

**P.**  
**v.**  
**EMBL**

**122nd Session**

**Judgment No. 3679**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. P. against the European Molecular Biology Laboratory (EMBL) on 21 August 2013 and corrected on 31 August 2013, EMBL's reply of 14 January 2014, the complainant's rejoinder of 6 March and EMBL's surrejoinder submitted on 25 April and corrected on 30 April 2014;

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

Having examined the written submissions;

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

The complainant contests the decision not to renew his contract.

In July 2007 the complainant joined EMBL under a three-year fixed-term contract, which was subsequently renewed. He was part of the desktop support team in the IT Services.

In the "End of Contract" performance assessment report (hereinafter the "performance report") of 14 June 2012, his supervisors recommended that he not be offered an extension of his "present contract", which was due to expire in June 2013, on the ground that his performance was not satisfactory. On 12 July he filed an internal appeal against the decision of 14 June 2012. The matter was referred to the Joint Advisory Appeals Board (JAAB) for recommendation. Having held oral hearings the

JAAB issued its report, and the Director-General informed the complainant by a letter of 17 December 2012 that, on the basis of that report, he had decided to offer him a one-year extension to give him the opportunity to prove himself. He indicated that an investigation would be conducted into the factual basis of the performance report upon which the appeal had been based, to be completed by February 2013. He added that the complainant's performance would be re-evaluated in accordance with applicable rules before the expiry of the subsequent one-year contract.

On 12 June 2013 the complainant's supervisor forwarded to him the performance report in relation to his contract expiring on 30 June 2014. He gave a detailed explanation of the work performed and concluded that his performance did not meet the job requirements. He also stated that he was available to discuss the report with him. The complainant gave his comments on the report but refused to sign it.

On 16 June 2013 the Director-General wrote to the complainant indicating that he had now reviewed his response to the report investigating the performance report of June 2012, and had concluded that the performance report was "soundly based on fact and [was] fair" and the allegations of bullying were unfounded. The report of June 2012 would therefore stand on record as it was originally written.

By a letter of 24 June 2013 the Administrative Director and the Head of Human Resources informed the complainant that, on the basis of his performance report which covered the period up to 30 June 2013 and after having discussed the matter with the Director-General, it had been decided that his fixed-term contract starting on 1 July 2013 would come to an end on 30 June 2014, and that he would not be offered an extension because his performance, in terms of both quality and quantity, was not at an acceptable level and there was no indication that this would improve. They added that the Director-General had decided to put him on special leave with pay until the end of his contract on 30 June 2014, and that his last day at work would be 28 June 2013, which would give him some time to find new employment. On 21 August 2013 the complainant impugned that decision directly before the Tribunal.

The complainant asks the Tribunal to order EMBL to give him a "[j]ob reference overall grade of 2.0 on a scale of 1 (very good) to 6

(unsatisfactory)”, to order EMBL to pay him an amount equivalent to his “loss of earnings up to June 2016 including the step increases until June 2016” as if his contract had been extended until June 2016, and to pay him an amount equivalent to the “leaving allowance” and the “pension contributions” he would have been paid until June 2016. He also claims “compensation for damages and compensation for pain and suffering”, and asks the Tribunal to sanction EMBL for violation of its duty of care and for its “illegal actions”.

EMBL asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress and unfounded and to order the complainant to pay 25,000 euros to EMBL.

#### CONSIDERATIONS

1. The complainant’s claims may be set out as follows:
  - 1) EMBL unlawfully gave him a one-year fixed-term contract, instead of a three-year contract which he previously held, from 1 July 2013 and in the letter to him dated 24 June 2013 informed him that his contract would not be renewed when it expired on 30 June 2014. Had he been given a three-year contract he would have been entitled to salary and all other benefits up to 30 June 2016.
  - 2) On the assumption that his contract should have been renewed to June 2016, he is entitled to be paid for loss of earnings up until that time, also taking into consideration step increases in 2012, 2013 and up to 2016.
  - 3) EMBL denied him access to his emails and his user account was disconnected before his contract ended in June 2014.
  - 4) On leaving office, EMBL failed to provide him with a job reference or job certificate at the end of his contract stating that his service was of a quality level of grade 2 on a scale of 1 (very good) to 6 (unsatisfactory).

- 5) He suffered harassment in the workplace in the form of “permanent bullying attacks and stress at the workplace” which made him mentally and physically ill.
- 6) EMBL breached its duty of care to him entitling him to damages.

