

EIGHTY-NINTH SESSION

In re Flösser (No. 5), Hassler, Herzog, Honig, Müller, Schechinger (No. 3), Stegmüller, Walter (No. 2), Weingand, Wernz and Winkler

Judgment No. 1986

The Administrative Tribunal,

Considering the common complaint filed by Mr Hans Flösser - his fifth - Mr Norbert Hassler, Mr Hans Herzog, Mr Erich Honig, Mr Konrad Müller, Mr Erich Schechinger - his third - Mr Albert Stegmüller, Mrs Anne Walter - her second - Mr Manfred Weingand, Mr Otto Wernz and Mr Wolfgang Winkler against the European Molecular Biology Laboratory (EMBL) on 2 August 1999 and corrected on 5 October, the EMBL's reply of 18 October, the complainants' rejoinder of 30 November and additional submissions of 9 December, the Laboratory's surrejoinder of 20 December and its letter of 30 December 1999 to the Registrar of the Tribunal;

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. The complainants are all present or retired staff members of the EMBL and took up employment with the organisation at various dates between 1973 and 1984. Prior to that they were contributing to the German national pension scheme, the *Bundesversicherungsanstalt für Angestellte* (BfA).

At the material time Article 12 of the EMBL Pension Scheme Rules read in part: "A staff member who enters the service of the Organization after leaving the service of a government administration ... may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer". Article 43 of the same Rules provides that: "Instructions for the implementation of these Rules shall be drawn up by the Director-General". The Pension Scheme Rules appear as Annex R.E.1 to the Staff Regulations.

Until 1995 the German national scheme referred to above had no provision for the outward transfer of pension rights. One of the complainants wrote to the Director-General on 4 November 1997 and attached data showing the amount that each complainant could potentially transfer into the organisation's pension scheme. The Director-General replied to that letter on 18 November 1997, saying that the question of transfers was under consideration by EMBL's Council. He indicated that he would take no action without its approval and that no decision was expected before the summer meeting of 1998 at the earliest. In a subsequent letter dated 10 December 1997 the Director-General said that staff should make no assumption on the matter of the transfers as it was not known when the Council would reach a decision, or whether it would be retrospective or what methodology would be used.

In March 1999 the complainants wrote individually to the Director-General requesting the transfer of their previously acquired pension rights into the EMBL scheme. In a letter of 19 March the Administrative Director told them on the Director-General's behalf that the position had remained essentially unchanged since 1997 and that the Council had set up a working group to study the question of transfers. On 12 April 1999 the complainants lodged a common appeal with the Director-General, pressing the matter of the transfer. They indicated that they were aware of the existence of the working group and had been informed that it intended proposing the abolition of Article 12. On 15 April he rejected their appeal as irreceivable and indicated that he would be able to take a final decision only after "informed consultation with Council". An exchange of correspondence ensued since the complainants asked the Director-General to convene the Joint Advisory Appeals Board. In a letter of 4 May 1999, which the complainants now impugn, the Director-General said he was unable to accede to that request and confirmed what he had told them in earlier correspondence.

B. The complainants submit that the letter of 4 May 1999 constitutes "a decision not to make a substantive decision" and that they are therefore free to challenge it under Article VII(2) of the Tribunal's Statute. They argue that if that letter cannot be considered a decision under Article VII(2), their complaint is receivable under Article VII(3) because of the Administration's failure to take a final decision.

They contend that Article 12 of the Pension Scheme Rules confers on them the right to arrange to have their pension rights that have accrued under the German national pension scheme - the BfA - transferred to the EMBL scheme. Such is clear from the wording: "A staff member ... may arrange for payment ...". They view that right as part of their employment contract and conclude that they are entitled to ask the Laboratory to make arrangements for the transfer. They hold that their right exists even in the present absence of instructions about the implementation of Article 12, and that the Director-General has a statutory obligation to provide those instructions but has not done so. Instead, the Laboratory delayed taking action on the pretext that the Council had yet to take a decision. However, Article 43 of the Pension Scheme Rules places the obligation on the Director-General and not on the Council.

The complainants want the EMBL to make an arrangement with each complainant for the transfer of amounts accrued under his or her national scheme and for the calculation of the years of "reckonable service" to be credited to the EMBL scheme by reference to the grade each held on confirmed appointment. They want the Laboratory to come to an agreement with the BfA that is "appropriate and adequate" for the transfer of each complainant's rights and they also ask for costs up to an amount of 30,000 German marks.

C. In its reply the EMBL says that for the complaint to be receivable under Article VII(2) of the Tribunal's Statute the complainants should have filed it within ninety days of receiving the letter the Director-General wrote to them on 18 November 1997 because that letter contained "the decision not to make a substantive decision". They did not appeal against it and are now time-barred. Moreover, they cannot plead the implied rejection of their claims under Article VII (3) as the Director-General has said that their appeal will be dealt with - but only in "clearly defined circumstances".

The Laboratory points out that although both Articles 12 and 43 have been in the EMBL's Pension Scheme Rules since 1978 there have been no formal requests for transfers and the 'Instructions' have never been drawn up. It also points out that the complainants knew when they filed their complaint that the Council had reviewed the matter of the transfers. They knew that in July 1999 it had reached a decision on what action to take and would be making a formal decision at its meeting in November 1999.

It holds that the complainants did not meet the requirements of Article 12 and their claims are devoid of merit. Rights conferred on a staff member by that article have to be exercised at the moment of joining the organisation. It is then that the staff member must be in a position to transfer entitlements from his or her previous scheme. But when the complainants took up service with the Laboratory their previous scheme did not allow such a transfer and so they could not request one. It was changes in German legislation in 1995 that opened up the possibility of transferring pension entitlements, but those changes could not lay retroactive obligations on the organisation.

D. In their rejoinder the complainants press their arguments on the receivability of their case. They state that the letter of 18 November 1997 merely summarised negotiation points and was only addressed to one of the complainants. They made no claim until March 1999. From the terms of the letter of 18 November 1997 the complainants were expecting a reply in 1998. They blame the administration for its 'inactivity' and delay. Contrary to what the organisation affirms, at the time they filed their complaint they were unaware of the Council's decision of July 1999.

On the merits they argue that Article 12 allows the transfer of the accrued pension rights after the employee enters the service of the EMBL, but does not specify at what point in time the transfer must take place and mentions no time limits.

The complainants contend that there was unequal treatment. In not arranging the requested transfer the Laboratory is discriminating against them, particularly as staff of other nationalities whose previous pension schemes allowed the transfer were able to proceed.

In additional submissions the complainants produce a letter dated 26 November 1999 from the Administrative Director informing them of the Council's decision to abolish Article 12. They view EMBL's action as a further

measure to "deprive" them of their rights but state that the rescinding of Article 12 will have no effect on them as it nonetheless formed part of their contractual relationship with the Laboratory.

E. The Laboratory presses its arguments against the receivability of the complaint. It reiterates its opinion that the letter of 4 November 1997 constituted a 'formal request' for the transfer. The letter of 18 November 1997 from the Director-General did go to all the complainants. Such is clear from the wording of the complainants' subsequent reply of 26 November, a letter which they all signed. It has been clear since November 1997 that the complainants have been requesting the transfer of their entitlements and the position adopted by the Director-General has remained unaltered since that time.

It also refutes the complainants' charges of delay and inaction. The Council did not at any stage make a firm commitment to reaching a decision on the question of the transfers in 1998. The Laboratory points out that two of the complainants were Staff Association representatives on the Finance Committee Working Group that made recommendations to Council on matters concerning the Pension Scheme Rules. They were therefore quite aware that a recommendation on Article 12 was to be put to the Council at its meeting in July 1999 and knew in advance of the proposal to abolish it. The Council too was aware of the complainants' situation.

On the merits, the Laboratory explains that in order to benefit under Article 12 a staff member entering the service of the organisation had to have transferable funds under a previous scheme. It is upon confirmation of appointment that the staff member can take the decision to transfer such funds. What Article 12 makes clear is that the funds must be transferable at that time and the decision cannot be deferred. Even in the absence of implementing instructions the essential requirements for transfer have to be met. The Laboratory reiterates that the complainants had no transferable funds when they joined the organisation and did not meet the requirements of Article 12. Citing the Tribunal's case law, it says that the complainants cannot retrospectively claim a benefit that has come about through a change in German legislation.

In a letter of 30 December 1999 it points out that it received the complainants' additional submission after the filing of its surrejoinder. It states that the Council did not abolish Article 12 to deprive the complainants of their rights. Indeed, the Standing Advisory Committee made its recommendations to Council with regard to the rescinding of Article 12 before the EMBL received copies of the present complaint.

CONSIDERATIONS

1. The complainants are all employees or former employees of the EMBL. Each of them joined the staff at various times between 1973 and 1984. Immediately before doing so, each of them had been a member of the German national pension scheme - the BfA. At the time they joined the staff, they were not given the opportunity of transferring their acquired rights in the BfA to the EMBL pension scheme because the BfA had no provision for such outward transfers. The situation changed in 1995 when the rules governing the BfA were altered so as to permit the transfer of pension rights.
2. In November 1997, in response to a request from the complainants, the Director-General advised the complainants that their request to transfer funds from the BfA to the EMBL scheme could not be accepted since the whole question of transfers in and out of the EMBL scheme was under study and would not be decided by the Council of the organisation before the summer of 1998 at the earliest.
3. Over the ensuing fifteen months, the complainants wrote on a number of occasions to the Administration reiterating their request but the replies received were all to the same effect.
4. Finally, when no substantive decision was forthcoming, the complainants wrote again to the Director-General in March of 1999 requesting that he accept the payment into the EMBL pension scheme of the amounts standing to their respective credits with the BfA. On 19 March 1999 a reply given on behalf of the Director-General indicated that the position remained unaltered from the earlier responses. Treating the letter of 19 March as a decision, the complainants filed an internal appeal against it. On 15 April, the Director-General rejected the complainants' internal appeal as irreceivable but indicated the circumstances under which the appeal could eventually be brought. On 4 May 1999 the Director-General, reiterating his previous position regarding the transfers, refused to convene a meeting of the Joint Advisory Appeals Board to deal with the complainants' internal appeal.
5. By their complaint filed on 2 August 1999, the complainants ask that the defendant be ordered:

"1. To make an arrangement with the respective Complainant for payment to the EMBL of any amounts corresponding to the retirement pension rights accrued under the pension scheme of BfA on the basis of the grade of the Complainant on confirmation of his/her appointment and the number of years of reckonable service with which the Complainant will be credited under the EMBL pension scheme and to conclude an agreement with BfA with respect to the accrued pension rights of the respective Complainant which is appropriate and adequate to transfer the accrued pension rights of the respective Complainant to the EMBL.

2. To bear the legal costs and expenses of these proceedings and the preparation thereof, including the fees of the attorney representing the Complainants, up to an amount of DM 30,000,-."

6. At the material time, the relevant provision was Article 12 of the Pension Scheme Rules which read as follows:

"1. A staff member who enters the service of the Organization after leaving the service of a government administration or national organization, or any international organization, or a firm, may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer.

In such a case the Organization shall determine, by reference to his grade on confirmation of appointment and to the Instructions for the implementation of these Rules, the number of years of reckonable service with which he shall be credited under its own pension scheme."

7. The defendant objects to the receivability of the complaint. The objection is clearly well taken. As was said above, the present complaint was filed on 2 August 1999. The only administrative decision taken with regard to the complainants' request that the organisation arrange for the transfer of their BfA contributions into the EMBL staff pension fund is contained in the Director-General's letter of 18 November 1997. While that was clearly not a substantive decision, it was nonetheless a decision not to accede to the complainants' requests and to defer the matter until it had been considered by the Council of the organisation. Despite the complainants' further requests, the Administration has never altered its position and its replies have all been in the same vein. A decision not to decide upon a request by an employee for the exercise of his alleged rights is nonetheless a decision. It may accordingly be impugned before the Tribunal but only within the time limits prescribed by Article VII of the Tribunal's Statute; those limits started to run on 18 November 1997. They were not suspended or revived by the complainants' repeated requests to the Administration or by the latter's repeated refusals to make any substantive decision until the matter had been decided by the Council of the organisation. If the complainants were dissatisfied with the Director-General's decision not to decide, they should have filed their complaints with the Tribunal within ninety days of receiving such decision. Since they did not do so, they must now wait until they receive a substantive decision on the merits of their claim. In its reply the EMBL concedes that when a final decision is reached the complainants will have available to them the full right to appeal. The Tribunal is informed in the surrejoinder that the Council has now made a decision relative to Article 12. The present complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

