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

**EIGHTY-EIGHTH SESSION**

# *In re* Berthet (No. 2), Lampinen, Leberman and Schechinger

**Judgment 1912**

**The Administrative Tribunal,**

**Considering the complaints filed by Mrs Carmen Berthet - her second - Mrs Mervi Johanna Lampinen, Mr Reuben Leberman and Mr Erich Schechinger against the European Molecular Biology Laboratory (EMBL) on 23 June 1997 and corrected on 26 March 1998, EMBL's replies of 2 July, the complainants' rejoinders of 7 August and the Laboratory's surrejoinders of 7 October 1998;**

**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. Some facts relevant to this dispute are to be found under A and E in Judgment 1798 (*in re* Ashurst and others) delivered on 28 January 1999.**

**The Coordinating Committee on Remuneration of the Coordinated Organizations (1) recommended a salary adjustment for 1996 of 1.3 per cent in Germany, 1.4 per cent in France, 3.5 per cent in the United Kingdom and 4.3 per cent in Italy. On 17 December 1996 the EMBL Council decided, in accordance with Article R 4 1.01 and Annex R.A.1 of the Staff Regulations as amended on 4 July 1996, that there would be no salary adjustment, for 1996, for staff serving in Germany and France and a 5.0 per cent adjustment for staff in the United Kingdom and Italy. It also decided to set up a working group to review all terms and conditions of employment at the Laboratory and to take account of the latest position in comparable national and international research organisations. The staff was informed of these decisions by the Director-General and the Administrative Director at a meeting on 19 December 1996 and by an undated document entitled "Good News in Heidelberg" which was later circulated throughout the organisation.**

**The complainants are employees of the Laboratory who serve in Germany. On 14 February 1997 they, and nineteen other staff members, lodged identical appeals with the Director-General through the chairman of the Staff Association. They asked for the quashing of what they considered to be the first individual decision applying the Council's decision of 17 December 1996 - i.e. the pay slips for January 1997, received on 15 January. They also asked, in the event of a denial of their request, to be allowed to appeal directly to the Tribunal, without exhausting the internal means of appeal.**

**By a letter of 26 March 1997, containing the impugned decision, the Director-General informed the chairman of the Staff Association that the pay slips were "nothing more than an automatic application of Council's decision of 17 December" notified to staff on 19 December 1996. That was the date on which the statutory thirty-day time limit for lodging an appeal started to run, so their appeals of 14 February were time-barred. Besides, they fell short of the requirements of Article R 6 1.04 of the Staff Regulations since they failed to state all the grounds of appeal and were not accompanied by the requisite documentary evidence.**

**B. Citing Judgment 1451 (*in re* Hamouda and others) of 6 July 1995, the complainants submit that their complaints are receivable: they impugn, within ninety days as required by Article 7(2) of the Tribunal's Statute, their pay slips as the first individual decisions applying the general decision under challenge. The fact that the Council's decision of 17 December 1996 was specific enough to cause them individual injury and hence to be challenged directly does not mean that their complaints are time-barred. To hold the contrary**

**would be inconsistent with the principle of legal protection. Their appeals are perfectly explicit.**

**On the merits they contend that the Laboratory took decisions "solely on the basis of budgetary consultations" whereas, according to them, Judgment 1682 (*in re* Argos and others) of 29 January 1998 excluded budgetary considerations from the reasons which may be given for departing from the recommendations of the Coordinated Organizations.**

**They argue that the amendment to Article R 4 1.01 of the Staff Regulations was in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted. By taking a standard of reference that is not binding the Council is "discarding the whole idea of adjustment". It has also repealed the ban on downward adjustment.**

**Besides, the method of adjustment is arbitrary and in breach of "the most elementary good faith" and general principles of international civil service law, such as legal protection and Noblemaire. Mrs Lampinen and Mr Schechinger contend that the Laboratory has also violated the principle of equality of treatment to the detriment of staff serving in Germany.**

**All the complainants plead breach of their acquired rights in that the impugned decision precludes adjustment of salary to the cost of living and infringes what they call the "right to maintain [their] salary".**

**They seek the quashing of the Director-General's decision of 26 March 1997 and an award of costs.**

**C. The Laboratory replies that the complaints are irreceivable because the decision of 17 December 1996 was a final one and the complainants have not impugned it within thirty days following its notification on 19 December. In addition, this decision was not the basis in law of the January 1997 pay slips. Article R 6 1.04 of the Staff Regulations says that appeals must state all grounds of appeal and be accompanied by all documentary evidence. The complainants' appeals did not meet these requirements.**

**In subsidiary pleas on the merits the Laboratory contends that the amendment to the Staff Regulations adopted by the Council on 4 July 1996 made no change of substance in the text put to the Standing Advisory Committee but simply deleted repetitions. Therefore, there was no need to consult the Committee again. Even the chairman of the Staff Association himself saw no point in its meeting again.**

**According to the Laboratory, the Tribunal's case law states that an organisation must abide by its own rules, but it is free to set those rules and, if necessary, amend them. Therefore, the Laboratory was not bound to take the system of the Coordinated Organizations as a binding standard of reference.**

**The purpose of the adjustments decided on in December 1996 was to ensure purchasing power parities between the different duty stations and they were not in breach of good faith. Besides, "some flexibility is needed to take into account changes in the financial and budgetary situation" of the Laboratory. The ban on downward adjustments imposed prior to July 1996 was a temporary measure.**

**As for the Noblemaire principle, the Laboratory states that "member States appear not to acknowledge any obligation to pay the highest salary scales to international civil servants".**

**It denies breach of the principle of equal treatment and the complainants' acquired rights - adjustment of salary to the cost of living is not an acquired right.**

**D. In their rejoinders the complainants submit that, according to the Tribunal's case law, a staff member may, without any risk of being time-barred, wait for an individual decision applying a general decision, even if the latter is challengeable. Their appeals did state all the grounds they were based on.**

**In their submission, any amendment to be adopted by the Council should have gone to a plenary meeting of the Standing Advisory Committee, and merely getting the opinion of the chairman of the Staff Association was not enough to replace this consultation.**

**In their view, the purpose of the amendment "was not just to stop rises in pay" but to reduce it by "applying negative indices".**

**E.In its surrejoinders the Laboratory concedes that the Council's decision of 17 December 1996 could be considered as the basis in law for the January 1997 pay slips. It therefore withdraws its objections to receivability on that point but maintains that there was a breach of Article R 6 1.04.**

**It asserts that in Judgment 1682 the Tribunal stressed the fact that the Laboratory "may switch to another system or standard of reference". That was exactly what the Laboratory did when it amended the rules in July 1996 so as to "allow greater flexibility as compared to the decisions of the Coordinated Organizations", and the decision of 17 December 1996 was in keeping with the amended rules.**

## CONSIDERATIONS

**1. The complainants are employees of the European Molecular Biology Laboratory who are challenging their pay slips for January 1997. Their arguments are identical, apart from a plea presented by only two of them, alleging a breach of the principle of equality of treatment between staff members serving in Germany and those serving outside Germany. The complaints can thus be joined.**

**2. The gist of the case is as follows: until 1996, the pay of the Laboratory's staff was ordinarily adjusted every year in accordance with Article R 4 1.01 of the Staff Regulations which provided that: "... the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations". Following Judgment 1419 (*in re* Meylan and others) of 1 February 1995, by which the Tribunal had ruled against another organisation for violating an identically worded text, the Council of the Laboratory adopted on 4 July 1996 an amendment to its Staff Regulations, of which Article R 4 1.01 now provides that:**

**"Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by Council as laid down in Annex R.A.1."**

**As for Annex R.A.1, it now reads in part:**

**"The Council**

**- stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;**

**- stating that the reference to the relevant decisions of the Coordinated Organisations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;**

**- herewith replacing its decision of December 9, 1981,**

**decides that:**

**1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations in Germany.**

**2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organisation and in the Member States.**

**3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organisations.**

**4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."**

**3. Following this amendment, certain Laboratory employees challenged their pay slips for July 1996, but in ruling on the dispute the Tribunal took the view that the complainants could not validly invoke, in support of their requests, the unlawfulness of the new rules since they had not yet been applied (see Judgment 1798, *in re* Ashurst and others, of 28 January 1999).**

