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

101st Session **Judgment No. 2547**

The Administrative Tribunal,

Considering the complaint filed by Mr E. K. against the United Nations Industrial Development Organization (UNIDO) on 11 October 2004, the Organization's reply of 17 February 2005, the complainant's rejoinder of 21 March and UNIDO's surrejoinder of 26 April 2005;

Considering the complaint filed by Mrs J. H.-R. against UNIDO on 4 May 2005, the Organization's reply of 19 October, the complainant's rejoinder of 16 November 2005 and UNIDO's surrejoinder of 27 February 2006;

Considering the complaint filed by Mrs W.E. K.-K. against UNIDO on 3 December 2004, the Organization's reply of 15 March 2005, the complainant's rejoinder of 12 April and UNIDO's surrejoinder of 25 May 2005;

Considering the complaint filed by Mr G. P. against UNIDO on 9 May 2005, the Organization's reply of 19 October 2005, the complainant's rejoinder filed with the Tribunal on 23 January 2006 and UNIDO's surrejoinder of 13 March 2006;

Considering the complaint filed by Miss D. M. R. against UNIDO on 12 November 2004, the Organization's reply of 22 February 2005, the complainant's rejoinder of 1 April and UNIDO's surrejoinder of 11 May 2005;

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 none of the parties has applied;

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

A. Information relevant to these cases can be found in Judgments 2123 and 2467 delivered on 15 July 2002 and 6 July 2005, respectively.

The complainants, all former staff members of UNIDO who were in the General Service category, retired between February 2000 and July 2001 after spending between 25 and 31 years working for the Organization. At the time of their retirement they received an "end-of-service allowance" (EOSA) calculated in accordance with Staff Rule 110.07(c) and Administrative Circular UNIDO/DA/PS/AC.58 issued on 8 November 1989. Following, in most cases, a preliminary exchange of correspondence with the Administration, the complainants individually wrote to the Director-General, between 31 May 2000 and 28 August 2001, requesting that the calculation of their EOSA be reviewed. They contested the fact that the deductions applied were based on final salaries and did not take into account the fact that their salary levels had increased over time due to promotion and step increments. The Human Resource Management Branch informed them, in individual replies dated between 13 July 2000 and 27 September 2001, that the payment they had received upon separation had been made in accordance with their entitlement. Between 15 September 2000 and 24 October 2001 the complainants filed individual appeals with the Joint Appeals Board. The Director-General's statement on each appeal was filed between 16 November 2000 and 27 November 2001; the complainants' replies thereon were filed between 11 March and 7 August 2003. The Board, after meeting many times between 26 May 2003 and 15 February 2005, issued reports dated from 17 June 2004 to 15 February 2005 on all the cases individually. In each case it considered that the appellant was not entitled to any calculation of EOSA that departed from the established UNIDO methodology valid at the time of his or her retirement and recommended that the appeal be dismissed. The Director-General endorsed those recommendations in decisions taken between 1 July 2004 and 7 March 2005, which were forwarded to the complainants by the Secretariat of the Joint Appeals Board between 5 August 2004 and 18 March 2005. Those are the decisions impugned by four of the complainants.

On 3 February 2005 Mrs H.-R. wrote to the Secretary of the Joint Appeals Board asking for clarification of the

Director-General's decision on her case, which was dated 12 January and stated that her appeal "should" be dismissed. On 21 March the Secretary sent her a copy of a memorandum dated 14 March in which the Director-General stated that "[t]he decision reflected in [his] memorandum dated 12 January 2005 was indeed to dismiss the appeal. This is clear in light of the [Joint Appeals Board] report and the fact that the Director-General is to decide and does not recommend to any other party". It is the decision contained in the memorandum of 14 March that she impugns.

On 4 August 2005 the Organization's Legal Adviser wrote individually to Mrs H.-R. and Mr P. (before UNIDO had replied to their complaints), informing them that the Tribunal had dismissed similar complaints on all counts in Judgment 2467. He pointed out that their pleas and claims were nearly identical to those put forward by the complainants in the cases ruled on in that judgment and asked them whether they would consider withdrawing their complaints. He added that the Organization would have to consider pursuing a counterclaim against them for costs if they decided to press their complaints.

B. The complainants put forward essentially the same pleas. Firstly, they deplore the "[l]ack of stability, foreseeability and clarity" in the methodology applied for the calculation of EOSA. They cite Judgment 2123, under 11:

"*Prima facie*, the argument that it was flawed is very convincing since the method used leads to a deduction from the allowance that is theoretically due which is higher than the compensation paid in the form of salary increases prior to 1987. [...]"

They point out that the Chief of the Human Resources and Staff Development Section had recognised, in an internal note dated 15 September 2000, that "the staff concerns [were] understandable" since "it was not foreseen" that the current method of calculation would lead to such a situation. The note concluded that the method was "not sustainable" and recommended that UNIDO take "corrective action". The complainants also produce a letter sent to another official on 19 September 1997, that is three years before the aforesaid note, which in their view proves that the Administration was fully aware of the inherent shortcomings of the methodology used. They deduce that the methodology outlined in Administrative Circular UNIDO/DA/PS/AC.58 and also described in an appendix to the Staff Rules did not comply with the criteria of stability, foreseeability and clarity established by the Tribunal. Furthermore, by maintaining over an extended period a flawed methodology that was known to be unfair to staff, UNIDO was not acting in good faith. This is shown, according to the complainants, by the fact that the methodology was eventually changed in Administrative Circular UNIDO/DA/PS/AC.58/Amend.1 of 25 October 2001, with retroactive effect from 1 September, in order to take account of changes in salary.

Secondly, they complain of a breach of the Agreement between the United Nations and UNIDO – annexed to the United Nations General Assembly resolution 40/180 of 17 December 1985 – Article 16 of which relates to harmonisation of personnel arrangements between the two organisations designed "to avoid unjustified differences in terms and conditions of employment". Yet where EOSA is concerned the lack of harmonisation is particularly striking, as noted by the Joint Inspection Unit of the United Nations in 2003, since the allowance would have been markedly higher using the methodology introduced at the United Nations Office at Vienna by the Secretary-General in June 1996. The complainants add that this allowance belongs to the "core conditions of service" and therefore falls within the scope of the aforementioned Article 16.

Thirdly, the complainants object to the excessive delay in their appeal proceedings. They recall that the Tribunal has previously sanctioned UNIDO for similar delays (see Judgments 2072 and 2197) and contend that in their case the delay was so substantial that it amounted to "an obstruction [to] the course of justice and intentional harm". Mr P. makes a request for documents that were examined *in camera* by the Joint Appeals Board.

The complainants ask the Tribunal to order the payment, with interest, of the difference between the amount determined on the basis of the methodology that they consider flawed and the amount computed on the basis of the revised methodology that came into effect in September 2001; compensation for moral damages in the amount of 10,000 euros for the excessive delay; and payment of costs in the amount of 5,000 euros. Mr K. also claims damages and costs in the amount of 20,000 euros on account of the Organization's "negligence for the delay in deciding [his] appeal".

C. In its replies UNIDO requests the joinder of the complaints. It points out that in Judgment 2123 the Tribunal upheld the legality, particularly with respect to the "Flemming" principle, of the method used to calculate the

EOSA as set forth in Administrative Circular UNIDO/DA/PS/AC.58, even though it does not take account of variations in grades and steps. In the same judgment the Tribunal expressly found that the methodology "did meet the criteria of predictability and stability required by the case law […] and did not offend against any general principles of international civil service law". The methodology in question could not therefore be ambiguous. The Organization denies having acted in bad faith.

With regard to the Agreement between the United Nations and UNIDO, the defendant points out that the expressions "as far as possible" and "to the extent feasible" contained in UNIDO's Constitution and in the agreement show that harmonisation was not mandatory but merely desirable.

The Organization accuses all the complainants of having submitted documents concerning other staff members and an internal working document which was not signed by its author and which, it maintains, was not submitted to the Director-General. It requests that the Tribunal offer its views as to whether such conduct is in conformity with the standards of the international civil service.

The defendant contends that there are no legal reasons which would justify the retroactive application to the complainants of the methodology introduced in September 2001, considering that the methodology applicable at the time of their retirement was lawful.

As far as the alleged delays in deciding their appeals are concerned, it submits that the complainants, having themselves contributed to the delay in the appeal process, have not shown negligence on the part of the Organization. Nor have they furnished any precise evidence to substantiate their alleged moral injury.

UNIDO objects to the receivability of Mrs H.-R.'s complaint. It notes that she received the Director-General's decision on her internal appeal on 18 January 2005, so her complaint should have been filed by 18 April. Since it was filed on 4 May 2005, the Organization contends that it is time-barred.

Considering their complaints to be vexatious, the Organization makes a counterclaim for costs against Mrs H.-R. and Mr P.

D. In her rejoinder Mrs H.-R. states that "if the Tribunal would judge in the same line as in Judgement No. 2467" then she withdraws her complaint concerning "the appeal of the End of Service Allowance" but that she maintains her complaint in respect of "the way the complaint was and is handled by UNIDO". She submits that her complaint is receivable and she maintains that she was not responsible for the delay in the internal appeals procedure.

In his rejoinder Mr P. denies that his complaint is vexatious. He submits that he has a right to claim compensation "according to what is fair and equitable". He maintains that the excessive delay in dealing with his appeal is attributable to the Organization and questions whether the delay would have been any shorter if he had filed his reply to the Director-General's statement at an earlier date. He presses his claims.

The other complainants state, in their respective rejoinders, that they cannot accept that the deductions made in calculating the EOSA should be greater than the total salary adjustments paid up to 1987. They point out that although the circular that applied at the time did not specify that grades and steps had to be taken into account, there was nothing in it to say that they should not. Noting that the criterion of clarity has not been referred to by the Organization, they draw attention to the lack of clarity of the provisions governing EOSA and the "ambiguity" of Administrative Circular UNIDO/DA/PS/AC.58. According to them, the "breach" of the Agreement between the United Nations and UNIDO is due to negligence on the defendant's part. In this respect, they argue that UNIDO has not offered proof that changing the EOSA calculation was not feasible once it had notice of the methodology introduced at the United Nations Office at Vienna in June 1996. The only reason for not making the change appears to have been concern for the financial implications, although the fact that the EOSA was eventually changed in September 2001 rules out, according to the complainants, financial concern as a valid reason.

Referring to case law, the complainants reject the defendant's objections to the disclosure of certain documents. They maintain that the blame for the delay in the appeal proceedings rests fairly and squarely on the shoulders of the Administration and the Joint Appeals Board. They consider that the situation thus warrants redress and the award of both compensation and moral damages. They press their claims, and Miss R. brings her own into line with those of Mr K.

E. In its surrejoinder to Mrs H.-R.'s submissions the Organization maintains its objection to receivability. It submits that she could have had no doubt that her appeal had been dismissed by the Director-General's memorandum of 12 January 2005. Noting the conditional nature of her comments regarding withdrawal, it is of the opinion that the claim regarding her EOSA has not truly been withdrawn.

In its surrejoinder to Mr P.'s submissions UNIDO points out that the complainant has failed to address any of its arguments on the merits set out in its reply, and that this underscores the appropriateness of its counterclaim for costs. It submits that his claim for damages on account of the delay in dealing with his internal appeal cannot be based on "a hypothetical and argumentative question that calls for speculation".

In its surrejoinders to the other complaints the Organization reiterates its objections to the disclosure of documents by the complainants and points out that the Joint Appeals Board's reports concerning other staff members are confidential in nature. It denies that it omitted to address the issue of the clarity of the provisions governing EOSA and rejects any allegation of negligence. It contends that it complied with Article 16 of the Agreement between the United Nations and UNIDO since it amended its EOSA calculation methodology. In its view, it is not required to furnish proof that it could have amended its calculation methodology in 1996, insofar as an organisation has a broad discretion to take decisions based on its own financial position, while the decision of whether to apply a methodology for the EOSA calculation does not depend on other organisations.

UNIDO draws attention to the fact that the Joint Appeals Board is an independent body and that any delay which might have occurred could not be blamed on the Organization. It reiterates that the claims for damages on account of delay are not justified.

CONSIDERATIONS

1. The complainants are five former staff members of UNIDO who contested the amount of the end-of-service allowance (EOSA) to which they were entitled when they reached retirement on the grounds that the methodology used to calculate their allowance, as applied prior to 1 September 2001, breached their rights owing to a lack of stability, foreseeability and clarity. When they received negative replies from the Administration, they lodged appeals with the Joint Appeals Board, which through various panels recommended that their appeals be rejected. In their complaints before the Tribunal, they challenge the final decisions to reject their appeals taken by the Director-General pursuant to the Board's recommendations.

2. Although the individual situations of the complainants differ, their pleas are essentially the same: they all criticise the method used to calculate the sums deducted, in accordance with a methodology relinquished by the Organization as from 1 September 2001, from the allowances to which they were theoretically entitled and claim compensation for the injury suffered as a result of the delay incurred in the course of the internal appeal procedure. The Tribunal therefore decides that the complaints shall be joined to form the subject of a single judgment.

3. With regard to the lawfulness of the methodology used to calculate their end-of-service allowances, the Tribunal can but recall the findings it made in Judgment 2123 and refer the complainants to Judgment 2467, by which it dismissed the complaints of seven UNIDO former staff members who were in the same situation as they are and who put forward similar pleas.

4. Consideration should be given, however, to certain specific pleas and claims, to which the above-mentioned judgments do not provide a sufficient answer.

5. Mr K., like his colleagues, complains at the lack of stability, foreseeability and clarity in the methodology applied to calculate his EOSA and casts doubt on the good faith of the Organization. He refers to an internal working document which drew attention to the unpredictable consequences of the methodology applied until 1 September 2001. The defendant considers that this internal document was confidential and should not have been produced by the complainant. The latter rightly points out, however, referring to Judgment 1637, that the document was not obtained by deceit and could be used in support of his case. At any event, the fact that doubts were raised regarding the relevance of the methodology then used does not establish that it was unlawful. As the Tribunal stated in Judgment 2467, "this working document in no way commits the Organization as such but simply expresses the legitimate concerns of an administration official regarding the methodology used to calculate the end-of-service allowance. The fact that its author indicated that some results of the methodology were unforeseen does

not imply that the method of calculation, which was perfectly clear, might have caused surprise to the staff members at the time of their retirement. The outcome of the calculation which every staff member could undertake at leisure was perfectly predictable".

This complainant also complains, like his colleagues, of the excessive delay with which his appeal was handled, considering that it took more than 31 months to set up the Joint Appeals Board which considered his case. He claims 20,000 euros in damages on account of the Organization's negligence with regard to the delay in deciding his appeal. He also claims 10,000 euros in moral damages for that excessive delay. To this the defendant objects, pointing out that the delay is partly due to the fact that the complainant himself took 19 months to reply to the statement submitted on behalf of the Director-General to the Joint Appeals Board. This long delay shows that the complainant did not pursue his appeal with the diligence required by the case law (see Judgment 1970), and however regrettable the delay in considering the complainant's appeal may have been, no fault warranting compensation may in this case be held against the Organization. The complainant's claims for the payment of compensation for alleged moral injury are equally unfounded.

6. Miss R.'s complaint is no different from the one examined above. In her complaint brief, she claims only 10,000 euros in compensation for the moral injury she alleges she suffered owing to the delay with which her appeal was considered by the Joint Appeals Board. The defendant acknowledges that the Board had to cope with a heavy workload, which is why it established an additional panel in 2003 to address the backlog of cases. Some 30 of those cases were submitted by retirees who, like the complainant, were objecting to the amount of their end-of-service allowance, despite the decision of the Tribunal in Judgment 2123 upholding the methodology used until September 2001. Moreover, as the previous complainant, Miss R. did not show diligence in pursuing her appeal, since she waited 28 months before replying to the Director-General's statement. The Tribunal considers that, in view of these facts, no fault that would entitle the complainant to compensation can be found.

7. The complaint of Mrs K.-K. is identical to that of Miss R. and calls for the same replies, bearing in mind that the complainant in this case took more than 20 months to reply to the Director-General's statement. The Tribunal finds that, in the circumstances, the complainant's claims cannot be allowed.

8. Mr P.'s complaint meets with the same replies as the previous ones, his delay in replying to the Director-General's statement amounting to 19 months after notification. He asserts that, had he replied earlier, his appeal would not have been dealt with more quickly, but this observation does not alter the fact that he could and should have pursued his appeal more diligently. There is no consideration in this particular case which would justify departing from the reply given to this argument in Judgment 2467.

This complainant also requests that the Tribunal order the Organization to disclose certain internal documents which preceded the decision to modify the methodology used to calculate the end-of-service allowance. But even if those documents quite probably showed the drawbacks of the methodology, it is hard to see how they could affect the lawfulness of the said methodology, which was confirmed by the Tribunal in Judgment 2123.

9. The defendant contends that Mr P.'s complaint has been maintained for vexatious purposes and in bad faith. Having suggested to the complainant in vain on 4 August 2005 that he withdraw his complaint which was based on arguments rejected by the Tribunal in Judgment 2467, delivered on 6 July 2005, the Organization submits a counterclaim for the complainant to be ordered to pay costs, to be determined *ex aequo et bono*. The Tribunal dismisses this counterclaim: even though the outcome of the complaint could hardly be in doubt in view of Judgment 2467, the complainant could still try to obtain a different ruling and he was not obliged to withdraw his case.

10. The complaint filed by Mrs H.-R. raises another issue: as in the previous case, the complainant, who was objecting to the amount of her end-of-service allowance on the same grounds as her colleagues, was invited on 4 August 2005 to withdraw her complaint because of its similarity with the complaints dismissed in Judgment 2467. While considering that this amounted to unacceptable intimidation, the complainant states in her rejoinder that, if the Tribunal would rule in the same way as it did in Judgment 2467, she would withdraw her complaint regarding her claim concerning the end-of-service allowance but would maintain her complaint in respect of "the way the complaint was and is handled by UNIDO". In view of the rulings made in this judgment on the other four complaints, the Tribunal considers, without examining either the receivability or the merits of the complaint, that it would of course have been dismissed and, in the circumstances, recognises the validity of the complainant's partial withdrawal, even though the defendant states in its surrejoinder that it does not accept that withdrawal. As for the

claim concerning excessive delay in the appeal procedure, the Tribunal notes that the complainant took over two years to reply to the Director-General's statement and that under those circumstances she cannot complain at a delay for which she is partly to blame.

11. As in the previous case, the defendant submits a counterclaim for costs to be awarded against the complainant. The Tribunal dismisses this request for the same reasons as those given under 9 above.

DECISION

For the above reasons,

1. The complaints of Mr K., Miss R., Mrs K.-K. and Mr P. are dismissed.

2. The withdrawal of Mrs H.-R.'s complaint, insofar as it challenges the decision not to change the amount of the end-of-service allowance she was granted, is hereby recorded.

3. Mrs H.-R.'s other claims are dismissed.

4. UNIDO's counterclaims are dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.