

FORTY-FOURTH ORDINARY SESSION

***In re* OVER**

Judgment No. 413

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Molecular Biology Laboratory (EMBL) by Mr. Geert Martijn Over on 20 May 1979, the EMBL's reply of 17 July, the complainant's rejoinder of 18 September and the EMBL's surrejoinder of 25 October 1979;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Staff Rules 2.6.01 and 6.1.02 and Staff Regulations R2.1.15, R2.2.05, R2.6.02, R6.1.03 and R6.1.04;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 1 June 1976 the complainant was appointed to the staff of the EMBL for three years. He was granted a step increase on the satisfactory completion of six months' probation and another one six months later, at the end of one year's service. Shortly before joining the Laboratory, he had followed outside courses, one third of the cost being met by the EMBL. At the end of his second year he was given a third step increase. In the meantime the Head of Finance, the section in which he was employed, proposed promoting him to the next grade. In a minute dated 15 June 1978 the Head of Personnel replied that the complainant could not be promoted since his work had shown shortcomings and other senior officials were not so positive in their appreciation of his "accuracy and insight". The minute acknowledged that the complainant had "undertaken a major investigation, in connection with his studies, of putting the budget on a computer", but said that it was too early to see what the results would be for the EMBL. On 29 November 1978 the Director-General offered the complainant a renewal of his appointment for one year from 1 June 1979 and asked him to say whether he accepted. On 28 February 1979 the complainant replied that he did so "as a provisional measure". His intention, he said, was to appeal against the decision to renew his appointment for only one year on the grounds that it was tantamount to "dismissal for specified reasons of unsuitability" within the meaning of Staff Rule 2.6.01(g). He therefore asked what were the specific reasons for it. On 15 March the Head of Personnel replied that he was mistaking an offer of renewal for dismissal and asked him to make up his mind to accept or decline the offer. On 19 March the complainant signed the extension of his appointment. On 20 May he appealed to the Tribunal against the decision of 29 November 1978 mentioned above.

B. The complainant contends that this is the first instance in which a recommendation by a head of branch for promotion has been turned down and the renewal of appointment offered has been for only one year. At no time has he been given any satisfactory oral or written explanation for those decisions. Since joining the staff of the EMBL his performance reports have all been well above average. Since there is no question of abolishing his post there is no reason to grant him only one year's extension. He left permanent and secure employment with a Dutch firm to join the EMBL and the impugned decision therefore cause him serious prejudice.

C. The complainant invites the Tribunal (1) to quash the decision of 29 November 1978; (2) to order that his contract be renewed for three years up to 31 May 1982; (3) to order that he be promoted to the next grade with retroactive effect from 1 June 1978; (4) to allow his claim for study expenses amounting to 814.14 Deutschmarks; and (5) to award him costs alternatively, if claims (1) and (2) are dismissed, to award him equivalent compensation.

D. In its reply the EMBL argues that the complaint is irreceivable because the internal means of redress were not exhausted and because it is time-barred. Although Staff Rule C.1.02 precludes an internal appeal against a decision not to renew a contract, it does not expressly rule out appeal against an offer of extension. The complainant ought therefore to have appealed to the Director-General in writing in accordance with Staff Regulation R6.1.03 - and within the limit of 30 days set in Staff Regulation R6.1.04 - instead of appealing directly to the Tribunal.

Moreover, since his complaint is dated 20 May 1979 it is time-barred: the 90-day time limit set in Article VII of the Statute of the Tribunal expired on 27 February 1979, i.e. 90 days after the impugned decision of 29 November 1978.

E. The defendant organisation puts forward subsidiary arguments on the merits. It cites Staff Regulation R2.1.15, which relates to the contract of service and its renewal: "Members of the personnel shall receive on appointment a fixed-term contract of not more than three years' duration. This contract may be renewed or extended once or more often...". The Director-General, the EMBL contends, made proper use of his discretionary authority in deciding to renew the complainant's contract for only one year. He took account of all the comments on the complainant's performance and not just of those of the Head of Finance. The organisation refers to the minute of 15 June 1978 mentioned above. Summing up the assessments of the complainant's performance, amenability to guidance from supervisors and willingness to co-operate with colleagues, it observes that "on balance" they give a "negative picture". All things considered, he was fortunate to get even the offer of renewal for one year. As for the decision not to promote him, the Director-General enjoys full discretion under Staff Regulation R2.2.05 to decide whether a staff member's duties and ability warrant promotion, and he took the view that it would be wrong to promote the complainant. Thirdly, the EMBL rejects the complainant's claim for repayment of study and travel expenses: the fact that it had repaid him half the expenses of the second course (computer systems) did not commit it to repaying him retroactively the same proportion of the expenses Of the first course (business administration), of which on 24 August 1977 it decided to repay only one third. Such repayments are made only at the organisation's discretion.

F. In his rejoinder the complainant, arguing in favour of the receivability of the complaint, observes that in a conversation with the Director-General on 8 December 1978 he protested against the decision to renew his contract for only one year. In his letter dated 28 February 1979 he expressed his intention of appealing against the decision and for that purpose asked the Director-General to give his reasons for it. The Director-General answered that he was not bound to do so and that the only material provision was Staff Regulation R2.6.02, which relates to fixed-term contracts. The complainant believes that ne therefore had no choice but to go to the Tribunal. As to the merits, he contends that the EMBL's strictures on his performance may be set down to hostility towards him inspired by constant bickering in the Administration. The former Director of Administration had to be dismissed for "lack of... financial expertise" and other reasons. How could the opinion of such a man on his performance be given greater weight than that of the Head of Finance? The complainant rejects every one of the EMBL's criticisms of his performance. He gives a detailed account of his duties, in particular as cashier and in regard to the processing of invoices, and of his disputes about work with other staff members and his immediate supervisor. In his view that account proves beyond doubt that the ground given by the EMBL for its decision are quite unsound.

G. The EMBL takes the view that it may disregard many of the allegations in the rejoinder since they relate to matters subsequent to the impugned decision. There are several instances, it, observes, in which contracts have been renewed for only one year. Even though the letter of 29 November 1978 said: "It will not be possible to contemplate any further renewal", that did not make the impugned decision dismissal, let alone a disciplinary measure. What the sentence meant was, that the decision was final and irrevocable, and if the complainant wanted to contest it he should have filed an internal appeal. In any event the Director-General was bound neither to offer a longer extension nor to give the complainant his reasons for renewing the contract for only one year. The EMBL has explained its reasons to the Tribunal in order to show that the decision was not prompted by any extraneous consideration. It nevertheless rejects the complainant's comments on his own performance and holds to its own assessment, which it considers to be borne out by the statements of one of the complainant's supervisors. It therefore asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, to dismiss it as unfounded.

CONSIDERATIONS:

The renewal of the complainant's contract

1. By a letter dated 29 November 1978 the Director-General informed the complainant that his contract would be renewed for one year, but could not be renewed for any longer.

He gave oral confirmation of that decision on 8 December 1978. Since the complaint is dated 20 May 1979, the complainant has not respected the 90-day time limit set in Article VII, paragraph 2, of the Statute of the Tribunal in so far as he is seeking the renewal of his contract. To that extent, therefore, the complaint is irreceivable.

It is true that by a letter dated 28 February 1979 the complainant did notify conditional acceptance of the decision

which he likened to dismissal, and asked on what grounds it had been taken. But by a letter dated 15 March the Director-General's representative drew his attention to the distinction between the expiry of a fixed-term contract and dismissal and declined to give the explanation asked for. Thus that letter merely upheld the decision taken on 29 November and confirmed on 8 December 1978 and so set no new time limit for filing a complaint.

That being so, it is immaterial whether the complainant ought first to have appealed to the Joint Advisory Appeals Board of the organisation. The point is moot. Although what Staff Rule 6.1.02 rules out is an appeal against a decision not to renew a contract, that need not mean that the joint board will hear an appeal against a decision to renew a contract for a particular period. The reason for barring an appeal against a decision not to renew a contract is the discretionary nature of such a decision, and that may also be a valid reason for barring an appeal against a decision renewing a contract, which is also a matter of discretion.

The claim for promotion

2. The complainant is claiming promotion to the next grade with effect from 1 June 1978. Like the decision to renew his contract for one year, the decision not to promote him was taken before 8 December 1978 and was upheld on that date. Since the complaint was filed more than 90 days later, the appeal against that decision in the complaint is time-barred.

There is no need to consider whether he was bound to appeal against it to the Joint Board.

The claim for payment of study expenses

3. The decision not to repay the complainant's study expenses dates back to 1977. Again, and for the same reasons, the complaint is irreceivable under Article VII, paragraph 2, of the Statute of the Tribunal. The Tribunal need not consider whether the internal means of redress were exhausted.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy