

EIGHTY-FOURTH SESSION

***In re* Argos, Flösser,
Glöckner, Hentze
and Olivo**

Judgment 1682

The Administrative Tribunal,

Considering the complaints filed by Mr. Patrick Argos, Mr. Hans Flösser, Mrs. Godefrida Cornelia Glöckner, Mr. Matthias Hentze and Mr. Jean-Christophe Olivo against the European Molecular Biology Laboratory (EMBL) on 7 December 1995 and corrected on 26 March 1996, the EMBL's reply of 1 July, the complainants' rejoinders of 11 October 1996 and the Laboratory's surrejoinder of 17 January 1997;

Considering the applications to intervene filed by:

**Ackermann, W.
Adam, V.
Altwarg, A.
Appleton, P.
Ashman, K.
Ashurst, J.
Bauer, U.
Becker, D.
Beneke, J.
Berrie, F.
Berthet, C.
Bois, J.-M.
Bonte, E.
Bosshard, A.
Bourke, S.
Brachvogel, V.
Breitwieser, J.
Burger, L.
Cabanel, F.
Ceska, T.
Charlesworth, A.
Clarke, M.
Clay, I.
Cliff, S.
Coomber, G.
Cooper, A.
Coppieters, J.
Creighton, T.
Culloo, M.
Cyrklaff, A.
Cyrklaff, M.
Dauvergne, F.
Dauvergne, M.
Dean, D.
Dose, K.
Dotti, C.
Drzonek, H.**

Erfle, H.
Eritja, R.
Everitt, P.
Felisaz, F.
Fleckenstein, K.
Foellmer, E.
Fry, H.
Fuller, S.
Gabriel, A.
Garcia Pastor, M. P.
Gawlitta, M.
Gemünd, C.
Gibson, T.
Giner, A.
Goosens, V.
Gounari, F.
Gowan, B.
Hage, M.
Haider, M.
Harper, R.
Härtlein, M.
Heinmöller, E.
Hodson, M.
Holmes, M.
Houthaeve, T.
Hübner, K.
Ittensohn, M.
Ivonen, K.
Jacob, R.
James, D.
Jaschke, M.
Joggerst, B.
Kaiser, M.
Kandels-Lewis, S.
Kapp, U.
Khazaie, J.
Kjaer, C.
Kläring, R.
Kollenz, H.
Kuhlmey, A.
Lafosse, F.
Leillard, S.
Lemaistre, M.
Leonard, K.
Liedtke, I.
Lüll, J.
Mahfood, T.
Mahfood, Z.
Mann, M.
Martín-Almendral, O.
McGowan, M.
McGuigan, C.
Merx, A.
Metcalf, P.
Meyn, L.
Miñana, B.
Moro, H.

Mortensen, P.
Moulton, S.
Mullaney, C.
Nilges, M.
Nurmi, S.
Oestreicher, G.
Öffner, W.
Panayi, D.
Parton, R.
Pastore, A.
Petfalski, E.
Pognant, D.
Polycarpou-Schwarz, M.
Postma, J.
Price, S.
Radeck, E.
Rasmussen, B.
Reckmann, I.
Reid, A.
Renkwitz, V.
Richards, P.
Riedinger, A.
Riedinger, P.
Ritter, G.
Rodriguez-Tomé, P.
Ryder, U.
Saffrich, R.
Salmon, N.
Sawyer, A.
Schaar, H.
Schechinger, E.
Schläger, B.
Schmitt, H.
Schnorr, M.
Scholten, H.
Schwager, C.
Sedita, J.
Seethaler, P.
Simon, A.
Sonntag-Buck, V.
Sossick, A.
Spiegel, M.
Stark, A.
Stegmüller, A.
Sterk, P.
Stettner, C.
Stösser, G.
Sulayici, A.
Tekotte, H.
Teo, H.
Thomas, D.
Thomas, S.
Toldo, L.
Tucker, P.
van der Zandt, H.
Vincentelli, R.
Vintersten, K.

**Virta, H.
Vogt, G.
Voie, A.-M.
Walter, A.
Warne, A.
Warne, K.
Way, M.
Weingand, M.
Werner, H.
Wernz, O.
Wierenga, R.
Wilhelm, H.
Wilkinson, C.
Winkler, S.
Wittmann, H.
Zimmer, A.
Zimmermann, J.**

Considering the EMBL's letter of 15 April 1997 informing the Registrar of the Tribunal that the Laboratory would not be commenting on the applications;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. What are known as the Coordinated Organizations* have their own system of adjusting staff pay. Since 1 January 1982 the Laboratory has been taking that system as the standard of reference for adjusting the pay of its own staff. So says Staff Regulation R 4 1.01:

(* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

"When reviewing remuneration, the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council as laid down in Annex R.A.1."

The Coordinated Organizations have a Coordinating Committee on Remuneration. In 1992 the Committee recommended in its 14th report making adjustments in pay for staff in grades A.2 to A.7 for the period from 1 July 1991 to 30 June 1992. Those grades match 9 to 14 at the Laboratory. To compensate for a change in the operative date from 1 July to 1 January each year the Coordinated Organizations decided, on a recommendation made by the Committee in its 22nd report, to make an interim adjustment to pay for all grades in the period from 1 July to 31 December 1992. On another recommendation in the Committee's 31st report they made a second such interim adjustment for the period from 1 January to 30 June 1993.

At its 20th Session (9 and 10 December 1993) the Council of EMBL took the view that it need not follow the Coordinated Organizations' decisions. It approved only as from 1 January 1994 the adjustment for the period from 1 July to 31 December 1992 and not to apply at all the one for the period from 1 July 1991 to 30 June 1992. At its 21st Session (17 February 1994) the Council also refused the adjustment for the period from 1 January to 30 June 1993. The Director-General informed the staff of those decisions by circular in April 1994.

The Coordinating Committee recommended in its 40th report a new adjustment for the period from 1 July to 31 December 1993 and in its 45th another for the period from 1 January to 31 December 1994. On 28 June 1995 the Council of the Laboratory passed a resolution rejecting the recommendations in the 40th report and adopting those in the 45th as from 1 July 1995. In July 1995 the Director-General and the

Administrative Director so informed the staff, explaining that the Laboratory had to safeguard both their jobs and its own finances.

On 26 May 1995 the chairman of the Staff Association had put to the Director-General identical claims to salary adjustment from the complainants and a dozen others. They wanted payment of "the full amount of salary" as from 1 July 1992, in line with the scales approved by the Coordinated Organizations. They also claimed interest thereon. They appended a text setting out proposals by the Staff Association for compromise. In a memorandum of 30 May 1995 to the chairman of the Association the Director-General said that he could not answer the claims because the whole matter was in the hands of a "working group" of the Council, and it was the Council that had sole authority to set pay. On 31 May the Association put to the working group proposals that were in much the same terms as the compromise offered to the Director-General on the 26th.

By a memorandum of 7 July 1995 the Director-General notified the Council's decisions of 28 June to the claimants through the chairman of the Association.

On 26 July the chairman forwarded to the Director-General internal appeals dated 19 July from the complainants and five others together with a "statement of support" signed by another 169 staff. The appeals were against the Director-General's memorandum of 7 July. By letters of 11 September 1995 the Director-General rejected them as time-barred. He declared them devoid of merit besides, on the grounds that the Council was not bound to follow the Coordinating Committee's recommendations. And he waived the need for referral to the Joint Advisory Appeals Board so that the claimants might come straight to the Tribunal. His letters are the decisions now under challenge.

B. The complainants deny that their appeals were time-barred. Contrary to what the Director-General says in his letters of 11 September 1995, the EMBL Staff Regulations and Rules set no time limit for claims to retroactive payment, and Regulation R 6 1.04, which sets a thirty-day time limit for appeals, draws no distinction between various sorts of decision and does not apply anyway to a retroactive one. Moreover, "successive decisions not to adjust staff pay are by nature repetitive" and so may not be ruled out of time.

The complainants have two pleas on the merits. The first is that the Laboratory broke Regulation R 4 1.01. That provision reflects the EMBL's decision of 9 December 1981 to stop following the system of pay at the European Organization for Nuclear Research (CERN) and to take the Coordinated Organizations' system instead. In their submission that decision binds the EMBL. The Laboratory was therefore in breach of *patere legem*: it decided to stop taking over fully the adjustments approved by the Coordinated Organizations, but it did not amend R 4 1.01. Citing Judgment 1419 (*in re* Meylan and others), which is about the adjustment of pay at the European Southern Observatory (ESO), the complainants contend that R 4 1.01 does not leave it to the Council's discretion whether or not to follow the system the Laboratory has chosen. That would make the whole exercise meaningless and deprive staff of "the certainty, predictability and objectivity that are the mainstays of any system of pay".

Their second plea is breach of the rule against retroactivity. The Council's decision of 28 June 1995 not to apply fully as from 1 July 1992 the adjustments due for prior periods amounts to retroactive change in the policy it adopted in 1981.

They ask the Tribunal to quash the Director-General's decisions of 11 September 1995 and to order the EMBL to pay them as from 1 July 1992 the difference between the pay set by the Coordinated Organizations and their actual earnings, plus interest at the rate of 10 per cent a year. They also seek costs.

C. In its reply the Laboratory submits that the objections to the Council's decisions prior to the one of 28 June 1995 are irreceivable in that they were not raised in any internal appeal lodged within the thirty-day time limit set in R 6 1.04. The pleas against the decision of 28 June are also irreceivable because they rest on the alleged unlawfulness of earlier decisions. The case law does say that if an organisation is in recurrent breach of an obligation every breach gives rise to a new cause of action. But that is so only if the staff member did not know of his rights. The staff did in this case since the Director-General told them of the Council's decisions after July 1992, which were an obvious departure from the Coordinating Committee's recommendations. Having failed to challenge those decisions, the staff tacitly accepted them and, by the principles of good faith and estoppel, may not now seek retroactive change in pay, which would "disrupt"

the organisation's finances.

Secondly, the Laboratory denies breach of the Staff Regulations and Rules. Though they, and the Council's decision of 9 December 1981, are binding unless amended, they lay down no obligation to follow the Coordinated Organizations. That decision said in paragraph 4: "The application of any rate of adjustment from the Coordinated System to the system of EMBL shall be subject to the approval of Council". And R 4 1.01 uses the words "shall use as a guide". All that goes to show that the Council has discretion in the matter and that the purpose is to keep the system "flexible". The Council's only duty is to consider the Coordinating Committee's recommendations, and it did so, but it was still free to apply other criteria in reaching its decision.

Judgment 1419 is immaterial: the Laboratory's rules differ from the ESO's. Only so as to prevent arbitrary decision-making will an international administrative tribunal interfere in the exercise of a governing body's discretion to set pay.

D. In their rejoinders the complainants plead first that what they are seeking is not "pay increases" that would lay a heavy burden on the Laboratory's budget but "adjustments" to offset inflation. They deny tacit acquiescence by the staff in the failure to adjust pay: the Council's decisions after 1992 simply put the matter off and were not an express and final refusal to adjust. Not being one of the Coordinated Organizations, the EMBL did not need to import their system of adjustment into its own rules. But once it did it was bound to follow suit. It is wrong - say the complainants - to make flexibility prevail in law since it offends against the requirement of certainty.

From 1981 to 1992 the custom was to follow the Coordinating Committee's recommendations, and, according to the case law, the custom is now binding.

E. In its surrejoinder the Laboratory maintains that the Council's decisions from 1992 until 1995 were final and explicitly notified to staff in pay slips and circulars. According to precedent "de facto alignment" is not enough to make a practice binding. Nor in this case was the practice followed from any sense of legal obligation. Flexibility is not, of course, the same thing as arbitrariness, and the adjustment and the increase of pay are hard to distinguish.

CONSIDERATIONS

1. The complainants, who are staff of the European Molecular Biology Laboratory (EMBL), have claimed adjustments to pay as from 1 July 1992. They are challenging decisions of 11 September 1995 by the Director-General upholding the refusal of their claims. They are relying on a decision of 9 December 1981 by the Council of the Laboratory and on Article R 4 1.01 of the Staff Regulations. They submit that as to staff pay the Laboratory has been departing farther and farther from the standards followed by what are known as the Coordinated Organizations and must now align their pay therewith as from 1 July 1992.

2. First comes the Laboratory's plea that their claims are irreceivable on the grounds that they may not seek any retroactive adjustment. Its argument runs as follows. By a decision of 28 June 1995 the Council set their pay as from 1 July 1995; the Director-General so informed them by a memorandum of 7 July; they appealed; and the purport of the challenged decisions of 11 September was to reject their appeals. It submits that since the Council had already ignored the rules of the Coordinated Organizations "the Council's final decision of 28 June 1995 is not challengeable on the grounds of failure to follow the Coordinated Organizations' adjustment of pay in 1995". The complainants retort that for want of any rule setting a time limit for challenge to pay they may claim the review of it as from 1 July 1992.

3. In line with Judgment 1329 (*in re* Ball and Borghini) of 31 January 1994 and other precedents the Laboratory's plea must in part succeed. What the complainants asked of the Director-General and are now claiming from the Tribunal is review of their pay since 1 July 1992 on the grounds that the Council had unlawfully stayed the application of adjustments approved by the Coordinated Organizations. As was said in Judgment 1329, allowing such a plea would mean that "in a matter as delicate as setting and adjusting staff pay appeal would lie *sine die* against past decisions". The decisions taken by the Laboratory each year on pay fully supersede earlier ones. In entertaining challenges to individual decisions on the complainants' pay - the only ones they may challenge -- the Tribunal will look at the latest decision of the Council's on pay

scales. In this instance the latest such decision is the one of 28 June 1995. The last adjustment approved by the Council -- a rise of 1.6 per cent in pay as from 1 January 1994 -- dated back to its session of December 1993, and the Council had proved unable to take any further decision on pay for 1995. So the only decisions that the complainants may challenge are those taken on 7 July 1995 and upheld on 11 September 1995 insofar as they refused alignment of pay for 1995 in keeping with the principles they rely on. They may not challenge their pay slips since 1 July 1992 on the grounds of the unlawfulness of earlier decisions by the Council.

4. On the merits they charge the Laboratory with breach of the rule against retroactivity and of Article R 4 1.01 of the Staff Regulations. As to the rule against retroactivity their plea fails. As has been said, the Laboratory was not required in 1995 to go back on decisions taken in earlier years on pay. Indeed the rule barred review of individual decisions that were by then beyond challenge.

5. But the argument about breach of the rules on the adjustment of pay is much more telling. R 4 1.01 says:

"When reviewing remuneration, the Council shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council as laid down in Annex R.A.1."

According to the Council's decision of 9 December 1981, which was still in force at the material time:

"1. ... for the periodic reviews of the basic salaries of EMBL the procedure of adjustment of the System of Remuneration of the Coordinated Organizations shall be applied as laid down hereinafter;

2. ... any rate of adjustment applied to the basic salaries in the system of remuneration of the Coordinated Organizations for staff posted in France and in the Federal Republic of Germany with effect from 1 July 1981 or later shall be applied with effect from 1 January 1982 to the basic salary scales of EMBL in force on that date ...

4. The application of any rate of adjustment from the Coordinated System to the system of EMBL shall be subject to the approval of Council."

6. There is a relevant precedent in Judgment 1419 (*in re Meylan and others*) of 1 February 1995. Like the defendant in that case, the European Southern Observatory, the Laboratory has imported safeguards for its staff into its own rules. True, R 4 1.01 does not commit it to granting them all the adjustments that apply to the staff of the Coordinated Organizations. Yet the provision does not leave it quite free to apply only in part, let alone to cast aside altogether, the decisions of those organisations. Whatever it does it has a duty to state proper reasons for any departure from those decisions. Of course it may switch to another system or standard of reference and indeed, as is clear from the pleadings, it did so on 4 July 1996. But as long as the Council's decision of 9 December 1981 and the system it endorsed hold good, and even though the standard of reference has in practice been overlooked more than once, the staff are entitled to the safeguards that R 4 1.01 bestows: objective arbitrament and sure figures. Further comment on such issues appears in Judgments 1265 (*in re Berlioz and others*) of 14 July 1993 and 1419.

7. Adjustments to pay in the Coordinated Organizations were supposed to serve "as a guide". Yet the Tribunal is satisfied on the evidence, especially the records of debate in the Finance Committee and the Council's deliberations, that the Laboratory often let budget policy prevail. However understandable that may be, such policy must not supplant the rule of law. The last adjustment -- the one approved in 1993 as from 1 January 1994 -- fell far short of those put into effect in the Coordinated Organizations. Likewise, the decision that, after much shilly-shally, the Council adopted on 28 June 1995 for that year and that the complainants are objecting to, gave staff in Germany an increase in pay of only 0.3 per cent and staff in France and the United Kingdom none at all. Though the preamble to the decision cites the Coordinating Committee's recommendations in its 40th and 45th reports, the reference is a mere formality and EMBL refused the increases recommended in the 40th.

8. R 4 1.01 does vest discretion in the Council to approve adjustments adopted by the Coordinated Organizations. But here the Council paid only perfunctory heed to those adjustments. In sum it did not treat them as a "guide" at all. So the Laboratory broke the rule it had itself undertaken on 9 December 1981 to abide by. The impugned decisions must be set aside insofar as they ignored the decisions of the Coordinated Organizations in setting pay for EMBL staff in 1995.

9. The Tribunal may not itself set the complainants' pay: it must respect the Council's discretion as to just

what action to take on decisions by the Coordinated Organisations. It therefore sends the case back so that the Laboratory may, in keeping with its own self-imposed rules, set pay scales for 1995 and pay the complainants accordingly. On any sums due it shall grant them interest at the rate of 10 per cent a year as from the due date of payment of each sum.

10. The defendant shall also pay them a total of 20,000 French francs in costs.

11. Since the complaints succeed, so too do the applications to intervene insofar as the interveners are in the same position in fact and in law as the complainants.

DECISION

For the above reasons,

1. The decisions of 11 September 1995 by the Director-general of EMBL are quashed insofar as they refused to review the complainants' entitlements to adjustments in pay for 1995.

2. The complainants are sent back so that the Laboratory may take new decisions as set out in 6, 8 and 9 above.

3. The Laboratory shall pay them a total of 20,000 French francs in costs.

4. Their other claims are dismissed.

5. The applications to intervene are allowed insofar as the interveners are in the same position in fact and in law as the complainants.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Seydou Ba
James K. Hugessen

A.B. Gardner