Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2863**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr J. G. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 11 June 2008 and corrected on 29 August, the Agency's reply of 4 December 2008, the complainant's rejoinder of 16 February 2009 and Eurocontrol's surrejoinder of 20 May 2009;

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

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

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

A. The complainant, a Belgian national born in 1951, joined the Agency on 1 August 1987 at grade B4. He was later promoted to grade B3 and on 1 July 1997 to grade B2. For administrative purposes he is assigned to the Human Resources Directorate, but he performs no other duties than those of President of the Eurocontrol section of the European Civil Service Federation (hereinafter "FFPE-Eurocontrol"), a trade union organisation recognised by the Agency.

On 23 March 2007 the Director of Human Resources sent the other Eurocontrol directors a memorandum regarding the promotion round for 2007, in which he invited them to submit a list of proposals for promotions "by grade and by name" in order that the Director General might decide on the maximum number of slots per directorate for that year. After a discussion with the Director of Human Resources, the Vice-President of FFPE-Eurocontrol proposed in a letter of 20 April that the complainant be promoted to grade B1.

On 22 May 2007 the Director General informed the staff of the maximum number of promotions available in each grade and each directorate in 2007. Updates were issued on 8 June and 5 July. No promotion to grade B1 was foreseen in the Human Resources Directorate.

On 18 June 2007 the Promotion Board for staff in the Human Resources Directorate met in plenary session and drew up a list of officials in that directorate for whom it proposed a promotion that year. At that point the staff representatives who had sat on that board challenged the proposal to promote Mr T., the president of the Eurocontrol section of another trade union organisation, from grade C3 to grade C2, on the grounds that priority should have been given to the complainant since he had more seniority in his grade than Mr T. For that reason, they refused to sign the minutes of the meeting.

The lists of officials who had obtained a promotion in 2007 were published on 5 and 9 July 2007 and an additional list was issued on 18 July. The complainant's name was not on these lists, but Mr T.'s promotion to grade C2 was announced therein. As the complainant considered that the decision to promote this official caused him injury, he submitted an internal complaint to the Director General on 26 July 2007, under Article 92(2) of the Staff Regulations governing officials of the Eurocontrol Agency, in which he requested the cancellation of this promotion and his own promotion to grade B1 as from 1 July 2007.

On 18 February 2008 the Joint Committee for Disputes issued a divided opinion, with two of its members recommending that the

internal complaint be dismissed as unfounded and the remaining two recommending that it be allowed.

By a memorandum of 10 March 2008, of which the complainant was notified on 11 March 2008, the Director of Human Resources informed him that the Director General had decided to dismiss his internal complaint on the grounds that it was unfounded in law. That is the impugned decision.

B. The complainant alleges firstly that the procedure is tainted with three flaws. He considers that fixing the maximum number of promotions per grade and per directorate can restrict promotion opportunities. Indeed, he could not be promoted in 2007 because no provision had been made for a B1 slot in his directorate. In his opinion, this constitutes not only a breach of Article 45 of the Staff Regulations, which requires "extended" consideration of the comparative merits of all officials at the same grade in all services and directorates, but also a breach of the principle of equal treatment. Furthermore, he asserts that the meeting of the Promotion Board for staff in the Human Resources Directorate was held in the presence of persons who were not members of this board, since the meetings of all the boards were held simultaneously in the same room, and that, as a result, members of boards had sometimes expressed an opinion on a file which had not been within the terms of reference of their own board. Lastly, the fact that the proposed promotion list for each directorate is forwarded to the Director General before he has decided on the maximum number of promotion slots available per grade and per directorate is likely to influence his decision and also constitutes a breach of Article 45 of the Staff Regulations.

Secondly, the complainant contends that Eurocontrol failed to give adequate reasons for the impugned decision, as he was not informed why he was not promoted in 2007. In his opinion, the Agency thus breached Article 25(2) of the Staff Regulations.

The complainant asks the Tribunal to quash the decision of 10 March 2008 and those of 5 and 18 July 2007 publishing the

promotion lists for 2007. He also claims 15,000 euros in compensation for moral injury and 5,000 euros in costs.

C. In its reply the Agency states that on 12 June 2008 the Director General published the promotion list for 2008 and that the complainant was thus promoted to the next grade as from 1 July 2008.

It contends that the complaint is irreceivable. It explains that the complainant was notified of the impugned decision on 11 March 2008, but since he did not file his complaint until 11 June 2008, the complaint is time-barred. According to Article 93(3) of the Staff Regulations a complaint to the Tribunal must be submitted within three months beginning on the "date of notification of the decision taken in response to the [internal] complaint"; the complainant ought therefore to have filed his complaint with the Tribunal by 10 June 2008 at the latest.

The Agency replies subsidiarily on the merits.

It denies that the procedure was flawed. In its opinion, the provisions of Article 45 of the Staff Regulations were not infringed since due consideration was given to the comparative merits of the files of officials for whom a promotion was proposed. It states that the minutes of the meeting of the Promotion Board do not indicate that persons other than the members of the Board took part in drawing up the list of officials from the Human Resources Directorate for whom a promotion in 2007 was proposed.

The Agency contends that there is no rule which obliges it to state the reasons for a decision not to promote an official and that, according to firm precedent, such decisions are discretionary. It adds that the complainant did receive explanations in this connection in the reply to his internal complaint.

Lastly, it denies that the complainant suffered moral injury.

D. In his rejoinder the complainant holds that his complaint was filed within the requisite time limits.

He enlarges on his pleas regarding the merits.

E. In its surrejoinder the Agency reiterates its arguments concerning the irreceivability of the complaint. It maintains its position on the merits.

CONSIDERATIONS

1. In the complaint which he filed with the Tribunal on 11 June 2008, the complainant challenges the fact that he was not promoted to grade B1 in the annual round of promotions in 2007. He enters two pleas in support of his complaint: flaws in the procedure culminating in the publication of lists of promotions by grade and directorate, resulting in a breach of Article 45 of the Staff Regulations, and failure to provide reasons for the decision not to include his name on the lists.

2. The Agency contends that the complaint is irreceivable on the grounds that it is time-barred. In its opinion the complainant, who was notified of the Director General's decision on 11 March 2008, had three months as from that date to submit a complaint to the Tribunal in accordance with Article 93(3) of the Staff Regulations. His complaint ought therefore to have been filed by 10 June 2008 at the latest. However, it was not filed until 11 June 2008 and was consequently time-barred.

3. The Tribunal draws attention to the fact that the conditions for the receivability of complaints submitted to it are governed exclusively by the provisions of its own Statute. An organisation which has recognised the jurisdiction of the Tribunal may not depart from the rules which it has thus accepted. Article VII, paragraph 2, of the Statute of the Tribunal stipulates that "[t]o be receivable, a complaint must […] have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published".

It is therefore unlawful for Article 93 to set a different time limit for filing a complaint with the Tribunal by specifying that this must be done within three months rather than within ninety days. In the instant

case the complainant, who was notified of the impugned decision on 11 March 2008, had ninety days to refer the matter to the Tribunal. While he is quite right in arguing that this period of time began on the day after that on which he had received notification and not on the date of notification itself, in accordance with the Tribunal's case law, his complaint is nonetheless time-barred, since this ninety-day period expired on 10 June. His complaint filed on 11 June 2008 was lodged on the ninety-first day after the day following that on which he was notified of the decision.

4. It follows that the complaint is time-barred and hence irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2009, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet