FIFTY-EIGHTH ORDINARY SESSION

In re WEIS

Judgment No. 738

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Molecular Biology Laboratory (EMBL) by Mr. Eckart Weis on 25 February 1985, the EMBL's reply of 24 May, the complainant's rejoinder of 25 June and the EMBL's surrejoinder of 25 July 1985;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article 22 of the headquarters Agreement concluded on 10 December 1974 between the Laboratory and the Government of the Federal Republic of Germany, section 6.1 of the EMBL Staff Regulations and Articles 11 and 12 of the EMBL Pension Scheme Rules;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of the Federal Republic of Germany, was seconded from the Federal Ministry of Finance to the Laboratory as from 1 June 1975. He was at the time member of a federal pension scheme. At the Laboratory's request the ministry gave on 21 July 1975 a written "guaranty" which preserved his rights to a pension under that scheme for the duration of his employment with the Laboratory. The Laboratory gave in return an undertaking that when he left its employ it would pay the ministry the amount of contributions due to cover the period of his service with the EMBL; in the meantime he was exempt from contributing to the scheme. A clause was then added to his contract to provide that any entitlements that might accrue to him from any pension fund the EMBL might set up later -- in 1975 it had none -- would offset the Laboratory's liability towards the ministry. The EMBL established its own fund in 1978, and membership was retroactive to the date on which the staff member had taken up duty. The complainant was admitted to the EMBL scheme and paid his contributions as from 1 June 1975. Article 22 of the headquarters Agreement between the EMBL and the Federal Republic exempted staff from contributing to federal pension schemes if the EMBL set up its own scheme, and so as from the same date the complainant was exempt from contributing to the German scheme. Nothing was said or done about the guaranty at the time.

The complainant left the Laboratory on 8 April 1984 to take up duty with his present employer, the North Atlantic Treaty Organisation (NATO). He asked the EMBL to transfer to NATO his pension entitlements, which, as retroactively adjusted, came to 175,909 Deutschmarks. The EMBL replied that it would do so once the ministry released it from its undertaking. It wrote to the ministry on 14 May. The ministry answered on 26 July that to safeguard the complainant's rights the undertaking should hold good for the period of his EMBL service. Further discussion took place in the following months between the complainant, the EMBL and the ministry. On 23 October and 7 November he wrote letters to the EMBL asking that as from 15 April 1984 interest be paid to him not just on his own contributions but on the EMBL's as well. On 27 November 1984 the Director-General wrote to say that his own contributions to the EMBL scheme, with the interest, were at his disposal, but no interest was payable on the Laboratory's contributions since they were not in his name but must be held in order to fulfil its undertaking towards the ministry. On 9 December the complainant wrote to say that he took the letter of 27 November, which he is now impugning, to be the final decision. He got no answer to that question.

On 20 December the EMBL wrote to the ministry expressing the view that the guaranty was no longer valid because the complainant, being a member of the EMBL pension scheme, was exempt under Article 22 of the headquarters Agreement from contributing to the federal pension scheme; retroactive insurance was possible only for periods during which the employee would have been subject to compulsory insurance. The ministry accepted that view in a letter of 22 January 1985 and on 31 January the EMBL transferred to NATO 97,879 marks, a sum which included 4 per cent interest of 908 marks due for the period from 9 April to 31 August 1984 on the complainant's own contributions.

B. The complainant submits that he is entitled to the payment of compound interest on the Laboratory's contributions as well as on his own to the EMBL pension scheme: from 15 April 1984 to 31 January 1985 in respect of his own, from 15 April 1984 to 31 March 1985 in respect of the Laboratory's, at the rate of 5.5 per cent a year. Deducting the amount of 908 marks already paid, he calculates that the sum due to him is 7,640 marks. He is claiming that amount, and costs.

As to receivability, he submits that he correctly inferred from the EMBL's failure to answer his letter of 6 December 1984 that no appeal would lie under section 6.1 of the Staff Regulations against the decision of 27 November 1984 and that that was the final decision.

As to the merits, he gives a detailed account of the facts. He submits that the EMBL is liable for the consequences of delay in paying him the sums due. It is immaterial, in his view, that the ministry took several months to release the EMBL from its undertaking and so held up payment of the sums due to NATO. The EMBL was negligent in failing to act when the guaranty became invalid, in 1979, at the time of his admission to the pension scheme. The sole purpose of the funds withheld was to meet a liability towards the ministry, and that liability ceased to exist several years ago. He asks that the rate of interest be 5.5 per cent. Article 11 of the Pension Scheme Rules does say that compound interest is payable at only 4 per cent a year, but it applies only while a staff member is still in the Laboratory's service and is not yet entitled to the refund.

C. The Laboratory replies that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal because the complainant has failed to exhaust the internal means of redress the Staff Regulations provide in R6 1.01: "Internal appeals may be made by members of the personnel...", and R6 1.02: "An appeal may contest the accuracy and interpretation of the facts giving rise to the decision in question, and the conformity of that decision to the Staff Rules and Regulations or the conditions of a contract". Before the Director-General gives his final decision he shall consult the Joint Advisory Appeals Board. The complainant did not file an appeal under those rules.

Subsidiarily the Laboratory contends that the claims are devoid of merit. It gives its own version of the facts and points out errors in the complainant's. Under Article 12 of the Pension Scheme Rules a staff member who leaves to take up employment with certain international organisations shall be entitled to transfer to the pension fund of his new employer either the actuarial equivalent of his accrued pension rights or else the amounts prescribed under Article 11. But what is at issue is not the payment of money but a guaranty of retroactive insurance of a former staff member. The complainant cannot show any financial loss and is not entitled to payment of interest on the strength of the guaranty. The transfer to NATO of the balance of the contributions made in respect of the complainant to the EMBL scheme puts an end to the matter.

D. In his rejoinder the complainant maintains that his complaint is receivable. No purpose would have been served by lodging an internal appeal with the Director-General, who had himself signed the decision of 27 November 1984. That decision was obviously final. Besides, R6 1.01 says that appeals may be lodged only by staff members: by December 1984 the complainant was no longer on the staff.

He also develops his submissions on the merits and takes up each of the Laboratory's arguments in turn, his main contentions being that interest is due on the full amounts transferred to NATO and that since the guaranty was invalid the Laboratory had no right to withhold the sums paid in order to meet its potential liability towards the ministry.

E. In its surrejoinder the EMBL enlarges on its arguments on receivability, observing that an R6 1.01 appeal may be lodged by a former staff member as well. As to the merits it submits that the rejoinder betrays misunderstanding of the nature of the guaranty and the Laboratory's undertaking to the ministry, and that he has failed to demonstrate any injury for which it can be held liable.

CONSIDERATIONS:

1. Article VII of the Tribunal's Statute provides that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. The decision impugned in this case is contained in a letter dated 27 November 1984. It came at the end of a long correspondence concerning the complainant's claim. The letter stated in its last paragraph that a further exchange of legal technicalities would serve no purpose and that a visit proposed

by the complainant would be of no use. In his reply of 9 December 1984 the complainant wrote: "I therefore take the last paragraph of your letter as to imply that you exclude an internal appeal as laid down in section 6.1 of the Staff Regulations. Should that not have been your intention, please advise me accordingly."

2. Section 6.1 of the Staff Regulations provides that an internal appeal may be made by members of the personnel. It is to be addressed to the Director-General, who shall judge the appeal. Before making his decision he has to consult the Joint Advisory Appeals Board. The Board is required to give a full hearing in camera and to submit its reasons to the Director-General.

3. The organisation objects to the complaint as irreceivable under Article VII mentioned above in that the complainant has failed to exhaust the means of redress provided by section 6.1. In answer to this objection the complainant relies on the failure of the organisation to advise him as requested in his letter of 9 December; he contends that thereby they were in breach of duty. The Tribunal rejects this contention, The complainant holds a Ph.D. in law and was employed as Head of Finance and Legal Affairs. Section 6 is quite clear and there is nothing in the organisation's letter of 27 November which suggests, however faintly, that the Director-General might absolve the complainant from compliance with it.

DECISION:

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.