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

EIGHTY-EIGHTH SESSION

In re Dauvergne, Gemünd, Harper, Lampinen (No. 2), Schechinger (No. 2), Stösser and van der Zandt

Judgment 1913

The Administrative Tribunal,

Considering the complaints filed by Mr François Dauvergne, Mrs Christine Gemünd, Mr Robert Harper, Mrs Mervi Johanna Lampinen - her second - Mr Erich Schechinger - his second - Mr Günter Stösser and Mr Hans van der Zandt against the European Molecular Biology Laboratory (EMBL) on 11 June 1998 and corrected on 1 September, the EMBL's single reply of 8 December 1998, the complainants' rejoinder of 10 March 1999 and the Laboratory's surrejoinder of 21 April 1999;

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. Some facts relevant to this dispute are to be found under A in Judgment 1798 (*in re* Ashurst and others) delivered on 28 January 1999.

The Coordinating Committee on Remuneration of the Coordinated Organizations (1) recommended a salary adjustment for 1997 of 1.6 per cent in Germany, 2.8 per cent in France, 3.5 per cent in the United Kingdom and 3.3 per cent in Italy. On 12 December 1997 the EMBL Council, in accordance with Article R 4 1.01 and Annex R.A.1 of the Staff Regulations as amended on 4 July 1996, decided to adjust staff salaries. The recommendations of the Coordinating Committee and the adjustments decided on by the EMBL Council are set out in the following table:

	Coordinated Organizations	EMBL	
		Grades 2 to 8	Grades 9 to 14
Germany	1.6 %	1.5 %	2.3 %
France	2.8 %	0.0 %	3.2 %
United Kingdom	3.5 %	2.9 %	0.0 %
Italy	3.3 %	4.0 %	7.5 %

The complainants are employees of the Laboratory. Owing to their grades and duty stations, their salary adjustments were lower than the adjustments recommended by the Coordinated Organizations. At various dates between 13 and 19 January 1998 they filed identical appeals with the Director-General. They asked for the quashing of what they considered to be the first individual decisions applying the Council's general decision of 12 December 1997 - i.e. the pay slips for July to December 1997, the latter of which was notified to them on 17 December. They also asked, in the event of a denial of their request, to be allowed to appeal directly to the Tribunal, without exhausting the internal means of appeal.

By letters of 13 and 17 March 1998 - the impugned decisions - the Director-General informed the complainants that in his view their appeals did not comply with the requirements of Article R 6 1.04 of the Staff Regulations since they failed to state all the grounds on which they were based and were not accompanied by the requisite documentary evidence.

B. The complainants submit that the amendment to Article R 4 1.01 of the Staff Regulations was adopted in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted.

By taking a system of reference which is not binding the Council is "discarding the whole idea of adjustment". It has also repealed the ban on downward adjustments. Besides, the method of adjustment is arbitrary and in breach of "the most elementary good faith" and general principles of international civil service law, such as legal protection, equality of treatment and Noblemaire.

They plead breach of their acquired rights in that the impugned decision precludes adjustment of salary to the cost of living and infringes what they call "their right to maintain [their] salary". They add that this right has been "breached by the Organisation since 1992" and "has in all likelihood exceeded" the threshold beyond which the Tribunal deems that this amounts to an impairment of acquired rights.

They seek the quashing of the Director-General's decisions of 13 and 17 March 1998 and costs.

C. In its reply the Laboratory submits that, in their appeals, the complainants purposely disregarded the requirements of Section 6.1 of the Staff Regulations and that their complaints are therefore irreceivable. It asserts that "any retroactive change in the pay adjustment for 1997" and previous years "would annul both the Council's approval of the [present] terms and conditions of employment" of Laboratory staff and "the standards of reference and purchasing power parities which have now been established" and, hence, the basis for accepting the recommendations of the Coordinated Organizations for pay adjustments in 1998 and 1999.

In subsidiary pleas on the merits the Laboratory refers to its replies in the cases ruled on in Judgment 1798, and Judgment 1912 (*in re* Berthet No. 2 and others) also ruled on this day. It submits that the amendment adopted by the Council on 4 July 1996 made no change of substance in the text put to the Standing Advisory Committee but simply deleted repetitions. Therefore, there was no need to consult the Committee again. Even the chairman of the Staff Association himself saw no point in its meeting again.

According to the Laboratory, the Tribunal's case law states that an organisation must abide by its own rules but it is free to set those rules and, if necessary, amend them. Accordingly, the Laboratory was not bound to take the system of the Coordinated Organizations as a binding standard of reference.

