

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

109th Session

Judgment No. 2941

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs T. A., R. C. (his second), M. C. (his second), C. D. (his second), B. G., J. M. (his second), E. O. (his second), T. P. (his second), B. S. (his second) and A. T. (his second) against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 November 2008 and corrected on 18 December 2008, the Agency's replies of 9 April 2009, the complainants' rejoinders of 18 June and Eurocontrol's surrejoinders of 16 September 2009;

Considering the application to intervene in Mr D.'s complaint filed by Mr S. P.;

Considering the applications to intervene in Mr M.'s complaint filed by Messrs K. H. and H. D.;

Considering the applications to intervene in Mr O.'s complaint filed by Ms A. J. and Messrs R. H., J.-M. L. and J. S.;

Considering the application to intervene in Mr P.'s complaint filed by Mr I. V. W.;

Considering the Agency's letters of 29 October 2009 in which it stated that it was not opposed 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 cases and the pleadings may be summed up as follows:

A. The Director General of Eurocontrol announced in Office Notice No. 20/06 of 1 December 2006 that an O grades structure had been created for the executive operational staff and operational support staff of the Operations Room at the Maastricht Upper Area Control Centre and that a series of amendments to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre and to the corresponding Rules of Application had been approved with retroactive effect from 1 January 2006. The new structure, which ended the classification of operational staff in the A, B and C categories, comprises eight grades from O1 to O8. Article 47 of the General Conditions of Employment – which deals with promotion – was amended to read as follows:

“A servant appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade.

For the purpose of this provision, each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps. A servant appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade. The allowance referred to in Article 69b, where applicable, shall be taken into consideration to calculate the notional step in the higher grade mentioned at sub-paragraph 1 above.

A servant appointed to a higher grade shall be classified not lower than the initial step for that grade.

Specific provisions applicable to servants occupying a post pertaining to category O are set out in Annex XV.”

Table II of Annex I to the General Conditions of Employment, which shows the grades corresponding to basic posts, was also amended.

In addition, Annexes XIV and XV, entitled respectively “Transitory measures relating to appointment of servants occupying on 31 December 2005 a post of category A, B [or] C governed by the General Conditions of Employment, Annex I – Table II, to a post shown in this annex and table as amended on 1 January 2006” and “Definition of career span and career progression in posts pertaining to category O” were adopted. Paragraph 3 of the Sole Article of Annex XIV stipulates *inter alia* that servants holding a post pertaining as from 1 January 2006 to category O “will be appointed to the new grade pertaining to their functions at the level corresponding to the amount of the basic salary of the grade and step they held on the day prior to their appointment in the new grade”, that “[f]or the determination of the basic salary in the new grade” the provisions of Article 47 concerning the notional step in the grade “will be applied”, and that the functional allowance provided for in Article 69b and pertaining to certain posts “will be taken into account” to determine the level of the basic salary of posts in the Executive Operational Support structure.

The complainants are all employed at the Maastricht Centre. They were informed by individual decisions of 24 April 2007 of their classification in the new O grades structure with effect from 1 January 2006. Messrs C., D. and T. were also informed that they had been promoted with effect from 1 April 2006 in the case of Mr C. and from 1 October 2006 in the case of Messrs D. and T. Some of the complainants submitted an internal complaint in July.

On 10 August 2007 Messrs A. and O. were promoted with effect from 1 July 2007. In Mr O.’s case this decision was amended on 28 September 2007. The decisions of 24 April concerning the other complainants were cancelled and replaced by new individual decisions in September 2007. At that point Mr M. was promoted with effect from 1 January 2007. Internal complaints were lodged against all these decisions. In opinions dated 30 June 2008 the Joint Committee for Disputes recommended by a majority that these internal complaints should be rejected as legally unfounded. Each complainant was informed by a memorandum of 26 August 2008 that the Director

General had decided to reject his complaint. These are the impugned decisions.

B. The complainants challenge the decisions of 24 April 2007 and those taken with regard to them in August and/or September 2007. They contend that the O grades structure has been “applied in a discriminatory and unfair manner” and that the failure to supply any reasons whatsoever for the above-mentioned decisions adds to the confusion. They rely on the general principle that an organisation may not act arbitrarily and must adopt an objective methodology for salary adjustment.

The complainants also contend that the Agency did not observe the principle of *tu patere legem quam ipse fecisti*. In their opinion, the provisions of Article 47 on the two-yearly step increment were not applied when the transition to the O category occurred. Furthermore, in breach of Annex XIV, no account was taken of the functional allowance provided for in Article 69b. The complainants, referring to Judgment 2490, draw attention to the fact that the main purpose of Article 47 is to ensure that promotion “will not result in a reduction in basic salary for the person concerned”, and they infer from this that its aim must be to preserve seniority when changing grade. However, as a result of the transition to the grade structure, some of them suffered an actual loss in terms of acquired seniority within their step, while others were appointed to the grade and step for “beginners” in breach of the transitory measures.

Moreover, the complainants contend that there is a discrepancy between the English version of paragraph 3 of the Sole Article of Annex XIV – which refers to the application of Article 69b and hence, in their view, to *Article 69bis* of the General Conditions of Employment – and the French version which refers to the application of *Article 69ter* – and that in these circumstances it is the provisions of *Article 69bis*, which they regard as more favourable to them, that must be applied.

Messrs A., C., D., M., O. and T. enter an additional plea related to the amendment of the rules on promotion. They state that, since the

change to the new grade structure, servants who have been promoted have found that the two-yearly step increment for which provision is made in Article 47 is no longer applied. As a result they have suffered an actual loss of salary and “absurd situations” have arisen where servants who have been promoted receive a lower basic salary than that which they would have continued to receive had they not been promoted. They submit that the general principles of the international civil service and, in particular, the principle of *tu patere legem quam ipse fecisti* have been breached, since according to the second subparagraph of paragraph 2 of the Sole Article of Annex XV, “[a]fter being integrated into category O, servants promoted to a post within category O will be appointed to the step in the higher grade guarant[ee]ing a basic salary at least equal or immediately superior to the one they held in their grade before promotion”. They add that “the general duty of care and good faith” which an organisation owes to its staff and the principle of equal treatment have also been breached. In this connection they draw the Tribunal’s attention to the situation of Duty Supervisors.

The complainants ask the Tribunal to find that Article 47 and Annexes XIV and XV of the General Conditions of Employment have been applied in an unlawful manner and to set aside the impugned decisions. In addition, they each claim 5,000 euros in costs.

C. In its replies the Agency objects to the receivability of Mr T.’s complaint on the grounds that his claims are not set out in his complaint form. Noting that Mr A.’s internal complaint was directed against a “non-existent” decision of 18 September 2007, it invites the Tribunal to examine the receivability of his complaint “from the point of view of the observance of time limits and the exhaustion of internal means of redress”. While the Organisation does

not object to the receivability of the other complaints, it states that it does not see what purpose the complainants can have in challenging the decisions of 24 April 2007 – or that of 10 August 2007 in Mr O.’s case – since they have been cancelled and replaced by the decisions of September 2007.

On the merits, the Agency explains that Office Notice No. 20/06 and a document outlining preparatory work for the creation of category O show that the transition to this category was never intended to have the effect of a promotion. It considers that the complainants’ reading of Annex XIV is superficial and that they have completely misunderstood it. Paragraph 3 of the Sole Article in this Annex expressly states that servants who are to be integrated into the O category “will be appointed to the new grade pertaining to their functions at the level corresponding to the amount of the basic salary of the grade and step they held on the day prior to the appointment in the new grade”, and that “in no case will the new basic salary in the new grade of category O be lower than the basic salary in the former grade”. As the basic salary scale of the new O category is different to that of the A, B and C categories, it was necessary to establish a mechanism whereby the seniority acquired in the step reached in the former grade in the A, B and C categories could be taken into account in the new category in order to ensure that in his new O grade a servant would not, at a given moment, receive a salary lower than that which he would have received in his former grade. Although the mechanism chosen was that used for promotions, this does not mean that promotion has to take place. The Agency states that in Annex XIV the reference to Article 47 concerns only the provisions of this article concerning the notional step in the grade for the determination of the basic salary in the new grade, and that it cannot be claimed in good faith that all the provisions of Article 47 ought to have been applied at the time of the change to the new grade structure. Eurocontrol recapitulates the calculations for establishing the grade, step and seniority within that step of each complainant as at 1 January 2006 and asserts that these decisions are “absolutely correct”.

Moreover, the Organisation points out that there is no contradiction between the English and French versions of Annex XIV, since *Article 69bis* and *Article 69ter* of the French version correspond respectively to Articles 69a and 69b of the English version.

In its replies to the complaints of Messrs A., C., D., M., O. and T., the Agency explains that the rules on promotion in paragraph 2 of the Sole Article in Annex XV do not provide for assignment to a higher step in the new grade. Career progression within the O category is automatic, and the introduction of this category constituted the “advance implementation” of an administrative reform under which, as from 1 July 2008, servants being promoted must be classified in the first step of their new grade, without seniority. It asserts that the promotion decisions of August and September 2007 were likewise “absolutely correct”, apart from that taken with respect to Mr O. on 28 September 2007. The latter decision was therefore cancelled and replaced by a decision of 18 March 2009.

Lastly, the Organisation states that the purpose of introducing the O category was to replace a scale divided into 3 categories comprising 15 grades with a single scale comprising 8 grades. It was therefore inherent to the new arrangement that servants of different grades and categories would find themselves in the same grade in the O category; indeed, a former B category servant could even be classed at a higher grade than a former A category colleague. The Agency emphasises that, although at a given moment the career progression of some servants might entail their receiving a smaller salary than that which they could have obtained in their former category, in the long term the persons in question “would not be worse off than before”. It considers that it has honoured its undertaking to introduce a “more interesting system all in all over the whole career span”, because there was never any question of ensuring at all times a more favourable situation than that which would have obtained in the former system of career progression.

D. In his rejoinder Mr T. states that the fact that the claims which he has submitted to the Tribunal are not set out in his complaint form has caused Eurocontrol no injury, since they are listed at the end of his

brief. Mr A. says that he infers from the opinion of the Joint Committee for Disputes that a decision concerning him was indeed taken on 18 September 2007 – a decision which he has mislaid – and that his internal complaint was therefore receivable. Since there has been no previous objection to the receivability of his internal complaint and since the Director General decided to reject it on 26 August 2008, he submits that his complaint is receivable inasmuch as it is directed against the latter decision.

On the merits, the complainants press their pleas. In their opinion, the Agency's reliance on the document outlining preparatory work for the creation of the O category to support its argument that the change to the new grade structure should not have the effect of a promotion is misplaced, for the representative of Eurocontrol's management maintained throughout the negotiations that Article 47 would be applied in full when that change occurred. Moreover, if only part of Article 47 was supposed to apply, Annex XIV would clearly have stated it. In their view, the above-mentioned document shows without a shadow of doubt that functional allowances ought to have been taken into account at the time of the change to the new grade structure.

Messrs A., C., D., M., O. and T. emphasise that, in its replies, the Agency admitted that some servants might find themselves in a situation which is less favourable than their previous one and they consider that this is "completely unlawful". Referring to a decision taken with respect to Mr H. in May 2009, they submit that the Organisation has discriminated against Duty Supervisors who were already performing these duties before the change to the O category, or who were promoted to grade O7. They tax Eurocontrol with breaching the principle of non-retroactivity through the implementation of the administrative reform of July 2008.

E. In its surrejoinders the Agency maintains its position in full. It admits that it did not dispute the receivability of Mr A.'s internal complaint during the internal appeal proceedings and says that it is for the Tribunal to decide whether his complaint is receivable.

In the case of Messrs A., C., D., M., O. and T., the Organisation draws attention to the fact that the O grades structure and new career profiles were created for operational staff in order to meet the demands of the trade union organisation recognised as being most representative of staff at the Centre, and that their introduction has enhanced the status of the staff concerned. It states that Mr H.'s situation was "very special" and is not therefore comparable with that of the complainants. In its opinion, the complainants are confusing the amendment of the General Conditions of Employment with the administrative reform which entered into force on 1 July 2008 when they allege that the principle of non-retroactivity was breached. It stresses that in his rejoinder Mr O. ignored the decision of 18 March 2009 which cancelled and replaced that of 28 September 2007.

CONSIDERATIONS

1. By an office notice of 1 December 2006 the Director General of Eurocontrol announced the creation of an O grades structure for the executive operational staff and operational support staff of the Operations Room at the Maastricht Centre. This structural change was the product of negotiations with the trade union organisation recognised as being most representative of the staff at the Centre. Under the new arrangement for the above-mentioned staff, which took effect retroactively from 1 January 2006, the A, B and C categories were replaced with a single O category divided into eight grades ranging from O1 to O8. The principle of eight steps within each grade was maintained, apart from in the higher grades O7

and O8, where there were six steps. The grading of posts was structured in such a way that an overlap permitted continuous progression in terms of grade and remuneration, either inside the same function or between two different functions. The main objective of this reform was to provide an efficient and simple remuneration and grading structure to accommodate “all the managerial and structural requirements concerning the career progression” of the staff concerned.

2. This structural modification made it necessary to amend the General Conditions of Employment retroactively from 1 January 2006. The staff were likewise informed of these amendments in the above-mentioned office notice.

(a) The version of Article 47 of the General Conditions of Employment which was adopted at that point is reproduced under A, above.

(b) Annex XV to the General Conditions of Employment, which defines career span and career progression in posts pertaining to the new O category, was also adopted. Paragraph 2 of the Sole Article of this annex read as follows:

“Servants in post on 1 January 2006 will be appointed from that date to a first post in function group O pursuant to the principles set out in Annex XIV, Sole article, paragraph 3 of the present General Conditions of Employment. Unless otherwise stated, progression in step is done to the end step of each grade band.

After being integrated into category O, servants promoted to a post within category O will be appointed to the step in the higher grade guaranteeing a basic salary at least equal or immediately superior to the one they held in their grade before promotion.

In order to determine the basic salary pertaining to the new post, the allowances provided by Article 69b of the present General Conditions of Employment will be taken into account, when the new function or new grade in the present function does not give entitlement to a functional allowance.”

(c) Provision was also made for transitory measures in a new Annex XIV to the General Conditions of Employment. Paragraph 3 of the Sole Article of this annex stated the following:

“Servants holding a post pertaining as from 1 January 2006 to the new category O will be integrated into the new salary structure referred to in Article 66, paragraph 2, as follows:

- They will be appointed to the new grade pertaining to their functions at the level corresponding to the amount of the basic salary of the grade and step they held on the day prior to their appointment in the new grade. For the determination of the basic salary in the new grade, the provisions of Article 47 of the present General Conditions of Employment concerning notional step in the grade will be applied. For the determination of the basic salary for the posts of the EOS (‘Executive Operational Support’) structure, the functional allowance provided for by Article 69b of the present General Conditions of Employment pertaining to the post of Flight Data Specialist Training Officer and Senior Flight Data Specialist will be taken into account to determine that level.
- In no case will the new basic salary in the new grade of category O be lower than the basic salary in the former grade. Should the level of the servant’s remuneration on the day prior to their appointment in the new grade as defined above be higher than the one pertaining to the highest grade of his new post in category O, he would retain this level on a personal basis.
[...]

3. The complainants are all members of the operational staff at the Maastricht Centre. On 31 December 2005 they held posts ranging from grade B2 to grade A6. These posts are now classified from grade O5 to grade O7.

They submit that, at the time of the change to the O grades structure, the Agency breached the principle of *tu patere legem quam ipse fecisti*, because it did not apply the provisions of Article 47 on the two-yearly step increment. Some of them also contend that this change has altered the rules on promotion. They make identical claims in the complaints which they have filed with the Tribunal. There is therefore good reason to join the ten complaints and to rule on them in a single judgment.

4. It must first be noted that, contrary to the complainants’ submissions, there is no discrepancy between the English version

of paragraph 3 of the Sole Article of Annex XIV to the General Conditions of Employment, which refers to the application of Article 69b, and the French version thereof, which refers to the application of *Article 69ter*. The confusion in this respect is probably caused by the different numbering in the two languages, with *Article 69ter* in the French version corresponding to Article 69b of the English version.

5. The Tribunal observes that salary progression, in other words the automatic increase in salaries after two years' seniority in a step, is the same in the old and the new system.

It is plain from the version of the General Conditions of Employment applicable on 1 January 2006, from the content of Annexes XIV and XV, and from the document outlining the preparatory work for the creation of the O category produced by the Organisation, that the introduction of the new structure amounted to no more than a transition to a standard category, and there is nothing in the file to suggest that this transition should have been accompanied by a general round of promotions. It is not for the Tribunal to review the reasons why the Organisation made this transition after consulting the trade union recognised as being the most representative of the staff at the Centre. Indeed, none of the complainants' arguments would justify the Tribunal's substitution of its own assessment for that of the Organisation which, in these matters, enjoys the requisite freedom of judgement enabling it to operate.

6. The only issue which arises is therefore that of whether this measure resulted in an undue reduction in the complainants' salaries. This is plainly not the case.

The Organisation abided by paragraph 3 of Annex XIV, specifying that servants holding a post pertaining to the O category would continue to receive the salary guaranteed by their previous grade. This aim has been achieved by a rigorous application of the second paragraph of Article 47 of the General Conditions of Employment, which requires the taking into account of the notional advantages acquired through seniority within a step. The notional

calculation demanded by this provision was carried out correctly in respect of each of the complainants, who retain not only their right to continue to receive their previous salary but also their right to an automatic increase in this salary by advancing to the next step on the basis of acquired seniority.

7. The rules governing the career progression of servants appointed to a post pertaining to category O as from 1 January 2006, as defined in paragraph 2 of the Sole Article of Annex XV in conjunction with paragraph 3 of the Sole Article of Annex XIV, cannot be criticised either. The Organisation has set out its reasons extensively in its replies and surrejoinders. It refers, on the one hand, to the implementation, as from 1 July 2008, of an administrative reform whereby, in the event of promotion, servants are systematically assigned to the first step of their new grade without seniority and, on the other hand, to a new career progression system within the O category where this progression comes from automatic advancement rather than promotion on merit. This new arrangement is designed to ensure that each servant's remuneration is at least equal to that which he or she received previously. The complainants' criticisms based on a breach of the general principles of the international civil service, in particular the principles of good faith and equal treatment, are consequently unfounded.

8. The complaints are therefore manifestly ill-founded. These complaints and the applications to intervene must therefore be dismissed, without it being necessary for the Tribunal to rule on the Organisation's objections to receivability.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 30 April 2010, 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 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet