Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

110th Session **Judgment No. 2996**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. C.-B. against the European Molecular Biology Laboratory (EMBL) on 24 March 2009 and corrected on 11 April, the Laboratory's reply of 26 June, the complainant's rejoinder of 14 December 2009, supplemented on 20 January 2010, EMBL's surrejoinder of 12 April, the complainant's further submissions of 9 June and the Laboratory's final observations thereon of 23 August 2010;

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

Having examined the written submissions;

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

A. The complainant, a French national born in 1955, entered the service of EMBL on 1 October 1998. During her career with this organisation she had several work-related accidents, the last of which occurred on 24 April 2007. On 31 August the complainant requested that her case be referred to the Invalidity and Rehabilitation Board in order that it might examine whether it would be possible for her to receive an invalidity pension. She was on sick leave when her contract ended on 30 September 2007.

Having been convened by the Director-General, the Invalidity and Rehabilitation Board, which comprised three members, examined two experts' reports, one drawn up by the complainant's doctor, who found that her fitness for work was considerably diminished, the other drawn up at EMBL's request by Dr T., who concluded that her physical fitness was "partially reduced". The Board issued its recommendation on 8 February 2008. On the basis of the latter report, it unanimously considered that the conditions of entitlement to an invalidity pension were not satisfied. By a letter of 13 March the Director-General informed the complainant that he was following the Board's recommendation.

On 31 March the complainant – who was still certified as being unfit for work – lodged an internal appeal against this decision, in which she requested that Dr T.'s report be forwarded to her and stated that, if the findings presented in that report proved to be very different to those of her own doctor, a "further medical opinion from a neutral, independent expert" would seem to be necessary. She also requested the application of Annex R.E.4 to the Staff Regulations – entitled "Accident-at-work insurance" – which stipulates that rehabilitation measures must be carried out with all means available, including assistance in retaining or obtaining a post. She was informed of the membership of the Joint Advisory Appeals Board by a letter of 16 April. On 21 April she announced that she wished to recuse two members of this Board and she requested the application of Article R 2 4.12 of the Staff Regulations, which provides that "full pay shall be granted throughout a period of sick leave deriving from an accident incurred or illness contracted in the course of duty". Having received Dr T.'s report, she expressed the view that it contained errors and inconsistencies and she again asked for a further medical opinion. By a letter of 30 April the Director-General advised the complainant that he was cancelling his decision of 13 March, that he had reconvened the Invalidity and Rehabilitation Board and that he rejected her request for paid sick leave.

On 2 June the complainant challenged the refusal to grant her request for paid sick leave and asked for the reimbursement of her legal counsel's fees. These requests were rejected on 19 June. The case

was subsequently referred to the Joint Advisory Appeals Board. On 10 December 2008 the Invalidity and Rehabilitation Board, which had reconvened with the same three members, issued its recommendation on the basis of the two previous reports submitted to it and a third report drawn up by Dr E.; after interviewing the complainant it unanimously found that she was not suffering from complete or even partial invalidity. By a letter of 23 February 2009 the Director-General notified the complainant that he had decided to reject her application for an invalidity pension. By another letter of the same date he told her that he endorsed the opinion of the Joint Advisory Appeals Board and dismissed her appeal. These are the impugned decisions. It should be pointed out that, subject to the payment in full of her contributions, the complainant was authorised to remain a member of the Laboratory's health insurance scheme – which is administered by Intermedex – until the Tribunal ruled on her complaint.

B. The complainant alleges that the Invalidity and Rehabilitation Board committed "serious errors" by ignoring both her doctor's report and a certificate attesting that she had 40 per cent disability, which had been issued by the pensions and social welfare office of her place of residence. Relying on these documents and the applicable staff regulations, she claims a partial invalidity pension and assistance in retaining or obtaining a post "suited to [her] residual ability".

Since the complainant considers that EMBL's liability for the consequences of an accident at work cannot end when the contract of the staff member concerned expires if he or she is not yet fit for work, she requests paid sick leave. She also asks to remain a member of the health insurance scheme administered by Intermedex because, owing to her work-related accidents, she is still receiving treatment and must undergo regular medical examinations.

She further maintains that, because of the Invalidity and Rehabilitation Board's errors, she has been obliged to seek the assistance of a legal counsel, and that in these circumstances his fees must be defrayed by EMBL. Lastly, she claims costs.

C. In its reply EMBL argues that the complainant's claim for an invalidity pension and assistance in retaining or obtaining a post is irreceivable, because she did not lodge an internal appeal against the Director-General's decision of 23 February 2009 on that matter.

On the merits, it holds that, as the report of the complainant's doctor was extremely superficial, the Invalidity and Rehabilitation Board focused its examination on the detailed reports of Drs T. and E. – distinguished independent experts – which clearly show that the complainant does not have any disability that would prevent her from working as a multilingual secretary. It states that she does not satisfy the conditions set out in Article 13, paragraph 1, of Annex R.E.1 of the Staff Regulations for entitlement to an invalidity pension since, in her case, the Board did not recognise the slightest degree of invalidity. It emphasises that she has provided no evidence to support the view that the Board's recommendation was wrong and it draws attention to the fact that the Tribunal has only a limited power of review in such matters. It adds that the certificate produced by the complainant is of no value in proceedings before the Invalidity and Rehabilitation Board, and in this connection it comments that the translation of that document supplied by the complainant is misleading; for example, the figure 40 does not refer to a percentage of disability. The Laboratory states that, as the complainant's application for an invalidity pension has been rejected, she is not entitled to any assistance in retaining or obtaining a post.

EMBL explains that, since her appointment ended on 30 September 2007, the complainant has no right to paid sick leave because, pursuant to Article R 2 4.12 of the Staff Regulations, this kind of leave may be taken only by established members of the personnel. Nor does she belong to any of the categories of personnel who may be members of the health insurance scheme administered by Intermedex.

Lastly, it points out that the Staff Regulations do not provide for the reimbursement of a legal counsel's fees and it asks the Tribunal to order the complainant to pay it at least 6,000 euros, either as damages for abuse of process or as costs.

D. In her rejoinder the complainant states that the provisions of Article R.B.4.15 of Annex R.B.4 to the Staff Regulations have been breached as, unlike the letter of 13 March 2008, that of 23 February 2009, which notified her of the refusal to grant her an invalidity pension, did not inform her of her rights of appeal. She holds that she was misled into believing that the letter of 23 February 2009 constituted a final decision. She explains that, as a precaution, she filed an appeal against this decision on 30 November 2009.

On the merits, the complainant expands on her pleas. She contends that the recommendation issued by the Invalidity and Rehabilitation Board on 8 February 2008 was tainted with several procedural flaws, while the recommendation of 10 December 2008 contravened the "principle of neutrality". The complainant takes issue with the fact that the members of the Board who re-examined her case were the same as those who examined it on the first occasion.

In support of her application for paid sick leave, the complainant relies on German law under which liability resulting from an industrial accident does not end when the person concerned loses his or her job. She informs the Tribunal that as from 1 January 2010 she will be covered by her husband's health insurance, but asks to be allowed to retain EMBL's accident-at-work insurance so long as she needs treatment in connection with her work-related accidents.

Lastly, the complainant repeats her request for the reimbursement of her legal counsel's fees on the basis of Article R.B.4.13 of Annex R.B.4 to the Staff Regulations and claims interest on the sums to be awarded to her, as well as damages for "administrative expenses and lawyers fees incurred on account of the injury caused […] by the Administration's errors, flawed procedure, abuse of authority and

failure to respect the parity principle and moral principles". In an annex to her rejoinder she asks for the convening of a hearing.

E. In its surrejoinder the Laboratory reiterates its position. It contends that the new claims contained in the rejoinder are irreceivable, because internal means of redress have not been exhausted.

On the merits, it explains that the references to German law are irrelevant, because that law did not govern the complainant's employment contract. Noting that the decision of 13 March 2008 was cancelled and the case referred back to the Invalidity and Rehabilitation Board, it observes that the Board's rules of procedure do not specify that its composition must be changed in these circumstances.

F. In her further submissions the complainant contests several assertions made in the surrejoinder and says that she has recently been informed that the Invalidity and Rehabilitation Board would never agree to recognise a case of invalidity.

G. In its final observations the Laboratory holds that in her further submissions the complainant has put forward nothing relevant to the outcome of the case, but has tried to influence the Tribunal by means of "fabricated submissions". It reiterates its counterclaim.

CONSIDERATIONS

1. The complainant was recruited by EMBL in October 1998 and worked there as a multilingual secretary.

On 31 August 2007 she applied for an invalidity pension on account of the after-effects of some work-related accidents of which she had been the victim, and she also asked for assistance in retaining or obtaining a post, for which provision is made in Annex R.E.4 to the Staff Regulations.

As the Invalidity and Rehabilitation Board considered, in its recommendation of 8 February 2008, that the complainant did not

satisfy the conditions of entitlement to an invalidity pension, her application was dismissed by a decision of the Director-General of 13 March 2008.

2. The complainant then lodged an internal appeal against this decision in accordance with the procedure laid down in Chapter 6 of the Staff Rules and Regulations. She contested both the lawfulness of the proceedings before the Invalidity and Rehabilitation Board and the merits of that body's recommendation, which rested on two medical experts' reports that reached different conclusions.

On 30 April 2008 the Director-General decided, in view of the complainant's criticism, to cancel his initial decision and to reconvene the Board.

On 10 December 2008, after obtaining the opinion of a third expert, who considered that the complainant was suffering only from very minor disorders, the Board again recommended that the complainant's application for an invalidity pension should be rejected.

By a new decision of 23 February 2009 the Director-General therefore refused to grant this pension.

3. In the meantime, the complainant, whose appointment with EMBL had ended on 30 September 2007 because her last employment contract had not been renewed, but who had been on paid sick leave at the time of her separation from the Laboratory, had asked to remain on that paid sick leave. She had also claimed some other related benefits, namely reimbursement of the fees of the legal counsel whom she had had to retain and continued membership of the organisation's health insurance scheme administered by Intermedex.

These various claims were rejected by a decision of 19 June 2008, which the complainant challenged in turn in accordance with the procedure laid down in the above-mentioned provisions. Endorsing a recommendation of the Joint Advisory Appeals Board, to which this second appeal had been referred, the Director-General rejected the said claims by another decision of 23 February 2009.

4. The complainant impugns both decisions of 23 February 2009 and requests not only their setting aside but also the granting of the disputed benefits and an award of costs.

5. In a letter annexed to her rejoinder the complainant has requested the convening of a hearing. In view of the abundant and very clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

6. In her rejoinder the complainant also presented new claims seeking compensation for the injury which she considers she has suffered on account of the disputed decisions. But, as the Tribunal has consistently held, a complainant may not, in his or her rejoinder, enter new claims not contained in his or her original complaint (see, for example, Judgments 960, under 8, or 1768, under 5). These new claims must therefore be dismissed.

7. EMBL submits that the claims directed against the Director-General's decision of 23 February 2009 to reject the complainant's application for an invalidity pension are irreceivable, because internal means of redress have not been exhausted as required by Article VII, paragraph 1, of the Statute of the Tribunal. The Laboratory contends that, unlike the initial decision of 13 March 2008, the Director-General's second decision on this pension application has not been the subject of an internal appeal.

8. It is true that the complainant did not lodge an appeal against this second decision before filing a complaint with the Tribunal, whereas she should normally have done so if her claims against this decision were not to be deemed irreceivable. However, the complainant rightly points out that the letter notifying the decision of

23 February 2009 did not indicate the means of redress available to her, or the time limits for submitting appeals, whereas Article R.B.4.15 of Annex R.B.4 to the Staff Regulations, which sets out the rules governing decisions taken after the Invalidity and Rehabilitation Board has been consulted, specifies that "[t]he Director-General will inform the person concerned of his decision […] and will inform him at the same time of his right of appeal (Chapter 6 of the Staff Regulations) […]". While procedural rules and time limits usually apply to the officials of international organisations without it being necessary to recapitulate them when a decision is notified, this is not the case where a rule expressly establishes an obligation to provide this information when notifying a decision, as is the case here, and where this formality has not been respected. Even though Article R.B.4.15 does not explicitly state that non-compliance with this obligation will render the procedural rules in question non-applicable to the person concerned, the principle of good faith requires that an official's complaint will not be deemed irreceivable owing to his or her failure to lodge an internal appeal, if the organisation itself has not abided by the requisite formalities enabling the official to submit an appeal.

9. Admittedly, in the instant case, the complainant had already been advised of the available means of redress and applicable time limits when she was notified of the decision of 13 March 2008, which did contain the requisite information. However, this did not exempt EMBL from again complying with this formality when notifying the decision of 23 February 2009. Moreover, the very fact that the latter decision differed from the previous one in this respect could have led the complainant to think that, in the particular context of the case, she was now entitled to file a complaint directly with the Tribunal. According to firm precedent, the provisions governing internal appeals will not be applied to a complainant if he or she might have been misled as to the conditions for lodging such an appeal and if they thus set a trap which is liable to catch out someone who is acting in good faith (see, for example, Judgments 1376, under 13, or 1720, under 8).

10. The Laboratory's objection to receivability will therefore be dismissed.

11. On the merits, attention must be drawn to the fact that, while the Tribunal may not replace the medical findings of a body such as an invalidity board with its own assessment, it does have full competence to say whether there was due process and to examine whether the board's opinion shows any material mistake or inconsistency, overlooks some essential fact or plainly misreads the evidence (see, for example, Judgments 1284, under 4, or 2361, under 9).

12. In the Tribunal's opinion, one of the complainant's pleas concerning the lawfulness of the proceedings is of decisive importance in this case, namely her plea that when the Invalidity and Rehabilitation Board issued its recommendation it was improperly constituted, in that it comprised the same members as those who had already expressed an opinion on the granting of the disputed invalidity pension prior to the Director-General's initial decision.

13. Indeed, it has been established that the recommendation of 8 February 2008 underpinning the decision of 13 March 2008 that was subsequently cancelled, and the recommendation of 10 December 2008 which preceded the decision of 23 February 2009 rejecting the complainant's request again, were issued by an Invalidity and Rehabilitation Board comprising the same three members. This fact alone objectively prevented this board from being able to issue its second recommendation with the requisite impartiality, even though its members subjectively considered that they could again take an unprejudiced decision on the case.

14. In Judgment 179 on one of its earliest cases, the Tribunal held that members of a body advising the executive authority of an international organisation may not participate in deliberations and are therefore bound to withdraw if they have "already expressed their views on the issue in such a way as to cast doubt on their

impartiality". More recently, in Judgment 2671, the Tribunal, having already set aside an organisation's decision, was led to set aside its second decision on the grounds that some members of the Appeals Committee who had expressed an opinion prior to the adoption of the new decision, had already been members of the Committee when it had been consulted on the first decision.

15. This precedent must also apply, for the same reasons, to this case. While generally speaking there is no reason why an advisory body on medical questions should not comprise the same members when it has to give a series of opinions on developments in the condition of the same official, that is not the case where it is required to give a second opinion on the same request of that person, as occurred here. Since on the first occasion the members of the Invalidity and Rehabilitation Board had fully addressed the merits of the complainant's request by recommending – unanimously – that she should not be deemed eligible for an invalidity pension, they could not again examine the same case without objective doubts being raised as to the Board's impartiality.

16. Lastly, the Laboratory's argument that the applicable rules and regulations do not stipulate that the membership of the Invalidity and Rehabilitation Board must be different in a situation like this, cannot be accepted. As the Tribunal found in the above-mentioned Judgments 179 and 2671, the rule that members of an advisory body must not examine a case on which they have previously expressed a view applies even in the absence of an express text, since its purpose is to protect officials against arbitrary action.

17. It follows that, without there being any need to examine the complainant's other pleas contesting the decision of 23 February 2009 to reject her application for an invalidity pension, this decision must be set aside and on that point the case must be referred back to EMBL. It shall be incumbent upon the Director-General to decide again on this application after consulting the Invalidity and Rehabilitation Board, which must be composed of different members.

18. As the Director-General did not recognise the complainant's invalidity, in his decision of 23 February 2009 he did not expressly deal with her request for the assistance in retaining or obtaining a post for which provision is made in Annex R.E.4 to the Staff Regulations. Since the effect of the complainant's separation from the Laboratory is that this request has become moot insofar as it referred to her possibly retaining her post, it will be incumbent upon the Director-General to examine her entitlement to assistance in obtaining a new post, in the light of the new recommendation issued by the Invalidity and Rehabilitation Board.

19. In order to challenge the Director-General's decision of 23 February 2009 rejecting her request to be granted paid sick leave after she had left EMBL, the complainant submits that she was entitled to this leave until she no longer suffered from the after-effects of the work-related accidents which had occurred while she was working for the organisation.

However, as the Tribunal has already stated in its case law, unless there are special provisions to the contrary, entitlement to sick leave may be granted only to a serving official and it therefore ends on the date of termination of an official's appointment (see, in particular, Judgment 2593, under 9).

20. In the instant case the complainant seeks to rely on the provisions of Article R 2 4.12 of the Staff Regulations, which state that, "[u]nder the conditions laid down in Articles R 2 4.09, R 2 4.10 and R 2 4.11, a staff member or fellow shall be entitled in any period of 36 months to 12 months' sick leave on full pay followed by 18 months' sick leave on two-thirds pay. Full pay shall be granted throughout a period of sick leave deriving from an accident incurred or illness contracted in the course of duty." However, it is clear from the wording of the first sentence of this article, and indeed from that of Articles R 2 4.09 to R 2 4.11 to which it refers, that this sick leave may be granted only to an established member of the personnel, thus excluding persons who no longer have this status. While the second

sentence of this article entitles a person to remain on full pay "throughout a period of sick leave deriving from an accident incurred or illness contracted in the course of duty", this benefit, which is thus expressly made subject to placement on sick leave, may be granted only to serving officials. For this reason, the complainant, whose appointment with EMBL ended on 30 September 2007, was not entitled to it.

21. The position would have been different had the termination of the complainant's appointment been unlawful, but that is not the case here, since the complainant's appointment with EMBL ended on the normal expiry of her last fixed-term contract and the Laboratory was under no obligation to renew it. In addition, the fact that the complainant was on sick leave when her appointment ended did not prevent its termination, insofar as this coincided with the normal expiry of her contract (see, for example, Judgments 1494, under 6, or 2098, under 8). The Tribunal further notes that the complainant does not formally contest the lawfulness of the decision not to renew her contract as such.

22. Lastly, the complainant's reliance on German law in support of her argument is misplaced, since her terms of employment were exclusively governed by the Staff Rules and Regulations of EMBL. Her reference to the national law of the organisation's host State is therefore to no avail.

23. With regard to the request for reimbursement of the legal counsel's fees borne by the complainant during the proceedings within EMBL, the Tribunal notes first that she is wrong to contend that the expenses in question ought to have been defrayed under Article R.B.4.13 of Annex R.B.4 to the Staff Regulations. This article states that the organisation will cover only "the costs of such enquiries, examinations or investigations ordered by the [Invalidity and Rehabilitation] Board", and not expenses incurred, as in this case, on a party's own initiative. In these circumstances, and in the absence

of any other rule or regulation providing for the defrayal of such expenses by the organisation, EMBL was right to refuse their reimbursement (see, for a similar case, Judgment 221, under 7).

These findings do not, however, prevent such expenses from being taken into consideration, to the appropriate extent, when assessing costs, on which a ruling will be given later in this judgment, since in that context the Tribunal may bear in mind expenses incurred during internal appeal proceedings.

24. With regard to the complainant's continued membership of the health insurance scheme administered by Intermedex, which the Director-General has allowed provisionally until the delivery of this judgment, it should be pointed out that, in her final submissions, she no longer requests this benefit. She now merely asks for the extension of coverage under the accident-at-work insurance. While the submissions show that, outside the context of the dispute referred to the Tribunal, the parties disagree as to whether some of the medical expenses claimed by the complainant may be ascribed to work-related accidents, EMBL has accepted in principle that she was entitled to that coverage, despite her separation from the organisation, in respect of injuries resulting from such accidents. The complainant's claims in this respect may therefore be regarded as moot.

25. As she succeeds in part, the complainant is entitled to costs in respect of the proceedings before the Tribunal as well as the internal appeal proceedings, which the Tribunal sets at a total of 3,000 euros.

26. EMBL requests that the complainant be ordered to pay it damages for abuse of process. While the Tribunal's case law does not in principle rule out the possibility of a complainant being ordered to pay damages, or at least costs, the very fact that this complaint proves to be partly well founded obviously means that this counterclaim will be dismissed.

DECISION

For the above reasons,

1. The decision of the Director-General of EMBL of 23 February 2009 rejecting the complainant's application for an invalidity pension is set aside.
2. The case is referred back to EMBL in order that the Director-General take a new decision on this application, after consulting the Invalidity and Rehabilitation Board, whose members must be different from those of the previous Board, and in order that the complainant's entitlement to assistance in obtaining a post be examined.
3. The Laboratory shall pay the complainant costs in the amount of 3,000 euros.
4. All the complainant's other claims are dismissed, as is the Laboratory's counterclaim.

In witness of this judgment, adopted on 9 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet