

## NINETY-THIRD SESSION

**(Interlocutory Order)**

**Judgment No. 2136**

The Administrative Tribunal,

Considering the complaints filed on 19 July 2001 by Mrs C. N. and Mr F. R. against the European Southern Observatory (ESO) and corrected on 18 September 2001;

Considering the complaints filed on 18 September 2001, also against the ESO, by Mrs C. N. (her second complaint), Mr L. P. and Mr F. R. (his second complaint);

Considering the ESO's single reply of 8 January 2002, the complainants' rejoinder of 1 February and the ESO's surrejoinder received by the Office of the Registrar on 2 April 2002;

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. Facts relevant to the present disputes are recounted under A in Judgment 1821 delivered on 28 January 1999, in Judgments 1995, 1996 and 1997 delivered on 12 July 2000, and in Judgments 2133, 2134 and 2135 delivered this day.

For the year 1999, the ESO Administration recommended to the governing bodies that ESO international staff salaries be adjusted by 1.7 per cent, in line with the percentage for Germany determined by the Coordinated Organizations<sup>(1)</sup>. However, following a recommendation of the Finance Committee, the ESO Council decided to grant an adjustment of 1.2 per cent with effect from 1 January 1999 which corresponded to the inflation rate for Germany as projected by the Coordinated Organizations. The Head of Administration informed staff of this decision in a memorandum of 24 June. The complainants were personally informed of the individual application of this general decision when they received a "salary action form" dated 29 June followed by their salary statement for July 1999.

On 13 August 1999 they lodged appeals with the acting Director General against the individual applications of the general decisions. In its report of 26 February 2001, the Joint Advisory Appeals Board noted that the long delay between the lodging of the appeals and the hearings (held on 30 January 2001) was due to the Administration's delay in submitting its reply. The Board recommended to the Director General that she should grant staff the 0.5 per cent difference between the Council's adjustment and that of the Coordinated Organizations. It also urged the Director General to find quickly a methodology for salary adjustments, based on the criteria defined by the Tribunal's case law, that is stable, foreseeable, and clearly understood. By letters dated 23 April 2001, which are the decisions impugned in the first set of complaints, the Head of Administration informed the complainants that the Director General was maintaining the earlier decision.

For the year 2000, the ESO Administration recommended to the governing bodies that ESO international staff salaries be adjusted by 1.3 per cent - the inflation rate for Germany as projected by the OECD - and not by the Coordinated Organizations' figure of 1.5 per cent. The Finance Committee endorsed this recommendation and the ESO decided to adjust salaries by 1.3 per cent with effect from 1 January 2000. The Head of Administration

informed staff of this decision in a memorandum of 16 June. The complainants were personally informed of the individual application of this general decision when they received their salary statement for June 2000.

On 10 and 11 August 2000 they lodged appeals with the Director General against the individual application decisions. It was not until 18 December 2000 that the Head of Administration, having received a follow-up letter from the complainants, acknowledged receipt of their appeals and referred them to the Joint Advisory Appeals Board. In its report of 29 May 2001, the Board recommended that the Director General should adjust salaries by 1.5 per cent with effect from 1 January 2000 and amend Article R IV 1.01 of the Staff Regulations so as to implement a methodology which would be "stable, foreseeable and clearly understood". By letters dated 19 July 2001, which are the decisions impugned in the second set of complaints, the Head of Administration informed the complainants that the Director General was maintaining the earlier decision.

B. The complainants consider that the ESO is resorting to dilatory tactics in order to delay the settlement of the dispute. Quoting the Tribunal, they assert that the adjustment granted for 1999 was not determined on the basis of a methodology leading to "results [that] are stable, foreseeable and clearly understood". The adjustments granted for 1999 and 2000 reflect only the inflation rate of the host state, which has thus become the main adjustment criterion. The justification based on the Observatory's financial difficulties and its consequent need to resort to borrowing disregards the Tribunal's earlier findings. Furthermore, the reference to salary trends in the German public sector is not a criterion provided for in Article R IV 1.01 of the Staff Regulations and cannot be considered, the complainants say, to be a tangible and objective factor. They quote the Appeals Board, which made the following observation in its report on the first appeal:

"The Board failed to see how the arguments presented by the Management to justify the level of the 1999 salary increase would stand in better stead with the [Tribunal]. The arguments are similar to ones already rejected in Judgement No. 1995".

Consequently, they consider that the impugned decisions are illegal insofar as the ESO has disregarded both the principles reiterated by the Tribunal and the provisions of Article R IV 1.01 of the Staff Regulations as interpreted by the Tribunal. They accuse the defendant of deliberately and openly defying the Tribunal's authority.

The complainants note that, according to the explanations given to the Council by the Head of Administration, the adjustment granted for 2000 was determined on the basis of "a new methodology". However, this new methodology is not apparent in Article R IV 1.01, which has not been amended. Nor has it been submitted, as required, to the Standing Advisory Committee. Consequently, the substitution of the inflation rate as projected by the Coordinated Organizations by that of the OECD has not been justified. Furthermore, the staff has no information concerning the "correction factors" mentioned to the Council by the Head of Administration. The complainants therefore challenge the legality of this methodology, which cannot lead to results that are stable, foreseeable and clearly understood.

They ask the Tribunal: to set aside the impugned decisions; to order the ESO, with a penalty for default, to pay the sums legally owed, together with interest on arrears at an annual rate of 10 per cent; and to award them costs.

C. In its reply the ESO reiterates that on 19 June 2001, in an attempt to end the disputes concerning salary adjustments for the period from 1996 to 2000, the ESO Council passed a resolution in which it decided to:

- adjust basic salaries by 4 per cent as from 1 January 2001;
  - adjust the allowances for dependent children on the basis of the Coordinated Organizations' recommendations for Germany;
    - increase the household allowance by 1 per cent;
      - authorise the Director General to grant one additional day of leave per calendar year;
      - grant a lump-sum payment of one full monthly salary per staff member (based on the salary of December 2000) *pro rata* to all staff members employed at 1 July 2001 who had been in service between 1 January 1996 and 31 December 2000;
        - mandate the tripartite group to review regularly employment conditions; and
        - request the ESO management to prepare a proposal for an amendment to Article R IV 1.01 of the Staff Regulations including a new formula for calculating the annual salary index which was to serve as a guide in determining the salary adjustment.

An explanatory note to the Council Resolution concerning the execution of the Tribunal's judgments, was published on 7 September 2001.

The ESO has confined its reply to the issue of receivability. It submits that the Council Resolution of 19 June 2001 and explanatory note of 7 September 2001 replace the earlier decisions on salary adjustments for the years 1999 and 2000. These earlier decisions have therefore been revoked and can no longer be challenged. The complainants have not appealed against the individual applications of the Council Resolution of 19 June 2001 and such appeals are now time-barred.

D. In their rejoinder the complainants argue that, with regard to the adjustment for 1999, the note of 7 September can in no sense replace the earlier decisions since it does not alter their conditions of employment but merely clarifies the Council Resolution of 19 June 2001. As for the resolution, the set of measures it contains cannot, in any circumstances, be considered as replacing the adjustment decision for 1999.

Regarding the adjustment for 2000, they submit that the resolution of 19 June 2001 could not revoke the individual decisions of 19 July 2001 which had yet to be taken. Furthermore, it was indicated in those decisions that they had been taken "in the light of the Council decision of June 19, 2001". The complainants consider that the impugned decisions are final decisions taken after all internal remedies had been exhausted and that the present complaints are therefore receivable.

E. In its surrejoinder, the defendant reiterates its arguments concerning the irreceivability of the complaints. It points out that the complaints were filed after the Council had adopted its Resolution of 19 June 2001. The complainants could have challenged that resolution, but not by means of appeals against earlier decisions which were in fact amended by the resolution. The ESO adds that the arguments put forward in the rejoinder are "misleading".

## CONSIDERATIONS

1. By a memorandum of 24 June 1999 the ESO's Head of Administration informed staff that the ESO Council had decided, with effect from 1 January 1999, to increase the scale of basic salaries by 1.2 per cent, in line with the inflation rate for Germany as projected by the Coordinated Organizations. The first salary statements applying that decision were those of July 1999.

2. By a memorandum of 16 June 2000 the Head of Administration informed staff that the Council had decided, with effect from 1 January 2000, to increase the scale of basic salaries by 1.3 per cent. The first salary statements applying the new scale were those for June 2000.

3. On 13 August 1999 two staff members lodged appeals with the acting Director General against the individual decisions setting their salary adjustments for the year 1999 at 1.2 per cent. The matter was referred to the Joint Advisory Appeals Board, which, having struggled to obtain the opinion of the Administration, issued a report on 26 February 2001 in which it recommended to the Director General that the adjustment for 1999 should be increased to 1.7 per cent so as to reflect the index

adopted by the Coordinated Organizations. It urged her to define a methodology for salary adjustments, based on the criteria established by the Tribunal's case law, that is stable, foreseeable and clearly understood. By a decision of 23 April 2001, the Head of Administration informed the complainants that the Director General was maintaining the earlier decision.

4. The individual decisions applying the adjustment rate for the year 2000 were challenged on 11 August 2000 by the two staff members mentioned above and also by a third staff member. Their appeals were referred to the Joint Advisory Appeals Board. In its report of 29 May 2001, the Board unanimously recommended that the Director General should adjust salaries by 1.5 per cent with effect from 1 January 2000, in accordance with the index of the Coordinated Organizations, "since no methodology conforming to the ATILO Judgments (Nos. 1821, 1995, 1996 and 1997) was presented by Management to justify a departure from this index". It also recommended that Article R IV 1.01 of the Staff Regulations be amended so as clearly to define the staff pay conditions in a manner satisfying the criteria established by the Tribunal's case law.

By a decision of 19 July 2001 the Head of Administration informed the complainants that their appeals had been rejected "in the light of the Council decision of June 19, 2001 which includes the settlement of the contested salary adjustments over the period 1996-2000".

5. The appellants, whose appeals were thus rejected for both 1999 and 2000, filed complaints with the Tribunal raising identical issues which have been examined together and joined by the Tribunal.

6. In response to these complaints, the defendant merely contends that they are irreceivable, without defending its position on the merits. It considers that by the above-mentioned Resolution of 19 June 2001 and explanatory note of 7 September 2001 the ESO Council settled the issue of salary adjustments for 1999 and 2000 and thus "revoked" the earlier decisions on salary adjustments for those two years. Having thereby disappeared, the impugned decisions could no longer be considered final, and since the complainants did not challenge "their individual pay-slips applying the Council decision on the revised salary adjustment for the years 1996-2000 ... they are time barred now to complain against a decision which has been wholly superseded by a later decision".

7. Clearly this plea of irreceivability cannot succeed. By its Resolution of 19 June 2001 the ESO Council certainly intended to settle the issue of staff salary adjustments for the period from 1996 to 2001, particularly by increasing salaries by 4 per cent with effect from 1 January 2001 and by granting staff an additional day's leave and a lump-sum equivalent to one month's salary. Nevertheless, it did not modify the adjustment rates of 1.2 per cent for 1999 and 1.3 per cent for 2000 which the complainants contest. Indeed, the advantages gained by the complainants entailed no modification of the contested salary statements. The issue of whether the advantages can be considered to be equivalent to a legally correct adjustment of their salary concerns the merits of the complaint and not its receivability. Neither the Resolution of 19 June 2001 nor the explanatory note of 7 September 2001 can be considered as annulling individual decisions, which the complainants were, and remain, entitled to challenge insofar as they adversely affect them.

8. Regrettably, the Observatory has confined its submissions to a challenge as to the receivability of the complaints. As a result, the Tribunal is unable to render a final judgment. The Tribunal orders further submissions on the merits. Before ruling on the case, it invites the ESO to submit its arguments within thirty days of the date of notification of this judgment. The Tribunal shall stay its judgment on the merits until it has received sufficient information to decide on the case (on this issue, see Judgment 499).

## DECISION

For the above reasons:

1. The complaints are receivable.
2. The ESO is invited to submit its arguments on the merits within thirty days of the date of notification of this judgment.
3. The Tribunal stays its judgment on the complaints until it has received sufficient information to rule on them.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).