EIGHTY-THIRD SESSION

In re Gawlitta

Judgment 1634

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Martin Gawlitta against the European Molecular Biology Laboratory (EMBL) on 2 September 1996, EMBL's reply of 27 November 1996, the complainant's rejoinder of 7 February 1997 and the Laboratory's surrejoinder of 20 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. The complainant, a German who was born in 1957, joined the staff of the Laboratory on 1 January 1991 under a so-called "supernumerary" appointment in category S.1 as an assistant in the Department of Finance and Accounts. His contract provided for either party to give notice of termination "without giving reasons".

According to Internal Policy No. 35, which the Administration issued in November 1987, only under "very special circumstances" may the duration of a supernumerary appointment in category S.1 exceed 12 months.

By a memorandum dated 8 December 1995 the head of Personnel told the complainant that EMBL would be terminating his appointment on 19 January 1996, but he gave no reasons. On 27 December 1995 the complainant appealed to the Director-General. In its report of 20 May 1995 the Joint Advisory Appeals Board concluded that the Laboratory had complied with the terms of his contract. In a letter dated 4 June 1996, which he is impugning, the Director-General rejected the appeal.

B. The complainant submits that the termination of his appointment was unlawful. The decision was taken *ultra vires*, failed to state any reasons and did not give him enough notice. In any event there were no grounds for termination and the Laboratory was in breach of good faith.

He seeks the quashing of the impugned decision and reinstatement under a fixed-term appointment. He also claims at least 10,000 German marks in costs.

C. In its reply EMBL says it acted in strict compliance with the terms of his appointment and the material rules. General principles of the law of the international civil service do not prevail over the specific terms of a contract. Though EMBL was not bound to give him reasons for its decision he knew full well that it was due to "dissatisfaction" with his performance and conduct.

D. In his rejoinder the complainant seeks to rebut the Laboratory's pleas in the reply. He contends that EMBL had a duty to substantiate such a decision.

E. In its surrejoinder the Laboratory submits that the mere continuance for almost five years of the complainant's supernumerary appointment could not afford him rights he never had under that contract.

CONSIDERATIONS

1. The EMBL employed the complainant from 1 January 1991 under a contract dated 5 December 1990. That contract described his "Category of Personnel" as "Supernumerary Employee (A) - S1" and his function as that of a "Bookkeeping Assistant" at grade 2-0; it set a probationary period of six months; and it provided for termination after that period without any statement of reasons by the giving of six weeks' notice. It did not state the duration of the contract. It said that the contract was subject to the Staff Rules

and Regulations as well as to the internal guidelines and rules issued by the Director-General.

2. The complainant received regular advancements in step on the completion of probation and on every anniversary of his appointment up to 1 January 1994. By a memorandum of 3 January 1995 the head of Personnel informed him that for the reasons stated in his own memorandum of 18 October 1994 and the Administrative Director's of 27 October he was not being granted an annual step increase but:

"Should your work performance have improved by the end of April 1995 to an extent that justifies the removal of [those two] letters from your personal file you will then receive a step increase."

The head of Personnel told him by a memorandum of 18 April 1995 that he had fulfilled those requirements and by another of 10 May 1995 that he was granted as from 1 May the promotion to "4-04" which had until then been withheld.

3. In another memorandum of 18 April 1995 the head of Personnel informed him of his transfer from the Finance Department to Personnel. In that memorandum the "Category of Personnel" was described as "Administrative Officer of Paying Office" and not as "Supernumerary". The EMBL did not, however, carry out that transfer but decided instead to keep him in Finance, "where he could draw on his experience of the work and consolidate on a recent performance that had been considered satisfactory enough to grant him a step increase to 4-04".

4. By a memorandum dated 8 December 1995 the head of Personnel gave him six weeks' notice of termination without any statement of reasons.

5. On 27 December he filed an internal appeal challenging the validity of that notice on the grounds that the memorandum had been signed by the head of Personnel and not, as Staff Rule 2.1.02 required, by the Director-General; that it did not, as Staff Regulation R 2.6.06 required, state the reasons for termination; and that the termination, for which there was in fact no cause, was in breach of good faith.

6. In its report of 20 May 1995 to the Director-General the Joint Advisory Appeals Board concluded that, though the accuracy and quality of the complainant's work were undisputed, relations between him and his first-level supervisor had irretrievably broken down, partly because he "could be seen to be overqualified for his post". The Board observed that contracts for supernumeraries were beginning to be widely used to relieve difficulties caused by limits imposed on the EMBL in the recruitment of staff; that, while they "were originally intended to apply to short term positions", they were more and more being applied to "long term employment ... in administrative, secretarial and other posts"; and that they were "inappropriate for long term employment" by the EMBL and "should be eliminated as quickly as possible". The Board considered the contract between the complainant and the EMBL to be "inappropriate for the period of his employment", and that its termination conditions were suitable only for a contract not exceeding one year, and expressed dismay "that a person could be employed for 5 years on a contract with such poor personal protection". It concluded, however, that the parties were bound by the contract which they had signed and that the EMBL had acted strictly in accordance with its terms.

7. The complainant asks the Tribunal to declare that the termination was invalid and that he is entitled to further employment by the EMBL under a fixed-term contract.

8. The EMBL pleads that under Staff Rule 1.1.01 its legal relationship with each employee is governed by the Staff Rules, the Staff Regulations and the contract. The contract concluded with the complainant provided for termination with due notice, but without any statement of reasons, and declared him to be a supernumerary employee. Not only did he accept those terms at the time but he did not challenge them even later by internal appeal. Nor can he have assumed that his contractual relationship with the Laboratory underwent any fundamental legal change by the passage of time.

