

R.
v.
EMBL

120th Session

Judgment No. 3498

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. R. against the European Molecular Biology Laboratory (EMBL) on 18 September 2012 and corrected on 16 October 2012, EMBL's reply of 16 January 2013, the complainant's rejoinder of 15 February 2013 and EMBL's surrejoinder of 30 April 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant is seeking retroactive admission into the EMBL pension scheme as from the commencement of his service at EMBL in 1976.

The complainant was initially hired at EMBL on 15 June 1976 under a three-year fixed-term contract. At the time, as EMBL did not have its own social insurance scheme, the complainant was insured under the German national social protection scheme, comprising health insurance, a pension scheme, accident insurance and unemployment insurance.

In January 1978 EMBL introduced its own social security scheme, including an EMBL pension scheme. At that juncture, staff members who, like the complainant, had joined EMBL on a limited contract prior to 1 January 1978, were given the option, under Article 45 of the EMBL Staff Regulations R.E.1, of joining the EMBL pension scheme as from the date of its entry into force.

In March 1978 the complainant notified EMBL in writing of his intention to remain under the German national pension scheme, in light of the fact that his employment contract was for a three-year period and that he might not therefore reach the required number of years of employment at EMBL that would entitle him to draw a pension under the EMBL scheme.

In June 1979 EMBL extended the complainant's contract for another three years and on 1 January 1982 he obtained an indefinite contract. Furthermore, as of 1 January 1982, pursuant to Article 43 of the EMBL Pension Scheme Rules, EMBL allowed staff members holding an indefinite contract, who had chosen on appointment to belong to a national pension scheme, to opt to transfer to the EMBL pension scheme retroactively. This possibility remained open until 1 August 1986, when Article 43 of the Pension Scheme Rules and Article 45 of the Staff Regulations were repealed, but the complainant did not manifest his intent to adhere to the EMBL pension scheme at any time during that period.

In April 2012 the complainant contacted the Administration inquiring about social security coverage for his family members in the event of his death. On 17 April 2012 the Administration replied that, in the event of the complainant's death, his surviving family members would no longer receive any health insurance coverage and that the contribution to his long term care insurance would end. On 15 May 2012 the complainant lodged an appeal with the Director General, challenging the Administration's reply. He contended that EMBL had not treated him fairly, in that it had failed to meet its duty of care by not sufficiently informing him with regard to the social protection rights of his survivors and the benefits of joining the EMBL pension scheme, and by inadequately answering his questions.

Responding to this appeal on behalf of the Director General, the Administrative Director, by letter of 5 July 2012, explained to the complainant, in detail, his social protection entitlements. He also drew the complainant's attention to the fact that only a decision could be appealed pursuant to section 6 1.01 of the Staff Regulations, and since no administrative decision could be identified, there could therefore be no appeal before the Joint Advisory Appeals Board (JAAB).

On 1 August 2012 the complainant filed a second internal appeal, claiming discrimination and failure to recognize his rights under the Pension Scheme Rules. In its reply of 13 August 2012, the Administration reiterated that it could not identify any appealable decision which would allow the JAAB to convene.

By letter of 21 August 2012 the complainant requested a proceeding before the JAAB and asked that the Director General waive the EMBL's internal appeal procedure, so that he could go directly before the Tribunal. The Director General replied, on 21 September 2012, that although he considered that no administrative decision had been taken that could be the subject of an internal appeal, he would nevertheless convene the JAAB so that it could examine that issue and thus determine whether the complainant's appeal was receivable.

Meanwhile, on 18 September 2012, the complainant filed a complaint with the Tribunal, alleging that EMBL had failed to take a decision on his appeal of 15 May 2012.

Having held a hearing in October 2012, the JAAB concluded in its report and recommendation to the Director General of 16 November 2012, that there was no actual decision which could be the subject of an appeal. The relevant decisions had been taken many years earlier and had not been challenged within the applicable time limits. In a letter addressed to the complainant, dated 29 November 2012, the Director General endorsed the JAAB's findings and dismissed the internal appeal.

In his complaint before the Tribunal, the complainant requests that EMBL recognize that he has been a member of the EMBL pension scheme from the commencement of his service. He also claims consequential relief, damages under various heads and costs. EMBL

argues that the complainant has not exhausted the internal appeal remedies and that the complaint should therefore be dismissed as irreceivable.

CONSIDERATIONS

1. The complainant, who commenced employment with EMBL in 1976, raises questions concerning his rights under EMBL's social insurance scheme for its staff members.

2. The complainant states that EMBL did not have a social insurance scheme for staff members in 1976, but established one by the time he signed his second employment contract on 15 June 1979. He contends that Chapter 5 of the EMBL Staff Rules makes it obligatory for EMBL to provide him with compulsory social insurance. He alleges that the Administration erred when it advised him that his pension insurance should have continued under the German national pension scheme, which he now finds to be disadvantageous to him and his family members who survive him. He states that his decision to follow that advice was wrong, but that he subsequently asked EMBL to insure him under its pension scheme and again when he obtained his third employment contract in December 1981, which was then made an indefinite contract. He insists that in these circumstances, although he submitted a document in March 1978 stating that he did not wish to enter the EMBL pension scheme, EMBL was wrong, in the first place to require him, an individual staff member, to apply to be included in its full insurance scheme. He bases this contention on Chapter 5, and, additionally, on Staff Rule 1 1.03, which stipulates that the Director General shall have sole responsibility for the application of the Staff Rules and to ensure that they are applied. These are matters which the complainant had raised with EMBL over the years.

3. The complaint was filed in the Tribunal on 18 September 2012. In section 3(b) of the complaint form, the complainant indicates that the impugned decision is an implied rejection of his first appeal lodged with EMBL on 15 May 2012. Indeed, according to him, there was no

decision by the Director General on that internal appeal. As the complainant explains it, his internal appeal of 15 May 2012 arose out of inquiries that he made of the Administration concerning his retirement pension and other rights to which he thinks he is entitled under the EMBL social insurance scheme. He states that he received a response from the Administration on 17 April 2012, which stated, *inter alia*, that in the event that he died, the long term care insurance for his surviving family would end. According to the complainant, he sent a further communication to the Administration on 25 April 2012 seeking confirmation that its response of 17 April 2012 was a final decision. He received a commitment from the Administration stating, *inter alia*, that it was prepared to insure his surviving wife under its health insurance scheme. He took issue with EMBL's response because it was not couched in terms that were legally binding. He asked for explanations as to how the Administration interprets and implements the relevant Staff Regulations. It seems apparent that he is mainly concerned with the rules which govern the pension scheme as they might benefit him.

4. In his internal appeal of 15 May 2012, the complainant contested the Administration's responses as disputed decisions. This challenge was on the ground that they were based, *inter alia*, on inaccurate interpretation and application of the relevant Staff Regulations. He contended that the Regulations and decisions thereon are discriminatory and that the Administration had not provided reasons for them. He asked the Administration to properly explain to him his insurance rights, including those of his surviving relatives. He further sought to impugn the process by which the Administration makes Staff Regulations and, in particular, those regulations that he thinks adversely affected his insurance rights and are discriminatory towards him and his family. He argued that Staff Regulations R.E.2 4.2(e) and R.E.1 45 are not in conformity with the Staff Rules, which he says stipulate obligatory social insurance for staff members. On this basis he sought to impugn the EMBL Council's decisions, that he said spawned consequential irregular provisions governing social insurance from 1997. He also sought to impugn the Administration's decisions

concerning insurance entitlements, including its alleged advice to him to continue his pension insurance under the German national insurance scheme.

5. The complainant's internal appeal of 15 May 2012 to the Director General was against decisions by the Administration concerning his insurance entitlements. His communication of 21 August 2012 confirmed and added to that initial communication. He states that it was at the beginning of May 2012 that he discovered that EMBL's internal rules do not permit staff members to be insured in non EMBL pension insurance schemes, because the EMBL pension scheme is compulsory for staff members. By way of relief, the complainant asked EMBL to insure him and his family and to treat them as insured, in a manner that would permit them equal treatment with other staff members, pursuant to the EMBL Staff Regulations, European law and the EMBL Headquarters Agreement. He seeks damages against EMBL.

6. EMBL Staff Rule sections 6 1.01 and 6 1.03 permit a staff member to file an internal appeal to the Director General against a disputed decision. Before taking a decision on the substance of the matter, the Director General shall consult the Joint Advisory Appeals Board (JAAB). By communication dated 21 September 2012, the Director General advised the complainant that notwithstanding in his opinion there was no actual decision which could have been the basis of an internal appeal, he would convene the JAAB to determine whether such a decision existed, and, accordingly, the receivability of his internal appeal. In its report, dated 16 November 2012, the JAAB found that an appealable decision did not exist, as the decisions which the complainant sought to challenge dated back many years and an appeal against them was not now receivable.

7. The complainant lodged his complaint in the Tribunal on 18 September 2012, before the JAAB had delivered its report and in the absence of a final decision by the Director General, which EMBL Staff Rule section 6 1.03 requires. Under Article VII, paragraph 1, of

the Tribunal's Statute, a complaint is not receivable unless the impugned decision is a final decision and the complainant has exhausted his or her available internal remedies. It is obvious that the complainant had not exhausted the internal remedies available to him when he filed his complaint and that he does not impugn a final decision. None of the exceptional circumstances permitted by the Tribunal's case law existed that would have permitted him to come directly to the Tribunal. There is no indication, for example, that his internal appeal process had been paralysed. Accordingly, the complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute and must be dismissed.

8. The Tribunal notes that on 29 November 2012 the Director General took an express final decision on the complainant's appeal of 15 May 2012. Although EMBL produced a copy of that decision with its reply, the complainant does not controvert its content in his submissions before the Tribunal. In any event, any challenge to the decision of 29 November 2012 would now be time-barred.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