

SIXTY-SECOND ORDINARY SESSION

***In re* STRAUSFELD**

Judgment 822

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nicholas James Strausfeld against the European Molecular Biology Laboratory (EMBL) on 30 October 1986, the Laboratory's reply of 19 December 1986, the complainant's rejoinder of 26 January 1987 and the Laboratory's surrejoinder of 24 February 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the EMBL Staff Rules and Regulations in force up to 31 December 1985, the Staff Rules and Regulations in force since 1 January 1986, and Articles 7 and 11 of the Pension Scheme Rules;

Having examined the written evidence;

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

A. The complainant, a British neurobiologist born in 1942, joined the staff of the Laboratory in 1975 as a scientist at grade 9. In 1980 he was granted an indefinite contract. By 1982 the Laboratory wanted to change to what it called "rolling tenure", whereby the staff member would hold a contract of constant duration, usually a number of years, until given notice, the period of notice being the same as that of the contract. In a letter of 29 April 1982 the Director-General wrote to the complainant explaining what he had in mind and the upshot of lengthy correspondence was another letter the Director-General wrote to him on 18 February 1983 proposing a rolling tenure contract that would end on 31 March 1986. One sentence read: "When you leave the Laboratory on 31 March 1986, or should you voluntarily leave sooner, you will receive those indemnities to which you have acquired a right, namely those payable following the suppression of an indefinite contract according to the Staff Regulations existing on this day". On 22 February 1983 the parties accordingly signed a contract that was to expire on 31 March 1986.

New Staff Rules and Regulations - the "new rules" - were approved by the Council of the Laboratory and came into force on 1 January 1986.

By a minute the Director-General approved on 27 March 1986 the Personnel Section informed the complainant that he would get 21,615 Deutschmarks in reinstallation grant and 90,062 DM in terminal grant, making a total of 111,677 DM. On 10 April he appealed to the Director-General claiming, among other things, 36,805 DM in reinstallation grant, 184,025 DM in termination grants, "leaving allowance" under Article 11.1 of the Pension Scheme Rules and the refund of his pension contributions. The leaving allowance and refund came to 173,982 DM. The total amount of his claim, including lesser sums and as adjusted, was 394,812 DM. He also claimed interest "at an appropriate rate" as from 15 April 1986. The appeal went to the Joint Advisory Appeals Board, which made recommendations to the Director-General. By a letter of 17 September 1986, the impugned decision, the Director-General informed the complainant that the Laboratory would pay him no more than the amounts of reinstallation and termination grants allowable under the new rules. The Laboratory also refused to pay the leaving allowance and to pay back his pension contributions because he qualified for a pension, though as a concession it was willing to make them over if he accepted the rest of its decision.

B. The complainant submits (1) that he is entitled to a larger reinstallation grant. Under Rule R 2 6.08 read together with Annex R.A.9 of the Rules and Regulations in force up to 31 December 1985 - the "old rules" - the amount the staff member was entitled to under that head depended on the number of "complete years of uninterrupted service" and on whether he was being paid family allowance. According to the scale he is entitled to 36,805 DM - five times basic monthly salary - and since the Laboratory offers only 22,083 DM he claims another 14,722 DM.

(2) He claims 184,025 DM in termination grant. According to Annex R.A.9 i)2)2 of the old rules, which related to

"Dismissal owing to the suppression of a post or to reduction of the complement", staff over 34 years of age in grades 8 to 14 were paid "the full indemnities". According to the appended schedule he is entitled to 25 times basic monthly salary, or 184,025 DM. Since the Laboratory is offering only half that he claims the difference.

(3) That the old rules apply is clear from two things. (a) R 8 1.02 of the new ones says: "The entry into force of the present Staff Regulations shall not disturb rights acquired by members of the personnel under the former Staff Regulations until the end of their present contract". The Head of Personnel confirmed that at staff meetings at the time. (b) It is obvious that the complainant would have consented to the terms of the Director-General's letter of 18 February 1983 only if his rights under the old rules were unimpaired. The phrase "the Staff Regulations existing on this day" in that letter meant the rules in force on 18 February 1983, not the new ones.

(4) The complainant claims leaving allowances on the strength of R 5 1.01 and .02, read together with Annex R.E.1, Articles 11 and 7, of the new rules: a staff member who has an "open-ended" contract may get his pension contributions back plus interest at 4 per cent a year and a leaving allowance equal to one-and-a-half months' final salary multiplied by the number of reckonable years of service. The complainant contends that rolling tenure was the "predecessor" of an "open-

ended" contract. He therefore claims 49,049 DM - the total of his contributions - plus 8,997 DM in interest, and a leaving allowance of 115,936 DM (his monthly salary x 1.5 x number of years of service), making a total of 173,982 DM. Other staff members in the same position have been paid under the old rules.

He claims a total of 280,717 DM, plus interest at 7 per cent a year since 31 March 1986 on 265,995 DM, and costs of not less than 10,000 DM.

C. In its reply the Laboratory contends that the complainant is inconsistent in that he rests his claims to reinstatement and terminal grants on the old rules and his claims to the refund of pension contributions and leaving allowance on the new ones. He may not rely on different rules to suit himself.

In any event he did not hold an "open-ended" contract, the term in the new rules. An open-ended contract is not a fixed-term one such as the complainant held but one whose duration is not predetermined. Besides, such contracts were not offered until 1986. The terms of the complainant's appointment arose solely out of the special agreement in the letter of 18 February and the contract of 22 February 1983. The Laboratory took full account of his acquired rights and in support of that view it discusses the Tribunal's case law on the doctrine. It construes the words "on this day" in the letter of 18 February 1983 to mean, not 18 February 1983, but the date on which the complainant was to leave, 31 March 1986: the new rules therefore apply. The other cases of termination the complainant cites are immaterial. He got no guarantee he would continue to enjoy the benefits of the old rules: such a guarantee, being exceptional, would have had to be in unequivocal terms, and it was not. The claims are devoid of merit.

D. In his rejoinder the complainant seeks to refute the arguments in the reply and enlarges on his own main pleas, namely that the rolling tenure contract he held up to 31 March 1986 is analogous to an open-ended one as defined in the new rules; that the new rules should apply to him only insofar as they do not impair his acquired rights under the old ones; that the old ones formed part of his contract and might not be unilaterally altered to his detriment; and that he has been discriminated against.

E. The Laboratory devotes most of its surrejoinder to answering those pleas. It submits that the analogy between rolling tenure and an open-ended contract is invalid and besides irrelevant; that the complainant has an acquired right only to the existence of a benefit that was of decisive importance to him in accepting employment, and that in this instance he has no such right; that the full application to him of the old rules was never guaranteed; that the contract of 22 February 1983 reveals no intent to preclude any change in the rules; and that other officials the complainant mentions were not in the same position because there was no special agreement for the termination of their employment.

CONSIDERATIONS:

1. The complainant joined the Laboratory on 1 October 1975 and held an indefinite contract from 4 November 1980. He agreed to have that contract turned into one for "rolling tenure" which he signed on 22 February 1983 on terms set out in a letter of 18 February from the Director-General. The new contract was for three years and was to expire on 31 March 1986.

The complainant's main claim is to have his termination and "reinstallation" grants reckoned according to the Staff Regulations that applied until new ones came into force on 1 January 1986. He is also claiming "leaving allowance" under the Pension Scheme Rules.

The termination and reinstallation grants

2. In support of his claims the complainant cites the contract of 22 February 1983. Clause 2 reads:

"This Rolling Tenure Contract will be subject to the applicable provisions of the Staff Rules and Regulations when these have been finalized and accepted by Council. This does not affect any rights you have already acquired, or will acquire according to 4. of the letter of 18.2.83".

Clause 3 reads:

"The conditions of this contract are specified in my letter of 18 February which you will find enclosed".

Paragraph 4 of the letter of 18 February 1983 said:

"When you leave the Laboratory on 31st March 1986, or should you voluntarily leave sooner, you will receive those indemnities to which you have acquired a right, namely those payable following the suppression of an indefinite contract according to the Staff Regulations existing on this day."

The complainant also relies on Article R 8 1.02 of the new rules:

"The entry into force of the present Staff Regulations shall not disturb rights acquired by members of the personnel under the former Staff Regulations until the end of their present contract."

His case is that payment of the grants in a certain amount is a right he acquired under his contract; that in any event the provision for them under the old rules swayed his decision to sign the new contract with the Laboratory; and that the refusal to reckon them by the old rules was therefore in breach of his acquired rights.

3. The new contract he signed on 22 February 1983, on the terms set out in the letter of 18 February, determined relations between the parties and the Laboratory was bound to respect it.

The grants he is claiming under that contract are those which were payable on the cancellation of an indefinite contract under the rules in force "on this day".

The Tribunal takes that expression to denote 18 February 1983, the date on which the letter was signed, not 31 March 1986, the date when the complainant left on the expiry of his contract. The mention of 31 March 1986 is further removed than that of 18 February 1983 from the words "on this day", and had 31 March 1986 been meant the wording ought to have been "on that day".

One thing that bears that out is that paragraph 4 of the letter suggested that the appointment might end earlier - "should you voluntarily leave sooner" - in which case "on this day" would not have properly denoted the date of the end of the contract.

What is more, clause 2 of the contract makes it subject to the new Staff Regulations as soon as the Council of the Laboratory approved them. So the allusion to the rules in force "on this day" would be pointless if it meant the new rules, which applied anyway by virtue of clause 2.

The conclusion is that the parties' intent was to confer on the complainant entitlement to the grants due under the old rules, the ones in force on 18 February 1983.

Those grants are the ones due under old rule R 2 6.08 on the termination of an indefinite contract. That rule refers to Annex R.A.9, including the appended scale: R.A.9 thus forms part of R 2 6.08 and the Tribunal disallows the Laboratory's plea that what the clause in the contract means is just the text of the rule itself excluding the annex, notwithstanding the reference thereto.

The Laboratory was therefore wrong to apply the new rules which prescribe much smaller grants, and the

impugned decision must be set aside.

The leaving allowance

4. But the claim to the leaving allowance fails.

Article 11.1 of the Pension Scheme Rules says that the allowance is due to a "staff member whose service terminates otherwise than by reason of death or invalidity and who is not entitled to a retirement pension", and 11.2 that 11.1 applies also to a "staff member having worked under an open-ended contract".

As the Laboratory points out, the complainant is entitled to a retirement pension under Article 7 of the Rules because he has completed more than ten years' actual service.

Moreover, he is mistaken in his plea that he was entitled to the benefits of an open-ended contract. Admittedly such a contract is granted for the same reason as "rolling tenure" used to be, namely the need for a wider choice of appointment to suit the organisation's scientific work and the state of its finances, and the Laboratory did at one time moot provision for rolling tenure in the new rules. But as things turned out there was no formal provision put in the new rules to assimilate rolling tenure to an open-ended contract. They each have special features that make them quite different. And, as the Laboratory observes, Article R 2 1.16 of the new rules says that it is staff "in grade 11 or above" who may receive an open-ended contract, whereas the complainant's grade was only 10/9.

The complainant seeks to prove discrimination by citing what he sees as comparable cases of staff members who got the allowance prescribed in the Pension Scheme Rules and the grants payable under the old rules.

All that the principle of equal treatment requires is that those who are in like case both in fact and in law be treated the same in law. The evidence before the Tribunal fails to show that those the complainant says fared better than he were in the same position in fact and in law.

For the foregoing reasons the claim fails.

The complainant's application for the hearing of witnesses and oral proceedings

5. The complainant has had an opportunity to argue his case in his original brief and in his rejoinder, and there are many items appended, including written evidence from the main witnesses he wants the Tribunal to hear.

The written submissions are sufficient to permit a ruling on all the material issues.

Costs

6. In the circumstances of the case the Tribunal will award the complainant 8,000 Deutschmarks in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 17 September 1986 is set aside insofar as it refused the complainant's claim to have his termination and reinstatement grants reckoned by the former Staff Regulations.

2. He is sent back to the organisation for a revised reckoning of the grants.

3. He shall be paid interest at the rate of 7 per cent a year on the sums wrongfully withheld from him from 31 March 1986 up to the date of payment.

4. His other claims are dismissed.

5. He is awarded 8,000 Deutschmarks in costs.

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

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
E. Razafindralambo
A.B. Gardner

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