2. It is observed that the Director-General addressed the fifth-mentioned allegations of bullying in his letter dated 16 June 2013 stating that they were unfounded. It was in the letter dated 24 June 2013 that the Administrative Director and the Head of Human Resources informed the complainant that it had been decided that his fixed-term contract from 1 July 2013 to 30 June 2014 would not be renewed because the Administration had lost confidence that the situation (with respect to his performance and behaviour) would improve. They also informed him that the Director-General had decided to put him on special leave with pay until the end of his contract on 30 June 2014, and that his last day at work would be 28 June 2013, which would give him some time to find new employment. The complainant received the letter dated 24 June 2013 on 28 June 2013.

3. EMBL contends that none of the foregoing claims is receivable because the complainant appealed directly to the Tribunal, thereby not exhausting such other means of appeal that were open to him. The provisions of Section 6.1 of the Staff Rules are the rules that are applicable to this issue.

Section 6.1.01 states:

“In respect of matters that concern him personally, every member of the personnel or former member of the personnel shall have the right to appeal against any decision by the Director-General or those to whom he had delegated authority.”

Section 6.1.02 states:

- “There shall, however, be no appeal against any decision:
- to terminate an appointment during the probation period
  - not to extend a contract
  - not to award a new fixed-term contract
  - of termination of an open-ended contract taken under Staff Regulations R 2 6.03.”

Section 6.1.03 states:

“Such appeals shall be made first to the Director-General who, before taking any decision on its substance, shall consult a Joint Advisory Appeals Board whose composition shall be defined in the Staff Regulations.”

Section 6.1.04 states:

“A member of the personnel may appeal to the Administrative Tribunal of the International Labour Organization against any final decision of the Director-General.”

4. These provisions show that the claim which concerns the non-renewal of the complainant’s contract is receivable as it is exempted from being considered in EMBL’s internal appeal process by virtue of Section 6.1.02 of the Staff Rules. In the absence of available internal appeal proceedings an official may bring his complaint directly to the Tribunal (see, for example, Judgment 2312, considerations 3 and 5).

5. By extension, the second-mentioned claim in consideration 1 of this Judgment is also receivable insofar as it relates to the complainant’s claim that the non-renewal of his contract was unlawful. However, to the extent that the complainant seeks the recovery of lost earnings taking into consideration step increases in 2012 and 2013, as well as step increases until 2016, the claim is irreceivable and will be dismissed. It is noted that the complainant was informed by letter dated 29 June 2012 that his 2012 step increase would not be granted because of unsatisfactory performance.

Moreover, it is noted that in a sworn statement, which Mr K.W. gave on 13 January 2014, he deposed, among other things, that EMBL had received no claim for compensation from the complainant for step increases for 2012, 2013 and up until 2016 as if his contract were to end in June 2016. Decisions concerning step increases are not exempted from the internal appeal process under Section 6.1.02 of the Staff Rules and there was no internal appeal concerning the step increases for which the complainant seeks payment for loss of earnings. Therefore, the complainant has not exhausted internal remedies in relation to these aspects of the second-mentioned claim as Article VII, paragraph 1, of the Statute of the Tribunal requires.

6. The third-mentioned claim concerning the denial of access to his emails and user account is receivable to the extent that it may provide a basis for the sixth claim that concerns alleged breach of EMBL's duty of care.

7. The fifth claim concerning alleged harassment is not receivable as Section 6.1.02 of the Staff Rules does not exempt it from EMBL's internal appeal process. It will therefore be dismissed pursuant to Article VII, paragraph 1, of the Statute of the Tribunal as the complainant has not exhausted internal remedies in relation to that claim.

8. It is also determined that the fourth-mentioned claim, that EMBL failed to provide the complainant with a job certificate at the end of his contract stating that his service was of a specific quality, is irreceivable and will be dismissed. The record shows that, through his legal counsel, the complainant was negotiating a separation agreement, as well as the issuance of a job certificate or reference to him. He had requested an interim certificate in February 2013 to confirm that he was employed by EMBL. However, by letter dated 2 July 2013, during the course of the negotiations, he requested a certificate that went beyond a mere job confirmation to facilitate his future career. The negotiations failed as the parties could not agree on the wording of the certificate because the complainant did not accept EMBL's drafts.

The record does not show that an official of EMBL issued a decision that rejected the complainant's request for the issuance of the certificate. In any event, such a decision would not have been exempted from an internal appeal by virtue of Section 6.1.02 of the Staff Rules and there was no internal appeal. Accordingly, the complainant has not, in keeping with Article VII, paragraph 1, of the Statute of the Tribunal, exhausted such other means of appeal that were available to him. Moreover, the complainant's legal counsel had correctly accepted that there was no legal basis for the issuance of such a certificate.

9. The complainant seeks a hearing under Article 12, paragraph 1, of the Tribunal's Rules. This Article provides that a party that so applies shall identify any witness whom that party wants the Tribunal to hear

and the issue that the witness is to address. The complainant states that he wishes to call his colleague, Mr A.M., to give evidence on the circumstances at the workplace. However, the reports and documents which have been provided by the parties in these proceedings fully detail those circumstances. They include the oral evidence which the complainant, Mr A.M. and others gave during the JAAB's proceedings concerning those circumstances. It is therefore determined that it is unnecessary to order a hearing.

10. As to the merits of the claim that the non-renewal of his contract was unlawful, the basic applicable principles are, firstly, that such decisions are within the discretion of an international organization. Section R2 1.01 of the Staff Regulations confers that discretion on the Director-General. Moreover, this is a consistently stated principle, as set out as follows, for example, in Judgment 3586, consideration 6:

“[...] Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization's freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6). These grounds of review are applicable notwithstanding that the Tribunal has consistently stated, in Judgment 3444, under 3, for example, that an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant's terms of appointment contained a similar provision.”

11. Additionally, the reason for not renewing a contract must be valid, and where, as in the present case, the non-renewal is for unsatisfactory performance, the staff member must be informed in a timely manner as to the unsatisfactory aspects of his performance and be given reasonable time to improve it as an aspect of the organization's

duty of care and good faith. Accordingly, it was relevantly stated as follows, in Judgment 3282, considerations 5 and 6:

“Consistent case law states that ‘[a] staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation’ (see Judgment 2414, under 23). [...]

As the Tribunal has ruled before ‘[a]n opportunity to improve requires not only that the staff member be made aware of the matters requiring improvement, but, also, that he or she be given a reasonable time for that improvement to occur’ (see Judgment 3026, under 8).”

The statement in Judgment 3026, consideration 8, is also instructive. It states as follows:

“Although the Administrative Directive allows for the non-extension of a contract in the case of a rating of ‘Insufficient’, it does not and cannot relieve the [organisation] of the duty to provide an opportunity for improvement, that being an important aspect of the duty of good faith (see Judgment 2414, under 23 [...]). And as the decision not to renew the complainant’s contract was based solely on his 2006 performance appraisal, the question whether he was given a fair opportunity to improve must be answered by reference to the situation at the end of that year.”

12. The complainant commenced regular employment with EMBL in 2007. He first received an unsatisfactory performance rating in his June 2009 assessment and was given one year to improve his performance. His performance improved and he was given a two-year fixed-term contract to 30 June 2013. He received an unsatisfactory performance assessment in June 2012 and he appealed that assessment on 12 July 2012.

The matter was referred to the JAAB, which heard evidence from the complainant and four witnesses whom he requested be called: two users of IT services and two of his colleagues from the IT desktop support team. Their evidence was that the complainant was reliable and available to assist them; successfully solved problems, and worked well with them in circumstances within the office which were often stressful because of an uneven-tempered and moody supervisor. They also stated that the ticketing system by which their performance was measured often mal-functioned and that the work which they were assigned was basic and not sufficiently challenging.

13. The Tribunal notes that the main reasons which EMBL proffered before the JAAB for the proposed non-renewal of the complainant's contract were unsatisfactory performance, his refusal to perform given tasks, including proper management of the ticketing system, and a general lack of trust in his work. In its report, the JAAB stated that it "was less concerned with the reported performance as all tickets [were] dealt with rapidly and [did] not think this point justify[ed] denying the contract extension". The JAAB also found that the number of cases in which the IT management complained about the complainant's non-responsiveness on given tasks was not large, but that he frequently failed to describe the solutions which he found to particular problems in the reports attached to the tickets when he dealt with them, and the most serious issue concerned the lack of trust in his work.

The JAAB noted the dysfunctional atmosphere in the desktop support office where he worked, but opined that it doubted that the complainant's departure from it would solve that problem unless the management considered the causes and addressed them. It concluded that the complainant's performance did not justify the non-renewal of his contract, as it would be "a quite drastic measure". Accordingly, the JAAB recommended that the complainant be given a new performance assessment, as he had requested, to be supported by an external reviewer, as the representative of the staff association had recommended. It further recommended that a decision regarding the complainant's contract be taken following that assessment.

14. In accepting the foregoing recommendation, in the letter of 17 December 2012 to the complainant, the Director-General stated as follows, among other things:

- "1) EMBL is to make you an offer of a subsequent contract for a term of one year. During this time, you have the opportunity to prove yourself again.
- 2) Next, I ask all [persons] concerned to strive in the interest of the [EMBL], to contribute to the success of the team and to actively [discuss] the mentioned negative work atmosphere in the team and participate in their betterment. You and the [Head of] IT [shall report] to the EMBL Administrative Director [on a quarterly basis with respect to both aspects].
- 3) The EMBL Administrative Director will investigate the factual basis on which your current performance appraisal was [made]. If necessary, he will

get help from other people. This investigation shall be completed by end February 2013. In case the assessment does not support the facts or only in part, the assessment shall be corrected accordingly. However, should there be facts which show the current performance appraisal as true, then the performance appraisal remains unchanged. The recent decision to offer you a subsequent one year contract, however, remains unaffected.

4) Before the expiry of the subsequent one year contract, your performance will be re-evaluated according to the rules of the EMBL Staff Rules and [Regulations].”

15. In an email reply, the complainant accepted this decision but raised issues concerning whether his step increase for 2012 would be granted retroactively if he received a positive 2013 performance assessment. He also sought certain assurances that the appeal proceedings and the past negative assessment would not be taken into account and suggested that in due course the question whether the ticket system is a suitable basis for performance assessment should be examined. The Director-General’s email response of 9 January 2013 suggested to the complainant, among other things, that he needed to ensure that his performance met the required standards so that none of those theoretical problems became issues at his next assessment.

16. It was necessary to detail the foregoing exchanges as they show that the complainant was informed in a timely manner that he would not be recommended for a contract renewal because of his unsatisfactory performance assessment. When he challenged that decision, EMBL took steps to address his concerns, through the JAAB process, which eventually led to the extension of his contract for one year, to June 2014. He was given the opportunity to improve his performance, which was a fair one.

There was also a special investigation into the complainant’s 2012 appraisal. That investigation was thorough. In his investigation report the Administrative Director recommended that the original assessment should stand as there was “belief that there [was] a factual basis for the criticisms made in [the 2012 assessment], that it [was] fundamentally fair and that the recommendation not to renew [the complainant’s] contract was supported by the facts”. It is observed that the complainant,

through his legal counsel, challenged aspects of the report. The Director-General's detailed response of 16 June 2013 explained that he accepted the recommendations in the report because, in his opinion, the Administrative Director had drawn the correct conclusions from the evidence. This was not appealed.

17. The Tribunal observes that the Administrative Director's conclusion did not take into consideration that following the unsatisfactory performance assessment, the complainant was entitled to a fair opportunity to improve his performance before a recommendation not to renew his contract was considered. This was within EMBL's duty of good faith and care to the complainant.

The Tribunal considers that the extension of the complainant's contract for the year from 1 July 2013 provided that opportunity. He had the period from 1 July 2012 to his next assessment in June 2013 to improve his performance, notwithstanding his frequent absences from work during that period. Unfortunately, that assessment shows that his performance during that period was unsatisfactory and the Tribunal sees nothing that suggests that that assessment was unfair or that the terms of the letter of 24 June 2013, which informed the complainant that his employment with EMBL would end on 30 June 2014, breached EMBL's rules or regulations or applicable legal principles. Accordingly, the claim that EMBL unlawfully failed to renew the complainant's contract when it ended is unfounded and will be dismissed. Moreover, as EMBL has not been found in breach of its duty of good faith or its duty of care to the complainant by failing to renew his contract, his claim for compensation on this ground is also unfounded and will be dismissed.

18. As to the claim that EMBL denied him access to his emails and that his user account was disconnected before his contract ended in June 2014, the Tribunal notes the evidence that, at the complainant's telephone request in July 2013, one of his work colleagues reformatted the complainant's computer hard drive, thereby irretrievably deleting the data that was stored thereon. In these circumstances, EMBL was justified in denying the complainant access to his emails and user account and this claim is accordingly unfounded and will be dismissed.

19. In the foregoing premises, the complaint will be dismissed in its entirety.

20. As to EMBL's counterclaim for an award of costs against the complainant, it bears recalling that the Tribunal's case law states that such costs would be awarded only in exceptional cases in which it could penalise the filing or maintenance of a complaint as being vexatious or abusive (see, for example, Judgment 1962, consideration 5, and Judgment 3043, consideration 24). As the present complaint raises, among other issues, the lawfulness of the non-renewal of the complainant's employment contract, which is neither vexatious nor abusive of process, the counterclaim is unfounded and will be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed, as is EMBL's counterclaim.

In witness of this judgment, adopted on 19 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER