FORTIETH ORDINARY SESSION

In re DIAZ ACEVEDO

Judgment No. 349

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Southern Observatory (ESO) by Mr. Hector Diaz Acevedo on 17 February and postmarked 25 February 1977, the ESO's reply of 23 May, the complainant's rejoinder of 29 June, the ESO's surrejoinder of 12 September, the complainant's further memorandum of 13 October and the ESO's reply thereto of 20 October 1977;

Considering the applications to intervene filed by

Mr. Manuel Bahamondes,
Mr. Helmuth Helborn,
Mr. Joaquín Pérez,
Mr. Guido Pizarro,
Mr. Manuel Pizarro,
Mr. Oscar Pizarro,
Mr. Luis Ramírez,
Mr. Gorky Román,
Mr. Rolando Vega,
Mr. José Véliz;

Considering the ESO's observations of 1 December 1977 on the applications to intervene;

Considering Article II, paragraphs 2 and 5, and Article VII, paragraphs 1 and 3, of the Statute of the Tribunal and Article IX, paragraph 2, of the Annex to the Statute, Article 9, paragraph 2, and Article 17, paragraphs 2 and 4, of the Rules of Court of the Tribunal and the Local Staff Regulations and Staff Rules of the ESO, particularly Articles LS I 3.07, LS II 1.07, LS II 1.08, LS II 1.10, LS II 1.11, LS II 3.15, LS II 5.03, LS II 5.04(2), LS II 5.04(10), LS III 1.01 to 1.13, LS V 1.02, LS VI 1.01 to 1.10, LS VIII 1.01, Appendix A3 (Article A3 1.02) and Appendix A4 (Article A4 1.01);

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The ESO engaged the complainant on a contract dated 4 June 1973 which took effect on 8 May 1973 and assigned him as a night assistant to the observatory known as La Silla in Chile. His contract was renewed from time to time, and for the last time on 23 March 1976. The ESO took the view that the complainant had adopted an inadmissible attitude towards his supervisors at a staff meeting held with the competent officials on 17 August 1976 to discuss working conditions of night assistants. By a letter of 19 August it told him that he was dismissed.

B. On leaving the ESO the complainant made several claims particularly for payment of overtime and night work and of compensation for disability caused by a service-incurred spinal injury in 1973. His claims were dismissed on the ESO's behalf by Mrs. Meinen in Santiago on 3 September 1976 and then by the Director-General himself in Munich by a letter of 30 November. It is the decision in the Director-General's letter that he now impugns.

C. The complainant asks the Tribunal:

(a) to declare that his dismissal was unjustified and a breach of Articles LS II 5.04(2) and LS II 5.04(10) of the Local Staff Regulations; accordingly to quash the decision and order his reinstatement; to order the ESO to pay him the salary which he would have received had he remained on the staff and, should it prove impossible or unadvisable to quash the decision, compensation for the prejudice he has suffered; subsidiarily, failing such relief, to order the ESO to pay the sums prescribed in the Local Staff Regulations as set out in the ESO's letter of dismissal;

(b) to declare that the ESO infringed Articles LS III 1.8 and LS III 1.13 of the Local Staff Regulations and accordingly order it to pay him retroactively the sums due to him for the night work which he performed between 3 May 1973 and 1 April 1976, which shall not be less than 10 per cent of his basic salary as paid at present to night assistants;

(c) to declare that his basic working week was forty hours from 1 June 1976, as for all members of the staff, and that accordingly any working hours over 160 a month should have been regarded as overtime and paid as such in accordance with Article LS III 1.03 of the Local Staff Regulations; and to order the ESO to pay compensation for twenty overtime hours a month from 1 June 1976; and

(d) to declare that the service-incurred spinal injury suffered by the complainant constitutes partial work disability and to order proper compensation therefor.

D. The ESO asks the Tribunal to declare the first claim irreceivable on the grounds that the internal means of redress have not been exhausted and in any event to dismiss the four claims as utterly unfounded.

E. The ESO also asks the Tribunal to declare the applications to intervene irreceivable on the grounds that they are time-barred and that the interveners have not exhausted the internal means of redress and in any event to dismiss their claims as utterly unfounded.

CONSIDERATIONS:

On receivability:

1. The organisation objects that the complaint, in so far as it concerns the decision to dismiss the complainant, is irreceivable under Article VII of the Tribunal's Statute inasmuch as the complainant failed to exhaust the means of resisting it open to him under the Staff Regulations. The complainant, who was employed as a night assistant at the La Silla Observatory in Chile, was notified of his dismissal by letter dated 19 August 1976 signed by two out of the four members of the Executive Council of the Observatory. Two grounds were given. The first was that the complainant had answered in an improper and disrespectful manner to Mr. De Jonge, his direct superior and one of the signatories of the letter, at a meeting held on 17 August to discuss the new working conditions of night assistants. The second was his non-acceptance of the conditions established and accepted by the rest of the night assistants. The letter invited the complainant to attend at the office in Santiago for settlement of outstanding sums. On 20 August the claimant attended at the office and on the back of the liquidation settlement then presented to him noted under seven heads his claim for sums not shown on the settlement. On 3 September the Administrator wrote to the complainant admitting some of these claims and rejecting others. It is convenient to note at this stage the three heads that are still in dispute, which are:

(1) for overtime payments;

(2) for an indemnity for night work;

(3) for compensation for an accidental injury alleged to have been sustained by the complainant in the course of his work.

2. On 6 September 1976 the complainant addressed to the Executive Council a letter in which he enclosed "an appeal aimed at reaching an agreement satisfactory for the two parties on the liquidation of the relevant claims, which will be submitted to the Director-General". The appeal referred to the two reasons given for his dismissal, which he contested on the facts and described as a reprisal; it set out at length his version of the meeting of 17 August; it did not refer to the claims arising out of the settlement. To this letter he received no reply.

3. On 18 October he wrote two letters to the Director-General. In the first he stated that he enclosed a copy of his appeal "so that you may study it and resolve on it as indicated in Article LS VI 1.07". He added what he called a summary of the problem, which was a brief account of his relations with Mr. De Jonge, concluding with the suggestion that he had been deliberately fired as a reprisal for fighting for the rights of his group. In the second letter he described in detail his other claims concerning the final settlement. The Director-General has power under the Regulations to appoint a committee with staff participation to advise him on specific cases of dispute and appeal, but in this case he did not exercise it. It does not therefore appear in the dossier what evidence he had

before him relating to the dispute or what matters he took into consideration. On 30 November 1976 he replied to the complainant. In the first paragraph he acknowledged both letters of 18 October and said that the complainant had already received answers "on most of these points" which the Director- General could only endorse as quite appropriate. In the next two paragraphs he dealt with the claims arising out of the settlement and in the fourth paragraph he concluded by saying that he saw no possibility of answering "any of your requests in a favourable way".

4. Chapter VI of the applicable Regulations for local staff members (known as the LS Regulations) prescribes by Article 1.03 that appeals shall be lodged in writing with the Director of the ESO in Chile, who shall acknowledge receipt. It does not appear in the dossier who the Director in Chile is or whether he ever considered the appeal; no one acknowledged receipt. The organisation accepts however that the complainant complied with the procedure under this Article, in respect of all his claims.

Article 1.07 (this being the Article cited by the complainant in his letter of 18 October as quoted above) provides that in the case of continued disagreement an appeal against the Chile Director's decision may be made in writing to the Director-General. The organisation contends that in his two letters of 18 October the complainant made no reference to his dismissal and that by failing to request a reversal of the specific decision, he has not exhausted his internal remedies. The Tribunal does not interpret in this manner the first letter of 18 October and the objection fails.

On the merits: factual background:

5. The letter of dismissal in making the charge of improper and disrespectful behaviour alleges that the complainant had had in the past "several warnings because of similar attitudes". The complainant on the other hand contends that his dismissal was a reprisal. This, as well as the examination of the subsidiary claims, makes it necessary to consider in some detail the events which led up to the meeting on 17 August 1976.

6. The night assistants are a group of about eight men under the direction of Mr. De Jonge. They work in the Observatory at night mainly to assist visiting astronomers in making their observations. They are flown up to the Observatory from Santiago and work for 8 nights continuously and then have 6 nights off duty, the whole being known as a "turno". The complainant entered this employment on 8 May 1973 and at the material time was working under a contract dated 23 March 1976 in which the duration of his employment was given as indefinido.

7. Chapter II of the Regulations deals with conditions of employment.

Article 1.07 provides that every appointment shall be recorded in a written contract and Article 1.08 says that the contract shall indicate inter alia the basic salary, the basic working week and its actual length if this is different, and any special conditions. Article 1.10 states that "any change in the conditions of contract shall require a written amendment accepted and signed by both parties".

Article 5.03 provides for termination of contract by means of dismissal. Grounds for dismissal are stated under fourteen heads. They do not all involve misconduct and the termination unless it is for disciplinary reasons, carries a small indemnity. For the first ground of dismissal, the organisation relies upon the second head in Article 5.03, viz. "lack of probity, proven injuries or immoral conduct". As to the second ground, there is no head which quite fits being in a minority of one in refusing to accept an amendment; the organisation cites the tenth head, which is "termination, reduction and functional change in the operational structure of employment of the organisation".

8. Chapter III deals with working conditions. The first three Articles provide for the basic working week of 45 hours, including 4 hours' transport, and for overtime. The next nine

Articles do not apply to night assistants, except to the extent that Article 1.08 states:

"For regular night work a special contract has to be signed with the local staff member stating the conditions and special indemnities paid for this kind of work."

Article 1.13 provides that their conditions of work are specified in individual contracts and in an annex. The annex provides only for "special working time" as already set out, which during the basic working period of 8 nights is not to exceed 90 hours. This 90 hours in the fortnight is therefore the equivalent of the ordinary basic week of 45 hours.

9. The organisation has not drawn up individual contracts for night assistants. It has used the common form and left blank the space in that form which provides for special conditions to be stated. The contract states the basic monthly salary but does not, as required by LS III 1.08, state the special indemnities. It is true that LS III 1.13 states that night assistants are not subject to LS III 1.04 to 1.12, but this exclusion cannot be applied to LS III 1.08 since that

Article relates to night assistants and to no one else.

10. There is no satisfactory evidence that the night assistants were paid a special indemnity. The organisation contends that the figure given in the complainant's contract as the basic salary "Took account of his special duties" and was higher than the corresponding figure for local staff generally. The organisation does not state, either in the form of a flat figure or of a percentage, what this excess was. Moreover, when, as will be seen, the organisation eventually offered an indemnity, it was in the form of 10 per cent of the basic salary and no suggestion was made that an excess would first have to be deducted. It seems improbable that the excess was of a size which could fairly be represented as an indemnity. The Tribunal concludes that the organisation has failed to comply with the regulations, probably by not paying an indemnity and certainly by not specifying in the contract what it was.

11. In June 1974 the night assistants presented a petition to the Director of the ESO in Chile asking for the special indemnity. On 25 September 1974 Professor Westerlund, Mr. De Jonge's predecessor, told the assistants that he expected a decision to be taken by the end of October which would provide an indemnity from 1 January 1975 and perhaps retroactively.

On 13 January 1975 a memorandum from the Director-General's office addressed to "all members of the international staff" dealt with a number of points relating to remuneration on which changes were proposed; one of them was that the payment for night work would be increased from 25 per cent above the basic hourly rate to 40 per cent. On 26 May 1975 six night assistants, including the complainant, wrote to the professor, recalling their previous efforts and requesting an indemnity of 25 per cent.

12. On 27 February 1976 a memorandum from the Director-General was addressed to the Administration at La Silla and to all night assistants, dealing with working hours, overtime and the night indemnity. On the first point it referred to irregular arrangements made during the last few years which were to be discontinued; from 1 March 1976 night assistants were to work "as specified in the Statutes" and Mr. De Jonge was to prepare a schedule accordingly. On the second point, the normal activity of a night assistant was to include a reasonable amount of day-time work, such as the development of photographic plates, and overtime would be paid only in exceptional circumstances. On the third point, "effective March 1, 1976, a special compensation will be introduced for regular and habitual night work which has been set at 10 per cent of the basic salary".

13. On 2 March 1976 Mr. De Jonge organised a meeting of the assistants to discuss a new working schedule in accordance with the memorandum. There is no record of the meeting and no full account of it by any witness. There is no evidence that the night indemnity was discussed and certainly most of the discussion related to hours of work. There is a full record of the discussion on this topic at the later meeting of 17 August and this shows that the problem was mainly one of overtime. There were during the night "standby" periods when the assistants had nothing to do, but these might be followed by day work, such as the development of photographic plates which the astronomers wanted. Mr. De Jonge argued that only hours actually used should count. No conclusion was reached. Mr. De Jonge states that "in the course of the meeting Mr. Diaz made insulting statements accusing me of not understanding anything of the night assistant's work, of being incompetent as superior, of having written the DG memo myself, not having the courage to sign it myself, etc."

14. On the following day Mr. De Jonge and the complainant met casually and in response to a friendly enquiry the complainant replied that things would not be settled so easily. Mr. De Jonge said that he was very willing to compromise and that this was why he had postponed the application of the Director-General's memorandum even though it was a standing order. The complainant said that if Mr. De Jonge had acted on the memorandum, he would have regretted it seriously. Mr. De Jonge asked why and the complainant refused to say, but said "next time I will not hesitate to act". Mr. De Jonge ascertained from some of the other night assistants that the complainant was trying to obtain support for a letter to the Director-General to complain about Mr. De Jonge and his assistant (who also acted as supervisor from time to time) on the ground that they maintained too intimate relations with the secretaries. Mr. De Jonge called the complainant to his office and told him that "this type of insulting remark" was

unacceptable and that he proposed to make an investigation. The complainant said that there must be a misunderstanding and the matter was dropped.

15. Mr. De Jonge considered that while the quality of the complainant's work was rated as good by the visiting astronomers - the complainant has produced evidence to this effect - his attitude towards other supporting staff was far from correct. On 23 March he addressed a memorandum to him giving instances of this and complaining of his "negative attitude". This would not, he said, solve "our disagreement" on working hours and, if continued, would oblige him to "take a drastic decision from which you yourself will suffer most".

16. The complainant reacted vigorously and argumentatively in a memorandum of 9 April dealing with each allegation. The organisation describes it, not unfairly, as displaying the attitude of "an investigating magistrate". It is written in the style in which a man might speak and is the best evidence there is of the tone which the complainant adopted in discussion, so that it is worth giving a number of examples.

Well then, why didn't you check that the Operation's Report was signed by the astronomer...?

How are we going to develop the plates taken at the end of the night among the others supposedly already developed by 04.00 in the morning? We are not magicians! Can you tell us how to do it?

Why are you avoiding the key trouble about this matter?

Don't you remember that you yourself told Dr. Grewing... etc.? Supposing that you are going to deny this, why didn't you call me then in order to find out what was happening?

Why do you systematically refuse to clarify everything?

Do you all have so much work that you can't say that a certain thing has been repaired or that "not having enough time to repair it, why don't you do it", for instance? Does it take too much time to say so?

I am here replying you that that statement (made by one of Mr. De Jonge's assistants) is completely false. You cannot compare his moral standard with mine and you know it. It is evident that he is helping you to establish a false argument so that I can be fired, and that means persecution!

The complainant concluded that "I will try to do my best", but he added a note to ask Mr. De Jonge, if he found these explanations acceptable, to remove his admonition from the complainant's file; and if he found them unacceptable, to say so in writing so that the complainant could take the matter to the Director-General. He sent copies of this memorandum to the Personnel Section at Santiago and to the Staff Association.

17. Mr. De Jonge therefore called the complainant to his office again. They had a discussion; the complainant promised to improve and Mr. De Jonge promised to withdraw his note and the answer to it from the complainant's personal file. No further trouble occurred before 17 August. It is therefore now appropriate to consider what bearing this history has on the crucial incident of 17 August. Primarily what it does is to point to three misapprehensions apparent in the organisation's case. The first is the statement therein that the Director-General's memorandum of 27 February settled the whole matter; Mr. De Jonge could simply have imposed it and the meetings of 2 March and 17 August were only gestures of goodwill which the complainant regarded as "a sign of weakness". The second, which is not unconnected with the first, appears in the letter of dismissal which alleges disrespect to "a direct superior"; likewise, the organisation in the surrejoinder talks of "insubordination towards his hierarchical superior". The third is the allegation in the same letter that the complainant had had in the past several warnings about his improper and disrespectful attitude.

18. Both the Director-General and Mr. De Jonge would have been exceeding their powers if they had tried to enforce the memorandum as a piece of dictation. First, the organisation knew or ought to have known that it had not complied with the Regulations as to the special indemnity and Mr. De Jonge had to try to obtain a settlement at 10 per cent - in the light of paragraph 11 above probably to lowest figure obtainable - in a way that would mean the tacit abandonment by the night assistants of any claims in respect of the past. Secondly, the organisation, to put it bluntly, wanted the night assistants to work overtime without being paid for it, as under LS III 1.03 they would be entitled to demand; Mr. De Jonge had to put it across that, since part of the night working hours were spent in standby, it was reasonable to ask for some unpaid overtime during the day. All these matters, unless the organisation was prepared to override the Regulations, required discussion and settlement, and Mr. De Jonge, at

any rate at this stage, was, as he said, willing to compromise.

19. The relevance of this to the second misconception is that Mr. De Jonge was not appearing at either of the meetings as a direct superior to convey orders. He was appearing as a wage bargainer seeking amendments to existing contracts, which amendments had under LS II 1.10 to be in writing and to be "accepted and signed by both parties". Wage bargainers ought not of course to be insulted, but there is a great difference between their position and that of hierarchical superiors; the latter speak from above and the former on equal terms. The hierarchical principal in the international civil service is not there solely an institution cannot be run efficiently without discipline and there cannot be discipline without a measure of respect for superiors. It is arguable that the principle should operate only within the institution, that is, when the superior is acting as such; it is certain that if the principle applies beyond that it must be relaxed according to the circumstances. Things can be said in free negotiations about conditions of work in a manner which cannot be used in answer to an order which has to be obeyed. A negotiator does not need to be armed with disciplinary sanctions; he is as free as any other individual to break off discussions with anyone whose manners he finds intolerable. It is because a superior officer cannot break off relations with his subordinates that sanctions against disrespect have to be provided.

20. Thirdly, the contention that the complainant was several times warned against his disrespectful manner is not borne out by the evidence. What indeed is significant is that disrespect was the one thing he was not warned about. He was seriously warned about his "negative attitude" to his fellow workers and he gave no further grounds for complaint. He was warned about his scandal-mongering and he dropped it. There is no doubt that he could have been warned about his language and manner, for the memorandum of 9 April was in response to Mr. De Jonge writing as his superior. The language of the memorandum was, to use a neutral term, abrasive. It could be described as insolent and offensive; it could also be described as blunt and outspoken. The appropriate description depends on the relations between the two men and they are for the superior to decide. Some men like their subordinates to be formally correct; others like them to be frank and say exactly what they are thinking. It is for the superior, when he thinks that the subordinate has gone too far, to make it clear that he will not put up with it any longer. This is what Mr. De Jonge never did. He did not administer a rebuke either at the meeting of 2 March or later; he says in his statement that he hoped that the complainant's attitude would change. Although in his statement he calls the memorandum of 9 April "insulting", he made no protest at the time. At the subsequent interview he says only that he "explained to him my opinions on the different matters". Then both memoranda were withdrawn.

On the merits: termination of employment:

21. The meeting of 17 August was attended by all the available night assistants, including the complainant, and by the representative of the Staff Association. Mr. De Jonge opened it by saying that he had invited the night assistants to discuss first, working hours, second, overtime hours, and third, night indemnity; there were also two minor points concerning the timetable. Discussion of the first item almost immediately merged it with the second. Mr. De Jonge said that the complainant's calculation put the daily average of hours worked at 11 ½ whereas he put it at 10 to 10 ½. But this, he said, was not important; the Observatory was an institution and not an industry and working hours could not be strictly defined. There was then a discussion, chiefly between Mr. De Jonge and the complainant with the others occasionally intervening. The complainant maintained that under a proper system excess working hours could be ascertained and controlled and Mr. De Jonge insisted that they could not. Mr. De Jonge's calculations showed, he said, that during 1974 and 1975 the average overtime hours paid for was about three hours per turno, and he offered instead of overtime, a regular payment equivalent to five hours per turno. There was no discussion about the amount of the indemnity; Mr. De Jonge said that he now had instructions to pay it as from 1 April.

22. Mr. De Jonge then tabulated his proposals and said that and amendment should be immediately prepared and the new contract individually submitted to each of the night assistants. He continued:

De Jonge: Evidently, for him who does not sign, ESO is finished.

Diaz: Do you mean to say that he who does not sign the new working conditions shall stay out from ESO?

De Jonge: Exactly. The night assistants must understand that the organisation cannot provide Rules and Regulations to satisfy the desires of each member of the personnel.

This was followed by some discussion, in which the complainant took no part, about study courses which

apparently the organisation provided. Then Mr. De Jonge asked each man present whether he agreed and all, except the complainant, said that they did; the complainant said that he did not agree because he consider that the points had not been sufficiently discussed. There was then a discussion about details, such as the break for a meal. During this discussion, to which he did not contribute, the complainant asked for permission to retire from the meeting. As it was the end of the turno, he left for Santiago, where two days later he received the notification of his dismissal. Mr. De Jonge had reached the conclusion, he says in his statement, that he could no longer accept the complainant's progressive and insulting attitude".

23. The full record of the meeting, which was signed by Mr. De Jonge, contains only one provocative remark made by the complainant of the type of which the memorandum of 9 April provides numerous examples. This remark, which Mr. De Jonge ignored, suggested that a question asked by Mr. De Jonge was pointless. There is a witness to another similar instance of discourtesy which is not however in the record. Mr. De Jonge also complains that the complainant, having asked for permission to leave, did not wait for the authorisation. Both he and the other witness say that the complainant's manner was aggressive. It may be thought that some degree of aggression from the side of the night assistants would be forgivable; they had been invited to discuss amendments to their contract and confronted with an ultimatum that if they did not agree they would be dismissed.

24. The Tribunal concludes that nothing that was said or done by the complainant on this occasion can, having regard to the nature of the occasion and to the fact that in the past similar attitudes and expressions had not encountered any rebuke, properly be interpreted as showing a degree of disrespect sufficient to constitute an offence against the regulations or breach of contract. Alternatively, the Tribunal concludes that any offence that was given did not deserve more than a reprimand. It is true that once an offence is proved, the selection of the appropriate penalty falls within the discretion of the Director-General. But this discretion must be exercised subject to the principle of proportionality. In the opinion of the Tribunal the penalty of summary dismissal was out of proportion to any offence committed. Accordingly, the first reason given for the termination of the contract fails.

25. The second reason raises questions both on the facts and on the law. On the facts, did the complainant refuse the amendment and, if he did, would the resulting lack of uniformity have created an impossible situation for the management? What is shown on the record is only that the complainant was not ready to agree there and then. Mr. De Jonge states that when the complainant was asked to agree he left the meeting in protest. The record however shows a substantial interval between the request and the departure and contains no evidence of any protest.

26. The amendment was offered to the other night assistants and incorporated in their contracts on 31 August. The complainant says that if it had then been offered to him, he would not have refused it. Even if he had refused it, it would not in the opinion of the Tribunal have created an impossible situation. The organisation could have invited him to work temporarily under the new conditions while reserving his rights and appealing to the Director-General. If this would have created an impossible situation, then it is one that is created by the Regulations which give to the complainant an individual contract of indefinite duration and the right to refuse amendments to it. The organisation does not in its submission to the Tribunal explain how such a situation can be brought under the alternative ground for dismissal set out in paragraph 7 above, and in the opinion of the Tribunal it cannot be. Accordingly the Tribunal holds the termination of the complainant's contract to be unjustified.

On the merits: night work indemnity:

27. For the reasons given in paragraph 10 above the organisation was in breach of contract in that it failed to specify and pay this indemnity. Accordingly, the complainant is entitled to be paid an indemnity of such an amount as would have been negotiated between the parties; the organisation having failed to establish what sum, if any, it actually paid towards such an indemnity, the complainant would be entitled to the whole of such an amount. The best evidence of what would have been negotiated is the offer that was made in the memorandum of 27 February and which was accepted without discussion, namely, 10 per cent of the basic salary. Accordingly, the complainant would, but for LS VIII 1.01, be entitled to be paid this addition from the beginning of his employment. This regulation however prescribes that claims relating to the payment of inter alia indemnities may not be raised later than six months from the date on which the local staff member became entitled to raise such a claim. Accordingly, the claimant cannot claim for more than six months' arrears.

On the merits: overtime:

28. The complainant is entitled to claim payment for such hours as he can prove that he worked in excess of 90 per

turno. He bases his claim for 10 hours per turno from 1 June 1976 on the following facts:

On 12 May the Administrator at La Silla addressed a memorandum to the Director-General in which it was proposed that transport time should no longer be calculated as working time and that the basic working week should be reduced from 45 to 40 hours, this proposal to take effect as from 1 June. It is not clear from the memorandum whether this proposal was or was not intended to apply to night staff. The complainant has produced a copy of a new schedule, starting on 21 June, which shows the working week as 40 hours and it is common ground that this was not applied to night assistants. The result of the amendment proposed by Mr. De Jonge on 17 August and accepted by the night assistants other than the complainant is that their working week remained at 45 hours (or 90 hours per fortnight), that hours to be counted were only those in which assistance was required by the astronomers and that the equivalent of five extra hours was to be paid per turno in compensation for casual day work.

29. The complainant can only claim overtime in accordance with his contract and his contract was never amended. While the fact that his contract would have been amended if he had not been dismissed is a factor to be taken into account in assessing compensation for the dismissal, the complainant cannot base a separate claim for overtime on a provision that was not a term of his contract, or indeed of the contract of any night assistant before 31 August 1976. It is possible that the complainant is arguing that from the facts stated in the preceding paragraphs it ought to be inferred that the organisation was admitting that the complainant had in the past done overtime on day work amounting in the average to 45 per turno. The Tribunal cannot draw this inference and, there being no proof of how much, if any, overtime was worked by the complainant, the claim fails.

On the merits: occupational invalidity:

30. The complainant contends that he is now suffering from an injury to his dorsal spine which has incapacitated him permanently from certain activities and thus diminished his earning power. He alleges that the injury originated in August 1973 when he was helping with the movement of a heavy telescope and claims compensation for occupational partial invalidity.

31. Under LS VIII 1.01 the complainant should have made his claim within six months from the date the injury originated or at latest within six months of the date when its serious consequences became manifest, and this he has failed to do. It is not enough to report the occurrence, as the complainant claims he did to a direct superior or to the organisation's male nurse or medical doctor; there must be a claim for compensation.

On compensation for dismissal:

32. The Tribunal will not order the reinstatement of the complainant. This could create a difficult situation at La Silla, a situation for which the complainant's abrasive conduct would be partly to blame. The compensation in lieu of reinstatement must however be substantial, The complainant had the right to indefinite employment in an excellent job in which he was interested and which he was doing well; there are in the dossier several references to the serious economic loss which the complainant would sustain by the loss of his job. The Tribunal must however take account of the fact that while the complainant's employment with the organisation might have lasted for the rest of his working life, he being then thirty years of age, there is a risk that a man of his temperament might sooner or later have given just cause for dismissal.

On the interveners:

33. The interveners associate themselves with the complainant's claim to arrears of indemnity for night work and ask that similar claims by them should be admitted for arrears accruing before 1 April 1976. However, by the amendment to which they agreed as recorded in paragraphs 20 to 26 above the interveners accepted 1 April 1976 as the date from which the arrears should run and it is not now open to them to claim payment from an earlier date. Since on this ground their claims would be bound to fail, there is no object in admitting the interventions.

On costs:

34. The organisation asks the Tribunal to order the complainant and the interveners to pay an equitable contribution towards the lawyers' fees incurred by the organisation. It is true that the organisation has succeeded against the interveners and on some of the claims made by the complainant. But it has never been the practice of the Tribunal to order the complainant to pay the whole or any part of an organisation's costs even when the claim

has entirely failed. Moreover, any such order would appear to be inconsistent with the regulation cited in the next paragraph. Accordingly, the Tribunal rejects this request.

35. In appropriate cases in which a complainant has obtained relief against an organisation, it is the practice of the Tribunal to order the organisation to pay to the complainant a fixed sum in respect of his legal costs. In the present case LS VI 1.10 provides that "any cost arising to the appellant in resorting to the Administrative Tribunal in Geneva shall be borne by the organisation". Under this regulation the complainant is entitled to present a claim to the organisation and to be reimbursed any costs which he has reasonably incurred in the proceedings. It would not therefore be appropriate for the Tribunal to make any order for costs until after the complainant has exhausted his rights under the regulation.

DECISION:

For the above reasons,

1. The decision of the Director-General of 30 November 1976, in so far as it concerns the first and second claims of the complainant, is quashed and it is ordered that the organisation pay to the complainant:

(a) in satisfaction of the first claim 12,000 United States dollars with interest thereon at 8 per cent per annum running from 1 September 1977; and

(b) in satisfaction of the second claim, an amount equal to 10 per cent of the basic salary payable to the complainant for the months of March to August 1976 inclusive with interest thereon at 8 per cent per annum running from 1 September 1976.

2. The other claims are dismissed.

3. The applications to intervene mentioned in the second paragraph of the preamble of the present judgment are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 May 1978.

M. Letourneur
André Grisel
Devlin

Roland Morellet

Updated by PFR. Approved by CC. Last update: 7 July 2000.