

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**M.**

**v.**

**Eurocontrol**

**121st Session**

**Judgment No. 3572**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V. T. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 29 August 2013, Eurocontrol's reply of 20 December 2013, the complainant's rejoinder of 6 February 2014 and Eurocontrol's surrejoinder of 16 May 2014;

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 his non-inclusion in the list of staff members eligible for promotion in 2013.

The complainant joined the staff of Eurocontrol on 5 January 2009 as an official at grade B\*5, step 1. At the end of the transitional period that followed the entry into force, on 1 July 2008, of a wide-ranging administrative reform which resulted, in particular, in a new grade structure and which is explained in detail in Judgment 3189, the complainant's grade was renamed AST5 with effect from 1 July 2010. On 1 January 2011 the complainant advanced to step 2 of this grade pursuant to Article 44 of the Staff Regulations governing officials of

the Eurocontrol Agency (Staff Regulations), according to which an official will generally advance to the next step every two years.

After having participated successfully in a competition, the complainant was appointed with effect from 1 May 2012 to grade AD5, step 2, his seniority in this step being reckoned from 1 January 2011. As he wished to ascertain whether he was eligible for promotion in 2013, he asked the Directorate of Resources for confirmation of his seniority in his new grade. He was informed that, having been appointed to a post within the AD function group, he could be promoted pursuant to Article 45 of the Staff Regulations only after two years in the grade that had been allocated to him within his new function group, i.e. in 2014.

Office Notice No. 1/13 was published on 7 February 2013. In substance it announced that “[a] procedure for grade promotion [would] be organised for 2013” and that for this purpose “the list of staff eligible for promotion [would] comprise those officials and servants who in 2013 ha[d] at least two years’ seniority in their grade and [were] not yet in the last grade of their respective career brackets as defined in their job descriptions.”

Having noticed that his name did not appear in the list of staff eligible for promotion, the complainant lodged an internal complaint on 10 April 2013. He requested, firstly, that his seniority in “grade 5” be reckoned from 1 January 2009 and, secondly, that his name be added to the aforementioned list. The list of staff who had been promoted was published on 25 June 2013.

At the time of filing his complaint with the Tribunal on 29 August 2013, the complainant had received only an internal memorandum dated 4 July acknowledging receipt of his internal complaint and informing him that it would be considered by the competent service. Considering that this memorandum was not a substitute for a reply, he impugned what was, in his view, an implied decision to dismiss his internal complaint arising under Article 92, paragraph 2, of the Staff Regulations. He requested that his seniority in “grade 5” be reckoned from 1 January 2009, that his name be added to the list of staff eligible for promotion in 2013, that the promotion exercise be restarted “in

[his] regard” or, failing this, that he be awarded compensation for loss of income, moral damages and costs.

In its reply, Eurocontrol asks the Tribunal to dismiss the complainant’s first three claims as without merit and, subsidiarily, to dismiss his financial claims as without merit.

On 4 February 2014, just before submitting his rejoinder in which he maintained his claims, the complainant enquired into the progress of his internal complaint. He was told that it had been examined by the Joint Committee for Disputes but that the opinion issued by the latter on 20 December 2013 had not yet been forwarded to the Director General for his final decision.

Eurocontrol repeats its arguments in its surrejoinder. It states that the complainant was informed by an internal memorandum dated 11 March 2014 that his internal complaint had been dismissed as unfounded, the Director General having decided to follow the opinion of a member of the Joint Committee for Disputes who had held that the complainant was not eligible for promotion because he did not have sufficient seniority in his grade.

## CONSIDERATIONS

1. Article 5, paragraphs 1 and 2, of Eurocontrol’s Staff Regulations as amended in consequence of the Agency’s wide-ranging reform of human resource management that entered into force on 1 July 2008, reads as follows:

- “1. The posts covered by the Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in a function group for managers or administrators (hereinafter ‘AD’) and a function group for assistants or other specific functions referred to in Annex I to these Staff Regulations (hereinafter ‘AST’).
2. Function group AD shall comprise twelve grades, corresponding to administrative, advisory, executive and management duties, as well as to linguistic duties. Function group AST shall comprise eleven grades, corresponding to duties involving the application, supervision and execution of technical, operational or clerical tasks.”

Paragraph 3 of the same article sets out requirements in terms of levels of education, professional training and professional experience for appointment respectively to “function group AST”, “function group AD for grades 5 and 6” and “function group AD for grades 7 to 16”, which are different for each of the three categories of post in question.

Lastly, paragraph 7 of the article provides that all posts within the Agency are to be classified based on a summary table showing the types of posts that is provided in Annex I to the Staff Regulations. This table divides posts into grades within the AD and AST groups depending on the nature of duties and level of responsibility entailed. Posts are categorised either in grades AD5 to AD16 or in grades AST1 to AST11, for each of the two groups respectively.

2. It is apparent from these provisions that although the grades specified in the Staff Regulations have been allotted a number corresponding to a basic salary level which, for posts at levels 5 to 11, applies to both the AD and AST categories, they are fundamentally attached to the function group to which they belong. For each of these groups, the grades are defined by different characteristics relating not only to the competencies required for appointment to a given grade but also to the nature of the duties entrusted to officials holding that grade. Thus, although holders of posts in grades AD5 and AST5 receive the same basic salary, these grades cannot be considered the same.

3. As regards advancement to the next grade, Article 45 of the Staff Regulations provides that “[p]romotion [...] shall be effective by appointment of the official to the next higher grade in the function group to which he belongs” and “shall be exclusively by selection from among officials who have completed a minimum period of two years in their grade”.

It is clear from these provisions that the minimum seniority required for an official to be promoted to a new grade in a function group must be understood as referring exclusively to seniority acquired in the grade immediately below within the same group. Apart from

the fact that, in the Tribunal's view, the article's wording makes this interpretation obvious, it should also be underlined that this interpretation is completely in keeping with the concept of "grade" as analysed above, to which the Staff Regulations refer. Indeed, it is hardly conceivable that a period of service in a post in the other function group, the characteristics of which are deemed to be markedly different, could be taken into account when calculating the seniority conferring eligibility for promotion to the new grade in question.

4. The complainant is therefore mistaken in his belief that, because he was recruited by Eurocontrol in 2009 at grade B\*5, which was subsequently renamed AST5, he should have retained the benefit of seniority acquired in a so-called "grade 5" when he was later appointed, through a competition, to grade AD5.

5. None of the various arguments put forward by the complainant to invalidate this finding can be accepted.

6. First, the fact that the Staff Regulations and some of its Rules of Application refer to grades either by using the form "grade 5 of function group AD" or by employing the shorter form of "grade AD5" for linguistic brevity does not really cause confusion, as the complainant contends. On the contrary, the use of these alternative designations merely serves to emphasise that the grades are fundamentally attached to the function group to which they belong. Although purism would dictate that only one of these expressions – and the former is undoubtedly preferable – should be used in the documents in question, the coexistence of the two expressions does not create any ambiguity that would impede their interpretation. Furthermore, it may be observed that, in any case, neither expression lends weight to the complainant's contention that a grade is determined solely by its number, regardless of its attachment to a function group. There are hence clearly no grounds to construe the relevant provisions of the Staff Regulations in a manner favourable to the complainant in application of the *contra proferentem* rule.

7. Second, the complainant's reliance on the provisions of Part 2 of Annex XIII to the Staff Regulations, which were adopted as a transitional measure during the above-mentioned reform with a view to reclassifying officials in intermediate grades for the period between 1 July 2008 and 30 June 2010, and then in new grades introduced as from 1 July 2010, is misplaced. Article 3 of Part 2 did indeed provide that the awarding of intermediate grades would not affect "[t]he step occupied by an official and the seniority acquired in grade and step". However, this provision concerned officials who would continue to hold their post in the same conditions as previously and for whom it was hence natural to maintain their seniority in their previous grade. The situation that it was designed to address was thus completely different to that of an official appointed through a competition to a grade in a different function group to the that which he had previously held, albeit with the same number. The complainant is hence wrong to cite "the reasoning behind [the above-mentioned] Article 3" in support of his plea.

8. Third, the complainant relies on the provisions of Article 45a of the Staff Regulations, which deals *inter alia* with the appointment to a post in function group AD of an official in function group AST who has passed a professional examination set by Eurocontrol. As paragraph 4 of this article states that "[a]ppointment to a post in function group AD shall not affect the grade and step occupied by the official at the moment of appointment", the complainant argues that officials appointed to group AD in this manner retain their previous grade and hence the seniority that they have acquired in that grade. Although the complainant recognises that this article is not applicable to officials who, like him, are appointed to group AD following a competition, he claims that he should benefit from the same advantages in accordance with the principle of equal treatment.

However, the complainant misconstrues the scope of paragraph 4. Although it is regrettable that the term "grade" is used incorrectly here to designate the grade number, these provisions have neither the aim nor the effect of granting the officials concerned the right to retain the

seniority acquired in their original grade. As the defendant organisation correctly observes, their sole purpose is in fact to ensure that these officials will receive the same net remuneration as they received in their previous posts.

Since the officials concerned by Article 45a are thus likewise not entitled to retain seniority in the manner claimed by the complainant, his plea of a breach of the principle of equal treatment must be dismissed as factually unsound.

9. Fourth, contrary to the complainant's view, there is no inconsistency in the fact that, for the purpose of calculating his seniority in grade, the seniority that he acquired from 1 January 2011, which was recognised in his step when he was appointed to grade AD5, cannot be taken into account. Seniority in step and seniority in grade are, in fact, distinct concepts that are largely independent from each other and are governed by substantially different provisions. Thus, although a majority of the members of the Joint Committee for Disputes appear to have taken the opposite view in the opinion delivered by that body, the fact that an official may be credited, upon being appointed to a grade, with a seniority in that grade that is not the same as his seniority in step, is not in itself objectionable. Moreover, with regard to the eligibility for promotion to a higher grade that is at issue here, for the reasons outlined under 3, above, the complainant could hardly have been exempted from actually completing two years of service in the grade to which he was appointed within group AD on the basis that seniority acquired previously had been recognised at the time when he was appointed to a post in that group.

10. Fifth, the complainant observes that the failure to take into account the seniority that he acquired in the AST function group before his appointment to the AD group has had the paradoxical effect of penalising his success in the competition that led to this appointment, particularly as his duties changed but his grade stayed the same. He concludes from this that one of the main objectives of the 2008 reform and, more generally, of Eurocontrol's human resources management, namely to encourage performance-related promotions rather than

automatic advances, has been disregarded by Eurocontrol in his case. However, apart from the fact that this is a line of argument based more on expediency than on law, in advancing it, the complainant unjustifiably ignores the fact that his appointment to the AD group opened up distinctly more favourable career prospects than those to which he could have aspired in the AST group. Furthermore, it should be noted that, although the complainant was not eligible for promotion in 2013, he became eligible the next year, which puts into perspective the alleged disadvantages entailed by the situation at issue.

11. Lastly, the complainant complains that Eurocontrol lacked celerity in dealing with his requests for information and his internal complaint. However, apart from the fact that, in light of the evidence, this criticism is only partly justified, it does not have any bearing on the lawfulness of the impugned administrative decision.

12. It follows from the above that the complaint must be dismissed in its entirety, without there being any need to rule on its receivability.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.



Delivered in public in Geneva on 3 February 2016.

*(Signed)*

CLAUDE ROUILLER      PATRICK FRYDMAN      FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