

W.
v.
EMBL

124th Session

Judgment No. 3851

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. W. against the European Molecular Biology Laboratory (EMBL) on 10 July 2015 and corrected on 24 August, EMBL's reply of 10 December 2015, the complainant's rejoinder of 10 February 2016 and EMBL's surrejoinder of 3 May 2016;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant, who held a fellowship contract at EMBL, challenges the rejection of his request to be paid unemployment benefits following his separation from the organization.

The complainant was recruited as a "non-established member of personnel/postdoctoral fellow" on 7 August 2007. His fellowship contract expressly stated that some forms of social security, such as unemployment insurance, could not be provided by EMBL and that he was advised to contact the appropriate national authorities responsible for such social security insurance matters. This contract was extended several times without any modification, except for the amount of the stipend and the duration. Having reached the maximum of five years' service under a fellowship contract, the complainant left EMBL on 31 August 2012.

On 16 December 2014, the complainant wrote an email to the Director-General in which he explained that he was facing financial difficulties because he had been unemployed for the previous two years and was unable to draw unemployment benefits. He stated that, in his opinion, EMBL had breached the terms of Article 22 of the Headquarters Agreement between the Government of the Federal Republic of Germany and EMBL by failing to provide him with adequate social security benefits.

Following an exchange of correspondence, EMBL informed the complainant on 27 April 2015 that, although since 1 January 2014 fellows had been included in the EMBL unemployment system, it was not possible to apply this benefit retroactively to him. That is the impugned decision.

The complainant filed his complaint with the Tribunal on 10 July 2015, asking it to award him material and moral damages.

EMBL invites the Tribunal to dismiss the complaint as irreceivable on the grounds that the complainant has not exhausted the internal means of redress available to serving and former members of personnel. Subsidiarily, it argues that the complaint is unfounded on the merits. It asks the Tribunal to order the complainant to pay “a reasonable and equitable amount”, but not less than 3,000 euros, to cover its legal expenses.

CONSIDERATIONS

1. The complainant alleges that EMBL’s failure to observe the terms of Article 22 of the Headquarters Agreement caused him financial injury. He raised this for the first time in his 16 December 2014 email to the Director-General. On 27 April 2015, the complainant was informed that the conditions and benefits of employment had been correctly applied to him in September 2012 and it was not possible to retroactively apply to him the unemployment insurance benefit that had come into force on 1 January 2014. The complainant filed a complaint from this decision directly with the Tribunal. Although it is arguable that the complainant’s allegation was not raised in a timely manner, as will become evident, a consideration of this question is unnecessary.

2. Pursuant to Article VII, paragraph 1, of the Tribunal's Statute, a complaint is not receivable unless "the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations". The complainant does not dispute that he did not bring an internal appeal against the impugned decision. However, the complainant submits that the words "open to him" in Article VII, paragraph 1, mean that "the procedure must be available to be followed and that the procedure must apply to the specific nature of [his] complaint". He adds that "[i]n the case of [his] complaint the EMBL internal procedure is not applicable, since the complaint is regarding a contractual rather than a disciplinary matter" and "[n]o express decision has been made by the Director-General that can be appealed against using the internal appeal procedure". Moreover, he asserts that the purpose of the internal appeal procedure is not directed at contractual matters but "is to contest the correctness of (disciplinary) decisions taken by EMBL towards staff members during service". The complainant's argument is rejected.

3. Under EMBL's Staff Rules and Regulations, there are two distinct mechanisms. The first provides for an internal appeal against any decision by the Director-General or those having delegated authority that may be accessed by serving and former members of the personnel in relation to matters of personal concern. In this regard, Staff Rule 6 1.01 states that "[i]n respect of matters that concern [her or] 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 has delegated authority". The internal appeal process is detailed in Chapter 6 of the EMBL Staff Regulations. Additionally, Staff Regulation R 6 1.11 provides that an appeal against the Director-General's final decision may be made to the Tribunal.

4. The second is a mechanism to deal with matters of a disciplinary nature defined under Staff Rule 2.5.01 as “unsatisfactory service or conduct which is materially or morally damaging to the Laboratory, negligence, misconduct or neglect of duties and obligations towards the Laboratory” for which the Director-General may impose disciplinary measures. Section 2.5 of the Staff Regulations sets out a detailed process to deal specifically with disciplinary matters, including hearings before the Joint Advisory Disciplinary Board.

5. It is abundantly clear that the subject matter of the complaint is not disciplinary in nature and comes within the purview of the internal appeal process. In Judgment 3388, consideration 2, the Tribunal reiterated the settled case law that “[a]n official may only appeal directly to the Tribunal against a final administrative decision, which he or she seeks to impugn, when all the internal means of redress within an organization have been exhausted”. As the complainant has not exhausted EMBL’s internal means of redress, the complaint is irreceivable and will be dismissed.

6. While it appears that the complainant was less than forthcoming in some instances in his pleadings, in the circumstances, the EMBL’s request for costs will not be granted.

DECISION

For the above reasons,

The complaint is dismissed as is the EMBL’s counterclaim.

In witness of this judgment, adopted on 10 May 2017, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

DRAŽEN PETROVIĆ