

The Administrative Tribunal,

Considering the second complaint filed by Mr N. K. against the European Southern Observatory (ESO) on 29 May 2002 and corrected on 26 June, ESO's reply of 2 August, the complainant's rejoinder of 9 September and the Observatory's surrejoinder of 2 October 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 neither party has applied;

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

A. Facts relevant to the present case are set out in Judgment 2124, delivered on 15 July 2002, on the complainant's first case. As explained in that judgment, ESO did not renew the complainant's contract which was due to expire on 30 April 2002. He entered into correspondence with the Director General to negotiate the terms of an earlier departure. His last day of service was 14 September 2001 and his contract ended on 30 September 2001.

In the event of non-extension of a fixed-term contract after four years of service, Article R A 11.01 b) 1) of the Staff Regulations provides for the payment of "one half of a month's basic salary per completed year of uninterrupted service up to a maximum of five months' basic salary". Article R A 11.02 provides for the payment of a reinstatement grant upon termination, subject to certain conditions.

A draft letter dated August 2001 contained the proposed terms of a mutual agreement between ESO and the complainant; it listed seven points. The first concerned the complainant's departure date; the second provided for three months' basic salary in termination indemnity and four months' basic salary in reinstatement grant, as though he had stayed in service until the end of April 2002 and completed six years of service. In a letter of 3 September 2001 the Director General agreed to the proposed text for both those points. She expressed reservations about two others that were listed. The closing paragraph of her letter read: "Please let me know your acceptance, in writing, within the next days."

In a letter of 17 October the Head of the Personnel Department informed the complainant that ESO would pay him 2.5 months' basic salary in termination indemnity, on the basis of five completed years of service. Because of his possible entitlement to a reinstatement grant he was asked to let the organisation know of any pending removal. On 21 October he notified the Head of Personnel of his intention to file an internal appeal against that decision.

He then wrote to the Director General on 12 December 2001 asking for his letter to be treated as an internal appeal. He considered that the decisions communicated in the letter of 17 October were "not in line with previous agreements". By a letter of 18 December 2001 the Head of Administration informed the complainant that as he was no longer a member of the personnel his internal appeal was not receivable.

His removal having been effected, ESO wrote to the complainant on 31 January 2002 attaching the relevant "request for payment" form for the reinstatement grant, deeming it to be "for final settlement of [his] entitlement to indemnities". He received three months' basic salary in reinstatement grant. On 11 February the complainant protested to the Director General, asking her to treat his letter as an internal appeal directed against both the letter of 31 January denying him the amount he was expecting and against the letter of 18 December 2001. By a letter of 28 February 2002, which the complainant received on 6 March 2002, the Head of Administration told the complainant on behalf of the Director General that, for the same reason as before, his appeal was not receivable. That is the decision which the complainant impugns.

B. The complainant contends that on the basis of a partial agreement with the Observatory he was expecting a total of seven months' salary in indemnities, but he was paid only 5.5.

He submits that agreement had been reached in respect of payment of indemnities for termination and reinstallation. Such was confirmed by the Director General's letter of 3 September 2001. From that letter and one written by ESO on 13 September it was clear on which points there was agreement. Even if it remains questionable as to whether there was full agreement, the Observatory's confirmation of the points deemed to be settled constituted a "unilateral commitment" on its part. ESO reneged on the agreement in an arbitrary manner and gave no reasons for not paying the full amount of the indemnities.

While acknowledging that 5.5 months' basic salary corresponds to the statutory amount due to him, he considers that he is justified in claiming the extra amount agreed on because, for one thing, he could not claim his actual removal expenses from ESO.

The complainant seeks an additional 1.5 months' salary, interest on that amount as from 1 October 2001, and costs.

C. The Observatory replies that the complaint was filed out of time and is not receivable. The complainant is in fact challenging two decisions: one of 17 October 2001, relating to the amount of his termination indemnity, and one of 31 January 2002, relating to reinstallation grant. Under the International Staff Rules and the Staff Regulations the internal appeal procedure is available only to members of the personnel and he ceased to hold that status on 30 September 2001. Consequently, both decisions when taken were final, and under Article VII(2) of the Tribunal's Statute the complainant had ninety days from the date of receipt of each decision in which to file a complaint with the Tribunal. Furthermore, under Article R VIII 1.01 of the Staff Regulations claims for payment of grants and indemnities are not admissible unless made within six months from the date on which payment becomes due, and so the complainant's claim for termination indemnity is precluded on that ground too.

The Observatory contends that the complaint is also devoid of merit. It points out that the complainant's claim for 1.5 months' basic salary in fact constitutes an amalgamation of two claims. He is claiming half a month's basic salary as indemnity for termination of contract and one month's basic salary in reinstallation grant. However, during the negotiations that preceded the complainant's departure, agreement was reached as to the date his contract would end, but none was reached on matters of a financial nature. The Director General made her offer contingent on the complainant's written acceptance. He did not ever accept it in writing as requested.

At 30 September 2001 the complainant had been in the service of the organisation for five years and five months, and because no firm agreement had been reached regarding the indemnities due to him, ESO claims that the complainant was entitled only to the statutory amount. He was paid what was due after five completed years of service.

D. In his rejoinder the complainant rebuts ESO's objection to receivability. Its last decision as to whether he was entitled to 5.5 or seven months' basic salary in indemnities was contained in its letter to him of 31 January 2002. His internal appeal against that decision was filed in a timely manner, as was his subsequent complaint to the Tribunal. Citing the case law, he argues that it has been ESO's practice to accept internal appeals from former staff members.

Furthermore, he argues that by saying that there was agreement only on the subject of his earlier departure date ESO is trying to limit the scope of the agreement that existed between himself and the organisation.

E. In its surrejoinder the Observatory presses its objections to receivability. The letter of 31 January 2002 did not contain a new decision that could have set off a time limit for filing an internal appeal. The letter of 17 October 2001 clearly expressed the organisation's decision that the indemnities falling due at the end of his appointment would be paid on the basis of five completed years of service. It was clear therefore that the reinstallation grant too would be paid on that basis. The letter of 31 January did not show that the matter had been re-examined, it merely implemented the earlier decision. ESO objects to the complainant's allegation that it is the organisation's constant practice to accept internal appeals from former staff members; the case law he cited does not corroborate his position.

The correspondence exchanged between the Director General and the complainant shows that no agreement was reached. For that reason, the Director General had no other option but to apply the statutory provisions governing

indemnities.

## CONSIDERATIONS

1. By his complaint, the complainant challenges two decisions. The first decision is dated 17 October 2001 and relates to the payment of 2.5 months' salary as indemnity for termination of his contract in consideration of five uninterrupted years of service. The second decision is dated 31 January 2002 and relates to the payment of three months' salary as reinstallation grant also calculated on the basis of five years' service. He contends that in compliance with the terms of an agreement entered into on 3 September 2001 with the Administration, by which the parties agreed that he would leave his post early, he was entitled to be paid the indemnity and reinstallation grant on the basis of six years' service; there is a dispute as to whether those terms were ever agreed to by the Administration.
2. On 12 December 2001 the complainant appealed the decision of 17 October, which appeared to renege on the alleged agreement of 3 September. On 18 December 2001 the Head of Administration acknowledged receipt of the letter of 12 December 2001 on behalf of the Director General, but informed him that as he was no longer a member of the personnel his internal appeal was not receivable.
3. On 31 January 2002 ESO referred to and confirmed the 17 October 2001 decision and, as a result of the complainant's move to France, informed him of its further decision to pay him a reinstallation grant of three months' salary, that being the amount to which five years of service would entitle him under the Staff Rules and Regulations.
4. On 11 February 2002 the complainant lodged an internal appeal against the 18 December 2001 decision that rejected his first internal appeal and against the 31 January 2002 decision, relating to the payment of three months' salary in reinstallation grant. ESO again considered this appeal to be irreceivable and so informed the complainant in a letter dated 28 February.
5. It is clear that the complaint, lodged on 29 May 2002, is irreceivable. With regard to the decision of 17 October 2001, the complainant's internal appeal was rejected as irreceivable by the Director General's decision of 18 December 2001. His only recourse against that decision on the question of the receivability of his internal appeal was by a complaint to the Tribunal within ninety days thereof, a time period which the complainant failed to meet. The decision of 31 January 2002 insofar as it simply confirmed the decision of 18 December 2001 to the effect that the first internal appeal was irreceivable, was not a new decision. As such, time did not begin to run again from the date of this decision.
6. As regards the 31 January 2002 decision, insofar as it related to the payment of the reinstallation grant, the complainant's internal appeal was rejected as irreceivable on 28 February 2002. Since the complaint attacking the decision of 28 February was timely filed, the first question for the Tribunal is whether the internal appeal process was in fact open to the complainant. It was not.
7. By agreement, the complainant ceased to be employed by the Observatory on 30 September 2001. He thus ceased to be a member of ESO personnel on that day. The decisions which he attacks are all posterior in time to his departure.
8. Article R VI 1.02 of the Staff Regulations and Article VI 1.01 of ESO's International Staff Rules concern the right of appeal and read respectively as follows:  
  
"Internal appeals may be made by members of the personnel individually or as a group. Such appeals shall not defer the effects of the disputed decision."  
  
and  
  
"Every member of the personnel shall have the right to appeal against any decision of the Director General concerning himself."
9. Thus, a person who is not a "member of the personnel" has no right to launch an internal appeal and his or her

only recourse is directly to the Tribunal. Therefore, to be receivable pursuant to Article VII(2) of the Tribunal's Statute, the complaint should have been filed within ninety days after the complainant had been notified of each of the challenged decisions. The decision of 17 October 2001 was received by the complainant no later than 21 October 2001 and the decision of 31 January 2002 was in the complainant's possession at the latest on 11 February since those were the dates on which he sought to file his internal appeals. The complaint filed on 29 May 2002 was out of time and is irreceivable.

10. The complainant argues that the Observatory has adopted a practice of accepting internal appeals by persons in his position but he has failed to prove his allegation and the plea fails.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet