

FORTY-SEVENTH ORDINARY SESSION

***In re* GALE**

Judgment No. 474

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Molecular Biology Laboratory (EMBL) by Mr. Desmond Stanley Gale on 14 March 1981, the EMBL's reply of 15 May, the complainant's rejoinder of 12 June and the EMBL's surrejoinder of 20 July 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, EMBL Staff Rules 2.1.01, 6.1.02, 6.1.03 and 6.1.04 and EMBL Staff Regulations R.2.1.03, R.6.1.03 and R.6.1.04;

Considering the provisional order made on 6 July 1981 by the President of the Tribunal on the complainant's application for interim relief;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a British subject, joined the staff of the Laboratory in Heidelberg on 1 July 1976 on a three-year contract as head of Personnel. By common consent his contract was extended to 30 June 1981. A notice prospecting for the post of head of Personnel was circulated to British Government departments in May 1980. By a minute of 30 July 1980 the complainant informed the Director-General that he wished to stay with the Laboratory until June or even September 1982. Interviews with candidates for the post took place in October and November 1980. On 14 November the complainant told the Director-General orally and in a manuscript note that in his view the matter of replacing him had been mishandled from the start and that he was willing to stay longer than one year. On 18 December he returned from a mission to Hamburg to find a letter from the Director-General dated 17 December officially informing him that a candidate interviewed in Heidelberg on 14 November had accepted the post and offering him an extension of his appointment to 31 August 1981. On 16 January 1981 he appealed to the Director-General against the decision to extend his appointment by only two months. By a letter of 3 February the Director-General informed him that his appeal was irreceivable under Staff Rule 6.1.02, and he accordingly filed his complaint with the Tribunal.

B. The complainant contends that in taking the decision of 17 December 1980, which he impugns, the Director-General was acting without authority, was not safeguarding the organisation's interests, overlooked essential facts or drew clearly mistaken conclusions from the facts, and committed an abuse of authority. The appointment of his successor to the post of head of Personnel was in breach of Staff Rule 2.1.01, which requires that the Council of the EMBL should give its approval before the Director-General appoints or dismisses senior staff, defined in the rule to comprise division leaders and persons of equivalent authority. There was also a breach of Staff Regulation R.2.1.03, since the Selection Board which examined candidates for the post was not constituted as required by that regulation. The decision to extend his appointment by only two months was unfair since the head of General Services was given an appointment of indefinite duration, and nothing was done to replace the head of Finance, whose appointment expired before the complainant's. The Director-General never found fault with his performance, despite the increase in his workload since the departure of the Director of Administration: indeed he was promoted in 1979. The unfair and arbitrary treatment he has received has done injury to his dignity and reputation. He accordingly invites the Tribunal to quash the decision of 17 December 1980; to order the Director-General to offer him a new contract of at least one year's duration from 1 July 1981 in his grade, step and capacity; alternatively, to order the EMBL to pay him compensation equivalent to one year's salary and allowances corresponding to his step and grade; and to award him costs.

C. In its reply the Laboratory observes that it was at the complainant's own request that the date of expiry of his contract was set at 30 June 1981. It was only two months after the circulation of the notice of vacancy that the

complainant suggested to the Director-General extending his own appointment instead of recruiting someone else. The Director-General entered into no commitment towards the complainant and was therefore wholly free to decide as he saw fit. Nor is he required to justify decisions he takes on the extension of an appointment: the complainant's appeal against non-renewal was thus irreceivable under Staff Rule 6.1.02. The complainant produces no evidence to bear out his allegation that the Director-General's decision was unfair and arbitrary. The Council was not required to approve the termination of the complainant's appointment, since the post is not that of a senior staff member: the head of Personnel is the chief officer of an administrative section, not of a division, and only the Director of Administration is to be considered equivalent to a division leader within the meaning of Staff Rule 2.1.01. No administrative appointment save that of the Director of Administration has ever been approved by the Council. It is also mistaken to contend that the Council's approval was required for the appointment of the complainant's successor. As for the complainant's objections to the composition of the Selection Board, the matter is irrelevant to the decision on the extension of his appointment. Nor is there any substance to the allegation of inequality of treatment: the Director-General is not bound to extend or make indefinite an appointment because he has done so in other cases.

D. In his rejoinder the complainant elaborates his contention that the Director-General committed an abuse of authority. Despite objections from the complainant to the appointment of a successor, which the Director-General never even acknowledged or discussed with him, the Director-General proceeded to interview candidates for the post and to offer it to someone else. He did not even inform the Chairman of the Council of his intentions with regard to the complainant, despite an undertaking to do so. The EMBL is mistaken in its view that the Director-General is to be the sole arbiter in the matter of the extension of an appointment of a senior member of the Administration. The Director-General failed to keep his promise to consider the complainant's wishes and to ask the candidates for his post whether they could start their appointment in 1982 rather than in 1981. The Director-General has failed to explain why his decision was in the EMBL's interests, and the complainant believes that he has amply explained why it was not. The Director-General had a clear responsibility to give fair and equal treatment to the senior members of his Administration. The Director of Administration having left the organisation in 1978 and never been replaced, the head of Personnel and the head of Finance were in practice elevated to the same rank as the Director and were exercising responsibilities at the same level, and the termination of the complainant's appointment therefore did require the Council's approval.

