

**NINETY-FIFTH SESSION**

**Judgment No. 2223**

The Administrative Tribunal,

Considering the complaint filed by Miss G. B. against the European Molecular Biology Laboratory (EMBL) on 30 August 2002, EMBL's reply of 29 November 2002, the complainant's rejoinder of 5 February 2003, EMBL's surrejoinder of 6 March, the complainant's further submissions of 19 March and EMBL's comments thereon of 14 April 2003;

Considering Articles II, paragraph 5, and VII 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, a citizen of the Netherlands born in 1970, entered EMBL's service on 1 May 2000 as a postdoctoral fellow. She worked in the group of Dr B. on the Cell Biology and Biophysics Programme. Her appointment with EMBL was due to end on 30 April 2002.

On 11 February 2002 Dr B. came across a document bearing that date, which was a business outline for a commercial venture, and the complainant was named therein as one of the people involved in setting it up. According to the Laboratory, the authors of the document appropriated concepts for which it had already filed patent applications. On 14 February, with the endorsement of the Administrative Director, Dr B. ordered the complainant to leave his group with immediate effect. In a letter dated 20 February, she asked him to explain in writing the reasons for his decision. By a letter of 7 March, which she allegedly received on 14 March, the Head of Human Resources informed her that because she had forfeited the trust that EMBL had placed in her and had acted in breach of the Laboratory's regulations, the challenged decision was justified. He added that EMBL had taken steps to ensure that the project on which she had been working would be completed. On 19 March the complainant received a second letter from the same person, saying that it appeared, in the light of the document dated 11 February, that she had failed to observe Staff Rule 1.4.02, by filing patent applications without the authorisation of the Director-General for work she had done in the Laboratory, and had used discoveries of other members of EMBL personnel without their consent for commercialisation purposes, which constituted scientific misconduct in the meaning of Internal Policy No. 5. The Head of Human Resources concluded that it would not be appropriate for her to be present in Dr B.'s laboratory until her role in the matter had been satisfactorily explained.

On 25 March, in reply to a letter she had sent him on 18 March, the Director-General wrote to the complainant informing her that her suspension had no disciplinary character, considering that, in accordance with Article R 2 5.13 of the Staff Regulations, the Administrative Director could suspend staff members while investigations were in progress if he considered that their presence would be prejudicial to the interests of EMBL. He added that it would be better if she continued working somewhere other than in Dr B.'s laboratory. On 2 April the complainant denied the accusations contained in the letter of 19 March, and on 4 April she submitted to the Director-General an internal appeal against the decisions of 7 and 25 March. In a letter dated 3 June 2002, which constitutes the impugned decision, the Director-General replied that her appeal was time-barred, since the decision of 7 March had merely confirmed that of 14 February.

Meanwhile, the complainant discovered that EMBL had never asked her to sign a contract and, in a letter to the Director-General of 25 March, she requested rectification of that omission. She then refused to sign the contract

drawn up on 3 May, on the grounds that it contained a provision stipulating that the contract could be terminated by either party without a reason being given. The contract was duly amended on 22 July 2002. She subsequently found employment in a scientific institute in Germany.

B. The complainant rebuts EMBL's objection to receivability. As her internal appeal had challenged the decision of 7 March 2002, and not that of 14 February, she had complied with the prescribed time limits.

She considers that her suspension is illegal. The letters she received contained only accusations by the Laboratory without proof or reasons. The letter of 19 March 2002 did not refer to any fact which might be construed as scientific misconduct in the meaning of Internal Policy No. 5. She points out that EMBL suspended her following the discovery of a document which she had not drafted. It emerges from the letter of 25 March that the decision was based on Article R 2 5.13, from Section 2.5 of the Staff Regulations which relates to disciplinary measures. However, none of the steps of the disciplinary procedure was followed: the Joint Advisory Disciplinary Board was not convened and no investigation ever took place.

Insofar as it did not offer her a contract when she entered its service, the Laboratory violated its Staff Rules and Regulations as well as general principles of employment law.

Lastly, she accuses EMBL of abuse of power, particularly as it denied her access to scientific equipment she needed to continue her research and gave her no opportunity to be heard by either the Director-General or the Joint Advisory Appeals Board. She contends that EMBL infringed her rights, her future career, her dignity and her health.

The complainant asks the Tribunal to award her the sum of 10,000 euros for moral injury, 138,000 euros for "professional damage" and costs.

C. In its reply the defendant contends that the complaint is irreceivable since the complainant filed her internal appeal after the time limit.

On the merits, EMBL explains that the document of 11 February 2002 mentioned the complainant as one of the founders of a company which was to operate in the same field as Dr B.'s start-up company. The reciprocal trust which must prevail in a research group was thereby lost. Dr B.'s decision to order the complainant to cease working in his laboratory in the interests of its proper functioning was therefore fully justified and had the Administrative Director's approval. The reasons for the contested decision were immediately made clear to the complainant. Having on several occasions been given the opportunity to submit her views, she cannot claim that she was not given a fair hearing. It was for her to demonstrate that Dr B.'s suspicions were unfounded.

The Laboratory denies that the complainant suffered any injury or ill-treatment.

According to EMBL, the conditions for initiating a disciplinary procedure were not met. Under Article R 2 5.13, suspension is an administrative measure devoid of any disciplinary character. In the circumstances, the complainant was not suspended in the legal sense of the term, nor was she forbidden to enter EMBL's premises. She was merely ordered to stop participating in the work of her research group. The possibility of taking such a measure must exist even in the absence of any express provision in the Staff Rules and Regulations, provided that certain conditions are met, as in her case. The complainant was offered the possibility to complete her research in facilities other than those used by Dr B. The Laboratory concludes by stressing that the fact that the complainant had no contract was unrelated to the subject-matter of the complaint.

D. In her rejoinder the complainant points out, with regard to receivability, that since the Joint Advisory Appeals Board was not consulted, she was deprived of her right to be heard and to defend herself. Furthermore, the misunderstanding arising from the discovery of the disputed document, which she had obtained only on receiving EMBL's reply to her complaint, could have been dispelled if the latter had not acted contrary to its Staff Rules and Regulations. According to the complainant, her suspension, barring her from access to all the Laboratory's premises, could only have been disciplinary in character. As far as she knows, the project on which she was working is still not finished.

E. In its surrejoinder EMBL maintains its objections to receivability. It finds it hard to believe that the complainant was unaware of the content of a document that used her name and reiterates that she was excluded only from her research group. The measure was only temporary and, in order to alleviate its effect, the Laboratory allowed her to

work in another group. She never tried to complete the project she was working on, even though she was provided with all the necessary equipment. On this point, the defendant cites an e-mail dated 18 September 2002 from the Coordinator of the Cell Biology and Biophysics Programme. EMBL maintains that since the complainant was given the opportunity to express her views to the Director-General, her right to defend her case has been respected.

F. In her further submissions the complainant states that EMBL's surrejoinder contains "untruthful remarks and allegations" on which she wishes to comment. She denies the content of the e-mail of 18 September. She encloses with her submissions a letter from one of the authors of the document of 11 February 2002, making it clear that she was not involved in the preparation of the document, which since then has been extensively modified. According to her, she was prevented from completing her research by EMBL.

G. With its comments, EMBL encloses a letter dated 8 April 2003, in which the Programme Coordinator expresses further criticism regarding the complainant's behaviour and the quality of her services.

## CONSIDERATIONS

1. The complainant joined EMBL as a postdoctoral fellow on 1 May 2000 and was admitted to pursue research in Dr B.'s group. As a non-established member of the personnel, she was subject to the provisions of the Staff Rules, unless otherwise stated. Her work with the Laboratory was to end on 30 April 2002.
2. On 14 February 2002 Dr B. asked her to leave his group with immediate effect. According to the complainant, he gave no precise reasons for this, but rather just accused her of "stealing his intellectual property". Although it is not clear from the parties' submissions whether the complainant was immediately informed of this reason, it appeared subsequently that Dr B. had discovered a document on 11 February showing that the complainant was involved in a commercial venture, which used research results for which EMBL had already filed patent applications and whose objectives were similar to those of a project developed in the Laboratory.
3. The complainant left the Laboratory and, on 20 February 2002, wrote to Dr B. reminding him that she had the right and the duty to continue her research and asking him to inform her in writing of the reasons for the decision he had taken concerning her. There was no reply. On 14 March she received a letter from the Head of Human Resources dated 7 March, stating that he had asked her to leave Dr B.'s laboratory, with the approval of the Administrative Director, because she had engaged in an activity which breached the trust placed in her as a "guest" of EMBL. Nonetheless, the organisation had not terminated her stipend and had even made arrangements for the project on which she had been working to be completed. He further asked her to return any notes or documents she might have obtained while working at EMBL.
4. Further correspondence took place, in the course of which the complainant wrote to the Director-General on 18 March mentioning the fact that the letter from the Head of Human Resources did not give the grounds for her expulsion. In a letter of 19 March that official set out the reasons why the Laboratory had considered that the content of the document discovered by Dr B. raised the question of possible breaches of certain rules and rendered her presence in the laboratory inappropriate until such time as her role in the matter had been satisfactorily explained. He invited her in conclusion to submit her comments. In a letter dated 25 March, the Director-General informed the complainant that the challenged decision was not a disciplinary measure. He reminded her that EMBL had not gone so far as to deny her access to the Laboratory, which it could have done under Article R 2 5.13 of the Staff Regulations, but had merely informed her that she was to continue her work somewhere other than in Dr B.'s laboratory and that steps had been taken to ensure that the project on which she had been working would be completed. The complainant filed an internal appeal on 4 April 2002, after protesting against the fact, acknowledged by the organisation, that she had never been offered a contract, as she should have been.
5. This internal appeal was rejected on 3 June 2002, when the Director-General reminded her that she had been invited to complete her research on EMBL premises, but not in Dr B.'s laboratory. He informed her, moreover, that since her appeal had been lodged after the prescribed time limit, it had to be considered irreceivable and no formal appeal procedure could be entered into.
6. The complainant asks the Tribunal to award her damages on several counts.
7. The defendant objects that the complaint is irreceivable, on the grounds that the complainant was aware on

14 February 2002 of the decision she challenged in her internal appeal, so that her appeal of 4 April was filed after the time limit of 30 days stipulated in Article R 6 1.04 of the Staff Regulations. The decisions she challenged merely confirmed that of 14 February.

8. The Tribunal dismisses this objection to receivability: the starting point of the 30-day period stipulated in Article R 6 1.04 is the day the impugned decision is notified, whereas the verbal order given by Dr B. to leave his laboratory can clearly not be regarded as the notification of an administrative decision. The 30-day period started to run on 14 March, the date the complainant received the letter of 7 March 2002 from the Head of Human Resources. The internal appeal filed on 4 April was therefore receivable and the fact that the Director-General rejected it without initiating the appeal procedure invalidates the defendant's argument that internal remedies were not exhausted, although they should have been as required by Article VII of the Tribunal's Statute. While it is regrettable that the case was never brought before the Joint Advisory Appeals Board, this does not prevent the Tribunal from ruling on the merits of the complaint, which has been filed within the applicable rules.

9. On the merits, the complainant contends that she was suspended without being informed that a disciplinary action was contemplated against her, and without being given the opportunity of a hearing to clarify the accusations against her. She was not informed of her rights, particularly the right to be assisted by a member of staff or a lawyer, and was denied the guarantees provided for in the Staff Regulations, especially the convening of the Joint Advisory Disciplinary Board. According to her, the reasons finally given for denying her access to Dr B.'s laboratory were based on extremely serious accusations of scientific misconduct, which were not supported by evidence. Generally speaking, the organisation had systematically abused its powers in obstructing her research activity and depriving her of a means of defence. When the complainant discovered that, in breach of the applicable rules, she had no contract, EMBL offered her one, which she had to refuse because it included clearly illegal provisions.

10. The defendant replies that the decision to remove the complainant from Dr B.'s laboratory was taken by the competent authority. EMBL adds that the complainant was never suspended in the legal sense of the term, but an administrative measure was taken against her to solve temporarily a problem arising from a lack of trust between the head of a group and one member of that group, and to keep that group functioning properly. According to the defendant, even in the absence of any express provision in the Staff Rules and Regulations, a measure of this type is acceptable provided that certain principles are respected, as was the case. A disciplinary procedure could have been initiated only if the investigations regarding the decision of 14 February had shown that certain rules applicable to EMBL personnel had been breached, such as the rules that require staff to seek authorisation from the Director-General prior to engaging in any activity of a commercial nature which might be detrimental to EMBL; or those that require a staff member to obtain the authorisation of the Director-General before making use of EMBL property (including intellectual property) for private purposes; or those regarding scientific misconduct. The defendant adds that in such a case the matter would have had to be solved by denying the complainant access to all EMBL premises and considering what type of disciplinary measures would be appropriate. The complainant, however, was not subjected to any disciplinary procedure; she was given every opportunity to explain herself, as well as the possibility to continue working on EMBL premises to complete her research.

11. The Tribunal notes that several irregularities attributable to the defendant appear in this case. Firstly, although this did not give rise to the dispute, the complainant was not under contract during her employment at EMBL. On 10 April 2002 the Director-General acknowledged that she should have been issued a "visitors" contract (although she had been taken on as a fellow) and that it was a pity she had not brought the omission to the EMBL's attention earlier. On 3 May 2002 she was in fact offered a back-dated contract. However, it contained a clause concerning the termination of service which was clearly illegal. When the complainant protested, EMBL offered her a new contract on 22 July 2002 back-dated to cover the period from 1 May 2000 to 30 April 2002.

12. Secondly, the very nature of the decision taken regarding the complainant raises doubts. The proper suspension procedure was not followed and no disciplinary procedure was initiated, whereas suspension occurs in principle when such a procedure gives rise to an investigation. Moreover, the defendant's submissions expressly acknowledge that the disputed measure is not a suspension. Thus, the complainant was left in doubt as to the legal nature of the measure taken against her.

13. Thirdly, the order she was given verbally to leave the laboratory where she was conducting her research was not part of a procedure which might have given her an opportunity to reply to the accusations made against her and to defend her case. It was only after writing several letters that the complainant was able to know for sure what she

was accused of. In the event, it appears from the defendant's reply that those accusations were ultimately not maintained, since it points out, as indicated above, that a disciplinary procedure would only have been required if the investigation had revealed violations of the rules of conduct applicable to members of the EMBL personnel, which was not the case.

In any case, an adversarial procedure, which would have been appropriate, would have established whether the accusations made against the complainant were founded, and the Tribunal must conclude that this point remains unresolved, through no fault of the complainant.

14. Lastly, the way EMBL dealt with the complainant's internal appeal is very much open to criticism from a legal point of view, as was made clear under 8, above.

15. In view of all these irregularities, the Tribunal must quash the impugned decision. As compensation, the complainant claims moral damages of 10,000 euros, and a further award for "professional damage". She states that "what seems to be two months of lost productivity, in fact constitutes two years of lost productivity". In fact, while the moral injury suffered by the complainant is undeniable in view of the adverse effects the impugned decision may have had on her professional reputation, any assessment of the compensation due in respect of the professional damage she suffered must take into account the fact that EMBL allowed the complainant to complete her research in a laboratory other than Dr B.'s. She did eventually resume her research at EMBL in mid-April 2002 and, as her appointment expired on 30 April, she was given unpaid visitor's status until October 2002. Her allegation that her work was deliberately hampered during that period is expressly denied by EMBL, and the Tribunal fails to find any supporting evidence for the allegation in the submissions.

16. In the circumstances, the Tribunal considers it fair to award the complainant an indemnity of 10,000 euros to cover all heads of injury. Since the complaint succeeds in part, she is entitled to an award of costs, which the Tribunal sets at 2,000 euros.

## DECISION

For the above reasons,

1. The Director-General's decision of 3 June 2002 is set aside.
2. EMBL shall pay the complainant compensation of 10,000 euros.
3. It shall pay her 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

*(Signed)*

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

