

SEVENTY-EIGHTH SESSION

***In re* BIDAUD**

Judgment 1411

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Francine Bidaud against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 February 1994 and corrected on 7 March, Eurocontrol's reply of 17 June, the complainant's rejoinder of 25 August and the Organisation's surrejoinder of 13 October 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. Rule No. 7 of the Rules of Application of the Staff Regulations states in Article 4a of Section 2a:

"An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance.

The amount of this allowance shall be fixed under the conditions laid down in Article 65 of the Staff Regulations.

The rates provided for in paragraph 1 of this Article shall be as follows:

- BF 3,710 per month for officials in grades C4 or C5;
- BF 5,687 per month for officials in grades C1, C2 or C3."

The "typist's" allowance may be granted also to grade C staff who are "clerical officers" and whose duties include the use of a typewriter for 60 per cent or of a computer keyboard for 50 per cent of working time.

The complainant, a French citizen who was born in 1941, joined the Experimental Centre of Eurocontrol at Brétigny-sur-Orge, in France, on 1 April 1966 as a secretary and shorthand typist at grade C3. She was promoted to grade C2 on 1 January 1970.

On 11 June 1993 the Organisation published a list of promotions for 1993 which showed that the complainant had been promoted to grade C1.

Until that date she had been paid the typist's allowance. In a handwritten minute of 18 June 1993 the chief of her division said that since she spent much more than half her working hours typing on a computer keyboard she should continue to get the allowance.

In a minute to her of 25 June 1993 the Director of the Centre referred to "talks" with her and said that at 1 September 1993 she would be promoted to grade C1 and her post would change from secretary to clerical officer; the Director General would decide when she took up the new post whether she should get the allowance.

By a decision of 2 July 1993 the Director General promoted her to principal clerical officer at grade C1 at 1 September 1993 and terminated payment of the allowance to her from that date.

By a minute of 9 September 1993 to the Director of Personnel the complainant applied for payment of the allowance as from 1 September. In a minute of 27 September the Staff Committee at Brétigny asked the Director of Personnel to reconsider the effective date of her promotion on the grounds that she had "suffered on account of poor coordination between the Centre and headquarters in Brussels". As she had been a clerical officer since

September 1992 the Committee suggested either "backdating her promotion to 1 January 1993" or "granting her greater seniority in C1".

By a minute of 28 September to the Director General, the complainant lodged an internal "complaint" challenging both the date of her promotion and the decision to stop paying her the typist's allowance.

By a letter of 2 November 1993 the Director of Personnel rejected her "complaint" on the Director General's behalf. That is the decision she is impugning.

B. The complainant alleges that she did not learn of the decision of 2 November 1993 until 7 February 1994, when she saw the Director of the Centre.

Although the Agency made her a clerical officer on 1 September 1992, as is plain from her job description and the Eurocontrol directory of 1 June 1993, it continued until 1 September 1993 to pay her the typist's allowance.

The date at which her promotion took effect and the termination of her allowance are discriminatory and unexplained. The nature of her duties has not changed. Some with similar duties are still getting the allowance and others have had compensation for the loss of it in the form of a salary step increment.

She asks the Tribunal (1) to rule that the terms of her promotion, particularly the date at which it took effect, amount to discrimination against her; (2) to rule that the decision to stop paying her the "typist's allowance" was not substantiated; (3) to rule that "no measure may be applied before a general decision has been officially taken"; (4) to award her damages for the injury she suffered "at 1/1/93 in respect of (1) above and at 1/9/93 in respect of (2) above".

C. In its reply the Agency points out that Article 4a of Section 2a of Rule No. 7 does not entitle clerical officers to payment of the typist's allowance so the complainant was bound to lose the allowance on getting that grade. She knew that full well since the Director of the Centre told her so when he saw her on 25 June 1993.

The complainant did not become a clerical officer before 1 September 1993: although her duties may have changed earlier there was no decision to promote her.

There was nothing unlawful or discriminatory about the date at which her promotion took effect. There is no such thing as a right to promotion, the Director General having wide discretion in the matter. In this case he merely followed the Promotion Board's recommendation to make 1 September 1993 the effective date of promotion of the complainant and several other staff members. Since promotion causes no adverse injury it is not a decision that needs to be explained.

The complainant's promotion to principal clerical officer warranted stopping payment of the allowance to her. Admittedly some category C clerical officers may get it because they spend at least three-fifths of working time using a typewriter or a computer. But the Director General believed that "office automation" did away with the justification for the allowance and in 1992 he ordered a survey to determine case by case whether it was warranted. That is why the complainant had not received a reply by 9 September 1993.

The rules prescribe no allowance for "work on a visual display unit". The complainant's allegation that some got an increment is mistaken and irrelevant.

Lastly, claim (3) was not part of her internal "complaint" and so is irreceivable.

D. In her rejoinder the complainant states that she withdraws claim (2) and the second part of claim (4). She points out that by a decision of 9 June 1994 signed by the Head of Personnel on the Director General's behalf she had the typist's allowance restored as from 1 September 1993.

She maintains her other claims and reasserts that she was a "clerical officer" from 1 September 1992. The delay in giving effect to her promotion did cause her injury since she had spent over 15 years at step 8 in grade C2.

E. In its surrejoinder Eurocontrol points out that the Director General merely followed the recommendation of the Promotion Board, which set the date for the complainant's promotion at 1 September 1993. Citing the case law, the Agency observes that, having no right to promotion, an official can hardly object to the date at which it is granted.

CONSIDERATIONS:

1. The complainant joined the staff of the Experimental Centre of Eurocontrol at Brétigny-sur-Orge in 1966 as a secretary and shorthand typist at grade C3 and on 1 January 1970 she reached grade C2. On 2 July 1993 she was promoted as from 1 September 1993 to a post as principal clerical officer at grade C1. Eurocontrol thereupon stopped paying her the typist's allowance. On 9 September 1993 she claimed on the strength of her new duties an allowance for work on a visual display unit in an equivalent amount. Without waiting for a reply she filed a "complaint" on 28 September 1993 against the decision of 2 July 1993 to promote her. She objected both to its taking effect on 1 September 1993 rather than 1 January 1993 and to the ending on 1 September 1993 of the typist's allowance she had till then been receiving. By a decision of 2 November 1993 of which the text was handed to her on 7 February 1994 the Director General rejected her "complaint". That is the decision she impugns.

2. After she had filed the present complaint the Director General granted on 9 June 1994 her claim to payment of an allowance as from 1 September 1993.

3. She has four claims:

"1. a ruling that the terms of her promotion particularly the date at which it took effect (1/9/93) amount to discrimination against her;

2. a ruling that the decision to stop paying her 'the typist's allowance' was not substantiated;

3. a ruling that no measure may be applied before a general decision has been officially taken;

4. an award of damages for the injury she suffered at 1/1/93 in respect of (1) above and at 1/9/93 in respect of (2) above".

In her rejoinder she withdraws claim (2) and the second part of claim (4), the decision of 9 June 1994 having removed her cause of action.

4. Eurocontrol's preliminary objection is that claim (3) is irreceivable because it did not form part of her internal "complaint" and is besides couched in obscure terms. Indeed, as the Organisation observes, that "complaint" did not maintain that "no measure may be applied before a general decision has been officially taken". In any event the wording of the claim is vague and general. On both counts the objection is sustained.

5. Turning to the merits the Tribunal rejects claim (1). Article 2 of Rule No. 4 concerning the procedure for grade promotion provided for in Article 45(1) of the Staff Regulations reads:

"The power to award promotions shall be vested in the Director General. Officials shall be selected for promotion by the Director General from the promotion lists drawn up each year ...".

The provision embodies the general principle that there is no right to promotion. Consistent precedent has it that the appointing authority enjoys wide discretion in such matters and the decision is subject to limited review: the Tribunal will set it aside only if it shows a fatal flaw.

6. The complainant objects both to the terms on which Eurocontrol promoted her and to its making 1 September 1993 the date at which her promotion took effect. She pleads discrimination.

7. As to the actual promotion, though she alleges "administrative inefficiency in the Agency" she offers no specific criticism about being given the grade of principal clerical officer. That being so, her objections to the terms of promotion are immaterial and must fail.

8. She submits that the date of promotion should have been 1 January 1993 as it was for other staff. In her submission taking 1 September 1993 as the date was an unexplained measure of discrimination. She relies on two documents: a minute of 27 September 1993 from the Staff Committee at Brétigny and the Committee's information bulletin. Both refer to guidelines from the Director General saying that promotions for 1993 would ordinarily take effect on 1 January 1993. That, she argues, is borne out by a statement by the Director of the Centre reported in the minutes of consultations held on 21 July 1994; he proposed that for 1994, as for 1992 and 1993, promotions should take effect at 1 January of that year; save where the rules or budgetary factors required otherwise.

9. Eurocontrol demurs. It submits that the only promise the Director General made was in a letter which he wrote on 14 April 1992 and in which he said that promotions for 1992 would take effect at 1 January 1992; that promise cannot apply to promotion for 1993.

10. In the absence of a formal commitment by the Director General it is difficult to rule on the parties' opposing views. But at all events, even if there were guidelines on promotions for 1993 the statements the complainant cites show that exceptions were allowable: the Director General might treat some cases as exceptional or warranting a different date because of requirements of the rules or the budget. Such exceptions were to be made at the Director General's discretion.

11. This is an exceptional case. The impugned decision of 2 November 1993 observes that the date of promotion, like the actual decision to grant promotion, is discretionary and "takes account of various factors such as minimum seniority in the lower grade, whether there are funds to finance the promotion, and so forth". The decision also points out that the Promotion Board recommended 1 September 1993 in the complainant's case and not a single Board member had any reservations on that score.

12. Even if, as the complainant contends, the Director General had agreed that his promise about promotions for 1992 should hold good in 1993, he reserved the right to make exceptions and in any event to exercise his discretion in the matter. In exercising that discretion he was at pains to state the reasons which he thought warranted the date he chose.

13. Since Eurocontrol stated adequate reasons for the impugned decision the plea of breach of equal treatment also fails. Although in her "complaint" of 28 September 1993 the complainant said that "most of the other promotions" dated from 1 January 1993, she has failed to adduce evidence to prove that her case was on all fours with the others. Not only does that expression imply that hers was not an isolated case, but Eurocontrol actually mentions two other promotions for 1993 that did not take effect at 1 January: one was at 1 July and the other at 1 December. So there is no question of discriminatory or arbitrary treatment of the complainant.

14. The conclusion is that her objections are unsound and her complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner