

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session

Judgment No. 3189

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr G. R. (his second), Mr C. C. (his second), Mr C. D., Ms M. D. (her second), Mr B. H. (his third), Ms W. J.-G. and Mr S. N. (his third) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 November 2010, the complaints of Messrs C. and N. having been corrected on 4 January 2011, that of Mr H. on 10 January and that of Ms D. on 11 January, the Agency's replies of 15 April, the complainants' rejoinders of 29 June and Eurocontrol's surrejoinders of 7 October 2011;

Considering the complaints filed against Eurocontrol by Mr C. B., Ms S. A. (her fifth), Ms S. B. (her third), Mr R. B. (his third), Mr J. B. (his sixth), Mr D. C., Mr H.D.G. (his second), Mr P.D.H. (his second), Mr F.d.J. (his fifth), Mr R.D.K. (his fourth), Mr L. P.D.R. (his second), Mr D.D.S. (his third), Mr J.D.V. (his second), Mr R. D. (his fourth), Mr P. D., Mr D. D. (his fourth), Mr A. E. (his second), Mr W. F., Mr S. G. (his third), Mr L. G. (his fourth), Mr G. L. (his fourth), Mr C.L.R. (his third), Mr S. L. (his fifth), Mr A. O. (his fifth), Mr T. P. (his fourth), Mr H. P. (his third), Mr P. Q. (his fourth), Mr R. R. (his fourth), Ms K. T. (her third), Mr P.V.R. (his third) and Mr S. V. (his second) on 7 February 2011, by Mr J. A. (his fourth),

Mr T. B. (his second), Mr N. C. (his third), Mr P. C. (his fourth) and Ms K. D. (her second) on 24 February 2011, and by Ms D. D. (her second), Mr N. D. (his fourth), Ms H. F. (her second), Mr D. F. (his second), Mr G. F. (his third), Mr P. F. (his second), Mr A. G. (his third), Mr T. L. (his second), Mr A. L. (his fifth), Mr T. M. (his fourth), Mr R. M. (his second), Mr P. McG. (his third), Mr H. P. (his second), Mr S. R. (his fifth), Mr C. R. (his second), Mr F. V. (his fourth), Mr J.-M. V. (his third), Mr M. Y. (his third), Mr M. Z. and Ms E. Z. (her third) on 25 February 2011, the Agency's reply of 17 June, the complainants' rejoinder of 20 July and Eurocontrol's surrejoinder of 20 October 2011;

Considering the second complaint filed by Mr R. G. against Eurocontrol on 15 March 2011, the Agency's reply of 9 September 2011 and the complainant's letter of 13 February 2012 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering the complaints filed against Eurocontrol by Messrs G. A. (his second), F. B. (his fourth), P. C. (his third), M. K. and M. M. (his fifth) on 22 March 2011 and by Messrs P. F. (his second), J. G. (his fifth), A. L. (his fourth), M. M. (his sixth), K.V.d.M. (his third) and A.V.d.S. (his third) on 23 March, the Agency's reply of 9 September, the complainants' rejoinder of 19 October and Eurocontrol's surrejoinder of 8 November 2011;

Considering the applications to intervene in the complaints of Mr B. and others filed by:

A., M.	H., G.
B., P.	H., M.
B., V. L.	H., A.
C., E.	I. A., J.
C., K.	J., J.
D.K., M.	K., P.
D., M.	K., S.
D., S.	K., U.
E., G.	K., D. N.
F., M.	K., D.

K., P.	R., C.
L., R.	S., T.
M.-K., M.	S., M.
M. B., J. A.	S., D.
M., M.	S., C.
M., L.	S., P.
McK., J.	S., M.
M., C.	T., P. G.
N., S.	T., B.
O., R.	T., T.
O. R., M.	V., M.
P., N.	V.I., E.
P., C.	W., J.-M.
P.-C., D.	W., M.
P., A.	W., R.
P., A.	W., R.
R., D.	W., P.

and the letters of 11, 16 and 31 May 2011 and of 24 September 2012 in which the Agency recognised that these interveners were in the same situation as the complainants;

Considering the applications to intervene in the complaints of Mr A. and others filed by Messrs P. G. and T. H. and the letter of 9 September 2011 in which the Agency stated that it had no objection to these applications;

Considering the applications to intervene in the complaint of Mr R. G. filed by Messrs B. B., V. C., H.D.S., M. D., R. H., F. M., Y. P., J. S. and C. V. as well as by Ms S. W., and the letter of 7 March 2012 in which the Agency likewise stated that it had no objection to these applications;

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 none of the parties has applied;

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

A. On 23 May 2006 the Permanent Commission for the Safety of Air Navigation approved the main provisions of a wide-ranging administrative reform which was due to enter into force on 1 July 2008. It entailed the introduction within Eurocontrol of a new structure comprising more grades and fewer steps and of a new salary scale. The objective was to foster career opportunities linked to performance-related promotions rather than to automatic step-related advances. In the spring of 2008 the reform provisions concerning the Central Flow Management Unit (CFMU) were submitted to the Permanent Commission for approval. The members of CFMU operational staff, who were in one of three staff categories, A, B or C, were divided into two groups: E1 comprising staff ensuring the continuous operation of the CFMU, and E2 comprising operational support staff.

On 1 July 2008 the A, B and C staff categories were replaced for a two-year transitional period by the categories A*, B* and C* respectively. At that juncture non-operational staff were given a guarantee that, in their new grade, they would receive the previous basic salary corresponding to the grade they had reached on 30 June 2008, a safeguard known as the “passport”. In addition, a multiplication factor (of less than 1 in most cases) was applied to their basic salary in order to enable them, through a gradual increase in that factor, progressively to reach the level of the new salary scale. They would be definitively integrated in the new salary scale when, after at least one promotion, they attained a multiplication factor of 1, hereinafter referred to as “factor 1”. These measures could be applied to CFMU operational staff with some adjustments. Measures were therefore taken to avoid a situation where officials who had nearly reached the end of their career would be blocked in the eighth and final step of the last grade of their career bracket with no prospect of reaching factor 1 in their new grade and would thus be placed at a disadvantage compared with colleagues who could access that factor through the mechanisms put in place by the reform. This was the reason for

the adoption of paragraph 3 of Appendix II to the Staff Regulations governing officials of the Eurocontrol Agency, which reads as follows:

“Any officials in group E1 or group E2 who have already been placed in the last step of the last grade of their career bracket for two years as at 30 June 2008 or who are placed in corresponding grades (as determined in Article 2.1 or Article 8.1 of Part 2 of Annex XIII to the Staff Regulations) for two years following the entry into force of the Administrative Reform without reaching factor 1 in their grades shall, on expiry of the two-year period defined above, be awarded step 5 at factor 1 in the grades corresponding to those they hold (as determined in Article 2.1 or Article 8.1 of Part 2 of Annex XIII to the Staff Regulations) where the basic salary attaching to step 5 at factor 1 in the corresponding grades is higher than the basic salary attaching to their grades.”

On 1 July 2010 non-operational staff in category A* were transferred to the Administrator function group (AD) and those in categories B* and C* were placed in the Assistant group (AST). The grades of CFMU operational staff were converted into FCO (Flow and Capacity Operations) grades. The E1 and E2 groups were retained.

The complainants and interveners were all recruited before the administrative reform entered into force and they belong to the FCO function group. As they had not been placed in step 5, factor 1, of their new grade after having spent two years in the grade assigned to them of 1 July 2008, which, in their opinion, constituted a breach of the above-mentioned paragraph 3, they each lodged an internal complaint requesting the cancellation of their payslip for July, August or September 2010 and those for the following months. As they received no reply from the Administration within the sixty days allowed by Article VII, paragraph 3, of the Statute of the Tribunal, some of them filed a complaint directly with the Tribunal impugning the implied decisions to reject their internal complaints. The other complainants impugn the final decisions to reject their internal complaints as unfounded, which were adopted after the Joint Committee for Disputes had issued an opinion on the matter.

B. The complainants contend that paragraph 3 of Appendix II to the Staff Regulations draws a distinction between officials in the E1 or E2

group who, on 30 June 2008, had already spent at least two years in the eighth and final step of the last grade of their career bracket and those who, for a period of two years after the entry into force of the administrative reform, would be placed “in corresponding grades” without having reached factor 1 in their grades. As no reference is made to the step that this second category of officials must have reached in order to benefit from the measures set forth in that paragraph, the complainants argue that the step is not a relevant criterion; in their view, all that is required is that the official should have been placed in his or her grade for more than two years after the entry into force of the reform and that his or her basic salary at the end of that period should be less than the basic salary corresponding to step 5, factor 1, of his or her grade in the new structure. As they believe that they are in this situation, they submit that the above-mentioned paragraph has been breached and they tax the Organisation with failing in its duty of care and its duty to give reasons.

Mr R. G. contends that the above-mentioned paragraph 3 has been misinterpreted and that the *tu patere legem quam ipsi fecisti* principle has been breached. He also submits that the Agency, in refusing to adjust his remuneration, failed not only in its duty of care but also in its duty to act in good faith towards its staff.

Each complainant seeks the setting aside of the impugned decision, the cancellation of the payslip which he or she challenged through an internal complaint and of those for the following months, as well as costs in the amount of 5,000 euros.

C. In its replies the Agency requests the joinder of all the complaints. It states that it cannot find any trace of an internal complaint lodged by Mr D. and that, if he does not produce the corresponding acknowledgement of receipt in his rejoinder, it will object to the receivability of his complaint.

On the merits, the Agency contends that the complainants are misinterpreting paragraph 3 of Appendix II. In its view, following their reasoning would mean calling into question the career structure

introduced by the administrative reform and one of its objectives, namely to avoid a situation where members of the CFMU operational staff who had nearly reached the end of their career would be blocked in the last step of the last grade of their career bracket with no prospect of reaching factor 1 and would be “overtaken”, in terms of pay, by persons recruited after the entry into force of the reform. In addition, some people would be given a premature, undue advantage in that they would be “propelled” into the fifth step, factor 1, of their grade irrespective of seniority or grade. In Eurocontrol’s opinion, the complainants are endeavouring to obtain a very substantial financial benefit in the form of a rise in their basic salary of up to 26.30 per cent before it is due to them.

D. In their rejoinders the complainants state that they have no objection to the Agency’s request for joinder, provided that the sum total of costs is adjusted to take account of the number of complaints and applications to intervene.

Mr D., who had already appended a copy of his internal complaint to his complaint before the Tribunal, submits another copy. He considers that his immediate superior’s countersignature constitutes sufficient proof that this internal complaint was lodged and he submits that the Agency cannot demand the production of an acknowledgement of receipt which he never received.

On the merits, the complainants maintain that paragraph 3 of Appendix II to the Staff Regulations has been breached. They draw attention to the fact that Mr F. will never attain factor 1 and that three other complainants are likely “very soon” to have a salary lower than that received by officials who were recruited after 1 July 2008 and who were therefore immediately paid on a factor 1 basis.

E. In its rejoinders the Organisation states that as Mr D., unlike his colleagues, never received any acknowledgement of the receipt of his internal complaint, he should have tried to ascertain whether it really

had been passed on, but he never did so. Eurocontrol therefore objects to the receivability of his complaint.

On the merits, the Agency maintains its position. It explains that paragraph 3 of Appendix II is an “anti-blocking measure” and not a measure designed drastically to alter the structure of careers. It explains that, as Mr F. was recruited at grade B2 in May 2008 at the age of 56, he could not expect to have a full career.

CONSIDERATIONS

1. 1 July 2008 saw the entry into force at Eurocontrol of an administrative reform designed to modernise human resources management and, in particular, to place greater emphasis on staff members’ performance. This involved the establishment of a new structure comprising more grades and fewer steps and, therefore, of a new salary scale.

2. Prior to the entry into force of this reform, the Agency staff was divided into three categories, A, B and C, comprising eight, five and five grades respectively. As from 1 July 2008 they were replaced by the categories A*, B* and C* comprising twelve, nine and seven grades respectively, and an arrangement known as the “passport” was adopted in order to ensure that the remuneration of non-operational staff in their new grade would be at least equivalent to that which they received on 30 June 2008. In addition, the decision was taken to apply to their salaries a multiplication factor equal to the ratio between the basic salary paid on that date and that shown in the new salary scale. This factor was in most cases lower than 1. Progress towards a multiplication factor of 1 (hereinafter referred to as “factor 1”) was to be made through promotion and seniority progression, an official’s integration in the new scale being synonymous with access to factor 1. Officials recruited after the entry into force of the reform were immediately appointed at factor 1 in the new grade structure.

3. The members of the CFMU operational staff are divided into the E1 and E2 groups, as defined above under A. Before the reform entered into force, it became clear that those who had nearly reached the end of their career were likely to remain blocked in the last step of the last grade of their career bracket and, as they would be unable to access factor 1 in their new grade, they would be “overtaken” by newly recruited colleagues. That was the reason for the adoption of the corrective mechanism set out in paragraph 3 of Appendix II to the Staff Regulations, which is cited above under A.

4. Since 1 July 2010 the members of the CFMU operational staff have been placed in the new FCO function group.

5. The complainants and the interveners, who all belong to this function group, joined the Agency before 1 July 2008. Relying on the above-mentioned paragraph 3, they contend that, as from 1 July 2010, they should have been placed in step 5, factor 1, of their new grade, since by that date they had spent two years in the grade assigned to them on 1 July 2008. They noted from their individual payslips for July 2010 and the following months that their salary had not been calculated on the basis of that step. Each of them therefore lodged an internal complaint seeking the cancellation of those payslips. Before the Tribunal they impugn the implied or explicit decisions to reject their internal complaints.

6. Although one of the complaints was drawn up by a different representative the complainants’ submissions are identical in substance and their complaints all principally seek the setting aside of the above-mentioned decisions. It is therefore convenient that they be joined and that they form the subject of a single ruling.

7. The complainants’ plea that no reasons were given for the decisions is devoid of merit, since the dispute concerns the application of a salary scale. It must, however, be pointed out that the explicit decisions rejecting the internal complaints expressly referred to the

reasons given by those members of the Joint Committee for Disputes who recommended the dismissal of those internal complaints and that the complainants could freely object to the particular arguments advanced by the Agency in the proceedings before the Tribunal.

8. The plea that the Agency breached its duty of care must be dismissed because, contrary to the complainants' apparent understanding of this duty, it does not in any way imply a duty always to interpret texts in the staff's favour.

9. Since the complainants are not challenging the grade assigned to them in the new scale and as none of them had reached factor 1 on 1 July 2010, the only issue which arises here is whether, by that date, they had acquired the right to receive the salary attaching to step 5, factor 1, of their new grade.

The complainants assert that the corrective mechanism provided in paragraph 3 of Appendix II applied as from 1 July 2010 to all officials in the FCO function group, irrespective of the step reached.

The Agency considers that such an interpretation, which ignores the whole logic behind the administrative reform and the career structure it introduced, would be tantamount to deflecting an "anti-blocking measure" from its purpose in order to give each complainant a considerable financial benefit in an undue, premature manner. For example, it cites the case of one complainant who, if the interpretation advocated by the complainants were to be accepted, would see his monthly basic salary jump from 7,423.27 to 9,115.76 euros. It maintains that the corrective mechanism put in place by paragraph 3 of Appendix II applies only to those officials who, during any two-year period after 1 July 2008, find themselves in the same situation as their colleagues to whom paragraph 3 was immediately applied.

10. The aforementioned provision is certainly very complicated, but the only reasonable construction which can be put on it is that given by the Agency: a member of the CFMU operational staff who,

after the entry into force of the administrative reform, has spent two years in the last step of the last grade of his or her career bracket without having reached factor 1 must be awarded step 5, factor 1, of his or her grade in the FCO function group when the basic salary attaching to that step (factor 1) is higher than that attaching to his or her grade. The permanent provisions of the Staff Regulations then become applicable to that person.

A purposive and an historic interpretation of paragraph 3 of Appendix II (see in particular Judgments 1299, under 4 and 7, and 2362, under 4) both lead to the same conclusion.

If the complainants' interpretation were to be followed, it would give this provision a meaning which would conflict with the essential purposes of the reform as described earlier and would lead to the complainants and officials in the same situation as them being given a substantial financial benefit which would not be justified by any factors such as an increase in their duties or equal treatment. On the contrary, the principle of equality would be violated by this immediate award of an advantage to a group of officials who would not yet be in a situation comparable to that of the officials for whom the corrective mechanism of paragraph 3 of Appendix II was introduced.

Moreover, the underlying concern when paragraph 3 of Appendix II was adopted was that the remuneration of members of the CFMU operational staff recruited after the entry into force of the reform might overtake that received at the end of their career by colleagues with greater seniority who, on 1 July 2008, were already in the last step of the last grade of their career bracket, with a multiplication factor of less than 1, or who would subsequently find themselves in that situation.

Officials who found themselves at that stage of their career when the reform entered into force immediately benefited from the solution chosen to avoid that nonsensical situation. Those who will ultimately reach this level will benefit from the corrective mechanism in due course. The progression tables produced by the Agency demonstrate the fairness of the disputed solution.

11. It follows from the foregoing that the Agency's interpretation of the above-mentioned provision is sound and that the manner in which it has applied it is not unlawful and does not breach either the principle of good faith or the principle of *tu patere legem quam fecisti*, both of which have also been cited.

12. The complaints must therefore be dismissed, as must the applications to intervene, without there being any need to rule on the Organisation's objection to the receivability of one complaint.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 6 January 2013, Mr Seydou Ba, 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 6 February 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet