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

EIGHTY-SEVENTH SESSION

_In re_ Argos (No. 3), Eritja (Nos. 2 and 3), Flösser (Nos. 3 and 4), Glöckner (Nos. 3 and 4) and Olivo (Nos. 3 and 4) (Application for execution)

Judgment 1887

THE ADMINISTRATIVE TRIBUNAL,

Considering the second application for the execution of Judgment 1682 filed by Mr Patrick Argos, Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo on 31 July 1998 and corrected on 20 August, the reply of 29 October 1998 from the European Molecular Biology Laboratory (EMBL), the complainants' rejoinder of 22 January 1999 and the Laboratory's surrejoinder of 19 April 1999;

Considering the third application for the execution of Judgment 1682 filed by Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo on 11 September 1998, the reply of 29 October 1998 from the EMBL, the complainants' rejoinder of 22 January 1999 and the Laboratory's surrejoinder of 19 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 6 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The Tribunal, in Judgment 1682 of 29 January 1998 decided:

> "1. The decisions of 11 September 1995 by the Director-General of EMBL are quashed in so far as they refused to review the complainants' entitlements to adjustments in pay for 1995.
>
> 2. The complainants are sent back so that the Laboratory may take new decisions as set out in 6, 8 and 9 above.
>
> ... "

At its session of 2 July 1998, the Council of EMBL decided not to alter the amount previously fixed for adjustments in pay for 1995, in application of Judgment 1682.

2. Certain EMBL staff members contested this decision, considering that it was not in conformity with Judgment 1682.

(a) Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo each submitted an internal appeal to the Director-General, asking him to quash the first application to them of this decision, which they held was contrary to Judgment 1682.

By decisions of 31 July 1998 the Director-General rejected the appeal statements as irreceivable for non-respect of the internal procedure.

On 11 September 1998 the same staff members appealed to the Tribunal against that decision. While they submitted claims on the merits ("quash the impugned decision, that is, rule that the EMBL should give full application to points 1 and 2 of the decision of Judgment 1682, in spite of the Council's resolution of 2 July 1998 ..."), at no point in their brief attached to the complaint do they state why the objection to receivability should be unlawful.

This they do in their rejoinder, in particular by deploring the Director-General's over formal approach as displayed by his opinion that the appeal statements were unsubstantiated, while he was perfectly aware of the complainants' reasoning.

(b) On 31 July 1998, Mr Patrick Argos, Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo had come straight to the Tribunal. They challenged the application to them of the Council's decision of 2 July 1998.

3. The two groups of complaints are brought by the same complainants, except that Mr Argos challenges only the individual decision in his case (under 2(b)) without appealing to the Director-General. The same initial decision is contested by all complainants. The problems of receivability are also similar.

The cases can therefore be joined.

Formal flaw in drawing up complaints

4. The Laboratory states that the two groups of complaints are invalidated because of a formal flaw. One group of complainants does not specify the challenged decision in the third part of the Registry complaint form, and the other group "does not challenge a new final decision" under the terms of Article VII of the Tribunal's Statute.

It is true that the Argos (No. 3) and others complaints are drafted as applications for execution and part 3 is not filled in, while the pleadings in the fourth part call for a ruling obliging the EMBL to execute Judgment 1682, "in spite of the Resolution of the Council of 2 July 1998". In the Eritja (No. 3) and others complaints, the third part contains the date of the text of the challenged decision (31 July 1998), while in part four the complainants ask the Tribunal to "quash the challenged decision" and rule that the Laboratory shall execute Judgment 1682 "in spite of the Resolution of the Council of 2 July 1998".

According to Article 6(1)(a) of the Rules of the Tribunal, the complainant must fill up in English or French the complaint form as prescribed in the Schedule to its Rules; the Schedule lists the five following parts of the complaint form headed: (1) The complainant, (2) The defendant organisation, (3) The challenged decision, (4) The pleadings (relief claimed, list of documents, etc.) and (5) Special applications.

If the complaint does not meet the requirements of the Tribunal's Rules, the Registrar shall in accordance with Article 6(2) of the Rules call upon the complainant to correct the deficiency within thirty days; so the flaw can be corrected.

There is no reason, at this stage, to examine particular flaws in an application for execution, where, following a judgment by the Tribunal, the organisation takes a decision which the complainant holds to be unfavourable. In any event, the plea is without merit: only if the complainant had failed to respond to requests to correct the alleged flaw would the complaints have been deemed invalid; which was not the case.

It should be noted, however, that the Registrar was right in considering it unnecessary for the complainants to correct their complaint forms, since the contested decision was sufficiently clearly indicated for the form to fulfil its purpose.

Receivability of the complaints
lodged directly with the Tribunal

5. All the complainants submitted their applications directly to the Tribunal in respect of the new decisions regarding adjustment of pay for 1995 taken by the Laboratory after the delivery of Judgment 1682 without having prior recourse to internal appeal procedures.

The Laboratory argues that the complaints are irreceivable under Article VII(1) of the Statute of the Tribunal since the complainants have not exhausted the internal means of redress.

The complainants assert that this is not necessary before submitting an application for execution.

The Tribunal's case law has it that exhausting all internal remedies is not in fact necessary in cases which involve determining whether the authority responsible for executing a judgment has respected its terms. It is however in principle essential when a case is sent back to that authority to resume or continue the procedure and when the judgment leaves it a degree of discretion. However, with a view to avoiding a sheer pedantic approach, the Tribunal will waive the requirement for exhaustion of internal remedies where no legal purpose is served, for exemple where the case is fit to be judged and the parties have submitted their pleas (see Judgment 1771 *in re* de Riemaeker No. 4, and the case law cited therein).

In the present case the competent authority certainly had a degree of discretion; however, the applications are directly linked to Judgment 1682 and to whether the new decision is in line with that Judgment; and the parties have submitted their pleadings. Moreover, in the procedure prior to delivery of that judgment the Laboratory had allowed the complainants to dispense with an internal appeal. As such, obliging the complainants to seek first internal redress and thus lengthen the procedure, would be a mere formality. Therefore, the complaints are receivable.

6. Since all the complaints are receivable, there is no need to rule on the plea of irreceivability based on the complainants' failure to exhaust all internal remedies.

On the merits

7. The complainants contend that the Laboratory has not executed Judgment 1682 because it has merely confirmed its previous decision regarding adjustment of salaries for 1995 for purely budgetary reasons which, they say, are contrary to the considerations of that judgment. They assert that they should be granted the full salary adjustment decided upon by the Coordinated Organizations.

The EMBL admits implicitly that in the challenged decision it did not grant the entire adjustment, but only the adjustment amended by the forty-fifth report, for 1995, excluding the adjustment stipulated by the fortieth report. The Laboratory points out that if the Tribunal had wanted it to make the full salary adjustments recommended in the fortieth and forty-fifth reports of the Coordinated Organizations, "the judgment would have given unequivocal instructions to this end" but it did not do so. Since the Coordinated Organizations' adjustments were to be considered as a "guide", "adequate reasons" could justify "departing from the decisions of those Organizations". The Laboratory also asserts that the Council's Resolution of 2 July 1998 only applies the adjustment provided for in the forty-fifth report of the Coordinated Organizations, and not the fortieth report, since account had already been taken of the latter adjustment when the 1994 salaries were fixed. It adds that:

> "all retroactive adjustment of salaries for 1995, 1996 and 1997 would affect both the calculation and everything depending on it, as well as parity between the various antennae of the service ... the Council had subsequently been able to accept and apply the Coordinated Organizations' salary adjustments for 1998 in their entirety".

8. At the stage of execution of a judgment by the parties and also when making an application for execution, the judgment carries the authority of *res judicata*, and must be executed as ruled. It may not be called into question. It will need interpreting only if its ruling is deficient or not sufficiently clear.

9. Judgment 1682 is in fact based on the failure to take account of all the decisions of the Coordinated Organizations in setting pay for 1995 (under 8 *in fine*) and in particular on the fact that "EMBL refused the increases recommended in the 40th [report]" (under 7 *in fine*).

In principle, those facts could not be called into question at the time the judgment was executed.

In any event, the Laboratory does not contend that those facts were incorrect. Although it asserts that the fortieth report had already been taken into account when adjusting pay for 1994, it

appears clearly from the working documents on which the Council based its decisions that, among the various possibilities considered, non-application of the fortieth report was the option that was retained. The defendant does not claim that the level of remuneration decided upon by the Coordinated Organizations was reached for 1995; on the contrary, it puts forward arguments to justify departure from those recommendations. At the same time it said that full application of the Organizations' recommendations would have been costly, but that they had been fully applied when fixing pay for 1998. The working documents mentioned above indeed show what would have been the cost for the Laboratory of a full application, while implementation of the forty-fifth report alone did not involve any new charge.

According to facts given in Judgment 1682, the 1995 remuneration did not take account of the decisions made by the Coordinated Organizations. The same is apparent in the Council's new Resolution of 2 July 1998.

10. Judgment 1682 notes that Article R 4 1.01 of the Regulations ensures that remuneration shall be reviewed in accordance with the decisions of the Coordinated Organizations; the Laboratory must have "proper reasons" for departing from this Regulation; it must establish the existence of such reasons (in this connection see Judgment 1807, *in re* Storm). As to what may be considered as "proper reasons", the Tribunal notes in Judgment 1682 under 7, regarding previous adjustments, that "the Laboratory often let budgetary policy prevail. However understandable that may be, such policy must not supplant the rule of law"; the Judgment therefore shows that budgetary policy alone does not constitute a sufficient reason for not applying the adjustments decided upon by the Coordinated Organizations'.

Judgments of the Tribunal – of which several were cited by the Laboratory – regarding taking account of economic difficulties during salary adjustment, do not apply in cases where the staff have obtained a statutory guarantee that the adjustments will be made in line with the Coordinated Organizations' system; such a rule must be applied, as long as it has been neither revoked nor amended.

The purpose of the salary adjustment provided for in Article R 4 1.01 is to maintain purchasing power. In cases where a previous adjustment was not high enough to maintain the level yielded by the methodology of the Coordinated Organizations, the staff can claim the shortfall when a new adjustment is made. In this connection, the Tribunal considered under 3 in Judgment 1682, that while the complainants could not seek a retroactive salary increase for a period for which they had not challenged their pay slips, they could do so for the material period "in keeping with the principles they rely on". The principle was not challenged by the Laboratory, which believed it essential to examine the adjustments called for in the fortieth and forty-fifth reports, but decided that in view of the circumstances only the adjustments in the forty-fifth report should be retained. In this way the Tribunal also noted that "EMBL refused the increases recommended in the 40th [report]" (under 7 *in fine*) and that, in setting pay for 1995, the Laboratory had not taken account of "the decisions of the Coordinated Organizations" (under 8 *in fine*). The Tribunal therefore invited the EMBL to take the decisions set out under 6, 8 and 9 of its judgment.

11. In the present case the challenged decision is based on financial considerations: on the one hand the Laboratory's budgetary limitations, and on the other hand its desire to finance staff increments in 1995. It also needed to meet the expenses arising from freezing posts in 1994 and carry out investment needed to further the Laboratory's research, without putting jobs in jeopardy.

In the terms of Judgment 1682 and the precedent cited therein, especially Judgment 1419 (*in re* Meylan and others) under 27 to 30, financial considerations, no matter how understandable they may be, do not constitute a valid reason for not applying the Laboratory's commitment to adjust salaries according to the Coordinated Organizations' system. The case might be different were it not for Article R 4 1.01, which the Laboratory itself drafted and which it should respect, according to the rule of *patere legem*. The quasi-contractual nature of this clause obliges the Laboratory to give it priority consideration when making budgetary choices.

The Laboratory also points out that remuneration for 1998 was set in conformity with the decisions of the Coordinated Organizations. However, this does not compensate for insufficient pay for 1995.

12. The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded. The imposition of a penalty is not justified in the present case, since there is no reason to doubt execution. Interest is granted at the rate fixed under 9 of Judgment 1682, which provides sufficient compensation.

Since the applications are allowed, the complainants are awarded costs.

DECISION

For the above reasons,

1. The challenged decisions are set aside.
2. The cases are sent back to the EMBL so that it may take the decisions set out in 12 above.
3. The Laboratory shall pay the complainants a total of 20,000 French francs in costs.

4. The complainants' other claims are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET