

The Administrative Tribunal,

Considering the complaint filed by Mrs M. E. D. against the European Molecular Biology Laboratory (EMBL) on 11 December 2002, the EMBL's reply of 1 April 2003, the complainant's rejoinder of 7 May, the Laboratory's surrejoinder of 16 June, the complainant's further submissions of 7 August, and the EMBL's final comments thereon of 9 October 2003;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Australian national born in 1961, entered the service of the EMBL on 1 November 2000, under a three-year fixed-term contract at grade 6 as a Deputy Personal Assistant to the Administrative Director. After successfully completing a six-month probation period she became the Personal Assistant to that Director and was promoted to grade 7 with effect from 1 May 2001. From 16 August 2001 there was a new Administrative Director.

Under the Laboratory's Staff Regulations, if a fixed-term contract is to be extended the staff member concerned should be so informed at least 12 months before the expiry of the contract. As a follow-up to a meeting held on 15 October 2002 between the complainant and the Administrative Director, she wrote to the latter on 17 October asking to be explicitly informed as to whether her contract, which was due to expire on 31 October 2003, would be renewed or not. The Administrative Director replied in a letter of 31 October 2002 that because of numerous shortcomings in her performance her contract would not be renewed.

Since the EMBL's Staff Rules and Regulations have no provision for the internal appeal of decisions concerning the non-renewal of a contract, the complainant filed a complaint against that decision directly with the Tribunal on 11 December 2002.

B. The complainant makes three pleas. First, she argues that the Staff Rules and Regulations are "fatally flawed" because they do not allow for an internal appeal against decisions not to renew a contract. Consequently, she had been deprived of an important safeguard. There have also been breaches of statutory provisions on ongoing appraisal and a surprisingly "savage" assessment of her performance. She should have been given an opportunity to be heard and to challenge what the Administrative Director had said in his letter. She emphasises that the previous Administrative Director had no complaints about her work.

Secondly, she contends that the impugned decision was not properly reasoned and that it was not conveyed to her in such a way that she could defend her interests. She should also have been given suitable opportunity and time for any necessary remedial action on her performance before the decision had become final.

Thirdly, she says that the decision shows an abuse of authority for which she should be compensated. She also points out that she had a reasonable expectation that her contract would be renewed for a further three years.

She asks for material, moral and punitive damages as well as costs. She leaves it to the Tribunal's discretion to determine the amounts.

C. In its reply the EMBL challenges the receivability of her claims. First of all, the complainant has no legal right to claim a renewal of contract; she has, therefore, no basis on which to claim damages. The EMBL questions whether the fact that the Staff Rules and Regulations do not allow for internal appeals against decisions not to

renew contracts does not also bar complaints before the Tribunal. Denying that there has been any breach of the statutory provisions it says that her claims are not admissible. Lastly, the Laboratory objects to receivability on the basis that it regards the complaint to be an abuse of procedural rights, the complainant having forfeited her right to appeal to the Tribunal by refusing to discuss the quality of her work and any "amicable solutions" before she filed her complaint. She thereby failed to exhaust all internal procedural measures.

Subsidiarily, it says that her claims are without merit. The EMBL observed all of its statutory provisions in its dealings with the complainant. The Laboratory points out that the letter of 31 October 2002 summarised shortcomings which had been communicated to her verbally on several occasions, the last time during the meeting she had with the Administrative Director on 15 October. After that meeting she was invited by him to continue the discussions but she refused. Despite finding her performance to be lacking, the EMBL approached her twice trying to find an amicable solution but instead the complainant pressed her complaint.

The Laboratory submits that the decision not to renew an appointment is a discretionary one and as such the Tribunal's review of it is limited. It adds that its Staff Regulations provide that the EMBL is under no legal obligation to renew fixed-term contracts. That is why decisions concerning non-renewal of contract are not subject to any internal appeal procedure. Consequently, the Tribunal cannot be competent to hear her complaint. It denies that the complainant suffered any injury because she could not first appeal internally against the decision not to renew her contract.

Lastly, it submits that the decision was taken in the Laboratory's interest and that there was no abuse of authority.

The Laboratory makes a counterclaim, asking for a reimbursement of the expenses it has incurred in this complaint.

D. In her rejoinder the complainant clarifies that she does not seek an extension or a renewal of her contract. She says that her complaint is admissible and she refutes the EMBL's objections to receivability. She denies that she was informed of the criticisms regarding her work. The first time she suspected that her contract would not be renewed because of her performance was during the meeting of 15 October; furthermore, during that meeting she was only given "a very limited oral assessment" of her performance. She points out that there was never any discussion of finding her another position at the EMBL, nor was any offer made that she could have considered before the final decision of 31 October 2002 was taken.

Expanding on her claims she now quantifies the damages she seeks, and gives a total figure of "not less than" 140,000 euros that she regards as reasonable; she also seeks 10,000 euros in costs.

E. In its surrejoinder the Laboratory maintains that the decision not to renew the complainant's contract is a discretionary one over which the Tribunal's review is limited; it is on this issue only that it has based its objections to admissibility. It says it does not question the overall competence of the Tribunal to review decisions of the Director-General.

The EMBL accuses the complainant of distorting a number of facts. For example, it contends that the possibility of transferring her to another post was brought up on different occasions but that she did not want to discuss the matter. It also questions her recollection of what was discussed during the meeting of 15 October, pointing out that many more issues were addressed than the complainant has led the Tribunal to believe. If the first time the complainant suspected that her contract would not be renewed because of her performance was during the meeting of 15 October, then this shows "her degree of unawareness and lack of qualification for her post".

The Laboratory objects to the complainant's financial compensation claims, reiterating that it has not caused her any injury warranting damages or compensation.

Lastly, the EMBL informs the Tribunal that disciplinary proceedings have recently been brought against the complainant for misconduct.

F. In further submissions the complainant responds to the charges of misconduct that have been raised by the Laboratory. She submits that this issue is not relevant to her case before the Tribunal, which she had filed solely to challenge the non-renewal of her contract.

G. In its final comments the EMBL says that the question of misconduct is indeed relevant. It provides a copy of the report of the Joint Advisory Disciplinary Board dated 3 September 2003 in which the Board has unanimously

recommended that the complainant be dismissed without notice. The Director-General followed that recommendation and decided to suspend her without pay from 18 September 2003 until the end of her contract, that is 31 October 2003.

The Laboratory presses its counterclaim.

CONSIDERATIONS

1. The complainant appeals against the non-renewal of her fixed-term contract. She submits that, under the EMBL Staff Rules and Regulations, there is no provision to appeal internally such decisions and that consequently, these are "fatally flawed". She asserts that she is at a disadvantage since she cannot provide any findings from an internal review body to assist the Tribunal in reviewing her case. She says that the Staff Rules and Regulations have been breached insofar as the assessment of her performance is concerned. She argues that she was not given ample warning of any shortcomings in her performance before the decision was taken not to renew her contract, and consequently, she was unable either to contest any alleged shortcomings or to improve her performance. She contends that the decision was not sufficiently motivated. She intimates that the decision is flawed by an abuse of authority. She asks for material, moral and punitive damages, as well as costs.

2. The EMBL submits that there has been no breach of the Staff Rules or Regulations, which clearly provide that fixed-term contracts expire at the end of their term without any legal obligation for the Laboratory to renew them. Consequently, the complainant has no legal right to claim an extension of her contract nor to claim any damages arising from the non-renewal of that contract. For this reason, it objects to the receivability of her claims. It asserts that she was made aware of the shortcomings of her work performance. It submits that, in any event, the decision not to renew a contract is a discretionary one and open to only limited review. It refutes her account of the facts and says that there has been no abuse of authority.

3. There is no merit to the EMBL's assertion that the complaint is not receivable. Firstly, the mere fact that a claim may be based on the non-renewal of a fixed-term contract does not necessarily result in the claim being automatically irreceivable. All will depend on the circumstances alleged and proved; a non-renewal based, for example, upon gender discrimination would certainly be admitted by the Tribunal. Secondly, there is simply no merit to the Laboratory's suggestion that the deliberate exclusion in the Staff Rules and Regulations of an internal appeal mechanism with regard to the non-renewal of a contract operates so as to exclude complaints to the Tribunal. The Tribunal's jurisdiction is not determined by an organisation's Staff Rules but by the terms of the Tribunal's own Statute and the defendant organisation's submission to it. Thus, an organisation cannot unilaterally preclude the right to lodge a complaint. While it is the case that the Tribunal will often defer to discretionary decisions, the fact that a decision is discretionary does not take it outside of the Tribunal's jurisdiction. Although a discretionary decision may warrant significant deference, it is still reviewable. Thirdly, the fact that the Laboratory takes the position that the impugned decision does not violate its Staff Rules and Regulations has no bearing on the receivability of the complaint. Lastly, the EMBL's contention that the complainant did not exhaust internal procedural rights is ridiculous, in light of the fact that there are no internal procedural rights. The invitation, at the discretion of her immediate supervisor and the Director-General, to discuss the complainant's situation further cannot be said to constitute internal procedural rights.

4. The evidence simply does not support the complainant's claim that the Laboratory failed to observe the complainant's procedural rights insofar as they affect the complaint. The complainant contends that she had the right to a formal assessment process before the decision not to renew her contract was taken. The Staff Rules and Regulations, however, make no mention of such a procedural right. Staff Regulation Article R 2 2.04 states specifically that a written assessment of the performance of the staff member must be made: (1) prior to the end of the probation period; before a contract is extended; (2) before the offer of a new contract; or (3) at least every fifth year for staff members with indefinite or open-ended contracts or rolling appointments. It does not state that a written assessment must be completed before making a decision not to renew a fixed-term contract.

5. As already stated, the Staff Rules and Regulations do not provide an internal appeal mechanism for a person in the complainant's position. The Tribunal has frequently commented on the desirability and utility of internal appeal procedures which not only make the Tribunal's task easier but also substantially reduce its workload by bringing a satisfactory and less expensive resolution to many disputes at an earlier stage. In any case, the Tribunal remains the

ultimate arbiter of the rights of international civil servants and it can, and will, exercise its jurisdiction in appropriate cases. That said, however, there is no merit to the complainant's contention that the absence of an internal appeal mechanism is in itself a fatal flaw which vitiates the initial administrative decision not to renew her contract.

6. The complainant asserts that she was not given reasons for the decision not to renew her contract prior to the decision being taken. The parties disagree, and the evidence is contradictory, as to the extent to which the complainant was informed of her poor work performance prior to the decision. The right to receive written reasons, however, implies the right to be given detailed reasons for a decision once it has been made, not prior to its making. This right ensures that an appeal can properly be taken from that decision. While it may be preferable to conduct a formal work performance assessment, including giving a staff member the opportunity to respond to a supervisor's concerns prior to a decision being taken not to renew a contract, this is separate from the duty to provide adequate reasons for a decision in order to facilitate an appeal process. The complainant has failed to show that her rights were breached in any way in this regard.

7. The evidence is contradictory with regard to the complainant's contention that the decision not to renew her contract was an abuse of authority.

8. While the Tribunal has some reservations about the quality and persuasiveness of the evidence advanced by the Laboratory, the evidence produced by the complainant is even less substantial and convincing. The upshot is that neither side has provided credible evidence in support of its position. However, the fact that it is for the complainant to demonstrate that the decision constitutes an abuse of authority, or even that it was unreasonable, leads to the conclusion that her complaint should be dismissed. This conclusion is entirely independent of the allegations of misconduct contained in the surrejoinder and the response thereto in further submissions, as well as of evidence of her subsequent suspension for disciplinary reasons, all of which, being posterior to the complaint, are irrelevant thereto.

The Laboratory seeks an award of costs against the complainant. The Tribunal sees no reason for doing so and accordingly rejects the Laboratory's counterclaim.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Laboratory's counterclaim is also dismissed.

In witness of this judgment, adopted on 7 November 2003, 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 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet