Registry's translation, the French text alone being authoritative.

EIGHTY-SIXTH SESSION

In re Ashurst, Berthet, Bosshard and Tuli

Judgment 1798

The Administrative Tribunal,

Considering the complaints filed by Mrs. Jennifer Lilian Ashurst, Mrs. Carmen Berthet, Mrs. Agnès Bosshard, and Mrs. Mary Ann Tuli against the European Molecular Biology Laboratory (EMBL) on 6 December 1996 and corrected on 18 February 1997, the EMBL's replies of 27 May 1997, the complainants' rejoinders of 26 March 1998 and the Laboratory's surrejoinders of 2 July 1998;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. On 9 December 1981 the Council of the Laboratory decided as from 1 January 1982 to take what is known as the system of the Coordinated Organizations[(1)] as the standard of reference for adjusting the pay of its own staff: see Judgment 1682 (*in re* Argos and others) of 29 January 1998.

In 1995 a Working Group on Pay drafted a resolution in favour of replacing the decision of 9 December 1981 - though keeping a reference to the Coordinated Organizations - and amending the Staff Regulations accordingly. The Finance Committee recommended the resolution and on 20 December 1995 the Council adopted it.

On 4 March 1996 the Administrative Director submitted to the Council two new versions of Article R 4 1.01 of the Regulations. One came from the Standing Advisory Committee, the other from management without referral to that Committee. The Administrative Director explained that, when looking at the first version, the Committee had been told by the Staff Association that it had opposed the Council's resolution in December 1995 and could not agree to the amendments. Management had then drafted a simpler text and, instead of consulting the Committee again, had sent it to the chairman of the Association, who had merely repeated its hostility to the resolution. On 4 July 1996 the Council adopted the following, simplified, text of Article R 4 1.01:

"Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by Council as laid down in Annex R.A.1."

Annex R.A.1 reads:

"The Council,

- stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;

- stating that the reference to the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;

- herewith replacing its decision of December 9, 1981,

decides that:

1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organizations with respect to adjustment of the basic salary scales of the Coordinated Organizations in Germany.

2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the Member States.

3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organizations.

4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."

By staff circular of 25 July 1996 the Administrative Director announced that the Council had adopted the amendments and put off adjusting pay for 1996 pending a ruling by the Tribunal on recent pay policy - it came in Judgment 1682 - but that the adjustment would be backdated to July 1996.

On 8 August Mrs. Ashurst, the vice-chairwoman of the Association, sent the Director-General individual appeals from herself, the other complainants and 27 other staff members. They each challenged the "first application to my individual case" of the Council's decision in their pay slips of 15 July and asked the Director-General to quash the impugned decisions or, failing that, allow straight appeal to the Tribunal. The Administrative Director answered her the very same day that in his view the pay slips were not final decisions, the adjustment having been held over.

By a letter of 11 September 1996 the Director-General pointed out to her that, even if he waived the internal appeal, there was no final decision challengeable before the Tribunal. That is the decision the complainants are impugning.

B. The complainants submit that their complaints are receivable. Although the Council put off deciding on pay for 1996, their pay slips for July of that year were the first individual applications of the amendments of 4 July to the rules on adjustment. Citing Judgment 1330 (*in re* Bangasser and others) of 31 January 1994, for one, they contend that, for the suit to be receivable, "all that a complainant need show is that the decision under challenge may impair the rights and safeguards" of staff.

On the merits they argue that the amendments to Article R 4 1.01 were in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted. By taking a standard of reference that is not binding the Council is "discarding the whole idea of adjustment" and showing bad faith. It has also repealed the ban on downward adjustment. The impugned decision was in breach of such general principles of the international civil service as stability in law and Noblemaire. Mrs. Ashurst and Mrs. Bosshard contend that the Laboratory has discriminated, too, against the staff serving in Germany. And all the complainants plead breach of their acquired rights in that the impugned decision precludes adjustment of pay to the cost of living.

They seek the quashing of it and an award of costs.

C. The Laboratory replies that the complaints are irreceivable because there is no final decision, its Council having postponed deciding on pay for 1996. So the complainants can show no injury.

In subsidiary argument it pleads that the amendments adopted by its Council made no change of substance in the text put to the Standing Advisory Committee, which there was therefore no need to bring in again. The chairman of the Staff Association himself saw no point in its meeting again and the members of the Association on the Committee had had the opportunity of raising objections at the Council's session of July 1996. The Laboratory says that "some leeway is needed to make allowance for change in [its] financial and budgetary situation". There was no breach of any general principle of law. The new rules shelter staff from arbitrary decisions. There is "no general rule that an organisation must adjust pay to the cost of living". Such adjustment, and a ban on downward adjustment, are not acquired rights. As for Noblemaire, "member States appear not to acknowledge any obligation to pay the highest rates to international civil servants". The new rules do not discriminate against staff in Germany.

D. In their rejoinders the complainants maintain that their complaints are receivable because they are challenging final individual decisions which cause them injury. Citing Judgment 1682, they contend that until July 1996 the Laboratory's practice was in breach of its own rules. Since it is passing off the new rules not as amendments but as

an interpretation of the system in force before 4 July 1996, that interpretation too is unlawful. It seems to think that budgeting must prevail over the rules on pay, though the Tribunal has condemned the notion.

Any amendment should have gone to a plenary meeting of the Standing Advisory Committee, and merely getting the opinion of the chairman of the Staff Association was not proper consultation. The purpose of the new rules was not just to stop rises in pay but reduce it by "applying negative rates".

E. In its surrejoinders the Laboratory observes that the Council decided on 17 December 1996 not to adjust pay for 1996. It maintains that the complaints are irreceivable. The complainants could have challenged the individual decisions applying the Council's decision of 17 December 1996, as other staff members have done. Lastly, the complainants broke the staff rules by failing to submit to the Director-General in the internal proceedings the pleas they have put to the Tribunal.

CONSIDERATIONS

1. The complainants are employees of the European Molecular Biology Laboratory and are challenging their pay slips for July 1996. Apart from a plea by two of them about the case of staff serving in Germany the grounds of appeal are the same. Since the four complaints raise the same issues the Tribunal joins them.

2. The pay of the Laboratory's staff is ordinarily adjusted every year in accordance with the Staff Regulations. Until 1996 Article R 4 1.01 of the Regulations said: "The Council shall use as a guide the relevant decisions of the Coordinated Organizations". Judgment 1682 (*in re* Argos and others) of 29 January 1998 held that the Laboratory had broken that rule in setting pay for 1995. On 4 July 1996 the Council of the Laboratory amended the Staff Regulations. According to the new text of Article R 4 1.01 basic salary scales and allowances were to be reviewed and set "in accordance with the decisions taken by Council as laid down in Annex R.A.1". The Annex says that in reviewing the pay of the staff in Germany the Council "shall use as an orientation the index calculated according to the procedure of the Coordinated Organizations"; and "when assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the Member States". As for staff outside Germany, the Annex prescribes setting their pay "so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organizations".

3. A staff circular of 25 July 1996 from the Administrative Director said that the Council had amended the rules on pay and was holding over any adjustment in pay for 1996 until the Tribunal had heard the then pending complaints about pay for 1995.

4. The complainants found on getting their pay slips for July 1996 that there was no adjustment. They lodged internal appeals. After correspondence the Director-General rejected them on 11 September 1996 on the grounds that pending a ruling from the Tribunal the Laboratory had taken no final decision on pay for 1996. But he waived internal appeal and gave the complainants leave to come straight to the Tribunal. They have.

5. The Laboratory replies that their complaints are irreceivable: what they are impugning are their pay slips for July 1996, which are not final decisions. They rejoin that their pay slips are decisions to their detriment and the first individual applications of the Council's new rules on adjustment.

6. A strong line of precedent has it that pay slips are individual decisions which may be challenged before the Tribunal. Indeed the Laboratory concedes in its surrejoinder that a pay slip is a final decision within the meaning of Article VII of the Tribunal's Statute and that the complainants "do have the right to appeal against it and so incidentally challenge the rules and policy decisions which afford the basis for individual decisions on pay". Even though the Council has reserved its right to alter pay for July 1996 later, and retroactively, the impugned decisions do show a cause of action.

7. Though receivable, the suit must fail. The complainants are arguing that the impugned decisions are the first applications of the new R 4 1.01 and Annex R.A.1; that the new rules are unlawful for want of the referral to the Standing Advisory Committee required by Article R 7 1.01, for a departure from general canons that lets in arbitrariness, and for breach of acquired rights. Those pleas cannot succeed. It is common ground that the Council postponed applying the new rules pending a decision by the Tribunal on pay for 1995. Though that implied a provisional decision not to adjust pay, the reasons for the postponement and for retroactive review are quite

understandable. In itself the decision does not impair the rights of staff. Whether the new rules are lawful is an issue that must wait: the Tribunal may entertain it in determining whether the Council's final decision on pay for 1996 is lawful. But the pleas put forward in challenge to the Director-General's decision of 11 September 1996 must fail because at that time the new rules - the only ones the complainants are objecting to - had not yet been applied.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

A.B. Gardner

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

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