E. In its surrejoinder the EMBL argues that the complaint is not receivable since under Staff Rule 6.1.02 no appeal will lie against a decision by the Director-General on the extension or duration of an appointment. As to the merits, it again points out that Staff Rule 2.1.01 does not apply to the head of an administrative section. True, his workload was increased because there was no Director of Administration, and that was recognised in his upgrading. But he did not hold any higher authority, since any decision belonging to the Director of Administration was transferred to the Director-General. Under Staff Rule 6.1.02 no reasons are given for non-renewal or the duration of an appointment: the reasons cannot be communicated, formally or informally, to the staff member. They may be, and normally are, communicated to the head of Personnel, but in this instance the complainant should be treated like any other staff member, and is not entitled to notification of the reasons. The composition of the Selection Board was justified in the circumstances, there being no Director of Administration, and the head of Personnel being himself a candidate. The appointment of the complainant's successor is valid and, in any event, irrelevant to the decision impugned. As for his allegations of unfair treatment, no staff member is entitled to have his own appointment extended because the appointments of others have been. Nor did the Director-General give the complainant any undertaking to extend his appointment. The EMBL accordingly again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

Receivability

1. The complainant is challenging the Director-General's decision not to extend his appointment by a year but to offer him merely two months. Citing Staff Rule 6.1.02, which precludes appeals against non-renewal of appointment, the defendant organisation contends that the complaint is irreceivable. That, however, is to misconstrue the provision.

The provision, which forms part of the Staff Rules, does have force within the organisation in that it precludes bringing certain appeals under Staff Rule 6.1.03, which provides for appeals to the Director-General and invites him to consult a joint committee. But Staff Rule 6.1.02 is not binding on the Tribunal, whose jurisdiction has been

unconditionally recognised by the organisation and which will itself determine whether a complaint is receivable. That there is such a restriction on the effect of Staff Rule 6.1.02 is borne out by Staff Rule 6.1.04, which expressly allows appeals to the Tribunal against a decision by the Director-General.

Review of the impugned decision

2. In so far as the Director-General decided not to extend the complainant's appointment by one year he exercised his discretion. But that does not mean that his decision is exempt from review. The Tribunal has consistently held that such a decision may be quashed for breach of a rule of form or of procedure, for a mistake of fact or of law, for failure to take account of essential facts, for misuse of authority, or if clearly mistaken conclusions were drawn from the facts.

The Tribunal will consider whether the impugned decision in this case is tainted with any flaw which comes within the scope of review by the Tribunal.

The validity of the impugned decision

3. The Laboratory's submissions suggest that the Director-General regards himself as wholly free to decide whether or not to extend a fixed-term appointment: he believes that he need not state the grounds for his decision either to the staff member or to the Tribunal.

This view rests on an error of law. As is stated in 2 above, a decision on the extension of a fixed-term appointment is in fact subject to review by the Tribunal. Although the Tribunal has only a limited power of review, it will so exercise it that the Director-General does not enjoy the unfettered authority he asserts.

In assuming his decisions to be unchallengeable the Director-General went beyond the limits of his discretionary authority, and this error of law alone affords grounds for allowing the complaint, at least in principle.

4. Furthermore, there are no objective grounds for the decision not to extend the complainant's appointment by one year.

First, his behaviour and work did not prompt such criticism as would warrant the impugned decision. Far from reproaching him for failing in his duties, the Laboratory gave him promotion in 1979, thereby acknowledging his fitness for them. Although he says that the report about him sent to the British Government in 1980 was not so favourable as the one sent in 1978, there is no reason to suppose that there were any shortcomings which precluded extending his appointment. As for the minute which the Director-General wrote to him objecting to his having been described as a member of the Administration, it neither made nor implied any serious rebuke.

Secondly, the Laboratory does not contend that keeping the complainant on its staff would be against its own interests. It does not seek to defend the impugned decision by stating, for example, that it wanted to carry out structural reform or make savings.

The Director-General accordingly drew a clearly mistaken conclusion from the facts in refusing the extension, and that is a second reason for allowing the complaint, at least in part.

5. The Tribunal need not consider the complainant's further pleas in favour of allowing his complaint. In particular it need not determine whether there was any obligation to submit to the Council for approval the decision on the extension of his appointment.

Moreover, the written evidence which the complainant seeks to have produced is immaterial to the Tribunal's decision.

The Tribunal's decision

6. The complainant claims: principally, the offer of a new appointment of at least one year from 1 July 1981: subsidiarily, payment of compensation equivalent to one year's salary and allowances.

His principal claim must be rejected because it is inadvisable. After the present proceedings, to keep him on the staff might create ill feeling which would be both to his own and to the Laboratory's detriment. Moreover, his

successor has already been appointed and took up duty on 1 September 1981.

His subsidiary claim is in principle well-founded, however, because of the flaws which taint the decision he is challenging. Since, however, he was given a two-month extension of appointment and can probably return to the British civil service, from which he was seconded, the compensation to be paid by the Laboratory should not exceed 10,000 Deutschmarks.

7. The complainant is awarded 1,000 Deutschmarks in costs.

DECISION:

For the above reasons,

1. The Laboratory shall pay the complainant compensation amounting to 10,000 Deutschmarks, plus 1,000 Deutschmarks in costs.

2. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner