

**NINETY-THIRD SESSION**

**(Application for execution)**

**Judgment No. 2133**

The Administrative Tribunal,

Considering the second application filed on 9 May 2001 by Mr E. A. and Mr R. H. W. for the execution of Judgment 1821, the reply of 13 September from the European Southern Observatory (ESO), the complainants' rejoinder of 5 October and the Observatory's surrejoinder of 12 November 2001;

Considering Article II, paragraph 5, 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 this case are set out under A in Judgment 1821 delivered on 28 January 1999, and in Judgments 1995, 1996 and 1997 delivered on 12 July 2000.

In Judgment 1821 the Tribunal found that in setting the staff pay adjustment for 1996 the ESO "failed not only to establish any methodology, let alone one which complies with the ... requirements of international civil service law, but also to show compliance with Article R IV 1.01 of its own Staff Regulations", which requires the use of the index calculated by the Coordinating Committee on Remuneration of the Coordinated Organizations<sup>(1)</sup> as an "orientation". The Tribunal therefore set aside the impugned decisions and ordered the ESO to recalculate the salary adjustment.

In Judgment 1995, ruling on a first application for execution of Judgment 1821, the Tribunal held that the Observatory's decisions did not properly execute that judgment and sent the cases back to the Observatory for recalculation of the complainants' salary adjustment for 1996.

In Judgments 1996 and 1997 the Tribunal quashed the decisions taken by the ESO Council on pay adjustments for the years 1997 and 1998 and sent the cases back to the Observatory.

In June 2000 the Council set up a "tripartite group" comprising representatives of the member States, of the ESO Administration and of the ESO Staff Association. On 6 October 2000 it mandated the group to:

"(a) review the factual assumptions for the application of the criteria for salary adjustment of the years 1996 to 1999;

(b) analyse the five-yearly remuneration review at CERN and its relevance to ESO;

(c) seek possibilities of optimisation of the transparency of ESO's salary adjustment policy;

(d) examine possibilities for a termination of the three pending disputes and later internal appeals."

(Concerning the latter, see Judgment 2136 delivered this day).

The complainants filed this application for execution on 9 May 2001. Applications for the execution of Judgments 1996 and 1997 were filed on the same day. In an attempt to end the disputes over salary adjustments for

the period from 1996 to 2000, on 19 June 2001 the ESO Council passed a resolution 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.

B. The complainants accuse the Observatory of resorting to dilatory tactics in order to postpone settling the dispute and to evade its obligations. They submit that the adjustment of salaries for the years 1996, 1997 and 1998 is not open to negotiation because the Tribunal has already ruled on the matter. Consequently, the discussions held with staff in the tripartite group afford no grounds for not executing Judgments 1821, 1996 and 1997. An international organisation that has recognised the Tribunal's jurisdiction is bound to execute its judgments in good faith. Otherwise, it amounts to disregard of the Tribunal's ruling and the loyalty and mutual trust that must prevail in relations between employer and employee. The complainants assert that the Tribunal's finding in Judgment 1821 that the ESO had totally failed "to establish any basis upon which it could do anything but follow the Coordinated Organizations' index" continues to apply. The ESO has not paid what it owes them in salary arrears and, to make matters worse, is causing them to incur heavy legal costs.

They ask the Tribunal to order the execution of Judgments 1821 and 1995 and to order the Observatory, with a penalty for default, to pay the amounts it owes them pursuant to those judgments, together with interest on arrears at an annual rate of 10 per cent. They also claim costs.

C. The ESO replies that it executed the judgments in what was a reasonable period of time given the complexity of the matter. It also complied with the Tribunal's instructions and with the letter and spirit of Article R IV 1.01 of the Staff Regulations.

It asserts that in settling disputes extending from 1996 to 2000, it was entitled to resort to a single comprehensive decision applicable from 1 January 2001 to the Observatory's entire international staff. The Tribunal did not order the ESO to apply the Coordinated Organizations' index. In fact it recognised that use of the index was at the Observatory's discretion. Besides, the Coordinated Organizations' methodology was incoherent. That is why the ESO devised an alternative one which, although it also takes into account the consumer price index and the evolution of actual net civil service remuneration, is based on the German inflation rate as calculated by the German Federal Statistics Office and on general salary trends in comparable international and national institutions. The Council's resolution of 19 June 2001 does give full effect to Judgments 1821, 1995, 1996 and 1997 and does lead to "stable, foreseeable, clearly understood and fair results".

Lastly, the Observatory suggests that, should the complainants' claims succeed, the interest rate on any amounts due should be set by reference to the law of the country in which the ESO operates and the staff members live: in this case Germany, which applies an interest rate of 4 per cent in such instances. In its opinion any other approach would be arbitrary.

D. In their rejoinder the complainants point out in preliminary remarks that their claims pertain only to the period from 1996 to 1998. The pay adjustments for 1999 and 2000 are dealt with in other complaints now before the Tribunal (see Judgment 2136 delivered this day), and the adjustment for 2001 is the subject of a pending internal appeal. Furthermore, they never suggested that the Observatory was bound to apply "mechanically" the Coordinated Organizations' index for Germany: they are simply arguing that, having failed to introduce an acceptable method, the ESO cannot, without any valid reason, continue to deny its staff the benefit of the

Coordinated Organizations' index for the years 1996, 1997 and 1998.

