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

NINETY-SIXTH SESSION

(Applications for execution) **Judgment No. 2283**

The Administrative Tribunal,

Considering the applications for execution of Judgment 2095 filed by Mr L. G., Mrs A. H. and Mr V. K. on 19 September 2002 and corrected on 24 October 2002, the reply of the Surveillance Authority of the European Free Trade Association (ESA) of 7 February 2003, the complainants' rejoinder of 24 April and ESA's surrejoinder of 30 July 2003;

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. In its Judgment 2095, delivered on 30 January 2002, under 14, the Tribunal concluded as follows:

"the complainants are right in pleading a procedural flaw in the adjustment of their salaries from 1 January 1999. The Authority's contention that they are not entitled to have their pay automatically indexed to the cost of living may be right. But they are entitled to have the level of their pay set in accordance with the conditions laid down in the Staff Regulations and Rules and by means of a methodology which is in keeping with the general principles of international civil service recalled time and again in the case law. The Tribunal will not itself determine the methodology to be used nor the level to which pay must be adjusted in order to take account of all the allowances that may be due to the complainants. It therefore sends the case back to the Authority, as the complainants request, for a new decision on salary adjustment for 1999 and 2000. The amounts awarded to the complainants as an outcome of the adjustment shall bear interest at the rate of 8 per cent a year as from the dates on which they were due."

It decided as follows:

"1. The decisions rejecting the complainants' appeals of 2 February 2000 are set aside.

2. The case is sent back to the Authority, which shall review their remuneration since 1 January 1999, in accordance with 14 above.

3. The Authority shall pay the complainants a total amount of 6,000 euros in costs."

On 29 April 2002 the Surveillance Authority submitted a paper to the Committee of Representatives of the Contracting Parties to the Agreement between the European Free Trade Association (EFTA) Member States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the "ESA/Court Committee"). Reminding the ESA/Court Committee that if the compromise proposal it had submitted in 1999 had been adopted the case leading to Judgment 2095 and the strained relations with staff could have been avoided, the Authority proposed a new method of adjusting salaries. It made it clear that the method represented a compromise solution, less than what the staff expected, but nevertheless offering "stability, foreseeability and simplicity", and that it thought it could finance the cost from provisions it had made. According to this new method, salaries would need to be adjusted by 3.7 per cent at 1 January 1999 on the understanding that the adjustment granted on 1 January 1998 (3 per cent) would itself need to be increased by one percentage point. For 2000, the Surveillance Authority

proposed an adjustment of 5 per cent (instead of the 3 per cent granted).

On 12 June 2002 the ESA/Court Committee adopted three Decisions (8/2002, 9/2002 and 10/2002).

Decision 8/2002 concerned the new methodology of annual salary review. Although it did not mention the Authority's proposal of 29 April 2002, it did refer to a method proposed by the latter on 15 May 2001 for determining the adjustment of 1 January 2002, as well as to the Tribunal's Judgment 2095. Decision 8/2002 included the following provision:

"When reviewing salaries in accordance with Article 21[(1)] of the Staff Regulations of the EFTA Court and the EFTA Surveillance Authority the following principles shall apply:

A. Normative factor

Average general salary increase in the public sector in the EFTA States, weighted as follows: Norway 50%, Switzerland 25%, Commission 18,5%, Iceland 5% and Liechtenstein 1,5%

- Inflation in the EFTA States

+ Inflation (Belgium for the EFTA Surveillance Authority/Luxemburg for the EFTA Court)

B. Competitive factor

i) Working environment

ii) Staff performance evaluation

iii) Level of education of staff members/applicants

iv) Number of applications for new jobs

v) Working experience of applicants

vi) Economic growth in the EFTA States."

Decisions 9/2002 and 10/2002, which did refer to the Surveillance Authority's proposal of 29 April 2002, applied the new methodology to determine adjustments for 1 January 1999 and 1 January 2000 respectively. Decision 9/2002 set the normative factor at 0.72 per cent. No mention was made of the competitive factor, the ESA/Court Committee merely indicating that the salary scale would be increased by 1.5 per cent to take into account the need to recruit competent staff members and the obligation to maintain competitive employment conditions. Decision 10/2002 set the normative factor at 2.51 per cent and made no reference to the competitive factor. The 3 per cent increase in the salary scale previously granted for 2000 by decision of the ESA/Court Committee of 15 December 1999 was maintained.

In a memorandum dated 19 June 2002, the Surveillance Authority's Director of Administration informed the staff that the Authority had no choice but to implement the decisions of the ESA/Court Committee. He stated that, despite a request to that effect, the Authority had been unable to obtain an explanation from the ESA/Court Committee as to why it had not followed the proposal of 29 April 2002 and that, by implementing the Committee's decisions, the Authority was not expressing a view as to whether the latter had fulfilled its obligations under Judgment 2095.

The complainants were notified, in one case by payslip dated 28 June 2002 and in the other two cases by letters dated 16 August 2002, of how Decisions 9/2002 and 10/2002 would apply to their particular cases. Those are the impugned decisions.

B. The complainants put forward two pleas based on the actual terms of Judgment 2095, under 14. They maintain that the level of their pay for 1999 and 2000 was not set, firstly, "in accordance with the conditions laid down in the Staff Regulations and Rules" and, secondly, "by means of a methodology which is in keeping with the general principles of international civil service".

In support of their first plea, the complainants argue that Decision 9/2002 does not comply with the objective of maintaining competitive employment conditions stated in Staff Regulation 21.

That objective cannot be achieved with the adjustment rate of 1.5 per cent granted on 1 January 1999, since the latter is completely out of proportion with the 10 per cent adjustment recommended by the Surveillance Authority and the Court of Justice in a note dated 15 December 1999, a figure which was already well below the real loss of purchasing power experienced by the staff of those organisations since 1993. No reasons were given as to why the ESA/Court Committee did not follow the Authority's proposal of 29 April 2002.

Furthermore, the methodology itself is not suited to the aforementioned objective. This is shown in their view by the low rate of adjustment produced for 1999 using that methodology. According to them, the shortcomings of the methodology are threefold. Firstly, it takes no account of the significant loss of purchasing power since 1993, because only 1997 indicators are taken into account. Secondly, the "normative factor" is obviously not aimed at maintaining competitive conditions of employment. Some of the reference indicators chosen are not relevant (such as data concerning Switzerland - which is not a member of the Authority - or the European Commission - whose fringe benefits are not comparable), and the figures used are far removed from the official statistics mentioned by the Authority in its proposal. The same goes for the weighting system applied to these indicators, considering that Norway's rating is abnormally low in relation to the number of its nationals employed by the Authority and to its contribution to the Organisation's budget. Thirdly, the "competitive factor" is likewise not aimed at maintaining competitive employment conditions, since the criteria on which it is based (such as "staff performance evaluation") have little to do with that objective and since no indication is given as to their content or application, their determination being left to the discretion of the ESA/Court Committee.

The complainants put forward the same objections against Decision 10/2002, which ignores the Authority's proposal of 29 April 2002 (for a 5 per cent adjustment) and maintains the initially granted adjustment of 3 per cent without giving any explanation. They point out that no mention is made of the competitive factor, even though a discrepancy appears between the outcome of the normative factor (2.51 per cent) and the adjustment granted (3 per cent).

Their second plea is based on the failure of the methodology used to comply with the general principles of international civil service, namely transparency, stability and foreseeability. The normative factor is based on criteria for which no explanation is given, no calculation shown, nor any procedure set out. The breach of these principles is even more flagrant in the case of the competitive factor, which is vague and which, since no explanation is given regarding its content and mode of application, "leaves the door open to complete arbitrariness".

The complainants request that the Tribunal set aside the impugned decisions, send the case back to the Authority for a new decision on salary adjustment for the disputed period, and order the payment of interest of 8 per cent per annum on any amounts awarded as an outcome of the said adjustment, calculated from 1 January 1999, and costs.

C. In its reply the Authority states that its brief is submitted on behalf of the ESA/Court Committee, which was responsible for Decisions 8/2002, 9/2002 and 10/2002. Thus the methodology established by the Committee would not necessarily be one of those proposed by the Authority, while the statements and opinions of the latter's representatives should not be attributed to the ESA/Court Committee.

According to ESA, firm precedent has it that in matters of wage policy the Tribunal will not substitute its views for that of governing bodies of international organisations, so that there is "no reason for the Tribunal to review either the method set out in Decision 8/2002 or the way the method is applied in Decisions 9/2002 and 10/2002". It notes in this respect that the complainants do not challenge Decision 8/2002. It contends that the Committee took due account of and applied Judgment 2095, elaborated a methodology which would ensure results that are stable, foreseeable and clearly understood and maintain competitive employment conditions, and adjusted salary scales for 1999 and 2000 in compliance with the principles established by the case law regarding the exercise of its discretionary authority.

Returning to the new methodology, the defendant explains that the normative factor is calculated on the basis of the "average general salary increase in the public sector in the EFTA Member States", which includes inflation in those Member States as well as in Belgium, where the Authority is located. It adds that only the annual increase in salaries decided by each of the Member States and awarded equally to all public sector employees is taken into

account, to the exclusion of any additional salary increases, which would correspond to the step increases granted to ESA staff. According to the Authority, the competitive factor "is based on considerations which may be difficult to quantify, although its objective is to augment its staff's salaries so as to ensure that every salary scale review really reflects actual employment conditions in the Authority and current economic conditions in EFTA countries". It may be deduced from the adjustments granted for 1999 and 2000 that the figures derived from the normative factor were adjusted to take account of the competitive factor.

The Authority maintains that the complainants have not shown that the impugned decisions are tainted by at least one of the flaws that may invalidate a discretionary decision.

D. In their rejoinder the complainants deplore the fact that the defendant, in its reply, fails to respond to most of their arguments. This attitude, added to the lack of reasons given for the decisions taken by the ESA/Court Committee and the lack of response to the request for an explanation submitted by the Surveillance Authority, merely confirms, in their view, that their case is well founded.

They contend that the reason given for the difference between the official statistics used by the Authority and those used by the ESA/Court Committee (i.e. the fact that additional salary increases are not taken into account) is mistaken, insofar as it connects salary adjustments (aimed at securing a certain level of purchasing power) with step increases (arising from seniority). This had been pointed out by the Authority itself in a note to the ESA/Court Committee dated 15 October 2002, in which it expressed doubts regarding the legality of the methodology applied.

The complainants argue that the small percentage attributed to the competitive factor, despite the fact that in 1999 ESA was already facing recruitment difficulties, shows that the ESA/Court Committee's priority is not to maintain competitive employment conditions. Furthermore, they deduce from the defendant's failure to comment on the application of the competitive factor in Decision 9/2002 that this factor was determined "completely arbitrarily". In their view, the lack of clarity surrounding the calculation of salary adjustments is not compatible with the requirement of stability, transparency and foreseeability.

E. In its surrejoinder the ESA maintains that the complainants have produced no evidence to show that the chosen methodology does not meet the above requirement. It points out that the mere fact that they disagree with the methodology does not oblige the Authority to demonstrate its virtues. The burden of proof rests with them and not with the defendant. They have not shown that the methodology is technically flawed. The documents they produce prove only one thing, namely that there is a disagreement between different interest groups with regard to the most appropriate methodology. It reiterates that the methodology chosen is able to maintain competitive employment conditions.

It points out that one of the complainants was not a party to the proceedings leading up to Judgment 2095 and submits that the complainants are trying to "overturn" the actual methodology applied rather than the results derived from it for 1999 and 2000.

The Authority does not agree that the objective of "maintaining competitive employment conditions" is an obligation. It argues that, according to Regulation 21, only the annual review of Appendix A is mandatory. Lastly, it gives a further explanation of the methodology adopted, stating that the normative factor results from a calculation based on clearly identified statistics and that the competitive factor, though difficult to quantify, rests on qualitative information supplied by known independent sources.

CONSIDERATIONS

1. In its Judgment 2095, the Tribunal set aside a decision by ESA, which had rejected an appeal by staff members or former staff members of the Authority for an adjustment of their salaries as from 1 January 1999. The Tribunal considered that the decision refusing to examine a salary adjustment proposal for 1999 was in breach of Article 21 of the Authority's Staff Regulations and that the decision limiting the salary adjustment to only 3 per cent from 1 January 2000 was not based on a methodology able to ensure results that were stable, foreseeable and clearly understood. Furthermore, the defendant had offered no evidence to suggest that the contested adjustment had been set at a rate capable of "maintaining competitive employment conditions" as called for in the Regulations. The Tribunal made it clear that it would not itself determine the methodology to be used nor the level to which pay

should be adjusted and sent the case back to the Authority for a review of the complainants' remuneration in accordance with the conditions laid down in the Staff Regulations and Rules and by means of a methodology which was in keeping with the general principles of international civil service.

2. Following that judgment, on 6 February 2002, the ESA/Court Committee decided, according to the Authority, to set up "a working group made up of representatives of the three [...] Member States in order to respond to the issues raised in Judgment 2095". On 29 April 2002 the Surveillance Authority, for its part, proposed a new methodology to the Committee, which, had it been applied, would have led to a salary adjustment of 3.7 per cent at 1 January 1999, on the understanding that the adjustment granted on 1 January 1998 would itself need to be increased by one percentage point, and an adjustment of 5 per cent at 1 January 2000.

3. These proposals were not acted upon by the ESA/Court Committee, which, on 12 June 2002, adopted three decisions, one of which concerned the methodology to be used henceforth for annual salary review (Decision 8/2002), another the new salary scale starting on 1 January 1999 with an increase of 1.5 per cent (Decision 9/2002) and a third the new salary scale to come into effect on 1 January 2000, based on the 3 per cent increase previously granted (Decision 10/2002).

4. The methodology set out in Decision 8/2002 takes two factors into account: a "normative" factor and a "competitive" factor. The normative factor is intended partly to reflect public sector salary increases in Norway, Switzerland, the European Commission, Iceland and Liechtenstein, in accordance with a given weighting system, and partly to reflect inflation in those countries, as well as in Belgium for the Surveillance Authority and Luxembourg for the EFTA Court. The competitive factor, according to the decision, takes into account considerations "that may be difficult to quantify", such as the working environment, staff performance evaluation, the level of education of staff members and applicants, the number of applications for new jobs, the working experience of applicants and economic growth in the EFTA Member States.

5. The 1.5 per cent adjustment in Decision 9/2002 was arrived at on the basis of a normative factor of 0.72 per cent, which took account of salary increases and inflation observed in 1997 in the above-mentioned countries and the European Commission. The remainder was intended to take into account, as the competitive factor, the need to recruit competent staff and to maintain competitive employment conditions. The 3 per cent adjustment referred to in Decision 10/2002 was arrived at on the basis of a normative factor amounting to 2.51 per cent, while the competitive factor was not mentioned specifically.

6. The complainants challenge the application of Decisions 9/2002 and 10/2002 to their particular cases. On the ground that the EFTA Surveillance Authority did not abide by the terms of Judgment 2095 they have filed these applications for execution. They argue that the decisions they contest are not compatible with the objective of maintaining competitive conditions of employment, as specified in Regulation 21 and reiterated by the Tribunal, and that the adopted methodology in itself is not able to ensure results that are stable, foreseeable and clearly understood, nor to explain rationally the decisions taken.

7. The defendant replies to these pleas by pointing out that, as the Tribunal has ruled, in particular in Judgment 1498, the setting of salary scales is at an organisation's discretion, and that in determining an appropriate methodology for establishing the salary scales of its staff, it acted within its discretionary authority, while meeting the requirements stipulated by the Tribunal in Judgment 2095.

8. The applications for execution are receivable only to the extent that they were filed by staff members who submitted complaints leading to Judgment 2095.

9. The evidence on file shows that the reasons that led the ESA/Court Committee to disregard the closely reasoned proposals submitted by the Surveillance Authority on 29 April 2002, which would probably have been found acceptable by staff, are somewhat obscure. Moreover, the defendant itself acknowledges that the wrong data was used for the Icelandic figures in the 1999 adjustment, which was not picked up by the complainants. Nevertheless, leaving aside the complainants' disappointment with the outcome, the Tribunal can but verify whether the methodology used and the decisions taken to apply it comply with the instructions of Judgment 2095 and with the general principles of international civil service law.