The purpose of the adjustments decided on in December 1997 was to ensure purchasing power parities between the different duty stations and they were not in breach of good faith. Besides, "some flexibility is needed to take into account changes in the financial and budgetary situation of the Organisation". The ban on downward adjustments, imposed prior to July 1996, was a temporary measure.

As for the Noblemaire principle, the Laboratory states that "member States appear not to acknowledge any obligation to pay the highest salary scales to international civil servants".

It denies breach of the principle of equal treatment and of the complainants' acquired rights - adjustment of salary to the cost of living is not an acquired right.

Unlike the Coordinated Organizations, the Laboratory employs most of its staff on the basis of fixed-term appointments and grants them guaranteed annual pay increments of 2 to 3 per cent "over and above any other pay adjustment". Lastly, in Judgment 1682 (*in re* Argos and others) the Tribunal upheld the Laboratory's right to change to another system.

D. In their rejoinder the complainants maintain that their appeals did set out all the grounds they were based on.

On the merits, they refer to the rejoinders of the complainants in the cases ruled on in Judgment 1912. Any amendment to be adopted by the Council 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 enough to replace this consultation.

In their view, the purpose of the amendment "was not just to stop rises in pay" but to reduce it by "applying negative indices".

They add that the adjustments granted by the Laboratory, set out in the table under A, show that the logic for determining pay adjustments was based on grade rather than on duty station, yet changes in a country's cost of living affect all staff regardless of their grade. By treating some grades better than others the Laboratory has broken the rules of predictability, objectivity and transparency which an organisation must obey. The Laboratory cannot argue that the complaints must fail because the retroactive nature of the adjustments would disrupt the balance of its finances now and for years to come. To accept such an argument would amount to stripping the Tribunal's judgments of all effect.

They contend that the Laboratory is confusing the notions of pay adjustment and pay increase. According to their interpretation, the one aims "to maintain purchasing power" and the other "to increase it". The decision "not to apply a downward adjustment cannot mask the injury sustained".

E. In its surrejoinder the Laboratory maintains its objections to receivability. It denies any discrimination based on grade and points out that the decision on pay adjustment is a complex one and does not only involve cost of living increases. Lastly, it is "perfectly legitimate" for the Laboratory to mention the consequences of retroactive adjustment on salary structure and the financial situation of the Organisation.

CONSIDERATIONS

1. The complainants, all employees of the European Molecular Biology Laboratory (EMBL), are challenging their pay slips for July to December 1997 in that they have been awarded a pay adjustment lower than that which was recommended by the Coordinated Organizations.

Since the complaints, submitted on the same day, raise the same issues and develop an identical argument, the Tribunal joins them.

2. On 4 July 1996, the Council of the Laboratory, modifying the provisions of the Staff Regulations which required that it use the decisions of the Coordinated Organizations as a "guide" for annual pay adjustments to staff salaries, adopted a new version of Article R 4 1.01 of the Staff Regulations, which reads as follows:

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

As for Annex R.A.1, it now reads in part:

"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 Organisations 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 Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations 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 Organisation 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 Organisations.

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

3. On 12 December 1997, the Council decided, on the basis of the amended texts, to award to staff:

- in Germany: an adjustment of 1.5 per cent for grades 2 to 8 and 2.3 per cent for grades 9 to 14;

- in France: no adjustment for grades 2 to 8 and an adjustment of 3.2 per cent for grades 9 to 14;

- in the United Kingdom: an adjustment of 2.9 per cent for grades 2 to 8 and no adjustment for grades 9 to 14;

- in Italy, an adjustment of 4.0 per cent for grades 2 to 8 and 7.5 per cent for grades 9 to 14.

4. The complainants, taking the view that the salary adjustment was lower than what they were legally due, i.e. what was adopted by the Coordinated Organizations, addressed to the Director-General appeals against the individual decision applying to each of them the Council's general decision of 12 December 1997, as reflected in their pay slips for July to December 1997, and asked that, if their appeals were not accepted, they should be given leave to refer the matter directly to the Tribunal.

5. The Director-General, considering the appeals to be invalid because, in his view, they had not been introduced in accordance with the applicable rules, rejected the complainants' requests.

6. The complainants appealed directly to the Tribunal to request the quashing of the decision to award them a salary adjustment lower than that which they considered to be legally due to them and the drawing of all the appropriate conclusions therefrom. They argue in their complaints that first the new provisions of Article R 4 1.01 of the Staff Regulations were adopted in breach of the procedure provided for in Article R 7 1.01 of the aforementioned Regulations, and that, secondly, the decision under challenge was based on an unlawful system and that it violates their acquired rights.

On receivability

7. The Laboratory maintains that the complaints are irreceivable because they are not in keeping with Article VII of the Statute of the Tribunal. It states that the complainants had been clearly informed that the Director-General "was not prepared to accept internal appeals that did not comply with the basic requirements laid down in the Staff Regulations". Since the appeals submitted had not, according to the Laboratory, respected the Staff Regulations, they were deemed to be invalid. Consequently, according to the defendant organisation, the complaints filed directly with the Tribunal should be declared irreceivable for failure to exhaust internal remedies.

8. Article R 6 1.04 of the Staff Regulations, the requirements of which would not have been satisfied by the complainants' appeals, provides that internal appeals must state all grounds of appeal and be accompanied by all documentary evidence.

The Tribunal considers that this argument is not acceptable. The appeals submitted by the complainants to the Director-General clearly stated, even if succinctly, the pleas they pressed and the documentary evidence was well-known to the Laboratory since it consisted of general decisions of the organisation, individual decisions, or official correspondence.

As the complainants have fulfilled the requirements of Article R 6 1.04 and thus exhausted all internal remedies the Tribunal does not conclude that their complaints are irreceivable.

On the breach of the procedure provided for in Article R 7 1.01

9. The Laboratory is accused of having adopted the amendment to Article R 4 1.01 of the Staff Regulations in breach of the procedure provided for in Article R 7 1.01 which states that:

"The Standing Advisory Committee shall advise the Director-General on general questions concerning the personnel, without prejudice to relations between individual members of the personnel and the Director-General."

The complainants maintain that the amended text of Article R 4 1.01 adopted by the Council was not

submitted beforehand to the Standing Advisory Committee. It should be pointed out, first of all, that Article R 7 1.01, quoted above, does not oblige the Director-General to consult the Standing Advisory Committee at every stage of the preparation of a proposed amendment to a provision relating to general questions concerning the personnel; nor does it expressly provide that the Committee has to be consulted again if only stylistic changes have been made to a text after the Committee has examined it. In the present case, it is clear from the files that the Director-General did consult the Standing Advisory Committee on the proposed modification of the decision of 9 December 1981 concerning the adjustment of staff members' salaries. This clearly emerges from the statement by the Administrative Director to the Finance Committee, as quoted, and not contested, by the complainants:

"The Administration now feels that the text put to [Standing Advisory Committee] could be simplified. Rather than consult the full [Committee] again the simplified wording was referred to the Staff Association Chairman. He had no comment to make on the proposed text other than to repeat the Staff Association's opposition to the Council's Resolution."

Since the amended text submitted for the adoption of the Council was only a simplified version, without modification in substance, of a text already submitted to the Standing Advisory Committee, the Tribunal holds that there has been no violation of the procedure provided for by Article R 7 1.01 and is of the opinion that the plea is without merit.

On the unlawfulness of the system under which the challenged decision was adopted

10. The complainants assert that the system adopted for the adjustment of their salary is unlawful in that it is contrary to the general principles of law governing the matter. In their view, it is a system which leaves the door open to arbitrariness since it does not respect the obligation of an international organisation to bring its conduct and that of its staff members into line with the rules it has itself established and the general principles of law, as noted in the Tribunal's case law. They recall that the case law in the matter of salary adjustment relies on a number of principles which international organisations must respect when they establish a cost of living adjustment system; in particular, they must respect the principle of legal protection.

11. As indicated in Judgment 1821 (*in re* Allaert and Warmels No. 3):

"The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:

(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.

(b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.

(c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.

(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."

12. In their plea on the merits, the complainants assert that the Laboratory breached the general principles of international civil service law and the Tribunal's case law, both referred to above, and did not respect its own internal rules.

13. The complainants first of all maintain that, in revising the Staff Regulations, the organisation chose the most arbitrary position, whereby it considered that it was free to adjust or not adjust the remuneration by criteria that depended on its own evaluation of its own budget situation. For them, this means that the organisation will continue to use a reference that only theoretically derives from the decisions of the Coordinated Organizations and will downwardly adjust staff remuneration for reasons of budgetary considerations. This attitude, in their view, is a breach of the most elementary good faith as well as the principle of legal protection.

14. The Tribunal notes that the analysis of the new provisions, presented by the complainants, does not conform to reality. In fact, the revised provisions of the Staff Regulations establish that the Council must use the index of the Coordinated Organizations as an "orientation" and that, in evaluating whether this index must be applied as a net salary adjustment, it must take into account the pertinent criteria including the actual economic, budgetary and social situation in the organisation and the member States. At the same time the new provisions do not provide for the automatic application of any particular method of adjusting salaries, which is not against the principles indicated above. It appears from the above that all revisions made must be based on certain criteria which are as reasonable and objective as possible in relation to the decision to be taken.

It is regrettable that the Laboratory did not adopt a more precise methodology for adjusting salaries but the new system was instituted in order to introduce greater flexibility with regards to decisions of the Coordinated Organizations while maintaining the guarantee that all pertinent interests, including the legitimate interests of staff members, are taken into account in the decision-making process. In themselves, the new provisions in force are not in contradiction with the principle indicated in section (c) of consideration 11 above, nor do they violate the other principles mentioned in the same consideration. It should be noted that the Tribunal has held on numerous occasions that organisations are entitled to change the reference standards or system for adjusting the salaries of staff provided that they respect the forms and procedures laid down in their statutory rules, and do not, of course, violate the other principles mentioned above.

It is only when the application of these rules would result in impairing the guarantees offered to international civil servants and, more particularly, their right to receive - in the interest of the international civil service itself - a level of remuneration equal to that in countries where, for comparable qualifications, the salaries are the highest, that a challenge could justifiably be made. The complainants have not given any indication to the Tribunal that the salary scales for July to December 1997, as fixed by the Council's decision of 12 December 1997 - setting the adjustments as indicated under A above - have had the effect of keeping the salaries of staff members, without proper reasons, at a level that would be manifestly inadequate.

15. As for the particular issue of whether the Council's decision of 12 December 1997 respects the internal rules of the Laboratory, it should be pointed out that the case law cited by the complainants, notably Judgment 1682, is not applicable to the present case as that judgment was based on texts that have not been in force since 4 July 1996.

There is nothing in the file which makes it possible to conclude that the decision of 12 December 1997 was taken in breach of the system established from 4 July 1996 onwards whereas, in the case forming the subject of Judgment 1682 mentioned above, the Tribunal could not but find that the Laboratory was in breach of the legal rule that it had itself imposed by the decision of 9 December 1981.

16. The complainants raise the question as to whether the impugned decision does not violate the principle of equality by establishing for staff members based in Germany treatment different from that accorded to staff members based outside Germany, and by establishing discrimination in terms of grade. This plea cannot be accepted since the purpose and intended effect of the system applied are to preserve purchasing power parities between all staff members and that there is nothing in the complaints to indicate that the pay slips applying the new provisions reveal any genuine discrimination.

The Tribunal, after analysing the documents produced, particularly the report of the Finance Committee, finds pertinent the explanations of the Laboratory indicating why different adjustment rates according to grade and duty station have been deemed necessary.

17. As for the plea based on the new wording of Annex R.A.1 which makes it possible to reduce pay by applying to it negative indexes and which would seem to be "contrary to the general principle of law constituted by the Noblemaire principle", the Tribunal considers that it could be examined only if the disputed pay slips embodied a reduction in remuneration, and this is not the case.

18. The complainants consider that their acquired rights have not been recognised in the new Regulations: the Laboratory was obliged, in their view, to ensure that their pay was adjusted to the cost of living. Such an

obligation, they state, was incumbent upon the Laboratory when they entered its service and thus forms part of their basic and essential conditions of employment and, by not ensuring them an adjustment of pay to the cost of living, the defendant organisation is breaching their right to maintain their salaries.

The Tribunal points out that international civil servants do not have an acquired right - any more than national civil servants - to an automatic indexing of their salaries. As recalled in Judgment 1118 (*in re* Niesing No. 2 and others), the establishing of regulations for the periodic adjustment of salary is within the discretion of the organisations, provided that these regulations do not violate the principles of international civil service law and that their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members. In the present case such an erosion has not been proved and the Tribunal has no reason to conclude that the salary levels decided upon for the year 1997 jeopardise the basic conditions of employment to the preservation of which the complainants are entitled.

19. It follows from all the foregoing that the complaints must be dismissed as being without merit.

DECISION

For the above reasons,

The complaints are dismissed.

DISSENTING OPINION BY MR JUSTICE HUGESSEN

For the reasons already set out in Judgment 1912 (*in re* Berthet No. 2 and others) I dissent from the views expressed by the majority.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Julio Barberis, Judge, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Mella Carroll
Julio Barberis
Seydou Ba
James K. Hugessen

Catherine Comtet

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.