

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. B. (No. 3)

v.

Eurocontrol

136th Session

Judgment No. 4698

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr L. D. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 30 July 2018, Eurocontrol's reply of 7 November 2018, the complainant's rejoinder of 29 November 2018 and Eurocontrol's surrejoinder of 6 March 2019;

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 seeks reinstatement in a post to which he had been appointed and requests payment of the corresponding function allowance.

The complainant joined the Eurocontrol Agency, the secretariat of the Organisation, in December 1993. In May 2015, a notice of competition was published for a post entitled "Senior Technical Supervisor Exploitation Facilities". The complainant applied for the vacancy and was informed by email of 3 November 2015 that he had been selected for the post. By decision of 13 November 2015, the Director General appointed the complainant to the post of Senior Technical Supervisor in the Network Management Operational Directorate (DNM), grade FC08, step 1, within grade bracket FC05-FC10.

By email of 9 January 2017, the complainant advised the Administration that his payslip did not reflect the monthly allowance payable to Senior Technical Supervisors under Article 1 of Rule of Application No. 29a. He received a response the same day stating that this error would be corrected. By decision of the Director General of 11 January 2017, the complainant was granted a function allowance applicable to supervisory roles, with retroactive effect to 1 November 2015.

By email of 23 June 2017, the complainant was informed that his appointment on 13 November 2015 to the post of Senior Technical Supervisor had been made in error. This was because the job title published in the notice of competition was incorrect and the job description corresponded instead to the generic post of Deputy Team Leader. At the same time, he was sent the decision of 12 June 2017 taken by the Head of the People and Finance Operations Unit, acting by delegation of power from the Director General, to appoint him with effect from 1 July 2017 to the generic post of Deputy Team Leader, grade FC08, step 1. From 1 July 2017, he therefore stopped receiving the function allowance associated with the post to which he had initially been appointed.

On 13 September 2017, the complainant lodged an internal complaint pursuant to Article 92, paragraph 2, of the Staff Regulations governing officials of the Eurocontrol Agency. In its opinion dated 22 January 2018, the Joint Committee for Disputes concluded by a majority of members that the internal complaint was well founded and recommended that the complainant should remain in the post to which he had initially been appointed. One of the members concluded instead that the internal complaint was unfounded because the complainant had applied for certain duties rather than for a job title. Consequently, that member considered that the Administration was obliged to correct the unintentional error it had made.

By internal memorandum of 8 May 2018, the complainant was informed that his internal complaint had been dismissed. Acting by delegation for the Director General, the Head of the Human Resources and Services Unit endorsed the opinion of the member of the Committee

who had recommended that the internal complaint be dismissed. She explained that, since the job title did not match the description of the duties published in the notice of competition, the Administration was obliged to correct the inconsistency as soon as it became aware of it. Furthermore, she considered that function allowances could not be granted for the type of duties carried out by the complainant. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to reinstate him in the post of Senior Technical Supervisor. He seeks payment of the whole of the function allowance applicable to that post, with retroactive effect to July 2017. The complainant claims moral damages of 25,000 euros for the moral injury he considers he has suffered and 6,000 euros in costs.

Eurocontrol asks the Tribunal to dismiss the complaint in its entirety as unfounded.

CONSIDERATIONS

1. The complainant essentially seeks reinstatement, with retroactive effect, in the post of Senior Technical Supervisor to which he had been appointed and requests payment of the corresponding function allowance which has been denied to him since July 2017.

2. The complainant submits first of all that the impugned decision was unlawful in that authority had not been properly delegated to the Head of the Human Resources and Services Unit, Ms D., to take the impugned decision in the name of the Director General.

However, the Tribunal has already held, in Judgment 4593, consideration 5, in a case where the same plea was raised, that the Head of the Human Resources and Services Unit did have the authority to take and sign the decision to dismiss an internal complaint, as she did in the impugned decision of 8 May 2018. That same finding clearly applies to the present case, where the decisions attesting to this delegation of power have again been adduced in evidence.

The first plea is therefore unfounded.