10. With regard to the methodology used in Decision 8/2002, the Tribunal notes that, in accordance with its ruling and with the provisions of Regulation 21, the decision states that the ESA/Court Committee will conduct an annual

salary review in order to maintain competitive conditions of employment. Although they may be difficult to quantify, the criteria adopted by the defendant for the competitive factor provide a way of introducing useful data in the course of annual reviews and discussions, with which to verify whether, in the conditions prevailing in the Authority and the States in which it manages staff, competitive conditions of employment are being maintained. In this respect, contrary to the view expressed by the complainants, there is nothing unusual in the fact that the figures on which the normative factor is based should take account of data concerning average salaries in the public sector and inflation in the countries where the Organisation's staff are employed. Similarly, there is nothing reprehensible in using the overall average salary increase in the public sector to determine the normative factor, although the comparison drawn by the defendant with step increases granted to Authority staff on the basis of individual assessment is highly questionable. Lastly, the inclusion of data concerning staff performance evaluation in the competitive factor may be justified by the need to compare the remuneration of the Authority's staff with that of employees in other sectors, on the basis of equal qualifications.

As the defendant recalls, the Tribunal may not review the methodology chosen by the Authority, so long as, for example, it is not flawed by any error of law or of fact or based on clearly mistaken considerations. While it is true that the application of this method cannot lead to automatic salary increases and leaves the competent authority considerable discretion in its analysis and weighting of the criteria used as a basis for annual salary scale reviews, that discretion is not incompatible with the principles which the organisations are required to apply. Here, the defendant made provision for an annual review and worked out a method which took clearly specified criteria into account, while pursuing the objective of maintaining competitive conditions of employment. Consequently, despite its shortcomings, which the Authority itself recognises in a working document of 15 October 2002, the methodology adopted in Decision 8/2002 cannot be censured by the Tribunal.

11. A question remains as to whether the new methodology was correctly applied by Decisions 9/2002 and 10/2002.

12. With regard to the 1.5 per cent adjustment granted as from 1 January 1999, whereas the previous decision - set aside by the Tribunal - allowed for no increase at all, the complainants argue that it fails to take account of earlier circumstances and thus disregards the considerable loss of purchasing power suffered by staff, which was recognised by the Tribunal in Judgment 2095. This plea fails. In whatever annual salary adjustments it decides to apply, the Organisation is not obliged to make retroactive allowance for loss of purchasing power, especially where former decisions determining salaries were not legally challenged. The new salary scales could be deemed to be flawed by errors of law only if the increase granted was not sufficient to comply with the need to maintain competitive conditions of employment. In the present case, it cannot be established from the submissions before the Tribunal that the conditions of employment of ESA staff members are not or no longer competitive, even though there is little doubt that their purchasing power has been seriously eroded since 1993.

In their other arguments, the complainants refer mainly to the shortcomings of the methodology adopted and to the lack of relevance of some of the indicators used from the point of view of maintaining competitive conditions of employment. The fact that some data concerned Switzerland or the European Commission is not sufficient to render the rate of adjustment adopted unlawful. Moreover, while the discrepancies between the figures proposed by the Surveillance Authority on 29 April 2002 and those used as a basis for the impugned decisions are hard to understand, nothing in the parties' submissions casts doubt on the official statistics used in arriving at the impugned decisions. Lastly, the weighting system used, reflects no obvious error of judgement which might be reviewed by the Tribunal. As for the competitive factor, the Tribunal can but reiterate that the criteria on which it is determined are difficult to quantify; they are however relevant to the desired objectives.

13. With regard to the 3 per cent adjustment granted as from 1 January 2000, the complainants put forward the same pleas as those considered previously, which call for the same replies. They express surprise at the fact that there is a difference between the normative factor of 2.51 per cent and the adjustment rate of 3 per cent that was granted, without such difference being explained by the application of the competitive factor, which is not mentioned. It is clear, in fact, that the difference of 0.49 per cent was precisely the adjustment component derived from the competitive factor. Its inclusion is implicit, which is open to criticism, but it is nevertheless obvious. It may be thought surprising, as the complainants point out, that by applying the new methodology the ESA/Court Committee arrived at the same adjustment rate as that which had been previously cancelled, but there is no evidence to show that in this case the methodology was not properly applied.

Since all the pleas fail, the applications for execution must be dismissed.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Regulation 21 reads as follows:

"Salary

1. The salary of a staff member shall be that specified in Appendix A to the Staff Regulations.

2. The ESA/Court Committee shall review Appendix A every year with a view to maintaining competitive employment conditions. The Authority shall formulate proposals to this effect."

Updated by PFR. Approved by CC. Last update: 20 February 2004.