Citing the ESO's explanatory note of 7 September 2001 they submit that it contains arguments that the Tribunal has already dismissed, and that the ESO used an invalid criterion instead of the Coordinated Organizations' index. The note states that the adjustment rate of 2.4 per cent applied for the period from 1996 to 1998 corresponds to "the difference between the actual inflation rate in Germany (4.3%) and what ESO has granted in the years 1996-1998 (1.9%)". It is therefore obvious that the Observatory did not use the Coordinated Organizations' index as a guide, but simply aligned the adjustment rates on the consumer price index in the host country, and it has not established that the figure it put forward, which is different from that of the Coordinated Organizations for the same period (5.4 per cent), is valid. It thus disregarded both Article R IV 1.01 of the Staff Regulations and the Tribunal's instructions. What is more, it applied the overall adjustment of 4 per cent to a salary scale (December 2000) which was incorrect, being based on previous adjustments which were themselves incorrect. The salary scales ought to have been adjusted each year on the basis of the duly adjusted scale for the previous year.

The complainants refute the Observatory's assertion that the methodology it adopted was coherent. They object to the "new formula for the calculation of the annual salary index" referred to in the Council's resolution of 19 June 2001, because it is based solely on national data and no longer refers to other international organisations.

As to interest rates, they submit that the Observatory's suggestion is contrary to the Tribunal's case law establishing that national law will generally not apply to the international civil service. They add that the ESO's statutory rules and regulations make no reference to German law.

E. In its surrejoinder the Observatory submits that the wording of Article R IV 1.01, which only obliges the Council to use the Coordinated Organizations' index as an "orientation", emphasises that the Observatory has a discretion to decide whether or not to depart from that index. It rejects the complainants' argument concerning the adjustment of the salary scales for each year. Such matters are policy decisions involving the ESO's discretion. It deems that it has executed the Tribunal's judgments correctly, equitably and in good faith.

## CONSIDERATIONS

1. On 9 May 2001 the complainants filed an application for execution of Judgments 1821 and 1995 alleging that the Observatory had taken no decision to execute them. They ask the Tribunal to order the defendant, with a penalty for default, to pay the amounts owed to them together with interest on arrears at an annual rate of 10 per cent.

2. In Judgment 1821 delivered on 28 January 1999 the Tribunal found that the ESO had not introduced any method allowing factors other than the Coordinated Organizations' index to be taken into account in adjusting the salaries of staff for 1996. It therefore quashed a decision whereby the Director General refused to alter the 0.7 per cent adjustment applied to the complainants' salaries as from 1 January 1996, without offering a satisfactory explanation for the discrepancy between that rate and the 1.3 per cent calculated by the Coordinated Organizations, which the ESO was to use as an "orientation" pursuant to Article R IV 1.01 of its own Staff Regulations. In the same judgment the Tribunal ordered the Observatory to recalculate the staff salary adjustment applicable on 1 January 1996 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of its judgment.

3. In response to an application for execution of Judgment 1821 filed on 2 August 1999, the Tribunal issued an interlocutory order in Judgment 1908 asking for further submissions.

Having received these further submissions, the Tribunal held in Judgment 1995 that the decisions taken by the Observatory pursuant to Judgment 1821 did not properly execute the latter. It therefore sent the cases back to the Observatory for recalculation of the salary adjustment to which the complainants were entitled for the year 1996. It did so on the grounds that the ESO had failed to show that it had taken adequate steps to execute fully Judgment 1821, which required it to recalculate the adjustment of salary for staff in accordance with Article R IV 1.01 of the Staff Regulations, using a methodology based on objective criteria leading to results that are stable, foreseeable and clearly understood.

4. In Judgments 1996 and 1997 concerning two other complaints filed on 2 December 1997 and 18 December 1998 respectively, the Tribunal set aside the impugned decisions for the same reasons as in Judgment 1821 and sent the

cases back to the Observatory for recalculation of the staff pay adjustments for the years 1997 and 1998.

5. The ESO recounts that at a meeting in June 2000 the ESO Council set up a tripartite group of representatives of member States, of the ESO Administration and of the ESO Staff Association. The group was to keep the Council up to date on employment and salary issues. Following Judgments 1995, 1996 and 1997 the Observatory had decided to seek a comprehensive and generally acceptable solution to all three cases and the internal appeals challenging the pay adjustments for the year 1999 and 2000.

The group met several times. At its meeting of 18 and 19 June 2001 the Council took a comprehensive decision in the form of a resolution on salary adjustment which, according to the ESO, was based on Article R IV 1.01 of the ESO Staff Regulations. The provisions of this resolution are mentioned under A above.

6. In the Observatory's view that resolution gives proper effect to Judgments 1821 and 1995.

The ESO asserts that it acted with all due diligence in addressing matters that involved difficult policy decisions. It had preferred to end the pay adjustment disputes by a comprehensive solution encompassing the entire international staff of the ESO and the whole period from 1996 to 2000, rather than by individual decisions which would have benefited only the complainants.

It explains that in adopting a "package" of adjustments and benefits its intention was to offer all staff who had been employed at 1 July 2001 and in service between 1 January 1996 and 31 December 2000 a fair settlement of the adjustment issue covering the whole period (1996-2000). The lump-sum payment and the grant of an additional day of leave were intended to offset any remaining difference between staff members.

The Observatory has submitted an explanatory note to the Council's Resolution, dated 7 September 2001, concerning the execution of the Tribunal's judgments.

7. The complainants rightly observe that the measures set out in the resolution of 19 June 2001 cannot be regarded as executing Judgments 1995, 1996 and 1997 by means of a method which leads to results that are stable, foreseeable and clearly understood. Nor, they say, does the grant of an additional day of leave release the Observatory from its obligation to recalculate the adjustment of their pay for the years 1996, 1997 and 1998 in accordance with Article R IV 1.01 and in the light of those judgments. Furthermore, a "lump sum" is by definition an approximation, not the result of accurate reckoning. The additional leave and the grant of the lump sum are stop-gap measures and will not be carried over to future adjustments.

They conclude from the explanatory note of 7 September 2001 that the ESO applied an adjustment rate that was unlawful because it was based on an invalid criterion instead of the Coordinated Organizations' index, which is to serve as an "orientation". In calculating the pay adjustment for the period from 1996 to 1998, the ESO Council disregarded the Coordinated Organizations' index (5.3 per cent), which according to the ESO is derived from "a combination of the Reference Index and the Consumer Price Index ... of a particular country". Instead, it used "the figures of the German *Statistische Bundesamt* concerning the actual inflation rate" (4.3 per cent), whereas the Coordinated Organizations' figure for the German inflation rate during the same period was 5.4 per cent. The 2.4 per cent adjustment rate granted for the period in question corresponds to "the difference between the actual inflation rate in Germany (4.3%) and what ESO has granted in the years 1996-1998 (1.9%)". The complainants conclude that the Coordinated Organizations' index was not taken as a guide and that the 2.4 per cent adjustment applied to staff pay for the period from 1996 to 1998 is based on no method whatsoever and contravenes both Article R IV 1.01 of the Staff Regulations and the instructions given by the Tribunal in Judgments 1995, 1996 and 1997.

They also contend that the Observatory applied an unlawful adjustment rate to a salary scale (and hence to a salary level) which was incorrect. The comprehensive adjustment was applied to the salary scale adopted by Council for the year 2000, but that scale is incorrect because it results from incorrect adjustments applied particularly in 1996, 1997 and 1998.

8. There is no need for the Tribunal to dwell on the complainants' pertinent arguments and the Observatory's explanations concerning the procedure and methodology applied by the Council in adopting the resolution of 19 June 2001, since Judgments 1821 and 1995 were in any event not properly executed.

In those judgments the Tribunal held that the Observatory had failed to show that in calculating the staff pay

adjustments it complied with Article R IV 1.01 of the Staff Regulations and applied a methodology enabling objective criteria leading to stable, foreseeable and transparent results to be applied. It therefore sent the cases back to the ESO for recalculation of the salary adjustments to which the complainants were entitled for the year 1996.

The evidence plainly shows that the Observatory has failed to recalculate the adjustment of the complainants' salaries, particularly for 1996, using the criteria set by the Tribunal.

9. The conclusion is that the Observatory is still unable to show that it took adequate steps for the full execution of Judgment 1821, the decision of which was repeated in Judgment 1995.

For several years, and despite three judgments by the Tribunal on this matter, the ESO has been unable or unwilling to establish an acceptable method for adjusting the staff pay for the year 1996. It has also failed to put forward within a reasonable period any valid grounds for departing, on the basis of objective data, from the Coordinated Organizations' recommendation for 1996. In these circumstances and in accordance with the precedent set in Judgment 1419 the Tribunal considers that it would be fair redress to order the ESO to apply to the complainants the index used by the Coordinated Organizations for 1996, namely 1.3 per cent.

10. The complainants request that the Observatory be ordered, with a penalty for default, to pay the sums due in respect of the adjustment for 1996, together with interest on arrears at an annual rate of 10 per cent. The Tribunal sees no reason to order a penalty for default, but deems that an award of interest on arrears at an annual rate of 8 per cent is fully warranted.

11. The complainants are entitled to costs, which the Tribunal sets at 5,000 euros.

## DECISION

For the above reasons,

1. The ESO Council Resolution of 19 June 2001 does not properly execute Judgments 1821 and 1995.
2. The Observatory shall adjust the complainants' pay on the basis of the Coordinated Organizations' index for the year 1996, namely 1.3 per cent.
3. With effect from the date of delivery of Judgment 1995, interest shall accrue at an annual rate of 8 per cent on the amounts owed to the complainants pursuant to the said adjustment.
4. The Observatory shall pay to the complainants a global amount of 5,000 euros in costs.
5. The complainants' other claims are dismissed.

In witness of this judgment, adopted on 10 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

*(Signed)*

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and

Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

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