9. In Judgment 701 (*in re* Bustos) the Tribunal held:

"The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties -- or at any rate the party which is in a position to formulate the document -- do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties -- or at

any rate the stronger of them -- do not wish to face."

And in Judgment 1385 (*in re* Burt) the Tribunal looked behind the wording of a written contract on the grounds that it was merely a device to deny the employee the protection of the rules; it gave effect to the real intention of the parties.

10. Applying those principles, the Tribunal will determine from the terms of the complainant's contract and in the light of the applicable Staff Rules and Regulations whether he was indeed a supernumerary employee at the time of termination.

11. Staff Rule 1.2.01 distinguishes two categories of personnel: "established" or "staff members", and "non-established" personnel, consisting of supernumeraries, fellows, visitors and trainees.

12. Under Staff Rule 2.1.05 staff members are to be granted either a fixed-term contract of not more than five years' initial duration, an open-ended contract or an indefinite contract with no date of expiry save the normal age of retirement.

13. According to Regulation R D.1, supernumeraries are "casual workers employed outside the scope of the Staff Complement to carry out a certain task for a limited period of time" and, according to Regulation R 2.1.06, are employed "part-time or for work of specified duration normally up to 6 months".

14. Internal Policy No. 35, approved by the Administration and the Staff Association in 1987, set out guidelines for the employment of supernumeraries. There were three categories of position they might hold, and the first consisted of:

"Positions in which a staff member could be employed; but due to short-time requirements or specific talents staff membership is not primarily considered."

The statement added that the duration of the contract of a supernumerary "must be shown in the contract" and not be more than twelve months, though an exception was allowable in special circumstances.

15. The Staff Regulations prescribe for each type of contract periods of notice applicable to resignation, termination and dismissal, but with the proviso that they may be reduced by mutual agreement. Under Regulation R 2 6.06 every "member of the personnel" is entitled to be "notified of his dismissal in a letter indicating the reason or reasons, the date of termination of his contract and the date of the last day to be worked". There is no provision for any exclusion or exception.

16. It is the Director-General's duty under Regulation R 2 1.11 to ensure that every supernumerary receives a written contract which specifies, among other matters, the category of personnel to which he belongs, the classification of his work or the function to be performed, and a period of probation not to exceed three months.

17. The basic terms and conditions of the complainant's contract -- particularly as regards the nature of the work, the length of probation, and the failure to state a duration not exceeding the twelve months -- made it fundamentally inconsistent with supernumerary employment of the kind contemplated by the Staff Rules and Regulations. If the Director-General had really intended to employ the complainant as a supernumerary he ought to have given him a contract which complied with the Staff Rules and Regulations. He did not. The contract was therefore not one for supernumerary employment even though that was the label it bore.

18. Whatever doubt there might have been at the outset, it was quite clear by April 1995 that the complainant was not regarded as a supernumerary: his work was in no sense casual or temporary, he had received regular advancement, and his transfer to another department had been proposed.

19. Relying on Staff Rule 1.1.01, the Laboratory contends that the terms of the contract prevail over the Staff Rules and Regulations on the grounds that the latter are not "given a superior rank over the provisions in the individual contract". The Tribunal rejects the contention. Not only was the Director-General bound to abide by the Staff Rules and Regulations but the contract itself recognised that it was subject to the Staff Rules and Regulations.

20. The report of the Joint Advisory Appeals Board shows that the EMBL was resorting to the grant of supernumerary contracts even for long-term regular employment as a device to circumvent limits imposed on the recruitment of staff and was so formulating the contracts as to conceal its true relationship with the employees. It has not specifically denied this. Indeed in its reply it accepts that "the present situation of Supernumeraries is unsatisfactory" and states that changes are under consideration. The provision for termination without any statement of reasons and on six weeks' notice was an integral part of the device that it adopted.

21. The term "supernumerary employee" must therefore be disregarded because it was inconsistent with the parties' intent as expressed in the terms and conditions of the contract as well as with the Staff Rules and Regulations.

22. The Tribunal holds that in December 1995 the complainant was not a supernumerary and so his appointment could not be terminated without any statement of reasons on six weeks' notice. But neither might he be regarded as a staff member on a fixed-term, open-ended or indefinite contract. He had no right to the renewal of his appointment, and it does not appear from the evidence that the Laboratory would have renewed it had the proper procedure been followed.

23. As for the complainant's plea that the notice of termination should have been signed by the Director-General, Staff Rule 1.1.05 empowers the Director-General to delegate his authority and by a memorandum dated 1 December 1995 he authorised the "head of Human Resources" -- i.e. the head of Personnel -- to sign such notices.

24. The conclusion is that the intention that both parties formed, if not at the beginning, then at the latest by 1995, was -- to quote Judgment 701 -- that "the complainant should be employed for as long as his services were required and he was willing to give them", and that to an agreement of that character "the law adds the term that reasonable notice of termination must be given". The complainant is entitled to an award of damages for the lack of such notice, and the amount is set *ex aequo et bono* at 35,000 German marks.

25. He is also entitled to an award of costs.

DECISION

For the above reasons,

1. The EMBL shall pay the complainant 35,000 German marks in damages.

2. It shall pay him 8,000 marks in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

William Douglas
Michel Gentot
Mark Fernando
A.B. Gardner

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