SEVENTY-FIFTH SESSION

In re BRAUS

Judgment 1257

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Michaela Braus against the European Molecular Biology Laboratory (EMBL) on 27 August 1992, the EMBL's reply of 18 September, the complainant's rejoinder of 31 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 27 April 1993;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Rules 1.2.01, 1.2.02, 2.1.03 and 2.1.04 of the Staff Rules of the EMBL and Regulations R 2 1.06, R 2 1.10, R 2 1.11, R 2 1.17, R 2 2.01, R 2 6.07, 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 1963, began working for the EMBL on 16 October 1989 as a part-time helper in the nursery which the Laboratory provides for the children of its staff. Her letter of appointment dated 18 October and signed by the Head of Personnel referred to her as a "supernumerary and student aid". It prescribed 19 hours of work a week and leave at the rate of two-and-a-half working days a month. 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 Staff Rules and Regulations were to govern any conditions of employment not covered by the letter.

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, also 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 letter of 4 June to the Director-General she claimed social security coverage, unemployment insurance and damages for loss of employment. 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. The state social security scheme was, it observed, reviewing her claim to social insurance coverage. In a memorandum of 14 July 1992, which she impugns, the Director-General rejected her claim to such coverage on the grounds that the scheme exempted her from contributing and her claims to terminal entitlements on the grounds that she failed to qualify.

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 notice, save in 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 seeks the quashing of the decision of 14 July 1992, reinstatement and an award of not less than 5,000 Deutschmarks 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 by accepting its offer of appointment she acknowledged her status as a supernumerary staff member, which is implied anyway in the very nature of student employment. 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 points out that the complainant has not pressed the claim she made in her letter of 4 June 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.

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.

CONSIDERATIONS:

1. The European Molecular Biology Laboratory employed the complainant from 16 October 1989 as a "supernumerary and student aid" in the nursery it provides for the children of staff. The letter of appointment dated 18 October 1989 prescribed a working week of nineteen hours; payment of 1,154 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 holiday 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.

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. She appealed against that decision to the Joint Advisory Appeals Board. In its report of 13 July 1992 on her appeal the Board held that she had been given due notice of termination and recommended no action on her claims. By a memorandum of 14 July the Director-General informed her that he was rejecting her appeal, and 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 "punitive damages" and costs. She argues that:

(a) her contract was an indefinite one because it was neither for a fixed term nor "open-ended";

(b) she was not a "supernumerary" because she did not get the fixed-term contract that Regulation R.D.1 says must be given to supernumeraries, and she was therefore an "established" staff member;

(c) the reason for the termination of her appointment, namely a "change in the personnel structure", amounted to abolition of post and was wrong because the consequence was that more people were employed and a greater number of hours were worked; and

(d) the notice she was given was inadequate: because her post was abolished she ought to have been given six months' notice.

6. Staff Rule 1.2.01 puts the staff in two categories:

"established members of the personnel", who hold "fixed-term", "open-ended" or "indefinite" contracts; and

"non-established members of the personnel", namely supernumeraries, fellows, visitors and "non-graduate" trainees.

Chapter 2 of the Staff Regulations governs conditions of employment. Rule 2.1.04 and Regulation R 2 1.11, which are identical, read:

"The Director-General shall ensure that each supernumerary, fellow, trainee or visitor receives a written contract, letter of appointment or agreement to work at the Laboratory which the person concerned must accept by signature and which must include the following conditions where applicable."

There follow ten "conditions", and one of them is "the starting date and the date of expiry or the period of termination and resignation". Regulation R 2 1.06 stipulates that "Supernumeraries shall be part-time or for work of specified duration normally up to 6 months and paid at a level below grade 7". Another relevant provision is Regulation R.D.1, headed "Definition of staff at EMBL", which says:

"Staff Members are members of the personnel who are employed in a staff post which has been authorized by the Council and figures in the Staff Complement. They shall receive a fixed-term contract, an indefinite contract or an open-ended contract.

Supernumeraries are casual workers employed outside the scope of the Staff Complement to carry out a certain task for a limited period of time. They receive only fixed-term contracts."

7. The first issue is what sort of contract the complainant held.

The Laboratory does not explain, but merely says that she was a supernumerary. It is common ground that she did not hold an open-ended contract, and the rules on such contracts are therefore irrelevant to this case.

All things considered, the Tribunal is satisfied that what she had was not a fixed-term contract but an indefinite one for part-time employment. But plainly that contract did not confer on her the status of an "established" member of staff. She was not - as Regulation R.D.1 requires of such staff - "employed in a staff post which has been authorized by the Council" of the Laboratory and "figures in the Staff Complement". Nor was her post "classified" in accordance with Regulation R 2 2.01. Her contract, though it said that her employment was as a supernumerary and student helper, failed to satisfy the requirement that Regulation R 2 1.10 and Rule 2.1.03 lay down for the status of staff member, namely that "the category of personnel" to which the employee belongs be stated. Though she held an indefinite contract, it was not one within the meaning of Regulation R 2 1.17, which defines as follows the sort of indefinite contract to be offered to staff members:

"An indefinite contract until the normal retirement age laid down in Regulation R 2 6.05, may in principle be granted after nine years' service if the nature of the post justifies it and on conditions laid down by the Director-General."

She is therefore mistaken in contending that she must have been in the category of "established members of the personnel" because she held an indefinite contract. Her category was that of a supernumerary on an indefinite contract for part-time employment.

8. The second issue is whether she was dismissed because of the abolition of her post.

As the Laboratory explained, it had decided to change the staffing of the nursery to meet a growing need for professional care of the children and it therefore had to dismiss the students, who were not professional child-minders. Before the reorganisation the nursery had temporary and student helpers. The purpose was to replace them with four qualified nurses, two of them on full-time employment, one on a twenty-hour week and one on a thirty-hour week. The effect was to have more full-time staff in the nursery than before, and the change was not and cannot properly be described as entailing any abolition of post.

9. Thirdly, was the complainant given due notice of termination?

The periods of notice for resignation, termination and dismissal are set out in Regulation R 2 6.07, which applies to "members of the personnel". The provision stipulates, among other things, the periods of notice to be given to staff members and supernumeraries under the following four heads:

"1. Probation period.

2. Fixed-term contract (after the probation period).

3. Indefinite contract (after the probation period).

- Dismissal owing to suppression of a post or the reduction of staff complement.

- Other cases.

4. Open-ended contract (after the probation period).

- Termination."

The period applicable to the holder of a fixed-term contract after probation is three months. The holder of an indefinite contract who is dismissed for abolition of post is to be given notice consisting of a minimum of six months, and one month for each year of service from the seventh up to a maximum of twelve months. Other holders of indefinite contracts get three months in grades 2 to 7 and six in grades 8 to 14.

Since the complainant's contention that her dismissal was due to abolition of post is rejected for the reasons given in 8 above, she came under "other cases" of indefinite contract. And since, according to Regulation R 2 1.06, supernumeraries are paid "at a level below grade 7", she was entitled to only three months' notice.

The Organisation is wrong in interpreting Regulation R 2 6.07 as meaning that "other cases" form a category of their own: they are a division of "Indefinite contract".

10 .To sum up, the complainant was a member of the personnel in the category of supernumerary. She held an indefinite contract for part-time employment. The proper period of notice was three months and that is what she was given. Her complaint therefore fails in its entirety.

DECISION:

For the above reasons,

The complaint is 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

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