

W. (No. 6)

v.

Eurocontrol

122nd Session

Judgment No. 3665

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr J. W. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 9 March 2013 and corrected on 22 June, Eurocontrol's reply of 27 September, the complainant's rejoinder of 27 December 2013 and Eurocontrol's surrejoinder of 4 April 2014;

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 asks the Tribunal to reconsider the question of his promotion in 2007.

Facts relevant to this case may be found in Judgment 2869, delivered in public on 3 February 2010, concerning the second complaint filed by the complainant against the decision not to promote him in 2007. Suffice it to recall that the complainant was granted full-time release from his official duties with Eurocontrol to enable him to pursue his activities as a staff union representative and Staff Committee member from 2002 until October 2007, when he resumed duties as a Security Officer on a part-time basis. The Tribunal held that Eurocontrol had a duty to implement,

through specific rules, the Memorandum of Understanding Governing Relations between Eurocontrol and three Representative Trade Unions of 16 July 2003 (hereinafter “the Memorandum of Understanding”), according to which “[m]embership of a trade union, participation in trade union activity or the exercise of a trade union mandate may not be prejudicial, in any form or manner whatsoever, to the professional situation or career advancement of those concerned”. The Tribunal considered that by not adopting implementing rules to support the Memorandum, Eurocontrol had violated that Memorandum as well as the principle of equality. As a result the Tribunal quashed the impugned decision of 21 May 2008 rejecting the complainant’s internal complaint against the decision not to promote him but it “considered it inappropriate to require [Eurocontrol] to reconsider the complainant’s promotion for the 2007 promotion exercise”. It awarded the complainant 6,000 euros in compensation for the wrongful denial of a valuable opportunity to be promoted in 2007, moral damages in the amount of 4,000 euros and costs in the amount of 1,000 euros.

On 7 March 2012 the complainant wrote to the Director General asking to be promoted with effect from 1 July 2007, asserting that as the decision rejecting his internal complaint against the decision not to promote him in 2007 had been quashed by the Tribunal in Judgment 2869, no decision had in effect been taken regarding his promotion in 2007. By a memorandum of 9 May 2012 the Principal Director of Resources, acting with delegation of authority from the Director General, informed the complainant that he considered the matter of his promotion in 2007 to be closed, noting that he had been paid financial compensation in respect of the loss of opportunity for promotion in 2007, as well as moral damages and legal costs pursuant to Judgment 2869.

The complainant filed an internal complaint with the Director General on 9 August 2012 contesting the decision of 9 May, and another one on 16 August against the decision not to promote him in 2012. In its opinion of 31 October the Joint Committee for Disputes, to which both matters had been referred for an opinion, considered that the internal complaint of 9 August 2012, which is the subject of the sixth complaint, was irreceivable as Judgment 2869 had settled the matter. In

the same opinion it recommended that the internal complaint of 16 August be rejected as unfounded.

By a memorandum of 10 December 2012 the Principal Director of Resources, acting with delegation of authority from the Director General, informed the complainant that his internal complaint of 9 August was dismissed as inadmissible, taking into account the reasons given by the Joint Committee for Disputes in its opinion. He also considered that the internal complaint of 16 August should be rejected as legally unfounded. The complainant impugns the decision of 10 December in his sixth complaint before the Tribunal insofar as it rejects his internal complaint of 9 August.

The complainant asks the Tribunal to quash the impugned decision, to reconsider the question of his promotion in 2007 and to award him moral damages and costs. In his rejoinder he also asks the Tribunal to treat the complaint as an application for execution of Judgment 2869.

Eurocontrol asks the Tribunal to dismiss the complaint as irreceivable and unfounded. In its surrejoinder, it emphasises that it executed Judgment 2869 and that, in that Judgment, the Tribunal did not order Eurocontrol to enact implementing rules to the Memorandum of Understanding.

CONSIDERATIONS

1. By letter of 7 March 2012, the complainant asked the Director General to promote him as from 2007. Referring to Judgment 2869, he contended that the question of his promotion in 2007 had been left undecided. He was informed by memorandum of 9 May 2012 that the Director General had rejected his request. In his two internal complaints the complainant challenges his lack of promotion since 2007, the alleged failure to comply with the Memorandum of Understanding of 16 July 2003, the alleged failure to execute Judgment 2869, and the 2012 promotion list annexed to Office Notice No. 14/12 of 15 June 2012. In the present complaint, his sixth, the complainant impugns the decision dated 10 December 2012, except as it regards the 2012 promotion list which he impugns in a separate complaint (his seventh). By the 10 December decision the complainant was informed of the Director

General's decision to endorse the opinion of the Joint Committee for Disputes to reject his internal complaints of 9 and 16 August 2012 as inadmissible and legally unfounded respectively.

2. The issue of his promotion in 2007 was the subject of his second complaint which led to Judgment 2869 in which the Tribunal held that his promotion should have been considered on the basis of implementing rules to the Memorandum of Understanding, which would have addressed the promotion of staff representatives. Having failed to adopt implementing rules to the Memorandum of Understanding, Eurocontrol infringed the complainant's rights. However, the Tribunal neither ordered Eurocontrol to promote the complainant, nor did it order that the issue of his promotion be reconsidered. It awarded the complainant compensation for the denial of a valuable opportunity to be promoted in 2007.

3. The claims raised in this complaint are *res judicata* as the Tribunal has already ruled on the issue of his promotion in 2007 in Judgment 2869, as indicated above. Considering this, the Tribunal finds it unnecessary to address any other questions. With respect to *res judicata*, the main question raised in this complaint is the complainant's lack of promotion in 2007. The complainant submits that the question had been left unanswered by Judgment 2869. The Tribunal holds that that question was definitively addressed in that Judgment. Specifically, the complainant was awarded damages in compensation "for the wrongful denial of a valuable opportunity to be promoted in 2007". As Eurocontrol has paid the sum awarded by the Tribunal, the Tribunal considers the question of the complainant's promotion in 2007 to be fully resolved and executed.

4. Insofar as the complainant attempts to reopen the issue settled in Judgment 2869, the Tribunal recalls that the "Tribunal's judgments are final and [...] they may only be reviewed in exceptional circumstances and solely on the grounds of failure to take account of a particular fact, a mistaken finding of fact that involves no exercise of judgement, omission to rule on a claim or the discovery of some new fact which the complainant could not invoke in time in the earlier proceedings (see,

for example, Judgment 3379, under 1). As well, the ground on which review is sought must be one that would have led to a different result in the earlier proceedings (see Judgments 1952, under 3, 3000, under 2, and 3385, under 1).” (See Judgment 3477, under 6.)

In the present complaint, the complainant bases his contention on the fact that Eurocontrol has not adopted implementing rules to the Memorandum of Understanding and that, as of July 2010, he was denied promotion opportunities as he was placed in the last grade of his career bracket. The Tribunal holds that these facts do not constitute new facts which would have had any bearing on the Tribunal’s decision in Judgment 2869 as they occurred after the decision of 21 May 2008, which was impugned in the proceedings leading to that Judgment, was taken. In light of the above, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

DRAŽEN PETROVIĆ