's reply of 27 July, the complainant's rejoinder of 4 December, corrected on 22 December 2017, and Eurocontrol's surrejoinder of 16 April 2018;

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 decision not to promote him in the 2015 promotion exercise.

The complainant joined Eurocontrol in 1993. On 1 July 2010, following an administrative reform, the grade to which he had been promoted in 2007 was renamed "AST7". At the material time, he was devoting part of his working time to staff representation activities.

In Office Notice No. 25/15 of 22 October 2015, the Director General published the lists of promotions and accelerated step advancements for the 2015 exercise. The complainant was not among the officials promoted.

On 22 January 2016 the complainant submitted an internal complaint to the Director General in which he requested that the decision not to promote him be cancelled and that he be promoted to grade AST8 in the 2015 exercise.

On 4 February 2016 his complaint was referred to the Joint Committee for Disputes, which delivered its opinion on 5 October 2016. Two of the Committee's four members considered that the complaint was unfounded because the procedure laid down in Article 45 of the Staff Regulations governing officials of the Eurocontrol Agency and Rule of Application No. 4 concerning the procedure for grade promotion provided for in Article 45 of the Staff Regulations had been complied with. In their view, it was clear from Articles 4 and 5 of Rule of Application No. 4 that the Promotion Board examines only the list of eligible candidates centralised by the Directorate in charge of human resources.

The other two members considered that the complaint was well founded because, contrary to Article 5 of the Rule of Application No. 4, the Promotion Board had not examined the files of all the candidates eligible for promotion. One of those members added that the complainant's involvement in a staff union had counted against him when the possibility of a promotion was examined since the Organisation had failed in its duty to implement a procedure to appraise the performance of staff representatives, as ordered by the Tribunal in Judgment 2869, delivered in public on 3 February 2010.

By internal memorandum of 13 December 2016, the Director General informed the complainant that he endorsed the recommendation of two of the Committee members that the complaint should be dismissed as unfounded for the reasons put forward by them. That is the impugned decision.

The complainant seeks the annulment of the impugned decision and an award of 50,000 euros in compensation for material and moral injury. He also claims 5,000 euros in costs.

Eurocontrol asks the Tribunal to reject all the complainant's claims as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 13 December 2016 in which the Director General endorsed the recommendations of two members of the Joint Committee for Disputes and refused to grant him promotion to grade AST8 in the 2015 promotion exercise.

2. According to the Tribunal's settled case law, "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 3404, under 8, and 3495, under 11).

According to the same case law, an organisation enjoys wide discretion in staff promotion. For that reason, its decisions in that area are subject to only limited review. The Tribunal will intervene in such a decision only if it was taken without authority, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, if it was taken in breach of a rule of form or procedure, or if there was abuse of authority (see Judgments 2835, under 5, 3279, under 11, 4019, under 2, and 4066, under 3).

3. In support of his complaint, the complainant first of all alleges that, in the impugned decision, the Director General disregarded the concept of merit linked to performance and the concept of seniority, thereby breaching Article 45 of the Staff Regulations and committing a manifest error of judgement. The complainant contends that his name should have been included on the list of officials promoted in the 2015 exercise because, in his view, his professional performance and aptitude met the criteria set out in Article 45. He states that he had received particularly favourable performance appraisal reports since 2007, and that his merits and the tasks he performed under his staff union mandate had not been taken into account.

4. Article 45 of the Staff Regulations, in the version applicable at the material time, provides:

“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.

Promotion shall be exclusively by selection from among officials who have completed a minimum period of two years in their grade, after consideration of the comparative merits of the officials eligible for promotion. Merit shall be understood as e.g. performance and long-standing commitment.

[...]

When considering comparative merits, the Director General shall take account of the appraisal reports on the officials.

[...]”

5. As regards the complainant’s activities as a Eurocontrol official, the written submissions show that his performance, as described in the performance appraisal report concerning the period 1 January 2013 to 28 February 2014, preceding the 2015 promotion exercise, was not considered fully satisfactory. The Tribunal observes, moreover, that the complainant’s reporting manager, who had, in his performance appraisal report for 2012, proposed that the complainant be promoted, did not repeat that support the following year owing to the complainant’s shortcomings.

From 2013, the complainant’s staff union activities (representing 40 per cent of his total work) were subject to appraisals by a second reporting manager, the President of the Executive Committee of the *Union Syndicale Brussels*, Section Eurocontrol, which show that his work was always considered “well done”, “constructive and productive” and “always in the interest of the Agency and its staff”, but not “excellent” as the complainant states in the complaint. Nothing in the file indicates that that appraisal was not taken into account.

Under its case law referred to above, the Tribunal can only interfere with the decision to refuse a promotion on the ground of an error of judgement if that error is manifest. However, given the complainant’s performance appraisal reports for his professional activities for Eurocontrol (representing 60 per cent of his total work), the Tribunal cannot find that the decision in question involved an obvious error of judgement.

It also follows from the foregoing that the criteria on the basis of which a promotion may be granted under Article 45 of the Staff Regulations were not disregarded.

6. Citing the principle of equal treatment, the complainant submits that he faced discrimination owing to his staff union activity. That discrimination resulted from the Director General's failure at the material time to have implemented the Memorandum of Understanding of 16 July 2003 governing relations between Eurocontrol and three representative staff union organisations, which provides that participation in staff union activities may not be prejudicial to the professional situation and career advancement of the officials concerned. According to the complainant, this meant that the comparative examination of officials' merits in the 2015 promotion exercise did not take into consideration the role he played as a staff union representative, in particular during the discussions and negotiations on the administrative reform of the Staff Regulations and Rules of Application. This resulted in a breach of the principle of equal treatment, since the complainant was not treated in the same way as other members of staff.

In support of that contention, the complainant refers to Judgment 2869, in which the Tribunal set aside a decision of Eurocontrol on the ground that, "by not adopting implementing rules to support the Memorandum of Understanding, Eurocontrol violated that Memorandum as well as the principle of equality" (consideration 6).

7. In Judgment 3666, under 8, the Tribunal found that, by assigning an official to a post in which 50 per cent of his activity was devoted to the tasks listed in his job description (with the remaining 50 per cent devoted to his staff union activities), he was reintegrated into Eurocontrol's office hierarchy, which allowed for periodic performance appraisals by a line manager. The Tribunal concluded that this restored equality of treatment between that official and other staff members as required under the relevant provision of the Memorandum of Understanding and by Judgment 2869.

The complainant in this case is in a similar situation. Although, unlike other officials, he devoted 40 per cent of his working time to staff union activities, that situation did not prevent him from being the subject of various performance appraisal reports relating to his duties as a Eurocontrol official, nor did it prevent his reporting manager from

proposing his inclusion on the list of officials to be promoted in the 2013 exercise.

Furthermore, as noted above, the complainant's staff union activities were appraised from 2013 onwards.

The plea that the principle of equal treatment was infringed must therefore be dismissed.

8. In addition, the complainant submits that he was deprived of an opportunity to be promoted for the sole reason that he exercised a part-time staff union mandate. The grievance he thereby expresses should, in the Tribunal's view, be regarded as an allegation of misuse of authority.

9. In Judgment 3357, under 16, the Tribunal found that "the existence of [...] bias, which would constitute a misuse of authority, may not be presumed. It is incumbent upon the official who intends to rely on a plea of this nature to furnish at least some *prima facie* evidence in support thereof; mere allegations which are moreover purely speculative are immaterial here (see, for example, Judgments 1775, under 7, 2019, under 24, 2927, under 16, or 3182, under 9)". In this case, the submissions show that the complainant has not supported his allegations with relevant evidence from which the Tribunal may infer that the impugned decision involved a misuse of authority.

The plea is therefore unfounded.

10. Lastly, the complainant alleges that the Director General did not state reasons for the decision of 13 December 2016 dismissing his internal complaint. He contends that a mere reference to the opinion of two members of the Joint Committee for Disputes does not constitute a relevant statement of reasons that allows an objective assessment of the legality of the impugned decision.

11. The Tribunal notes that out of the four members of the Joint Committee for Disputes, two took the view that the complainant's internal complaint should be dismissed on the ground, *inter alia*, that the procedure provided for in Article 45 of the Staff Regulations and Rule of Application No. 4 had been followed. In stating, in the decision of 13 December 2016, that he "share[d] the opinion of [those members]",

the Director General endorsed their reasoning. The plea alleging a failure to state reasons is therefore unfounded.

12. It follows from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKIT 

YVES KREINS

DRA EN PETROVI 