3. The complainant claims that the duties described in the notice of competition for which he successfully applied are indeed those associated with the role of Senior Technical Supervisor and that the competition was conducted, and his appointment made, according to the rules. On this basis he considers, in the first place, that it was unlawful to subsequently withdraw his function allowance as there can be no question of any error appearing “solely in the job title that was published”.

The complainant also submits that, even if there had been an error, the fact that he succeeded in the competition and was appointed nonetheless confers on him rights that Eurocontrol cannot, on that basis alone, withdraw, withhold, vary or reduce. To take the contrary view would amount, in his opinion, to accepting that the Organisation may exercise its power arbitrarily, the effect of which would be to undermine legal certainty.

The Organisation maintains that the complainant’s initial appointment was the result of a manifest error. In the Organisation’s view, it is clear that both the job description and the reference “NM-2015-FCO/024” that appeared in the notice of competition were consistent with a “Deputy Team Leader” role and not a “Senior Technical Supervisor” role. The Organisation also explains that the latter post does not exist in the service where the complainant worked and that the duties which he actually carried out were those of a Deputy Team Leader. In addition, the Organisation notes that the complainant is essentially challenging the withdrawal of the allowance associated with the role of Senior Technical Supervisor and points out that, although he had therefore never been entitled to that allowance, it did not attempt to recover the overpayment but simply decided to withhold payment of the allowance in the future. Therefore, it considers that the impugned decision is not unlawful, as it merely responded to the need for Eurocontrol to regularise the complainant’s administrative and financial situation in light of the duties and tasks involved in the post to which he had been appointed following the contested competition.

4. Even though the complainant's pleas are essentially based around what he considers to be the unlawful withdrawal of the function allowance, it is nonetheless obvious that in reality he is relying as much on the unlawfulness of the decision to appoint him, with effect from 1 July 2017, to the role of Deputy Team Leader as he is on the unlawfulness of the withdrawal, from that same date, of the function allowance automatically linked to his appointment to the role of Senior Technical Supervisor, and that the impugned decision therefore has a dual object. This is also reflected in the complainant's claim to be reinstated in his post. The pleas relied on by the complainant must therefore be regarded as seeking to establish the unlawfulness of the impugned decision in terms of both objects.

5. Regardless of whether or not an error was committed by Eurocontrol in organising the contested competition, and whether or not any such error was manifest, the question that really needs to be answered in the present case is whether the Administration was lawfully able, firstly, to appoint the complainant with effect from 1 July 2017 to the "generic role of Deputy Team Leader, grade FCO8 step 1, within grade bracket FC05-FC010, in the Network Management Directorate (DNM)/Group E1", thereby overturning his earlier appointment as a Senior Technical Supervisor, and, secondly, to withdraw, from that date, the "benefit of the function allowance linked to supervisory roles under Article 1, paragraph 1, of Rule of Application No. 29a", to which the complainant was not entitled in his new post.

6. Since the Staff Regulations do not contain any specific provisions governing the conditions for the reversal – as is the case here – or the revocation of administrative decisions, this question can be settled only by referring to the general principles of law applied by the Tribunal. In accordance with these principles, an individual decision conferring an advantage on an official becomes binding on the organisation which has taken it and thus creates rights for the person concerned as soon as it has been notified to her or him in the manner prescribed by the applicable rules (see, for example, Judgments 3693, consideration 17, 3483, consideration 4, 2906, considerations 7 and 8,

2201, consideration 4, and 2112, consideration 7(a)). Where there is no express provision to this effect, as a general rule, such a decision may therefore only be overturned, whether by revocation or reversal, if two conditions are satisfied: the decision must be unlawful and it must not yet have become final (see, *inter alia*, Judgments 1006, consideration 2, and 994, consideration 14).

The position is different only where the initial decision stemmed from a purely factual error and where its revocation, or reversal, does not result in a breach of the requirements of the principle of good faith (see, in this respect, Judgments 3693, consideration 18, 3483, consideration 6, and 2906, consideration 11).

7. In the present case, the decision of 13 November 2015 which appointed the complainant to the post of Senior Technical Supervisor had already become final by the time it was reversed. As an appointment to a post, by its nature, creates rights, that decision could not lawfully be reversed unless it stemmed from a purely factual error.

8. The Tribunal notes that the manifest error that, according to the Organisation, flawed the decision of 13 November 2015, is not, in any event, a purely factual error.

With regard first of all to the contested notice of competition, it is undisputed that the post advertised was that of “Senior Technical Supervisor Exploitation Facilities” in the “Network Management Directorate (DNM) – Network Technical Systems Division (NTS/CNS/TFMS/EXO)”. There is no concrete evidence to substantiate the Organisation’s assertion that the description of the duties that appeared in the notice of competition actually corresponded to those of Deputy Team Leader. What is more, that assertion is contradicted by the fact that the duties listed made express reference to the ability to coordinate and supervise the activities of the Exploitation Facilities Team, that five years’ professional experience in technical supervision was required and also that the vacancy was specified to be for the “generic post type: Senior Technical Supervisor”, as is evident not only from the job title but also from the job description.

Next, the Tribunal notes that the function allowance associated with the post of Senior Technical Supervisor was paid to the complainant, with retroactive effect, following a decision taken on 11 January 2017. This confirms that, on that date, the Organisation still regarded the complainant as having been appointed to that post, which, under paragraph 1 of Article 69b of the Staff Regulations, is a condition of being entitled to a function allowance.

Lastly, although the Organisation argues that the complainant did not actually hold that post, which, in its view, precludes his entitlement under Article 1, paragraph 1, of the aforementioned Rule of Application No. 29a to the payment of the allowance in question, the Tribunal notes that various documents relating to the complainant's performance appraisals for 2015 and 2016 and the first half of 2017 all mentioned that he "held" the generic post of Senior Technical Supervisor and that one of the objectives assessed was his day-to-day management of the EXO Team as Technical Supervisor. There was even a record of this objective having been met, with specific achievements in this area being noted.

9. It follows from the foregoing that the Organisation was not able to lawfully overturn the decision of 13 November 2015.

The decision of 8 May 2018 must therefore be set aside, as well as that of 12 June 2017, without there being any need to rule on the other pleas raised by the complainant.

10. As a consequence of these decisions being set aside, the Tribunal will order the Organisation to pay to the complainant the function allowance provided for in paragraph 1 of Article 69b of the Staff Regulations with retroactive effect from July 2017.

11. The complainant claims moral damages for "the unjustified withdrawal of his title and allowance", which he assesses at 20,000 euros, but does not provide any explanation for this amount. In the circumstances of the case, the Tribunal considers that the fact that the Organisation questioned whether the complainant was performing

the role of a Senior Technical Supervisor, with the management responsibilities that entailed, did cause the complainant a certain moral injury, that this will be sufficiently compensated by the award of 3,000 euros.

12. The complainant also seeks moral damages for the undue delay in the internal appeals procedure. In this regard, he relies in particular on the fact that the Director General's final decision was not taken within the period of four months from the date on which the internal complaint was lodged, as prescribed by paragraph 2 of Article 92 of the Staff Regulations. However, the Tribunal notes that the appeals procedure lasted eight and a half months, which is not unreasonable, and that, even though the four-month deadline was not observed, the complainant's submissions do not contain evidence of any particular injury arising from that irregularity. In the circumstances, it is not appropriate to award him compensation under this head (see, for example, Judgments 4469, consideration 16, 4401, consideration 10, and 4396, consideration 12).

13. As the complainant succeeds to a great extent, he will be awarded the sum of 6,000 euros which he claims in costs.

DECISION

For the above reasons,

1. The impugned decision of 8 May 2018 is set aside, as is the decision of 12 June 2017.
2. Eurocontrol shall pay the complainant, with retroactive effect to July 2017, the function allowance provided for in paragraph 1 of Article 69b of the Staff Regulations.
3. Eurocontrol shall pay the complainant moral damages in the amount of 3,000 euros.
4. It shall also pay him 6,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 25 April 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