**4. On 17 December 1996, the Council of the Laboratory, applying the amended Regulations for the first time, decided not to follow the recommendations of the Coordinated Organizations for 1996, which were 1.3 per cent in Germany, 1.4 per cent in France, 3.5 per cent in the United Kingdom and 4.3 per cent in Italy. The salary adjustment was fixed at zero per cent for Germany and France and at 5.0 per cent for Italy and**

**the United Kingdom in order, according to the defendant organisation, to bring the purchasing power of the staff members based in the latter countries closer to that of the staff members based in Germany. The complainants, who had received no adjustment for 1996, addressed appeals against the pay slips of January 1997 to the Director-General, who rejected them as irreceivable by a decision of 26 March 1997 notified to the chairman of the Staff Association. It is this decision which the complainants now impugn.**

**5. The defendant organisation has, on two grounds, contested the receivability of the four complaints: on the one hand, it argues that the complainants are, in fact, challenging not their pay slips of January 1997 but the Council's decision of 17 December 1996, and did not do so within the required time limits; on the other hand, it takes the view that their appeals fall short of the requirements of Article R 6 1.04 of the Staff Regulations.**

**6. On the first point, the Laboratory states in its surrejoinder that it "will not insist on the objection that it had previously lodged" and appears therefore to withdraw its objection to receivability which is indeed untenable. The complainants are certainly entitled, on the occasion of appeals against individual decisions that concern them directly, to plead the unlawfulness of the regulation which underpins these individual decisions. The Council's decision of 17 December 1996 regulated, in principle, only the salary adjustment for 1996, but in view of the date of the decision it follows that it was the pay slips for January 1997 which applied for the first time the absence of adjustment decided upon.**

**7. On the second point, however, the Laboratory maintains that the complainants did not submit their appeals in accordance with the requirements of Section 6.1 of the Staff Regulations, which provides that internal appeals "shall state all grounds of appeal put forward by the appellant and shall be accompanied by all documentary evidence in support thereof". It is quite true that the appeals, signed on 14 February 1997 by 23 staff members and transmitted to the Director-General by the chairman of the Staff Association, lacked precision in respect of the legal arguments adduced to criticise the impugned decisions. They evoked, however, in addition to "errors of fact, errors of law and clearly false conclusions" - which is, indeed, very vague - a breach of the principle of good faith and of their acquired rights, making an express reference to the Tribunal's case law, and this definitely constituted sufficient motivation to satisfy the requirements of Section 6.1 of the Regulations. It is thus incorrect to maintain that the complainants have not exhausted the internal means of redress and that their appeals would thereby be irreceivable.**

**8. In support of their case, the complainants put forward first of all a procedural plea. According to Article R 7 1.01 of the Staff Regulations: "The Standing Advisory Committee shall advise the Director-General on general questions concerning the personnel ...". Although the Standing Advisory Committee was consulted concerning the draft amendment to Article R 4 1.01 of the Regulations, the administration submitted for the Council's approval two versions of the text: the one that had been submitted to the Standing Advisory Committee and another simplified version that the administration had prepared. It was this second version that was adopted by the Council. The complainants take the view that, in these circumstances, the consultation procedure provided for by Article R 7 1.01 was not followed. This tainted with unlawfulness the deliberations of 4 July 1996 and, consequently, the decision of 17 December 1996 which refuses all salary adjustment for staff members stationed in Germany and France.**

**9. The Laboratory counters that view with two arguments. While the version of the text adopted by the Council had not been submitted to the Standing Advisory Committee, only editorial corrections had been made to the text that had been submitted and no substantive changes had been made to it. Moreover, a new consultation would not have had any impact on the solution finally adopted, since the staff representatives had, during the consultation of the Committee, expressed their opposition to the proposed amendments and the chairman of the Staff Association had made it clear that it was not possible to remove that opposition on the grounds of principle and that a further meeting would be useless.**

**10. On this last point, the Laboratory's objection could not be accepted. The fact that the chairman of the Staff Association has made his position known does not mean that there is no need to consult an official body, made up of representatives of the administration and the staff who are entitled to make their views known quite independently and whose opinions can develop in the course of a discussion.**

**11. On the other hand, it is true that a further consultation of a body which must give its opinion on a draft text is necessary only if substantial changes are made to the text drafted by the authority having the**

**decision-making power. In the present case, the change made to the text initially submitted for the opinion of the Standing Advisory Committee had simply the effect of avoiding a repetition between the Regulation and Annex R.A.1, while maintaining their combined effect. There was thus no need to hold a further consultation to consider a draft text that had strictly the same meaning as that which had been submitted to the Committee.**

**12. On the merits the complainants maintain that the system adopted to fix pay as from 1996 is contrary to the general principles of law governing the matter and is a breach of their acquired rights.**

**In the first place, they take the view that the system introduced by the Laboratory leaves the door open to complete legal uncertainty and does not make it possible to preserve the principles of objectivity, stability, predictability, transparency, security and preservation of confidence which must characterise the relationships between an organisation and its staff.**

**13. As indicated in Judgment 1821 (*in re* Allaert and Warmels No. 3):**

**"The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:**

**(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.**

**(b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.**

**(c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.**

**(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."**

**14. In fact, although the Tribunal is attached to the principles thus defined and is determined to ensure that they are respected, it has never taken the view that the salary regime of international civil servants must be fixed once and for all. It has stated on numerous occasions that the organisations are entitled to change the standard of reference or the system for fixing the salary of their staff provided that they respect the procedures and forms laid down by their statutory rules (see, for example, Judgment 1419 and, as far as the defendant organisation is concerned, Judgment 1682) and do not, of course, breach the general principles of international civil service law. In the case in question, however, the amendments to Annex R.A.1 of the Staff Regulations of the Laboratory consist in specifying that the index calculated according to the procedure of the Coordinated Organizations shall be used as an "orientation" by the Council when it is reviewing basic salary scales and allowances for staff based in Germany; that, "when assessing whether or to what extent this index will be applied as the actual salary adjustment", the Council shall take into account relevant criteria including "the economic, budgetary and social situation" prevailing in the member States and the organisation; and that the basic salary scales and allowances for staff based outside Germany shall be determined so as to preserve the purchasing power of the persons concerned.**

**15. Certainly, it is regrettable that the Laboratory did not adopt a more precise methodology of adjustment. The methodologies adopted by international organisations for setting and adjusting the remuneration of the staff, in principle, must enable results to be obtained that are stable, foreseeable and clearly understood, as cited above in Judgment 1821. When the applicable method uses an external index, as does the Laboratory since the modification of its Regulations, not with a view to requiring the competent body to conform automatically to the index, but only as a simple "orientation", which in itself is not a breach of any rights, the staff can only be protected against arbitrariness if the criteria used in deviating from the suggested orientation of the external index are objective, adequate and known to the staff. The new Article R 1.01 of the Regulations, by itself, does not breach these principles, but it must be verified that its application does not impair the guarantees offered to international civil servants.**

**16. In the present case, the defendant organisation demonstrates that the automatic application of the index**

**resulting from the relevant decisions of the Coordinated Organizations would have led to increased disparity of purchasing power between the staff according to the salary scales applicable to their duty station. The adjustments made for the United Kingdom and Italy ensured the purchasing power parity of the staff stationed in these countries in relation to staff residing in Germany, which was a legitimate objective.**

**17. Without a doubt, the decision not to apply the 1996 adjustment to staff serving in Germany and France was not taken without budgetary considerations, but the budgetary situation of the organisation and the member States constitutes one of the pertinent elements which, in this case, could be taken into consideration. The complainants have not stated in what way the evaluation of these difficulties was based on wrong factors.**

**18. It is also necessary that the application of Article R 4 1.01 of the Regulations, in this case, does not breach the recognised right of the staff of international organisations to receive - in the interest of international civil service itself - a level of remuneration equal to that in countries where, for comparable qualifications, the salaries are the highest. It is only in the event of such a breach that a challenge could justifiably be made. The complainants have not given any indication to the Tribunal that the salary scale for January 1997, as fixed by the Council's decision of 17 December 1996, providing for no pay award for the persons concerned, has had the effect of keeping their salary, without proper motivation, at a level that would be manifestly inadequate. As for the plea concerning the breach of the principle of equality of treatment, invoked by Mrs Lampinen and Mr Schechinger only, based on the fact that the treatment of staff members stationed in Germany is different from that of staff members stationed outside Germany, it cannot be allowed either: the purpose and intended effect of the system applied are, as recalled above, to preserve purchasing power parities between the two categories and here again there is nothing in the complaints to indicate that the pay slips applying the new provisions have entailed genuine discrimination. Lastly, the plea that the new wording of Annex R.A.1 renders it henceforth possible to apply downward adjustments could be examined only if the disputed pay slips embodied such an adjustment and this is not the case.**

**19. The complainants consider that their acquired rights have not been recognised in the new Regulations: the Laboratory was obliged, in their view, to index their salary to the cost of living at the time when they entered its service and such indexing formed part of their basic and essential conditions of employment, and hence of their acquired rights. However, international civil servants do not have an acquired right - any more than national civil servants - to an automatic indexing of their salaries. As recalled in Judgment 1118 (*in re* Niesing No. 2 and others), the establishing of regulations for the periodic adjustment of salary is within the discretion of the organisations provided that these regulations do not violate the principles of international civil service law and their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members. In the case in question, such an erosion has not been proved and the Tribunal has no reason to conclude that the salary levels decided upon for the year 1996 jeopardise the basic conditions of employment to the preservation of which the complainants are entitled.**

**20. It follows from all the foregoing that, contrary to what the defendant organisation maintains, the complaints are receivable, nevertheless they must be dismissed as being without merit.**

## DECISION

**For the above reasons,**

**The complaints are dismissed.**

## DISSENTING OPINION BY MR JUSTICE HUGESSEN

**1. Over the years the Tribunal has developed a series of rules designed to protect the economic security of international civil servants by enshrining their right to periodic cost of living adjustments to their salaries. This is a right protected by many national legislations but for international civil servants only the Tribunal's case law stands between them and the inevitable erosion of their purchasing power by inflation.**

**2. These principles were recently restated, but certainly not invented, by the Tribunal in Judgment 1821 (under 7) as follows:**

**"(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.**

**(b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.**

**(c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.**

**(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."**

**3. The majority judgment, while paying lip service to these principles in fact sets them at nought and reduces them to mere empty words. It sets its blessing on a staff regulation which leaves the adjustment of salaries to the "sovereign" appreciation of the employer; how can this be described as a "methodology, system or standard"? It is none of them.**

**4. In Judgment 1821, quoted above, the Tribunal was very critical of a staff regulation drawn up in terms identical to those of the regulations at issue here. It said (under 8):**

**"Even if it were possible to dignify the process adopted by the ESO by calling it a methodology for salary adjustment, it obviously fails to produce results that are stable, foreseeable and clearly understood."**

**5. Likewise, one looks in vain at the regulation here being invoked by the defendant to find any trace of assurance that it will produce results that are "stable, foreseeable and clearly understood". There can be no stability in what is in essence left to the whim of the Laboratory, its foreseeability is a matter of pure guesswork, and it can be understood only in the context of an overriding desire of the Laboratory to save money at the expense of its staff.**

**6. In the present case the "methodology" chosen purports to rely on an external standard - the index of the Coordinated Organizations. This was the standard previously in use, but the Laboratory seems to think it has made a significant change by substituting the word "orientation" for the word "guide". That is a very dubious proposition, and even if it were accepted one may well ask how an adjustment of zero per cent can be said to have the same orientation as one of 1.3 per cent. It is in any event clear from the case law that the burden of justifying any departure from the chosen standard lies squarely on the shoulders of the organisation, and that such justification must be clear and unambiguous. Again, one looks in vain for anything of the kind in the present case.**

**7. Cost of living adjustments are not a matter of grace and favour for international civil servants. Adjustments are an essential part of the remuneration structure which allows salaries to keep pace with inflation. Of course the exercise is not, and can never be, purely mechanical: there are almost as many indices for the purpose as there are economists and the task is made particularly difficult for international organisations which have to take account of varying economic conditions in a wide variety of countries and duty stations. But that does not mean that an organisation can simply throw up its hands and resort to arbitrariness. The majority judgment opens the door to just that.**

**8. The complaints should be allowed, the impugned decisions set aside and the matters referred back to the defendant organisation for reconsideration.**

**In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Julio Barberis, Judge, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 3 February 2000.**

*(Signed)*

**Michel Gentot**
**Mella Carroll**
**Julio Barberis**
**Seydou Ba**
**James K. Hugessen**

**Catherine Comtet**

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

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