

110th Session

Judgment No. 2997

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs A. W. against the European Molecular Biology Laboratory (EMBL) on 26 November 2008 and corrected on 9 December 2008, EMBL's reply of 6 February 2009, the complainant's rejoinder of 16 March, the Laboratory's surrejoinder of 22 April, the complainant's additional submissions of 8 June and EMBL's final comments of 16 July 2009;

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. Facts relevant to this case may be found in Judgments 1986 and 2082 relating to the complainant's second and third complaints. The complainant, a British national born in 1943, joined the Laboratory on 1 January 1975. At that time, she had already accumulated 87 months of contributions to the United Kingdom (UK) National Insurance scheme and 100 months of contributions to the German national

pension scheme. EMBL introduced its own pension scheme in 1978. From 1 January to 30 June 1978 and again from 1 January 1982 to 31 December 1986 staff members were offered the option of either joining the EMBL scheme with retroactive effect from the date of their entry into service or remaining with the German pension scheme. By a letter of 24 February 1982 the complainant asked to join the EMBL pension scheme with effect from 1 January 1982 and her request was granted.

On 6 March 1995 she wrote to the Administrative Director, requesting that the pension contributions paid into the German pension scheme between 1 January 1975 and 31 December 1981 be transferred to the EMBL pension scheme. She argued that that scheme was more advantageous and that she would have joined it earlier had she not been misinformed by the Head of Personnel in 1978 as to the requirements for drawing a pension under German law. She contended, in particular, that although her combined UK and German contributions would in fact have sufficed for her to draw a pension from the German scheme, she had not been informed that her UK National Insurance contributions could have counted towards the 15 years of contributions required by German law for establishing a pension entitlement. The Administrative Director replied on 15 March 1995 that he “[did] not accept that the matter of [her] pension for the period 1975 to 1981 should (or indeed could) be re-opened”.

A meeting was held between the complainant and the Head of Human Resources in January 1996 to discuss her request. Soon thereafter, the complainant enquired as to why her letter of 24 February 1982 was not in her personal file and she offered to provide the Administration with a copy of that letter. On 5 October 1998, after the complainant had raised the matter again, the Administrative Director advised her that their correspondence on the matter of her pension contributions had ended with his decision of 15 March 1995, which was no longer open to appeal as it had not been challenged within the prescribed time limits. He added that there was nothing more he could do at that time but that, should a different decision be taken in the future, it could be open to appeal.

By a letter of 27 January 2006 to the Director-General the complainant reiterated her request for the transfer of her pension contributions, relying essentially on the same arguments she had put forward in her request of 6 March 1995. She was informed on 16 February 2006 that no new developments or changes in circumstances had occurred which would justify a different decision, and that the Director-General had therefore decided to confirm the previous decisions on the matter. On 28 April 2006, following a meeting with the Administrative Director, the complainant lodged an appeal with the Director-General against what she described as “the decision of the Administrative Director orally communicated to [her] on 26 April 2006”. The Director-General replied on 8 June 2006 that her appeal was inadmissible because it had not been filed within the prescribed time limit. He stated that, although her request had already been considered in 1995 and again in 1998 and the Administration’s decisions had been conveyed to her at the time, she had chosen not to appeal these decisions. He added that there were no grounds for reconsidering her case and that no new decision had been taken which would be open to appeal.

On 7 July 2008 the complainant wrote again to the Director-General, alleging that her letter of 24 February 1982 – which, in her view, constituted proof that she had been misinformed – had not been placed in her personal file and had therefore never been considered by the Administration. She argued that this constituted a new fact and requested that a new decision be taken on that basis. The Director-General replied on 22 July 2008 that her letter of 24 February 1982 did not constitute a new fact and that, if it had not been taken into account earlier, it was because she had chosen not to introduce the letter as documentary evidence. Moreover, it was now too late to do so.

In a letter of 6 August 2008 to the Director-General, the complainant asserted that the German pension scheme had agreed to transfer to the EMBL scheme the contributions paid by her between 1 January 1975 and 31 December 1981, provided that EMBL would sign the official application for reimbursement of unduly paid contributions to health, long-term care, pension and unemployment insurance, which she enclosed. She added that EMBL had failed in its

duty of care towards her and that it was not too late for it to rectify the situation. By a letter dated 4 September 2008, the Director-General advised the complainant that the matter of her pension contributions had been exhaustively reviewed and that he considered it closed. That is the impugned decision.

B. The complainant contends that EMBL violated its duty of care towards her by misinforming and misleading her with regard to her pension rights under the German scheme. She argues, in particular, that when she entered the service of the Laboratory in 1975 she had already accumulated the 15 years of contributions entitling her to draw a pension under the German scheme, given that her earlier contributions into the UK scheme counted towards the attainment of these 15 years. However, as the then Head of Personnel advised her otherwise, she did not join the EMBL pension scheme in 1978, with retroactive effect from 1 January 1975, but rather waited until 1982 under the false belief that an additional seven years of contributions into the German scheme were necessary in order to avoid forfeiting her pension rights in that scheme. As a result, she lost what could have been an additional seven years of contributions to the EMBL scheme and the right to the corresponding pension. Furthermore, she argues that by organising information sessions on the subject in the German language, EMBL failed in its duty of care towards non-native German speakers, such as herself.

In support of her assertion that she was misinformed, the complainant cites her letter of 24 February 1982, in which she wrote: “[h]aving now completed 15 years in the German Pension scheme, I would like to join the EMBL Pension scheme as from 1 January 1982”. She points out that the Laboratory never placed the said letter in her personal file, despite the assurances given to her in that respect. From this she infers that it failed to take into consideration the fact that she had not been properly informed about her pension rights when she requested to join the EMBL pension scheme with effect from 1 January 1982. This, in her view, amounts either to a failure on the part of EMBL to consider an essential fact, or to a new fact justifying a new decision on her request.

The complainant also points out that EMBL turned down the request she submitted in March 1995 for the transfer of her pension contributions without giving any formal reasons or any advice on appeal rights and procedures. By reason of that “blank refusal” she was not in a position to decide whether to appeal and on what grounds to do so; when she decided to go ahead with the appeal she was told that the time limit had expired. She contends in that connection that although time limits are important, they are not meant to set traps. The complainant reproaches EMBL for lack of good faith and for failing to recognise its duties as an international organisation.

She requests that EMBL be ordered to complete the necessary formalities so as to allow the German pension scheme to transfer to the EMBL pension scheme the contributions paid by her between 1 January 1975 and 31 December 1981, and to calculate thereafter her EMBL pension on the basis of full service as from 1 January 1975. She also seeks moral damages and costs.

C. In its reply EMBL submits that the complaint is irreceivable for failure to exhaust the internal means of redress, given that the complainant did not appeal any of the Administration’s decisions regarding her request for the transfer of her pension contributions. In particular, she did not appeal the decision of 15 March 1995 and neither did she appeal that of 5 October 1998 or of 8 June 2006.

On the merits, the defendant submits that the complaint is unfounded. It explains that the relief claimed by the complainant, namely that EMBL sign the official application for reimbursement of unduly paid contributions to health, long-term care, pension and unemployment insurance, would, if granted, constitute a false declaration and thus an offence under German law. This is so because the complainant’s contributions to the German pension scheme in the period between 1 January 1975 and 31 December 1981 were correctly made and cannot therefore be considered as “unduly paid

contributions”. Even assuming that the contributions during the aforementioned period were “unduly paid”, they would still be considered as correctly paid contributions under German law, given that they were not reclaimed within four years after their payment. This being so, the complainant knowingly made a false statement when she alleged that the German pension scheme had agreed to transfer to the EMBL pension scheme the contributions paid by her between 1 January 1975 and 31 December 1981. Furthermore, the defendant argues, the complainant’s claim for the transfer of her pension contributions is, in any event, time-barred since such claims are subject to a ten-year prescription period under German law.

The Laboratory rejects the allegation that it violated its duty of care towards the complainant or other non-native German-speaking staff. It refers at length to the various information circulars it publicised, and more particularly to a circular letter of 22 April 1976 entitled “Information on the German social security system” which was addressed to all members of staff in Germany. It also refers to the information sessions it organised prior to, during and after the introduction of its own pension scheme, and explains that these circulars and sessions gave staff members ample opportunity to inform themselves fully with regard to their pension rights. It points out that representatives of the German pension scheme participated in the sessions, giving information on the subject also in the English language. It asserts that, by providing staff with numerous opportunities to obtain all the necessary information, it fully complied with its duty of care and that it was the complainant’s choice not to avail herself of these opportunities. It adds that the complainant’s claim in connection with EMBL’s duty of care is, in any event, time-barred.

Moreover, the defendant dismisses the contention that the complainant’s letter of 24 February 1982 constitutes a new fact and therefore fresh grounds for appeal. Neither does it constitute evidence of its failure to consider an essential fact. It emphasises that it was on the basis of that letter – which may not have been properly placed in the complainant’s personal file – that the Administration made all

necessary arrangements in order for her to join the EMBL pension scheme in 1982. In addition, the letter provides no evidence that EMBL misinformed the complainant or that it had knowledge of her earlier contributions to the UK National Insurance scheme. EMBL denies that the complainant was not properly informed in 1995 with regard to appeal rights and procedures, noting that she had already filed an appeal leading to her first complaint before the Tribunal and that, in any case, she had at all times access to the Staff Regulations. It requests that the complainant be ordered to pay it at least 7,500 euros in damages, on the grounds that she initiated these proceedings knowing full well that a transfer is no longer possible under German law, thereby causing the Laboratory to incur considerable legal expenses.

D. In her rejoinder the complainant emphasises that her request for the transfer of her pension contributions is based on Article 22 of the Headquarters Agreement between the Government of the Federal Republic of Germany and EMBL, according to which “[t]he Laboratory, its Director-General and staff members shall be exempt from all compulsory contributions to German social security organs in the event that it establishes its own social security system [...] with [...] adequate social benefits”. She argues that EMBL has failed to implement Judgment 2082, first because it did not advise the complainants in that case – including her – of the number of years of reckonable service that would be credited to them upon transfer into the EMBL pension scheme of the amounts standing to their credit in the German pension scheme and, second, because it did not lay down implementing rules for the calculation of the transferable contributions.

E. In its surrejoinder the defendant submits that Article 22 of the Headquarters Agreement does not create any entitlement to a transfer of already paid pension contributions, but merely authorises EMBL to establish its own pension scheme on condition that this would provide adequate benefits. As to the allegations concerning Judgment 2082, the Laboratory contends that it bears no responsibility for the failure

to implement it. It explains that, although it did everything in its power to reach an agreement for the transfer of the contributions in question, the competent German authorities refused such transfer. EMBL accuses the complainant of having breached her duty of confidentiality by submitting to the Tribunal internal documents which she was not authorised to possess.

F. In her additional submissions the complainant asserts that in its surrejoinder EMBL has relied on staff members' testimonies and statements, which are nothing more than personal opinions. She denies any breach of her duty of confidentiality.

G. In its final comments the Laboratory states that in her additional submissions the complainant does not provide any information relevant to the merits of the case but merely seeks to discredit its personnel.

CONSIDERATIONS

1. The complainant, a British national, was already enrolled in the German national pension scheme when she joined the Laboratory in 1975. At that time she had accrued 87 months of contributions in the UK National Insurance scheme and 100 months in the German scheme. EMBL introduced its own pension scheme in January 1978 and, for six months, allowed staff members to choose either to join the EMBL pension scheme, with retroactive effect from the date of their entry into service, or to remain with the German scheme. The complainant remained in the German scheme. EMBL again offered staff members the chance to join its pension scheme between 1 January 1982 and 31 December 1986. In a letter dated 24 February 1982 the complainant requested affiliation to the EMBL scheme, stating: “[h]aving now completed 15 years in the German Pension scheme, I would like to join the EMBL Pension scheme as from 1 January 1982. Would you please arrange for the transfer to be made.” Her request was granted.

2. In a letter dated 6 March 1995 she requested that the pension contributions paid into the German scheme between 1 January 1975 and 31 December 1981 be transferred to the EMBL scheme, claiming that she would have joined the EMBL scheme earlier, as it was a more advantageous pension scheme, had she not been misinformed by the Administration in 1978. This request, which was rejected by a decision of 15 March 1995, was reiterated by the complainant on several occasions in the following years, but the Laboratory considered that there were no grounds to depart from its initial decision. In the impugned decision dated 4 September 2008, the Director-General stated:

“You have not put forward any new facts and I cannot therefore allow a further appeal on this issue.

[...] [EMBL] has now considered your appeal on three separate occasions.

On each of these occasions there was found to have been no error and no need for EMBL to correct the earlier decisions.

This matter has now been exhaustively reviewed and must now be considered closed.”

3. The complainant contends that, in breach of its duty of care, EMBL misinformed her about her pension rights as it did not verify her status in the national pension system and failed to advise her that, taking into account her UK National Insurance contributions, she had already accumulated sufficient contributions to qualify for a pension under the German scheme when she started work at EMBL. She also contends that her letter of 24 February 1982 should be considered a new fact or an overlooked essential fact, as it was missing from her personal file; that EMBL violated Article 22 of the Headquarters Agreement between the Government of the Federal Republic of Germany and EMBL; and that it did not execute Judgment 2082.

4. The Laboratory states that the letter of 24 February 1982 cannot be considered a new fact as the Administration has known of it since 1982, when it received the letter and proceeded to enrol the complainant in the EMBL pension scheme in accordance with her

request. It submits that the complaint is irreceivable as it seeks the same relief as was claimed by the complainant and rejected by the Administrative Director's decision of 15 March 1995, which was not challenged within the time limits. The defendant emphasises that it has informed the complainant on several occasions that, as she did not appeal that decision within the time frame allowed by the Staff Rules and Regulations, she is no longer permitted to do so. Subsidiarily, it contends that it provided all necessary information to the complainant and that there is no legal basis for transferring the contributions in question. It seeks an award of costs for its legal expenses in an amount no less than 7,500 euros.

5. The Tribunal is of the opinion that the impugned decision is not a new decision but is instead a confirmation of the decision of 15 March 1995, as the letter of 24 February 1982 cannot be considered a new fact – indeed on several occasions throughout the years that letter was mentioned in communications between the complainant and EMBL. As the complainant failed to appeal the original decision within the prescribed time limit, her complaint is irreceivable for failure to exhaust internal remedies. However, given that the complainant is asserting a violation of her pension rights which continuously affects her, the Tribunal will also rule on the merits.

6. The Tribunal considers that EMBL fulfilled its duty of care towards its staff by hosting several information sessions, publishing circulars and other documents, and by offering staff members several opportunities to meet with pension experts in order to inform themselves with regard to their pension rights. It is the responsibility of the staff to avail themselves of any information provided and to seek out clarification as needed for their particular situation. The Tribunal notes that in particular the circular letter of 22 April 1976 answers the complainant's main question regarding her contributions to the UK National Insurance scheme. The section entitled "International validity of the German social security system" advised

staff that pursuant to decree No. 14008 of the European Economic Community, within the countries of the Community contributions and benefits should be recognised in all the Member States and they should be transferable.

7. The Tribunal holds that the Laboratory has not violated Article 22 of the Headquarters Agreement between the Government of the Federal Republic of Germany and EMBL. That article reads as follows:

“The Laboratory, its Director-General and staff members shall be exempt from all compulsory contributions to German social security organs in the event that it establishes its own social security system, or adheres to that of another international organisation, in either case with, in the opinion of the Federal Republic of Germany after consultation with the Laboratory, adequate social benefits”.

This article simply recognises the discretion of EMBL to establish its own social security system – which must be comparable to the German one – and does not confer a specific right on any staff member.

8. The complainant’s claim that EMBL failed to execute Judgment 2082 is unfounded. In that judgment the Tribunal ordered the Laboratory “to advise each complainant of the number of years of reckonable service which would be credited to the latter upon the transfer into the EMBL Pension Scheme of the amounts standing to his or her credit in the [German pension] scheme”. The transfers in question had been requested on the basis of the now abolished Article 12 of the Pension Scheme Rules, which reads as follows:

“Article 12 – Inward and outward transfer of pension rights

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.
[...]

The evidence on file shows that, contrary to the complainant’s allegation, following the delivery of Judgment 2082, the Laboratory

with due diligence fulfilled its part of the transfer process but payment was not made as the German Government refused to release the funds.

9. Lastly, the complainant's claim requesting the Tribunal to order EMBL to sign the official application for reimbursement of unduly paid contributions to health, long-term care, pension and unemployment insurance is likewise unfounded as the contributions in question were not unduly paid. They were correctly paid in accordance with the complainant's decision to remain in the German pension scheme.

10. Consequently, the Tribunal concludes that the complaint fails also on the merits and that her claims for damages and costs must be rejected. Although the complaint must be dismissed, this is not an appropriate case for the award of costs against the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet