Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2899**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. W. against the European Free Trade Association (EFTA) on 30 April 2008 and corrected on 16 June, EFTA's reply of 15 September, the complainant's rejoinder of 23 October and the Association's surrejoinder of 4 December 2008;

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. The complainant is a Norwegian national born in 1958. He joined EFTA on 1 December 2004 under a three-year fixed-term contract – which was subsequently renewed for another three years – as a Senior Officer in the Office for the European Economic Area (EEA) Financial Mechanism and the Norwegian Financial Mechanism (hereinafter "the FMO"). The FMO was established by EFTA's Standing Committee in February 2004 in order to assist the

management of the EEA Financial Mechanism and the Norwegian Financial Mechanism. It also serves as secretariat of the Financial Mechanism Committee, which was established in June 2004 to manage the EEA Financial Mechanism. It is administratively part of the EFTA Secretariat but has a separate administrative budget. Pursuant to a Service Sharing Agreement signed on 21 July 2006, the EFTA Administration delivers certain administrative services and technical support functions to the FMO, including the recruitment and administration of staff.

On 1 February 2005 the complainant applied for a rent allowance for the house he was renting in Belgium, his duty station. He indicated on the application form that he was not sharing the accommodation with a gainfully employed person. Responding to a question from the Administration about the granting of dependency benefits, he stated in an e-mail of 16 March 2005 that his wife was not his dependant. He received a rent allowance from February 2005 to January 2007. However, by an e-mail of 15 February 2007 the Head of Finance informed him that, in light of his spouse's income, he was not eligible for some or all of the 18,821.81 euros he had received as a rent allowance. He asked the complainant to provide further details of his spouse's income since February 2005 and indicated that on the basis of that information the Administration would decide how to deal with the overpayment. He also informed him that the rent allowance paid to him in January 2007 had been deducted from his salary for February 2007 and that payment of the allowance was suspended until further notice.

Following an exchange of correspondence between the Administration and the complainant, a meeting was held on 4 July 2007 during which the Secretary-General offered the complainant the possibility of reimbursing the overpayment over a period of one or two years, without interest. On 6 July 2007 the complainant declined that offer, arguing that he should bear no responsibility for the Administration's mistake, particularly as he had acted in good faith; he had therefore decided to refer the matter to the Consultative

Body, in accordance with Staff Regulation 45. The Secretary-General replied on 16 July that there had been no mistake on the part of the Administration and that the complainant had to reimburse the overpaid amount. He reiterated his offer that the complainant reimburse the amount in monthly instalments over one or two years, without interest. Noting that the meeting of the Consultative Body was scheduled for September, he stated that if the complainant had not accepted that offer in writing by 20 August, he would be asked at the meeting to pay the full amount immediately, with interest.

The Consultative Body met on 10 September 2007. By letter of 17 September the Secretary-General informed the complainant that, according to EFTA's legal counsel, his behaviour constituted a criminal offence. He instructed the complainant to reimburse the overpaid amount with interest by 17 October stressing that this was his last chance to agree to reimburse EFTA before a final decision was made on what action to take concerning his misconduct. The Secretary-General also informed the complainant that, in accordance with Staff Regulation 46, he could refer the issue of reimbursement to an Advisory Board.

On 17 October the complainant paid the amount claimed. The following day the Secretary-General acknowledged receipt of the payment in a letter which, he stated, constituted a formal written censure in accordance with Staff Rule 44.2. He added that no further disciplinary action would be taken, given that the complainant had reimbursed EFTA. On 6 December 2007 the complainant wrote to the Secretary-General stating that he submitted his case to the Advisory Board. By letter of 15 January 2008 the Secretary-General notified him that he refused to establish the Board on the grounds that the complainant had put forward no new facts or information following the conclusions of the Consultative Body. He added that the complainant could appeal directly to the Tribunal if he so wished. The complainant did so on 30 April 2008, indicating that he impugned the implicit rejection of the "claim" he had notified to EFTA on 6 December 2007.

B. The complainant submits that he was entitled to a rent allowance. In his view, Staff Rule 25.5, on which EFTA relied in considering that he was not entitled to a rent allowance, is not valid as it contradicts Staff Regulation 25. Staff Rule 25.5 provides that, if a staff member shares accommodation with a gainfully employed person having an income equal to or above a certain threshold, the gross annual income of that person shall be added to the staff member's salary for the purpose of relevant calculations, whereas Staff Regulation 25 merely stipulates that "[a] staff member who pays rent exceeding 20% of his salary shall be entitled to a rent allowance". According to the complainant, Staff Rule 25.5 thus reduces the staff member's entitlement to a rent allowance by adding an additional factor to the calculation. He alleges that only his salary should have been taken into consideration to determine the amount of the rent allowance. He contends that, in any event, the provisions of the Staff Regulations and Rules concerning this allowance are ambiguous and that, according to the Tribunal's case law, in case of doubt, an ambiguous provision should be interpreted to the detriment of the party which drafted it, that is to say the defendant.

In the event that the Tribunal finds that Staff Rule 25.5 is valid, the complainant argues that EFTA's claim for reimbursement was not justified. Firstly, the Association suffered no financial loss since the amount allegedly overpaid was in fact paid out of the FMO's budget. EFTA performs certain administrative services for the FMO but its budget is discussed and approved by the Financial Mechanism Committee. In his view, a decision concerning approximately 20,000 euros lies far beyond the scope of the said administrative services and the Secretary-General was therefore not competent to make a decision concerning the reimbursement of the allowance. Secondly, the complainant asserts that the special circumstances of the case were not taken into consideration. He considers that he should not have been asked to reimburse the rent allowance given that he had acted in good faith and that he had not been negligent. When he applied for the allowance, he was not sharing accommodation with

a gainfully employed person. Indeed, at that time, his wife was not in Belgium. Moreover, he provided the Administration with the necessary information concerning his spouse as soon as her situation changed. Thus, in December 2004 he submitted a Confidential Family Status Report and Application for Dependency Benefits form in which he gave information about his spouse's income. EFTA should have reacted at that time and questioned his entitlement to a rent allowance; it showed negligence in not doing so. The complainant also criticises the fact that it took two years for the Association to determine that he might not be entitled to the allowance. This delay, coupled with the fact that he had to take out a loan in order to reimburse the allowance, caused him a financial loss.

The complainant considers that he is not guilty of misconduct since he has always acted in good faith. In his view, the Secretary-General's decision to impose a written censure constitutes an abuse of authority as his decision was not substantiated. He objects to the fact that he was given no prior warning of the decision to deduct the rent allowance paid in January 2007 from his salary for February 2007. Furthermore, he was denied the possibility of referring the matter to the Advisory Board, since the Secretary-General failed to set it up so that the Board would be informed that the complainant had asked that the matter be brought before it. He states that the negative impact of the dispute on his life led him to tender his resignation from EFTA in April 2008. He adds that he was never granted an extra step increase which had been approved in September 2007 with effect from 1 June 2007.

The complainant seeks the quashing of the decision of 18 October 2007 to issue him with a written censure. He claims payment of 4,307 euros, corresponding to the amount he would have received had he been granted an extra step increase as from June 2007, and 12,770 euros in lieu of payment of the rent allowance withheld from 1 January 2007 onwards, as well as 19,620 euros corresponding to the amount he reimbursed. He claims interest at a rate of 5 per cent per annum on these amounts. In addition, he seeks 8,684 euros in moral damages plus costs.

C. In its reply EFTA contends that the complainant's claim concerning his extra step increase is irreceivable for failure to exhaust internal means of redress.

It argues that when applying for a rent allowance staff members have a duty to give correct information and to report immediately any subsequent change in their situation. The complainant indicated on the application form submitted in February 2005 that he was not sharing accommodation with a gainfully employed person. However, at that time, his wife was working full-time in her country of origin, and he could not have misunderstood the simple question asked on the form. His wife moved to Belgium only a few weeks after he had handed in the application form; he should then have informed the Administration that she continued to be gainfully employed and that the information he had provided on the application form was therefore not valid anymore. EFTA adds that when it discovered that the complainant was living with a gainfully employed person and asked to be provided with information on her income, he refused to provide such information. It therefore rejects his argument that he acted in good faith. In its view, the written censure was justified since the complainant gave misleading information when he applied for a rent allowance, whereas it is explicitly stated on the application form that any failure to state correctly or update the information in the form may be regarded as a disciplinary offence.

According to EFTA, the Staff Regulations and Rules unambiguously provide that the income of a gainfully employed family member should be taken into account for the purpose of calculating the rent allowance. Since the complainant's spouse was gainfully employed and her income was above the relevant threshold, he was not entitled to a rent allowance. The complainant shows bad faith in pleading that the Staff Regulations and Rules concerning rent allowance are ambiguous. Staff Regulation 25 sets forth the basic condition for entitlement to a rent allowance – namely that the staff member must be paying rent exceeding 20 per cent of his or her salary – and Staff Rules 25.1 to 25.6 provide further details concerning that condition as well as the way of calculating the

allowance. Staff Rule 25.5 is consistent with the underlying purpose of Staff Regulation 25, which is to reduce the additional costs of living incurred by staff members who have to relocate when accepting to work for EFTA. Moreover, the Association's long-standing practice is to take into account the income of a gainfully employed spouse when calculating a rent allowance.

The defendant asserts that the complainant was obliged to reimburse the amount wrongly received and that its request for reimbursement was justified. Indeed, it is clear that the allowance was paid by mistake as a result of his misleading indications on the application form. Moreover, he did not establish, at the relevant time, that reimbursement would put him under unreasonable financial strain. EFTA stresses that, as soon as it discovered that the allowance was wrongly being paid to the complainant, it claimed reimbursement of the full amount and proposed a staggered reimbursement plan, which the complainant refused.

D. In his rejoinder the complainant argues that the rent allowance and the dependency benefits are interconnected issues and that the Administration should have considered the information he had provided concerning dependency benefits when calculating the rent allowance. He underlines that, having submitted Confidential Family Status Report and Application for Dependency Benefits forms in January 2005, December 2005 and December 2006, he thought he had given all relevant information with regard to his entitlement to benefits and allowances. He contends that no provision in the Staff Regulations and Rules authorised EFTA to deduct the overpayment directly from his salary without prior notice.

Concerning his claim for an extra step increase, he points out that he has withdrawn that claim as such, but that his claim for damages, which he maintains, is still partly based on EFTA's failure to grant the step increase, since this was one of the ways in which it sought to punish him in this case. He corrects his claim for the payment of the withheld rent allowance, indicating that the amount due is 12,131 euros and not 12,770 euros as indicated in his complaint.

E. In its surrejoinder the defendant maintains its position. It explains that staff assigned to the FMO are subject to EFTA's Staff Regulations and Rules, since the FMO is administratively part of the EFTA Secretariat. The responsibility for administering the FMO's human resources clearly lies with the EFTA Administration.

EFTA submits that the complainant was not absolved from his obligation to update the information he gave in relation to the rent allowance by the fact that he sent an update concerning other entitlements. It contends that the dependency benefits and the rent allowance are two separate entitlements for which a specific application form has to be completed.

CONSIDERATIONS

1. The complainant was recruited by EFTA on 1 December 2004 as a Senior Officer in the FMO, which serves as the secretariat of the Financial Mechanism Committee of the EEA. Although it has a separate administrative budget, the FMO is administratively part of the EFTA Secretariat and the complainant's employment contract specified that the Secretariat's Staff Regulations and Rules governed his conditions of service.

2. The complainant, whose duty station was Brussels, is Norwegian and had previously lived in his country of origin. On 1 February 2005 he applied for the rent allowance provided for in Staff Regulation 25.

Although his wife was on the point of joining him in Belgium, where she intended to continue working for the company already employing her in Norway, the complainant indicated in the application form for this allowance that he was not "sharing [his] accommodation with a gainfully employed person".

The parties to the dispute strongly disagree as to the complainant's reasons for ticking this box on the form. Although he admits that he no longer remembers exactly why he gave this answer, the complainant states that he had not realised that, regardless

of her income, his wife should be regarded as a "gainfully employed person" for the purposes of Staff Rule 25.5. He emphasises, however, that the information he gave was in any case correct, because on 1 February 2005 his wife had not yet joined him in Belgium and the plan was that she should then work part-time on conditions giving her the status of a dependant. According to the Association, the complainant had, on the contrary, deliberately supplied an incorrect answer on the form with a view to drawing a rent allowance to which he was in fact not entitled.

3. At the beginning of March 2005 it became clear that the complainant's wife, who in the meantime had indeed joined him, would in fact be working full-time at a salary level which ruled out any possibility of her being regarded as a dependant. On 16 March 2005 the complainant, who in December 2004 and January 2005 had also submitted Confidential Family Status Report and Application for Dependency Benefits forms, sent the Administration an e-mail stating that his wife was not his dependant. In forms of the same kind covering 2006 and 2007, which clearly indicated that the complainant's wife lived at his home, he again stated that he was "[n]ot claiming dependency benefits", which was consistent with the information supplied in that e-mail.

Nevertheless, the complainant continued to receive a rent allowance calculated on the basis of the information contained in the application form for this allowance which he had filled out on 1 February 2005.

4. On 15 February 2007, in other words approximately two years later, EFTA's Head of Finance sent an e-mail to the complainant to notify him that, in light of the information he had supplied on 16 March 2005, his spouse's income ought to have been taken into consideration when calculating his rent allowance and that at least some of the allowance he had received had been paid to him in error. This official told him that payment of the allowance in question had already been stopped until further notice and that a first deduction had even been made in that connection from his February salary. He also

asked the complainant to disclose his spouse's income for the period in question, in order that his exact entitlement might be ascertained.

After a subsequent exchange of e-mails, from which it is apparent that the complainant was extremely reluctant to supply comprehensive information on this matter, he did, however, admit that during the period in question he had plainly never been eligible for a rent allowance owing to the level of his spouse's income.

5. Despite that, when the Association announced that, in those circumstances, it intended to obtain full reimbursement of the overpayment, the complainant quickly made it clear that he was opposed to such a solution. In his opinion, this undue payment of the rent allowance resulted from an oversight on the part of the Administration, which had not acted on the information which he had supplied on 16 March 2005. Although at that point he did not dispute the fact that discontinuation of the allowance from then onwards was warranted, he considered it unjust to have to suffer the consequences of such a mistake by having to pay back all of the sum demanded from him, which amounted to approximately 18,800 euros. He therefore refused to accede to the Association's request, which was reiterated on several occasions, including at a meeting with the Secretary-General on 4 July 2007, to reimburse this sum without interest over a period of 12 or 24 months.

6. On 6 July 2007 the complainant referred the matter to the Consultative Body provided for in Staff Regulation 45, which then met on 10 September. During that meeting the Secretary-General, who had become convinced that the complainant had acted in bad faith, stressed the serious nature of the complainant's misconduct and plainly indicated, as he had done already at the meeting on 4 July, that the complainant might be dismissed if he continued to refuse repayment of the sum claimed.

By a decision of 17 September 2007 the Secretary-General finally instructed him to pay back the full sum, plus interest, namely 19,620 euros in total, before 17 October.

7. As the complainant did in fact pay the sum demanded by that date, the Secretary-General abandoned the idea of dismissing him. Nevertheless, by a decision of 18 October 2007, he subjected him to written censure pursuant to Staff Rule 44.2.

8. By a letter of 6 December 2007 to the Secretary-General, the complainant lodged an appeal with the Advisory Board referred to in Staff Regulation 46, challenging the decisions taken concerning him.

By a decision of 15 January 2008 the Secretary-General refused, however, to convene the Board on the grounds that, since the sum in question had been paid on 17 October 2007, the dispute had, in his opinion, been completely settled in the wake of the Consultative Body's meeting and there was no justification for incurring additional costs in relation to the case.

9. By a letter of 29 April 2008 the complainant resigned with effect from the end of July for reasons which, according to the terms of the letter, were directly connected with the treatment he had received from EFTA during the dispute.

10. In the complaint he has filed with the Tribunal, which must be deemed to be mainly directed against the above-mentioned decision of the Secretary-General of 15 January 2008, the complainant seeks, inter alia, the withdrawal of the written censure to which he was subjected and restitution of the sum which he had to pay as reimbursement of the overpaid rent allowance, plus interest. He extends this last claim, as he had begun to do shortly before the meeting of the Consultative Body, by submitting that he was in fact entitled to the disputed allowance and he requests the payment of the sums corresponding to the amount of rent allowance he would have received from the date on which payment thereof was discontinued until the end of his service with the Association. Lastly, he claims damages for the moral injury he considers he has suffered, compensation for failure to grant him the extra step increase which he should have received, and costs.

11. It should first be noted that the impugned decision by which the Secretary-General prematurely ended the internal appeal proceedings by refusing to convene the Advisory Board must be quashed, as it is grossly unlawful.

Staff Regulation 46(1) reads: "[a]ny staff question which has not been settled within the committee referred to in Regulation 45.6 [in other words, the above-mentioned Consultative Body] within 30 days after referral may be referred by the Secretary-General, the Staff Committee or the staff member directly concerned […] to an Advisory Board". It is therefore plain from the terms of this provision that the complainant, as the staff member directly concerned by the dispute, was entitled to refer it to this appeal body.

12. As the Tribunal recently confirmed in Judgment 2781, under 15, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Consequently, save in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body.

In the instant case, none of the reasons given by the Secretary-General for depriving the complainant of this safeguard can be accepted as valid. The fact that the complainant agreed to comply with the formal order given to him on 17 September 2007 to repay the disputed sum plainly did not signify that he waived his right to challenge the merits of this measure before the Advisory Board. In fact, he merely honoured his legal duty to abide by a mandatory administrative decision which EFTA clearly intended to enforce on pain of disciplinary penalties. It was thus clearly improper for the Association to claim that the dispute had been finally settled through this step. Nor do considerations pertaining to the cost inherent in holding an Advisory Board meeting justify this breach of a safeguard enjoyed by staff members. The argument employed by EFTA's legal counsel in a letter to the complainant of 31 January 2008 that, in any case, the Secretary-General would not be bound by the Board's

opinion, is all the more inadmissible for the fact that it implies that the Association views the appeal mechanism provided for in its Staff Regulations as being totally ineffective.

13. Although the complainant is entitled to file a complaint directly with the Tribunal, since he was deprived of the possibility of presenting his case to the Advisory Board, in such a situation the Tribunal could nonetheless decide to refer the case back to the organisation in order that the internal appeal procedure might be completed. However, in the circumstances of the instant case and having regard to the particularly antagonistic relationship between the parties, it considers it preferable to rule on the whole of the dispute forthwith.

14. In support of his contention that he was entitled to the rent allowance, the complainant asserts that Staff Rule 25.5 relating to the payment of this allowance in the event of the "sharing of accommodation" conflicts with Staff Regulation 25 establishing the principle governing the granting of this allowance. He infers from this that, in view of the hierarchy of norms defined by Staff Regulations 1(1) and 3(2), Staff Rule 25.5 is unlawful and hence inapplicable to him.

15. Staff Regulation 25 reads: "[a] staff member who pays rent exceeding 20% of his salary shall be entitled to a rent allowance".

Staff Rule 25.5 states: "[i]f a staff member shares accommodation with a gainfully employed family member or any other gainfully employed person having an income equal to or above B1/1 [corresponding to the lowest level on the EFTA salary scale for General Service staff], the gross annual income of that family member or person shall be added to the staff member's salary for the purpose of the relevant calculations".

According to the complainant, Staff Rule 25.5 could not lawfully provide for the inclusion of a third party's salary in the calculation of a staff member's entitlement to this allowance, because Staff Regulation 25 refers solely to the staff member's salary.

16. The Tribunal will not concur with the complainant's reasoning, since it is by no means abnormal that the above-mentioned provisions of Staff Regulation 25, which merely establish the principle that staff members who have to devote a significant proportion of their salary to housing expenditure are entitled to a rent allowance, should be clarified or adjusted by the Staff Rules as required in order to define the conditions on which they will apply. In particular, there was nothing to prevent Staff Rule 25.5 stipulating that, where accommodation is shared with another occupant who is able to contribute to the payment of the rent, the salary of this third party must also be taken into account when determining entitlement to the allowance. While the link between the two provisions in question is no doubt not entirely satisfactory as far as the wording is concerned, in that Staff Regulation 25 does indeed refer solely to the salary of the staff member concerned, the authors of the Staff Regulations certainly did not intend to rule out the possibility that minor adjustments of this kind might be added to the text through the Staff Rules. Moreover, the adjustment made by Staff Rule 25.5 is all the more justified for the fact that it is dictated by considerations of good sense and fairness. It follows that Staff Rule 25.5 cannot be regarded as unlawful.

17. Since the complainant was not entitled to the rent allowance, his claim to be granted this allowance for the period after payment was stopped must be dismissed.

It is, however, still necessary to examine whether – and if so, to what extent – the Association could demand the reimbursement of the payments received by the complainant during the prior period.

18. In this connection the complainant first contends that, since the allowance in question, like the whole of his remuneration, was paid from the FMO's own budget and not that of EFTA, the latter did

not suffer any injury on account of the mistake that had been made and could not claim that it was owed any money by him. He infers from this that the Secretary-General of the Association had no authority to demand the reimbursement of the disputed overpayment.

This argument is groundless.

19. Under Article 1(6) of the Decision of the Standing Committee of the EFTA States of 5 February 2004 establishing the FMO, "[t]he Office shall administratively be part of the EFTA Secretariat". In addition, the Service Sharing Arrangement of 21 July 2006, which defines the administrative services and technical support functions delivered to the FMO by the EFTA Administration, stipulates in Article 2 that the EFTA Administration is responsible for the "[p]ayroll (including allowances […])" and human resources "[w]ithin the frame of HR practices applied in the EFTA Secretariat".

It is clear from these texts that it is incumbent upon EFTA to pay the salaries and allowances of FMO staff members and, when necessary, to require the reimbursement of any components of remuneration unduly paid to them. It is true that, since the FMO has a separate administrative budget, the payments and reimbursements in question are ultimately not made from or to the EFTA budget. But the Secretary-General, as chief executive officer of the EFTA Secretariat, is nonetheless responsible for effecting these operations as part of the management duties entrusted to the Association by the FMO pursuant to the above-mentioned texts and he did therefore have the authority to ask the complainant to refund the rent allowance which had been paid to him by mistake. The complainant's reference in this connection to Judgment 1849, which concerned a different situation, is irrelevant. Lastly, the fact that, by a memorandum of 24 April 2007 the Director of the FMO, acting in agreement with the Chairman of the Financial Mechanism Committee, recommended that the EFTA Secretariat should not seek reimbursement of the sums in question, has no legal bearing on the outcome of the dispute, since the Secretary-General of the Association alone had the authority to take a decision on the matter.

20. It is a general principle of law, to which reference is made in Judgments 1195, under 3, and 2565, under 7(a), that any sum which has been paid in error may be recovered, save where such recovery is time-barred, which was obviously not the case here.

Nevertheless, the Tribunal's case law has it that an international organisation which has mistakenly overpaid an official must take into account any circumstances which would make it unfair or unjust to require repayment of the sum in question – at least the full amount thereof. Relevant circumstances include the good or bad faith of the staff member, the sort of mistake made, the respective responsibilities of the organisation and the person concerned for the causes of the mistake and the inconvenience to which the staff member would be put by repayment that is required as a result of the organisation's oversight (see Judgments 1111, under 2, and 1849, under 16 and 18).

21. According to this same case law, the decision of the chief executive officer of an organisation to recover an unduly paid sum of money falls within his or her discretionary authority and is subject to only limited review by the Tribunal, but this decision must nevertheless be censured if it is tainted with a formal or procedural irregularity, or if it was based on a mistake of fact or of law.

The decision of the Secretary-General of EFTA of 17 September 2007 instructing the complainant to reimburse the disputed sum in its entirety was unlawful on two counts.

22. It is plain from various documents in the file, especially the summary of the meeting of 4 July 2007 and the minutes of the meeting held by the Consultative Body on 10 September 2007, that the Secretary-General considered this decision to be warranted on the grounds that full reimbursement was necessary simply because undue payments had been made, without there being any need to enquire into responsibility for the original mistake. In the light of what was said above, this line of argument is based on an error of law.

23. It is also clear from the above-mentioned minutes that, during the meeting on 10 September 2007 of the Consultative

Body, the Secretary-General referred to the opinion of a lawyer who had been consulted by the Association. The Tribunal notes that this document contained some very serious allegations about the complainant. Not only did it cast substantial doubts on his good faith, but it also stated that his conduct might be deemed a criminal offence. It has, however, been established that this opinion, on which the Secretary-General heavily relied during the meeting to justify his position, had not been forwarded to the complainant prior to that meeting. By thus basing his decision on an essential document without having given the person concerned an opportunity to refute its content, the competent authority breached the right to be heard which every staff member possesses and his decision was thus tainted by a major procedural flaw (in this connection, see for example Judgments 69, under 2, and 1881, under 18 to 20).

24. It follows that the decision of 17 September 2007 must be quashed.

25. The Tribunal must therefore consider the parties' respective arguments regarding the obligation to repay the disputed sum, and in this regard it should first be noted that it is by no means established that the mistake made was due to bad faith on the part of the complainant. Several considerations lead to this finding on this important issue.

Firstly, although Staff Regulation 25 and Staff Rule 25.5 are sufficiently clear, it must be recognised that the Administrative Guidelines which the complainant was given when he was recruited made no mention of the fact that payment of the rent allowance was subject to the condition that the person in receipt of it did not share his or her accommodation with a gainfully employed person. As the very purpose of this document is to enlighten new staff members of the

Association as to the rules applying to them, the complainant has good reason to point out that he might have been misled on this point.

Secondly, and regardless of the uncertainty – acknowledged by the complainant himself – surrounding the reasons which might have led him to state on the form which he filled out on 1 February 2005 that he did not share his accommodation with a gainfully employed person, the fact remains that this information was not incorrect at that date, because his wife had not yet joined him. Admittedly, it would have been sensible for him to have indicated, in making that statement, that his personal situation was likely to change in the near future, but it transpires from the submissions that the complainant was still unsure in that respect. In addition, even if he had been aware of the rule established by Staff Rule 25.5, it is quite possible that at that juncture he thought that he did not need to mention the fact that he was sharing his accommodation with his wife, as it was initially expected that she would receive a salary below the threshold set by this provision.

Thirdly, it is true that it was undeniably up to the complainant to inform the Administration about the change in his situation as soon as it occurred. However, the available evidence does not support the view that he deliberately refrained from taking any steps in that direction, because on 16 March 2005 he did report – albeit through an inappropriate procedure – that his wife was not his dependant, and he subsequently confirmed this information every year in his Confidential Family Status Report and Application for Dependency Benefits forms which clearly showed that the two spouses shared the same accommodation.

Lastly, the fact that the complainant was reluctant to supply information about his spouse's income, which is heavily emphasised by the Association in its submissions, cannot be regarded as proof of bad faith. Whatever the complainant's reasons for adopting this stance, it must be noted that, as soon as the mistake was discovered in February 2007, he admitted that the level of this income had been above the threshold entitling him to the disputed allowance throughout the period in question. He is therefore right to assert that supplying this information did not really serve any useful purpose.

26. When it comes to apportioning the blame between EFTA and the complainant for the mistake made, the foregoing considerations do not alter the fact that, in the Tribunal's opinion, the complainant is chiefly responsible for the undue payment. Since, as he himself submits, he had no doubt misunderstood the question in the application form for the rent allowance which he filled out in February 2005, it was obviously up to him to ask the Association's Secretariat for more information on the subject. In addition, by merely reporting the change in his situation in an e-mail of 16 March 2005 in response to a question from the Administration about the granting of dependency benefits and not the rent allowance, the complainant did not furnish information that was clear enough to ensure that his entitlement to this allowance would definitely be reviewed. The subsequent filing of Confidential Family Status Report and Application for Dependency Benefits forms likewise afforded no guarantee that such a review would be carried out. It was therefore the complainant's duty to provide EFTA with more precise information specifically regarding his entitlement to a rent allowance.

27. The Association should not, however, be exonerated from all responsibility for the mistake made. Although the information provided by the complainant was not submitted in the appropriate form, it was nonetheless sufficient to enable the Association to avoid this mistake, or at least to detect it sooner. Under the applicable texts, dependants and gainfully employed persons, within the meaning of the provisions governing the dependency benefit and the rent allowance, respectively, are defined by reference to the same income threshold. Thus, all the Association needed to do in this respect was to make a simple comparison, as is evidenced by the fact that in February 2007 it ultimately noticed the anomaly in question solely on the basis of the data given to it by the complainant on 16 March 2005, and not from any additional more recent item of information. Moreover, it is clear from the submissions that the Administration had at least once made such a comparison in a very similar case. Lastly, the Tribunal notes that the Administration itself acknowledged in its e-mail to the

complainant of 15 February 2007 that it was partly responsible for the mistake.

Had it been more vigilant, the Association could at least have avoided undue payments being made for two years and resulting in a situation where the complainant was faced with a debt so large that its repayment – even in instalments – would inevitably cause serious disruption to his life.

28. In the light of all these circumstances, the Tribunal considers that the reciprocal obligations of the parties to the dispute may be fairly taken into account by reducing by a quarter the amount which EFTA has required the complainant to reimburse in respect of the allowance in question, in other words by lowering this amount from 19,620 euros to 14,715 euros including interest.

Consequently, the Association shall be ordered to pay the complainant the sum of 4,905 euros by way of restitution of the excess amount reimbursed.

This sum shall bear interest at a rate which shall be set, in accordance with the complainant's request, at 5 per cent per annum, as from the date of the reimbursement made by the complainant, i.e. as from 17 October 2007.

29. As regards the written censure to which the complainant was subjected on 18 October 2007, the Tribunal finds, firstly, that in one respect his conduct was certainly open to criticism in view of his obligations to EFTA. Contrary to his submissions, the complainant could not refuse, as he did until the decision of 17 September 2007, to comply with the Association's express and repeated requests for reimbursement. As the internal appeal procedure does not have a suspensory effect, and even though the Association would no doubt have been wiser to await its completion before demanding payment of the debt, he was bound to comply with these requests. His refusal to accede to them thus constituted misconduct which could lead to a disciplinary sanction on the basis of Staff Regulation 44.

30. However, the evidence on file shows that the main reason for the disputed censure was that, in EFTA's opinion, the complainant had deliberately attempted to obtain an allowance to which he knew he was not entitled. Insofar as the complainant could not legally be held to have acted in bad faith, as was stated earlier, this sanction must be deemed to rest on mistakes of fact, or at least on unestablished facts.

Furthermore, it is clear from the very terms of the decision in question that it was largely based on the above-mentioned legal opinion presented for the first time during the meeting of the Consultative Body on 10 September 2007. For the same reasons as those given above in respect of the decision of 17 September 2007, it was therefore tainted with a procedural flaw which is all the more serious here for the fact that the right to be heard must be respected in an especially rigorous manner in disciplinary proceedings.

The decision of 18 October 2007 must therefore be quashed as well.

31. The many unlawful aspects of EFTA's decisions regarding the complainant, especially the violation of some of his fundamental rights, such as the right to be heard or the right of recourse to an internal appeal procedure, plainly warrant an award of moral damages to the complainant. Such an award is particularly appropriate in this case because the Association's questioning of the complainant's good faith and its assertion, which was to say the least far-fetched, that his conduct constituted a criminal offence, were likely seriously to tarnish his honour and his reputation.

Although the method suggested by the complainant for assessing the injury in question, which is based on the time he has devoted to this case, is inappropriate, the Tribunal will grant him the sum which he claims, namely 8,684 euros, as it does not exceed the real amount of this injury.

32. The Tribunal will not, however, accede to the complainant's request for compensation for failure to grant the extra step increase to which he would have been entitled. As the Association rightly

contends, this claim is irreceivable since it has not first been submitted to the Consultative Body referred to in Staff Regulation 45. It is debatable whether the rule laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must be exhausted is applicable to this case, given that, as was explained earlier, the Association deprived him of his right of appeal to the Advisory Board; but in any case, in accordance with Staff Regulation 46, the Board could not have entertained a claim which had not previously been referred to the Consultative Body. This objection to receivability therefore has merit.

33. Since he partially succeeds, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of EFTA of 15 January 2008 and those of 17 September 2007 and 18 October 2007 are quashed.
2. The sum owed to EFTA by the complainant in respect of the rent allowance which he drew without entitlement is reduced from 19,620 euros to 14,715 euros including interest.
3. The Association shall pay the complainant the sum of 4,905 euros by way of restitution of the amount paid in excess of that stipulated in the previous paragraph, plus interest at 5 per cent per annum as from 17 October 2007.
4. The Association shall pay the complainant moral damages in the amount of 8,684 euros.
5. It shall also pay him 1,000 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President,

and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet