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

NINETY-FIRST SESSION

***In re* Argos (No. 4), Eritja (No. 4) and Glöckner (No. 5)** **Judgment No. 2057**

The Administrative Tribunal,

Considering the fourth complaints filed by Mr Patrick Argos and Mr Ramon Eritja, and the fifth complaint filed by Mrs Godefrida Cornelia Glöckner against the European Molecular Biology Laboratory (EMBL) on 2 August 2000, in which they apply in part for the execution of Judgments 1682 and 1887, the EMBL's reply of 2 November, the complainants' rejoinder of 6 December 2000 and the Laboratory's surrejoinder of 9 January 2001;

Considering the applications to intervene filed by:

G. Coomber

M. Cuq-Beutler

A. Gantner

N. Hassler

J. Jonkmay

A. Ökmen

G. Ritter

N. Salmon

E. Schechinger

H. Scholten

L. Schupp

M. Schupp

S. Sheldon

S. Stanarevic

A. Stegmüller

E. Stelzer

C. Stettner

A. Sulayici

J. Swoger

J. Tooze

A. Weck

S. Winkler

W. Winkler

H. Wittmann

D. Young;

Considering Article II, paragraph 5, 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. Since 1 January 1982 the EMBL has been using the system of the Coordinated Organizations[(1)] as a standard of reference for the adjustment of staff pay. On 28 June 1995 the Council of the Laboratory, deeming that it was not bound by the decisions of the Coordinated Organizations or by the recommendations of their Coordinating Committee on Remuneration (hereinafter "the Coordinating Committee"), adopted a resolution rejecting the recommendations made in the Coordinating Committee's 40th report and approving, as from 1 July 1995 only, those contained in the 45th report but without applying the downward adjustments proposed therein. In Judgment 1682 (*in re* Argos and others) of 29 January 1998, the Tribunal quashed the Director-General's decisions rejecting the internal appeals which ten staff members, supported by one hundred and sixty-nine others, had filed against a memorandum notifying them of the Council's decisions. Following that judgment, the Council decided on 2 July 1998 not to alter the previously determined adjustments of their pay for 1995. However, in Judgment 1887 (*in re* Argos No. 3 and others) of 8 July 1999, the Tribunal, ruling on an application for execution, sent the cases back to the EMBL and invited it to take the decisions set out in the judgment under 12, which provided inter alia that:

"The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded."

On 24 November 1999 the Council adopted a resolution in which it agreed, in principle, to fund salary adjustments as recommended in the Coordinating Committee's 40th and 45th reports, with effect from 1 July 1995.

On 10 January 2000 the Chairperson of the Staff Association transmitted to the Director-General the internal appeals that five members or former members of staff, including the complainants, had filed against the Laboratory's failure to execute Judgment 1887. The Director-General formally acknowledged receipt of the appeals on 13 January and proposed awaiting the Council's decision on the execution of Judgment 1887. He specified that the proposal would not prejudice the appellants' rights. He asked the Chairperson to forward his letter to the appellants and provide written confirmation of their acceptance of his proposal. On 14 January the Chairperson replied that the Staff Association Committee had no quarrel with the way he proposed to deal with the internal appeals. However, the complainants, who are not members of the Committee, assert that they were informed neither of the Director-General's letter of 13 January nor of the proposal it contained.

On 21 March the Council adopted a resolution on the execution of Judgment 1887, in which it decided to apply retroactively, for the period from 1 July 1995 to 30 June 1996, the adjustments recommended by the Coordinating Committee in its 40th and 45th reports, plus interest on arrears at the rate of 10 per cent a year as required by Judgment 1682. The following table was included in the resolution:

	40th Report	45th Report	EMBL [adjustment] 1995	Adjustment due

France	1.9 %	- 0.2 %	0.0 %	1.7 %
Germany	2.1 %	0.3 %	0.3 %	2.1 %
United Kingdom	3.5 %	- 0.1 %	0.0 %	3.4 %

In a written statement dated 29 March, the Director-General informed all staff of the Council's decision. He explained that the text of Judgment 1887 would give rise to significantly different interpretations. Two questions arose.

(a) First, should 1995 salaries be adjusted applying the indices recommended by the Coordinating Committee for that year (the option known as "salary adjustment"), or should they be increased to the level of salaries established by the Coordinated Organizations for 1995, which includes 1992-1994 increases not previously implemented in full by the EMBL (the option known as "salary level")? The Director-General observed that the Council was prepared to finance the first option, but that if the second option was adopted, the Laboratory itself would have to find the necessary resources. In the end, the Council chose the "salary adjustment" option.

(b) Secondly, should the increase in 1995 salaries be taken into account in determining the salaries for subsequent years (the so-called "consolidated" option), or should it be applied to 1995 only (the so-called "one-off" option)? The Director-General indicated that the "consolidated" option had been discussed in November 1999, but in Judgments 1912 (*in re* Berthet No. 2 and others) and 1913 (*in re* Dauvergne and others), delivered on 3 February 2000, the Tribunal had dismissed the complaints filed by staff members of the Laboratory challenging their pay slips for 1996 and 1997, and had stated that it had "no reason to conclude that the salary levels decided upon for the [years 1996 and 1997] jeopardise the basic conditions of employment to the preservation of which the complainants are entitled". The Council took those judgments into account and decided that the adjustment for 1995 would be applied only to that year and would not affect the level of remuneration in subsequent years. The Director-General emphasised that the Council's decision had been taken with the sole objective of executing the previous judgments on the "correct legal basis".

On 12 and 25 May the complainants filed internal appeals with the Director-General against the first individual applications of the Council's resolution. For Mrs Glöckner, this consisted of her pay slip for April 2000 and, for the other two complainants, their back pay for the period in question and the adjustment of their termination indemnities. By letters of 17 and 26 May 2000, the impugned decisions, the Director-General and the Administrative Director, who had delegated authority in the absence of the former, respectively rejected their appeals, but authorised them to go directly to the Tribunal.

B. Citing many excerpts from Judgments 1682 and 1887, the complainants contend that, in finding in favour of the complainants, the Tribunal was aware that they were claiming the alignment of the Laboratory's salary scales at 1 July 1995 with those of the Coordinated Organizations. Although they cannot now claim a retroactive salary increase for the period prior to 1995, as they have not challenged the Council decisions for that period, they are nevertheless entitled to a salary adjustment, as from 1 July 1995, that takes into account the adjustments recommended previously. They explain that the recommendations of the Coordinating Committee were based on the salary scales for the previous year, that is those incorporating the adjustments recommended previously. Consequently, if an adjustment recommended by the Coordinating Committee is not applied by the Laboratory, the level of the latter's salaries deviates by larger and larger amounts from those of the Coordinated Organizations, even if subsequent adjustments are granted in full, since they are applied to lower basic salaries. In the complainants' view, the use of the concept of indices rather than actual salary levels is misleading and in breach of Staff Regulation R 4 1.01 in its 1995 version. The resulting erosion in salaries substantially jeopardises the contractual balance between the EMBL and its staff and is therefore in breach of the Tribunal's ruling in Judgment 1913. This methodology does not meet the criteria recalled by the Tribunal in Judgments 1912 and 1913 which are necessary to secure results that are "stable, foreseeable and clearly understood". The complainants emphasise the recognised right of the staff of international organisations, as recalled in Judgment 1912, to receive a level of remuneration equal to that in countries where the salaries are highest.

The complainants contend that the adjustments granted for 1995 must be incorporated in all salary scales established since then. The Council's decision of 21 March 2000 to award the adjustment recommended for 1995 without taking it into account in determining the salary scales for subsequent years, the "one-off" option, is tantamount to reducing the scales at 1 July 1996 by the index applied on 1 July 1995. It therefore amounts to a retroactive decision to make a downward adjustment. That is certainly not what the Tribunal intended in Judgments

1912 and 1913. Furthermore, those judgments cannot interfere with the execution of Judgments 1682 and 1887 by virtue of the authority of *res judicata*. Here again, the retroactive downward adjustment resulting from the Council's decision of 21 March 2000 cannot be considered as achieving results that are "stable, foreseeable and clearly understood". The complainants accuse the Laboratory's Council of acting in bad faith in interpreting the judgments of the Tribunal as it did and in restricting the adjustment of salaries to the period between 1 July 1995 and 30 June 1996.

The complainants have the following claims:

"(i) ... the differences in absolute monthly salary levels for corresponding grades and steps between the original EMBL 1 July 1995 scales (before modification according to EMBL Council's resolutions of 21 March 2000) and those resulting from their alignment with pay levels given in the 45th [Coordinated Organizations] report form the basis for back compensation to the complainants.

(ii) The back pay accumulated on a monthly basis must begin from 1 July 1995 (or the date of employment if later) and proceed to the present for current staff members or to the date of contract termination for former members with a leaving date between 1 July 1995 and the present.

(iii) All pertinent differences in leaving allowances, reinstallation grants, and indemnities at contract termination ... based on salary scales at the time of staff departure must be appropriately compensated according to (i) and (ii) above.

(iv) Pensioners whose incomes are based on the EMBL salary scales as explained in Annex R.E.1 of the EMBL Regulations ... should also be appropriately compensated according to (i) and (ii) above.

(v) Interest at 10% per annum should be given on all sums due from 1 July 1995 to 31 December 1999 and interest at 20% per annum on all sums due from 1 January 2000 to the present.

(vi) All compensatory amounts requested above should be decreased by that already paid according to EMBL Council Resolutions of 21 March 2000.

(vii) All compensation given by the EMBL according to the Council resolution of 21 March 2000 must accordingly be declared insufficient with respect to Judgments 1682 and 1887.

(viii) A sum the Tribunal thinks fit in the circumstances shall be awarded to cover administrative and counsel costs, courier postage and telephone."

C. In its reply the Laboratory recalls that in Judgment 1682, under 3 and 4, the Tribunal explicitly refused to review the decisions taken by the Council prior to 1995 because they were not challenged in time. The EMBL contends that the complainants' claim in the present case, that the Council apply the adjustments recommended prior to 1995, is an attempt to reverse the Tribunal's judgment. The rule against retroactivity, which is based on the principle of legal certainty, requires that decisions which have not been challenged through the proper procedures are final and beyond challenge. Judgment 1682 also found that the Council was not bound to grant all the adjustments recommended by the Coordinated Organizations. Moreover, in Judgment 1329 (*in re* Ball and Borghini), in dismissing the complainants' claims, the Tribunal indicated that to allow previously granted pay adjustments to be challenged "would mean that in a matter as delicate as setting and adjusting staff pay appeal would lie *sine die* against past decisions".

The Laboratory also recalls that the Council has never been under the obligation to align EMBL salary scales with those of the Coordinated Organizations. The decisions of the latter serve only as a guide. The Tribunal's judgments do not oblige the Laboratory to adjust the salaries for 1995 based on all the previous recommendations of the Coordinating Committee. The defendant observes that if the "salary level" option advocated by the complainants were to be adopted, the financial implications for EMBL would be "catastrophic".

With regard to the selection of the "one-off" adjustment option, i.e. the application of salary adjustments for 1995 without follow-on consequences for the level of salaries in subsequent years, the Laboratory recalls that in Judgment 1682 the Tribunal stated that "[t]he decisions taken by the Laboratory each year on pay fully supersede earlier ones". Moreover, in Judgments 1912 and 1913 the Tribunal expressly stated that the salary levels decided upon for 1996 and 1997 did not jeopardise the basic conditions of employment of the staff. In the view of the

EMBL, the complainants' claims therefore amount to an attempt to revise those judgments.

D. In their rejoinder the complainants contend that if the adjustments granted for 1995 were not incorporated in the salary scales for 1996, it would be impossible to maintain staff purchasing power which, as recognised in Judgment 1887, under 10, Article R 4 1.01 of the Staff Regulations then in force. The Tribunal also states under 10 that "[i]n cases where a previous adjustment was not high enough to maintain the level yielded by the methodology of the Coordinated Organizations, the staff can claim the shortfall when a new adjustment is made" and that "while the complainants could not seek a retroactive salary increase for a period for which they had not challenged their pay slips, they could do so for the material period 'in keeping with the principles they rely on'". The complainants contend that those principles include the maintenance of purchasing power. Although endeavouring to minimise the importance of that paragraph, the Laboratory has never proposed a different interpretation of it.

The complainants recall that Judgments 1682 and 1887 found that, while the Laboratory was not under an obligation in 1995 to align the salary scales of its staff with those of the Coordinated Organizations, it did have a duty to provide proper reasons for its decision. However, the EMBL has never provided explanations other than financial considerations, which are specifically excluded by those judgments. Accordingly, the complainants say, the financial consequences cited by the Laboratory in its reply may not be relied on to justify the non-alignment of the salary scales. They point out in this connection that in 1995 the external auditors recommended that future budget plans should include outlays for settling possible salary disputes.

According to the complainants, the argument that Judgments 1912 and 1913 justify the downward adjustment in 1996 resulting from the failure to incorporate the 1995 adjustments is in contradiction with the ruling in those judgments, under 18 and 17 respectively, that the possibility of a downward adjustment could be examined only if such an adjustment had occurred, which was not then the case. The complainants submit that the Council's decision is in breach of the principles of equality of treatment, good faith and non-retroactivity.

E. In its surrejoinder the Laboratory reaffirms that Judgments 1682 and 1887 only require it to "apply the decisions for the period in question", or in other words to apply only the adjustments recommended in the 40th and 45th reports of the Coordinating Committee. The terms of Judgment 1887 under 10 do not give the staff a right of appeal *sine die* against salary decisions: that would offend against the principle of legal certainty and Staff Regulation R 4 1.01.

With regard to the rejection of the so-called "consolidated" option, the Laboratory refers to Judgments 1912 and 1913, in which the Tribunal reaffirmed that international civil servants do not have an acquired right to automatic indexing of their salaries. Lastly, the alleged breaches of the principles of equality of treatment, good faith and non-retroactivity have, in the EMBL's view, already been rejected by the Tribunal in the above judgments. If decisions on salary adjustments for subsequent years had been dependent on the implementation of Judgment 1887, the Tribunal would certainly have so indicated, rather than finding that they were in accordance with the principles of international civil service law.

CONSIDERATIONS

1. The complainants are staff members or former staff members of the European Molecular Biology Laboratory (EMBL). They are challenging the first individual applications of a resolution adopted by the EMBL Council on 21 March 2000. The resolution was intended to execute Judgments 1682 (*in re* Argos and others) and 1887 (*in re* Argos No. 3 and others). However, citing breach of *res judicata* and good faith, the complainants appealed, claiming full restoration of their rights or else authorisation to go straight to the Tribunal. By letters of 17 and 26 May 2000, they were informed that their appeals had not been allowed, but that they were authorised to take their case directly to the Tribunal.

2. For a proper understanding of the issues raised by the complainants, it is necessary to go back to the dispute between the EMBL and some of its staff since 1995 and to examine the judgments already delivered by the Tribunal on the matter.

3. In Judgment 1682, delivered on 29 January 1998, ruling on complaints by staff members challenging the level of the salaries that they had received from 1 July 1992 until the end of 1995, the Tribunal dismissed claims against

decisions taken prior to 1995. However, it allowed as both receivable and well-founded the claims challenging the decisions not to award salary adjustments for 1995. It found that, in breach of Article R 4 1.01 of the Staff Regulations, in the version then in force, the Laboratory had not paid any heed to the adjustment rates recommended by the Coordinated Organizations, whose decisions should have served as a "guide". The Tribunal sent the complainants back to the EMBL for re-examination of their entitlements to a salary adjustment for 1995.

4. At its session of 2 July 1998, after re-examining the situation, the EMBL Council decided to maintain the adjustments decided upon, which did not take into account the adjustments recommended in the 40th report of the Coordinated Organizations. In Judgment 1887 delivered on 8 July 1999, ruling on two applications for execution, the Tribunal found that the Council's resolution did not satisfactorily execute Judgment 1682 and once again sent the cases back to the EMBL.

5. In Judgments 1912 (*in re* Berthet No. 2 and others) and 1913 (*in re* Dauvergne and others), delivered on 3 February 2000, the Tribunal ruled on complaints challenging the adjustments granted by the EMBL for 1996 and 1997. In dismissing those complaints, the Tribunal found that the EMBL had applied the provisions of Staff Regulation R 4 1.01 and Annex R.A.1 in their new versions, which state that the index calculated according to the procedure of the Coordinated Organizations shall be used as an "orientation". It also found that, while it was regrettable that the Laboratory had not adopted a more precise methodology for adjusting salaries, its application in that instance had neither offended against the principles of international civil service law nor had it jeopardised the basic conditions of employment which the complainants were entitled to have maintained.

6. It was shortly after being informed of those judgments that the Council thought it could adopt a resolution, the one of 21 March 2000, applying the adjustments recommended in the 40th and 45th reports of the Coordinated Organizations, but limiting its application to salaries for the period between 1 July 1995 and 30 June 1996 and supplementing the amounts due with annual interest of 10 per cent.

7. In challenging the first individual applications of the resolution of 21 March 2000, the complainants contend, first, that the resolution does not satisfactorily execute the Tribunal's ruling for the period between 1 July 1995 and 30 June 1996 and, secondly, that the Laboratory was wrong to confine its decision to the period up to 30 June 1996, without applying its effects to the following two periods. The Laboratory retorts that it did execute Judgments 1682 and 1887 properly and that the complainants' claims for 1996 and 1997 are *res judicata*, having been addressed in Judgments 1912 and 1913.

8. On the first point, the Laboratory is undoubtedly right. Contrary to the complainants contentions, Judgments 1682 and 1887 did not oblige the Laboratory to align the salaries of EMBL staff in 1995 with those of the staff covered by the system of the Coordinated Organizations. As the Tribunal found in Judgment 1682, confirming the precedent in Judgment 1329 (*in re* Ball and Borghini), a line of argument cannot be entertained that would allow appeals to lie *sine die* against past decisions in a matter as delicate as the setting and periodic adjustment of staff pay. The issue on which the Tribunal ruled in Judgment 1682 was not whether, prior to 1995, the EMBL's decisions on pay had taken into account the decisions of the Coordinated Organizations. It merely concerned the lawfulness of the adjustments decided for 1995 in relation to the previous level of salaries. In the end, the recommendations of the 40th and 45th reports of the Coordinated Organizations were endorsed, which is in conformity with the Tribunal's ruling in Judgment 1682, as further developed in Judgment 1887. The Laboratory is right that it did not have to review all the salary scales applicable in 1995 to take into account the earlier decisions of the Coordinated Organizations.

9. Less clear-cut is the issue of whether the benefit of the adjustment granted in the resolution of 21 March 2000 should be limited to the period between 1 July 1995 and 30 June 1996. Admittedly, that was the only period material to the complainants' claims on which the Tribunal ruled in Judgments 1682 and 1887. But clearly, the salary scales resulting from this adjustment should have served as a basis for subsequent adjustments. However, this was not the case and although the Laboratory paid the staff concerned the amounts that they would have received for the period in question if their salaries had been properly adjusted, it retroactively took as a basis for the new adjustments for 1996 and 1997 the salary scales in force prior to the adjustment made as a result of Judgments 1682 and 1887. It is easy to understand why the Laboratory acted in this way. The decisions taken by the Laboratory's Council were in fact taken on 17 December 1996 for the year 1996 and on 12 December 1997 for the year 1997; at those dates the Tribunal's judgments concerning the adjustments for 1995 had not yet been delivered. But the Laboratory's retroactive reconstitution of the adjustments had the paradoxical effect of limiting the application of the EMBL staff's improved salary scales to a single year, and of reducing their salary levels - if

one discounts the subsequent adjustments - after 30 June 1996. The result is an impairment of rights: staff are entitled to expect that any adjustments to their pay will be made on the basis of the salary scales which were established lawfully for the period preceding the adjustment.

10. In rebuttal the Laboratory contends that in Judgments 1912 and 1913 the Tribunal dismissed complaints challenging the adjustments adopted for 1996 and 1997 and that those decisions are *res judicata* and so beyond challenge.

11. The Tribunal recalls in this respect that the judgments dismissing the above complaints carry the authority of *res judicata* only in respect of the matters under dispute, namely the lawfulness of the adjustment rate, not the salary scales. The lawfulness of the measures taken by the EMBL was appraised in the light of the circumstances prevailing when the Council took its decision, and of the complainants' pleas. But the resolution of 21 March 2000 has created a new situation to which the complainants may legitimately react, particularly as in Judgments 1912 and 1913 the Tribunal reserved judgment on any downward adjustments the EMBL might decide on. Without going into the allegation of bad faith, the Tribunal finds that the Laboratory was bound to give all due effects to a decision it had itself taken to change the salary scales for 1995. Accordingly, and notwithstanding Judgments 1912 and 1913, the complainants are right to claim that the adjustments granted for the period up to 30 June 1996 by the resolution of 21 March 2000 should be maintained beyond that period, and that subsequent adjustments of their pay should be recalculated as from 1 July 1996 on the basis of the amended salary scales that should have been in force at that date in view of the adjustments introduced by the above resolution. The amounts due to the complainants as a result of the adjustments that the Laboratory must make shall bear interest at 8 per cent a year from the due date of each additional amount of salary. The same amounts shall be paid to the complainants and interveners who have left the Laboratory, calculated up to their date of departure and taking into account the measures which must be taken as a result of this judgment for the determination of their allowances, grants and indemnities at the end of their service.

12. Since their complaints succeed in part, the complainants are entitled to costs, which the Tribunal sets at a total of 4,000 euros.

DECISION

For the above reasons,

1. The challenged decisions are set aside.

2. The case is sent back to the Laboratory for new decisions in accordance with 11 above.

3. The Laboratory shall pay the complainants a total of 4,000 euros in costs.

4. Their other claims are dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Jean-François Egli, Judge, Mr Seydou Ba, Judge, Mr James K. Hugessen, Judge, Mrs Flerida Ruth P. Romero, Judge and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Mella Carroll

Jean-François Egli

Seydou Ba

James K. Hugessen

Flerida Ruth P. Romero

Hildegard Rondón de Sansó

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: 27 July 2001.