

## SEVENTY-FIFTH SESSION

### *In re* GRIEBL-ZINK

#### Judgment 1258

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Birgit Griehl-Zink against the European Molecular Biology Laboratory (EMBL) on 25 August 1992, the EMBL's reply of 18 September, the complainant's rejoinder of 26 October, the Laboratory's surrejoinder of 25 November 1992, the complainant's further communication of 4 April 1993 and the Laboratory's comments thereon of 16 April 1993;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Rules 1.1.03, 1.1.04, 1.2.01, 1.2.02 and 1.3.03 of the Staff Rules of the EMBL and Regulations R 2 4.03, R 2 6.07, R 4 1.07, R.D.1, R.D.3.01, R.D.3.02 and R.D.4.02 of the Staff Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Section 1.2 of the Laboratory's Staff Rules reads as follows:

"1.2.01 The members of the personnel (M of P) shall be formally classified in one of the following categories:

a) established\* members of the personnel, called 'Staff Members' (SM);

b) non-established members of the personnel namely:

- supernumeraries (S)

- fellows (F)

- visitors (V)

- trainees (non-graduate) (T)

\* "established" means members of personnel with

- fixed-term contracts

- open-ended contracts

- indefinite contracts."

1.2.02 Unless otherwise stated, the present Staff Rules shall apply to all persons whose contract with the Laboratory indicates that they belong to one of the abovementioned categories. Each article shall indicate to which categories of personnel it applies."

The complainant, a citizen of Germany who was born in 1964, began working for the EMBL on 1 November 1989 as a part-time helper in the nursery which the Laboratory provides for the children of its staff. Her letter of appointment dated 6 November prescribed ten hours of work a week. As a student she was exempt from contributions to the state scheme of social security. The letter explained that the Laboratory would not contribute to a provident fund for her or grant her Christmas or holiday bonuses. The Laboratory's Staff Rules and Regulations were to govern any conditions of employment not covered by the letter.

On 25 August 1990 she got married and from 1 September to 30 November took unpaid leave. She says she told her supervisor about her marriage in December 1990.

As from 1 June 1991 her contract was amended to put her working week at 19 hours with a corresponding rise in pay.

By a memorandum of 27 March 1992 the Head of Personnel informed her that because of "a change in the personnel structure of the nursery" the Laboratory was to end all contracts of employment for part-time students and that her own would end at 30 June 1992.

She appealed to the Director-General against that decision by a letter of 13 April 1992 claiming reinstatement and 4,235.78 Deutschmarks in compensation for unpaid leave and asking him to say whether the Staff Rules and Regulations applied to her. She also filed suit against the Laboratory with the Heidelberg division of the labour court of Mannheim.

In a further letter of 24 May to the Director-General she claimed social security coverage and family allowance. The Joint Advisory Appeals Board took up her case on 11 June. In a report of 13 July 1992 it held that she had got due notice and recommended rejecting her claim to terminal entitlements. But it recommended compensating her for accrued leave. The state social security scheme was, it observed, reviewing her claim to social insurance coverage. As to family allowance it pointed to inconsistency between Staff Regulation R 4 1.07, which says that "A staff member, supernumerary or predoctoral fellow who is married or who has a dependent child ... shall receive a family allowance", and Internal Policy No. 35 of November 1987, on "supernumerary staff", which says that the allowance is not payable to university students employed for "short-term auxiliary tasks". In a memorandum of 14 July 1992, which she impugns, the Director-General rejected her claim to social insurance coverage and said she did not qualify for terminal entitlements. She was to get 2,069.60 Deutschmarks in settlement for 32 days' leave to which she was entitled from 1 June 1991, but no family allowance.

B. The complainant submits that her termination was unlawful. The reason the Head of Personnel gave her, "a change in the personnel structure of the nursery", made it tantamount to abolition of post. But the Laboratory never abolished her post: it put someone else on it.

She further pleads breach of the provisions on termination of "indefinite" appointments. Hers was neither a fixed-term contract within the meaning of Staff Regulation R.D.4.02 - since it stated no date of expiry - nor an "open-ended" one within the meaning of R.D.3.02. "Open-ended" contracts under R.D.3.02 have to "specify the period of notice ... which must be given by either party" and R.D.3.01 requires notice of "not less than 12 months or more than 5 years". Her contract said nothing of giving notice, save during the first four weeks, when she was on probation. Regulation R 2 6.07 sets at six months notice of termination in the event of abolition of post or staff retrenchment, and that is what she was entitled to.

The EMBL was wrong to treat her as a "supernumerary". Supernumeraries are defined in Regulation R.D.1 as "casual workers employed outside the scope of the Staff Complement to carry out a certain task for a limited period of time" and "they receive only fixed-term contracts". But the EMBL employed her neither for a specific task nor for a limited period.

She disputes the Laboratory's reckoning of the amount due her in compensation for accrued leave. She contends that such payments should be based on average workload for each period and the actual rate of pay at the time. On the strength of her time sheets and pay slips from 1 November 1989, which she produces, and taking account of the further three months' notice she was entitled to, she sets the total amount due to her at DM 6,568.13.

Having got married on 25 August 1990, she so informed her supervisor on her return from three months' unpaid leave in December but never got any family allowance. In April 1992 she raised the issue again with an officer in the Personnel Department but to no avail. She sets at DM 4,975 the amount due to her under this head from 1 December 1990 to 30 September 1992.

She seeks the quashing of the decision of 14 July 1992, reinstatement, DM 4,498.53 in compensation for accrued leave - 6,568.13 less the 2,069.60 already granted - DM 4,975 in family allowance and an award of not less than DM 5,000 in "punitive damages for wilful and continuous breach of contract". She also claims costs.

C. In its reply the EMBL submits that the complaint is irreceivable because the complainant has also filed suit with the Mannheim court. Not until she abandons that suit and submits to the Tribunal's jurisdiction alone will her complaint be receivable.

On the merits the Laboratory contends that its offer of student employment, which she signed on 10 October 1989, implied by the very nature of such employment that her status was that of a supernumerary. Rule 1.2.01 divides staff into two broad categories, the "established" and the "non-established". The complainant, who plainly falls into the latter, did not qualify for a fixed-term, open-ended or indefinite contract, since such contracts go only to established staff on conditions she fails to meet.

As her contract gave no mention of notice the period is the three months prescribed in Regulation R 2 6.07. To qualify for six months' notice she would have had to be an established staff member on a post that was being abolished. But there were no established staff looking after the nursery. Besides, the Laboratory was free to change its staffing policy and replace student helpers with professional child-minders.

The EMBL explains how it worked out the sum of DM 2,069.60 which it paid her in compensation for accrued leave. The material period ran from 1 June 1991, when she began to work 19 hours a week, to 30 June 1992, the date of separation. The Laboratory credited her with two-and-a-half days a month for each of those 13 months and divided her average monthly pay during that time by the number of days worked to get the total amount due to her for each day of leave.

Though married supernumerary staff members are entitled to family allowance under Regulation R 4 1.07, Rule 1.1.03 vests in the Director-General sole responsibility for applying the Staff Rules. In the exercise of his discretion the Director-General issued Internal Policy No. 35, which precludes students who are employed as supernumerary staff from getting family allowance. Besides, the complainant never submitted written evidence of her marriage nor formally applied for the allowance while in the Laboratory's employ.

The EMBL points out that the complainant has not pressed the claim she made in her letter of 24 May 1992 to social security coverage. Anyway it is as devoid of merit as her other claims.

D. On receivability the complainant rejoins that she had to go to the German court lest she be out of time if the Tribunal held that it was not competent. She has applied to that court for a stay of proceedings.

As to the merits she contends that what matters is that her contract specified neither a fixed term nor a period of notice. According to Regulation R.D.1 supernumeraries "receive only fixed-term contracts", and the one she had was not. So there was only one category left among those in R.D.1: she must have been an established staff member with an indefinite appointment.

There are no grounds in law for confining her compensation for accrued leave to the period from 1 June 1991 to 30 June 1992. Regulation R 2 4.03 does not make special provision for employees who work more or less than 19 hours a week. She demonstrates how the EMBL's method of reckoning discriminates against part-time employees, and she maintains that the proper basis of the reckoning is the number of days actually worked.

Since personnel officers had told her she was not entitled to a family allowance, she refrained from pressing the matter so as to protect her position at the Laboratory. In the event of conflict between the Staff Regulations and an "internal policy" the former must prevail.

E. In its surrejoinder the EMBL enlarges on its pleas and submits in particular that her social security coverage confirms the nature of her status: unlike established staff, who are subject to compulsory social security contributions, part-time students working less than 20 hours a week are exempt. The state social security scheme has upheld the complainant's exemption on the grounds that her main activity was university studies, not her work in the nursery. Besides, if she was dissatisfied with the terms of her employment she should have raised the matter with the Administration when it amended her contract in May 1991. The EMBL enlarges on the arguments put forward in the reply about her claims to family allowance and accrued leave.

#### CONSIDERATIONS:

1. By a letter of 6 November 1989 the European Molecular Biology Laboratory offered the complainant employment as a part-time student helper from 1 November 1989 in the nursery it provides for the children of staff. The letter prescribed a working week of ten hours; payment of 577 Deutschmarks a month; immunity from income tax according to special legal arrangements; and annual leave at the rate of two-and-a-half days a month. The complainant was to get no Christmas or vacation bonus or employer's contributions to the employees' provident fund. She was relieved of social insurance payments because she was a university undergraduate. She was to be on

probation for four weeks and might be given notice of termination in that period. The Staff Rules and Regulations were to apply to her. She was asked to supply a copy of the certificate of her enrolment at the university. As from 1 June 1991 her working week was increased to nineteen hours and her pay to DM 1,216 a month.

2. On 27 March 1992 she was given written notice of termination as from 30 June 1992 on the grounds that because of "a change in the personnel structure of the nursery" employment of student helpers there was to be terminated. On 13 April 1992 she appealed against that decision to the Joint Advisory Appeals Board claiming reinstatement and payment of DM 4,498.53 in compensation for accrued leave she had not taken. In a letter of 24 May to the Director-General she claimed social security coverage and family allowance. In its report of 13 July 1992 on her appeal the Board held that she had been given due notice of termination but recommended granting her compensation for the accrued leave she had not taken. It held that her claim to family allowance was "unclear". By a memorandum of 14 July the Director-General informed her that she had been given valid notice; that she was entitled neither to social security coverage nor to family allowance; but that she would be paid DM 2,069.60 for 32 days' leave from 1 June 1991, when her working hours had been increased from 10 to 19 hours a week. That is the final decision she is impugning.

### Receivability

3. The Laboratory submits that until the complainant drops the action she has brought against it in the Heidelberg division of the labour court of Mannheim her complaint is not receivable: only by such withdrawal will she show that she acknowledges the Tribunal's jurisdiction.

4. The Tribunal is competent to entertain her claims under paragraphs 5 and 6 of Article II of its Statute; she has observed the time limits; and her complaint is receivable. It is for the labour court of Mannheim to rule on its own competence.

### The merits

5. The complainant is asking the Tribunal to set aside the Director-General's decision, order her reinstatement and award her DM 4,498.53 in compensation for accrued leave, DM 4,975 in family allowance, "punitive damages" and costs.

### Reinstatement

6. In support of her claim to reinstatement she puts forward the same arguments as Mrs. Michaela Braus in the complaint on which the Tribunal also rules this day in Judgment 1257. Mrs. Griehl-Zink's contract was not identical to that of Mrs. Braus: it did not specify that she was a supernumerary and student helper but it did say that she was offered "part-time student employment". Yet in reality what she had was employment as a supernumerary on a part-time basis and no distinction may properly be made between the two cases. The conclusion is that for the reasons given in Judgment 1257 the complainant's claim to reinstatement fails.

### Compensation for annual leave

7. In answer to her claim to compensation for accrued annual leave the Laboratory concedes that she was entitled to payment from 1 June 1991, when she had her weekly hours increased. It has reckoned the amount due to her at DM 2,069.60 as follows: it has taken her total income and the number of months she worked and so determined the average monthly income from 1 June 1991 to 30 June 1992; it has then calculated her average daily income at the rate of twenty-two working days a month; lastly, it has multiplied that by the number of days' leave she was entitled to in the material period.

8. She submits that that method of reckoning reflects only the monetary value of one day of leave for a full-time employee and that the amount for each day's leave should in her case be the equivalent of one average day's pay.

9. The Tribunal rejects her argument on the grounds that compensation for leave must reflect the difference between full-time and part-time work and that the Laboratory's method ensured that in her case it did so fairly. But there is no justification for refusing to pay her for accrued leave from the date of her recruitment up to 31 May 1991. Regulation R 2 4.03 provides that "Staff members, supernumeraries and fellows shall be entitled to paid annual leave calculated at the rate of 2 working days per month of service, i.e. 30 working days in a full year". There is no requirement that supernumeraries work any minimum number of hours. The complainant is therefore

entitled to compensation for leave according to the Organisation's method of reckoning from the date of recruitment up to 31 May 1991, due allowance being made for the three months' leave of absence granted to her from September to November 1990.

#### Family allowance

10. The complainant claims family allowance under Regulation R 4 1.07, which provides that a supernumerary, among others, "who is married or who has a dependent child ... shall receive a family allowance, the amount of which is shown in Annex R.A.1." and that "if the contract stipulates a working week of less than 40 hours, the allowance shall be reduced accordingly".

11. The Laboratory retorts that in her case family allowance is precluded by Internal Policy No. 35, a text that the Director-General issued in November 1987. The text sets out the different categories of supernumerary, the third of them, S.3, being "Employment for short-term auxiliary tasks", and says that university students fall into that category. The text says under the heading "Remunerations and Reimbursements" in relation to category S.3: "Hourly or monthly salary. No allowances or grants, like S.2". S.2 provides that family allowance shall not be due.

12. The Director-General may not unilaterally amend a Regulation. According to Rule 1.1.03 he is responsible for applying the Staff Rules and shall issue and enforce the Staff Regulations. The power to amend Staff Regulations is set out in Rule 1.1.04, which reads:

"The Director-General shall draw up and amend the Staff Regulations after consulting the Standing Advisory Committee provided for in Chapter 7 and with the prior approval of the Council or of the body which will be designated by the Council for this purpose."

Regulation R 4 1.07 has not been amended and therefore takes precedence over the text on Internal Policy issued by the Director-General.

13. The defendant criticises the complainant for failing to present proper documents. The complainant's answer is that she omitted to do so because members of the Personnel Department had told her several times that she was not entitled to family allowance.

14. The Tribunal is satisfied that the complainant is entitled to family allowance, on production of the proper documents, in accordance with the Staff Regulations.

#### DECISION:

For the above reasons,

1. The Laboratory shall pay the complainant compensation for accrued annual leave in accordance with 9 above.
2. It shall pay her family allowance in accordance with the Staff Regulations on her production of the proper documents.
3. It shall pay her 1,000 Deutschmarks in costs.
4. Her other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
Mella Carroll  
Mark Fernando  
A.B. Gardner

