

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**L. (No. 6)**

**v.**

**EMBL**

**135th Session**

**Judgment No. 4583**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr V. L. against the European Molecular Biology Laboratory (EMBL) on 1 October 2021, EMBL's reply of 6 April 2022, the complainant's rejoinder of 28 June 2022 and EMBL's surrejoinder of 29 July 2022;

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 challenges the decision to terminate his appointment for reasons of professional unsuitability and the decision to place him on special paid leave until the end of his period of notice.

The complainant joined EMBL in 1991 as a fellow at EMBL's outstation in Hamburg, Germany. He became a staff member in April 1995 and in January 2003 he obtained an open-ended contract. At the material time he was serving as a Senior Scientist and Group Leader at grade 11.

By an email of 22 August 2018 the Administrative Director informed the complainant that the Director General had decided to "involve the Chair of EMBL Council to find a final solution for [his] problematic working relation with EMBL". He pointed out that there

were five ongoing internal appeal procedures, one disciplinary procedure and two pending complaints before the Tribunal on specific issues relating to the complainant's employment at EMBL, and that the deterioration of his working relationship with EMBL had become an unprecedented burden on the Laboratory in terms of the use of its resources and was having a visible impact on his work performance. He invited the complainant to attend a meeting with him and the Head of the Legal Office, accompanied by a lawyer if he so wished, "[i]n order to make a last attempt, before taking further legal measures, to settle the ongoing disputes and find a reasonable working perspective for [the complainant]". In a subsequent exchange of emails, the Administrative Director thanked the complainant for accepting his invitation and proposed some possible dates for their meeting. He also informed the complainant that the Chair of the EMBL Council had in the meantime agreed to appoint a Board (hereinafter referred to as "the Council Board") as provided for in Staff Regulation R 2 6.02 in cases of dismissal of staff in grade 11 or above for specified reasons of professional or medical unsuitability.

The complainant was formally notified of the convening of the Council Board in a letter from its Chair dated 18 September 2018. The complainant's lawyer replied the following day that this step was premature and that the procedure should be suspended, especially given that the complainant was the subject of an ongoing disciplinary procedure, but his objections were rejected. On 24 September 2018 the Council Board received a submission from the Director General setting out the reasons why he considered the complainant should be dismissed for professional unsuitability. In his concluding remarks, the Director General stated that "[the complainant's] attitude ha[d] fallen below the standards expected of an international civil servant", and he referred in particular to the complainant's "loss of trust and confidence towards the Administration and management", his "character and mentality", the "deterioration of [his] working relationship with colleagues", his "lack of managerial skills and incapacity or unwillingness to enable the progress of the projects and publications by his team members", his "perversion of and abuse of internal procedures, causing a waste of EMBL's resources", and his "threatening the Laboratory with the civil

and criminal penalties under Russian employment law and with the recourse to the Russian authorities”. A copy of the Director General’s submission was forwarded to the complainant, who provided a written response on 18 October 2018.

In January 2019 a new Director General took office. The procedure before the Council Board continued and hearings took place in February and March 2019. In its report dated 10 June 2019, the Council Board unanimously concluded that the reasons put forward by the former Director General to justify terminating the complainant’s appointment on the basis of professional unsuitability were valid and well founded. It therefore recommended that the Council should approve the request to that end. On 25 June 2019 the Council adopted a resolution authorising the Director General to terminate the complainant’s appointment for professional unsuitability. The Council noted in particular that the complainant’s attitude had fallen below the standards expected of an international civil servant, that he was “not suitable for working with EMBL” and should be dismissed, and that “[n]ot dismissing [him] would reinforce the existing inappropriate working environment, further hinder research, and reflect poorly on the image of the Laboratory”.

By a letter of 30 July 2019, the new Director General informed the complainant that she had decided to terminate his appointment for specified reasons of professional unsuitability, “based on the deterioration of [his] working relationship, the perversion and abuse of internal procedures causing a waste of EMBL’s resources, and the loss of trust from and towards EMBL administration and management”. She further informed him that he was entitled to 36 months’ notice, but that in accordance with Staff Regulation R 2 6.13 he was required to take special paid leave from 1 November 2019 until 30 July 2022, the end of his period of notice. His last day of work would therefore be 31 October 2019.

On 28 August 2019 the complainant lodged an internal appeal challenging the decision of 30 July. On 29 October 2019 he received a letter from the Director General setting out the terms of his special paid leave. These covered various matters, including access to EMBL’s premises and the extent to which he could engage in professional

activities while on special leave. On 28 November he lodged another internal appeal, challenging the conditions imposed by the letter of 29 October. These two appeals were examined together by the Joint Advisory Appeals Board (JAAB). A hearing took place in February 2021 and the JAAB issued its report on 22 June 2021, recommending that the appealed decisions be confirmed in all aspects. By a letter of 7 July 2021, the Director General informed the complainant that she had decided to accept the JAAB's recommendation for the reasons stated in its report. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him material damages including the loss of salary and other benefits he would have received had he worked until his retirement age of 65 or 68, pension benefits and future earnings. He claims moral damages in the amount of 150,000 euros and exemplary damages in the amount of 100,000 euros, and he requests that EMBL be ordered to remove from his personnel file and destroy all documents relating to the termination procedure, and to publish the Tribunal's judgment on its website and distribute it to each member of the Council. Lastly, he seeks an award of costs in the amount of 200,000 euros and such other relief as the Tribunal considers just and proper.

EMBL asks the Tribunal to dismiss the complaint as unfounded.

#### CONSIDERATIONS

1. The complainant's pleas are presented under the following headings:

- (i) retaliation for exercising right of appeal;
- (ii) errors on interpretation of professional unsuitability;
- (iii) deterioration in working relationships and loss of trust;
- (iv) breaches of due process in Council Board proceedings;
- (v) breaches of due process in the JAAB proceedings;
- (vi) special leave decision and imposition of draconian leave conditions;  
and
- (vii) institutional harassment/breach of good faith and mutual trust.

2. The complainant's second plea is well founded and, as it is decisive, there is no need to deal with the remaining pleas.

The complainant submits, in essence, that the organisation erroneously followed the procedure for termination of contract based on professional unsuitability. The complainant argues that "professional unsuitability" is concerned with unsatisfactory performance, whereas his performance was never assessed as unsatisfactory. He adds that the termination decision charges him with misconduct, therefore it should have been preceded by a proper disciplinary procedure.

3. It is appropriate to recall, at this juncture, that the termination decision issued on 30 July 2019 was grounded on "specified reason[s] of professional unsuitability, based on the deterioration of [the complainant's] working relationship, the perversion and abuse of internal procedures causing a waste of EMBL's resources, and the loss of trust from and towards EMBL administration and management". In its report of 22 June 2021 the JAAB rejected the complainant's plea that the termination decision was essentially based on misconduct and that the organisation should therefore have initiated a disciplinary procedure prior to the termination of his appointment. The JAAB observed that "[...] notwithstanding that some of the allegations the EMBL is using to substantiate professional unsuitability can be seen as amounting to allegations of misconduct, the JAAB disagrees that the EMBL is basing their decision on misconduct". The JAAB concluded that "professional unsuitability" as a ground for termination in the absence of a disciplinary procedure may include not only unsatisfactory performance but also "other circumstances", which could occur "as the result of deterioration of working relationships between the employee and the organisation to the degree that is beyond repair and is at least in part caused by the employee". According to the JAAB, in such circumstances, the employee could be considered "professionally unsuitable" if two conditions were met: "a) their working relationship with the organisation has become dysfunctional and even destructive, and is beyond repair, and b) this situation has occurred under the condition that the employee played a significant role in that deterioration". The JAAB added: "[...] if the deterioration of working relationships results from cumulative

actions, none of which necessarily amount to misconduct warranting a disciplinary action, then we can envisage circumstances when the person may be deemed to be professionally unsuitable. In other words, in such a case no single action or serious misconduct would be identified as the cause for the deterioration of working relationships”.

Regarding the alleged “perversion of internal procedures”, the JAAB observed that this in itself could not be used as a legitimate justification for “professional unsuitability”. However, it agreed with the Council Board in concluding that “the number of cases [was] a clear sign [of] the total loss of trust and confidence of [the complainant] in the EMBL Administration and Management”.

4. The Tribunal notes that the concept of “professional unsuitability” is not defined in the Staff Rules and Regulations, but, for reasons which will appear shortly, it is unnecessary to determine whether the JAAB’s analysis on this point was correct.

According to the relevant provisions of the Staff Rules and Regulations, the termination of a contract may be grounded both on dismissal as a disciplinary sanction (following a disciplinary procedure for misconduct) and on professional unsuitability:

**Staff Rule 2 6.01**

“Appointments shall terminate on account of:

[...]

f. dismissal

g. specified reasons of professional or medical unsuitability

[...]”

**Staff Regulation R 2 6.01**

“Appointments shall end on account of

[...]

g. dismissal for disciplinary measures

h. termination for specified reasons of professional or medical unsuitability

[...]”

The two instances are different and follow different procedures. In instances of misconduct, the disciplinary procedure is provided for, which entails a series of steps in order to better safeguard the right of defence of the official concerned, namely: a preliminary investigation (Staff Regulation R 2 5.04); consultation of the Joint Advisory Disciplinary Board (JADB) before taking any disciplinary measure other than a written warning or a written reprimand (Staff Rule 2 5.04); the participation in the JADB of a staff representative (Staff Regulation R 2 5.20); the opportunity of a further investigation requested by the JADB (Staff Regulation R 2 5.17); the hearing of the official concerned both during the preliminary investigation and after the JADB is convened (Staff Rule 2 5.03; Staff Regulations R 2 5.07 and R 2 5.15); and strict time limits for the steps of the procedure (Staff Regulations R 2 5.03 and R 2 5.04).

In instances of professional unsuitability, a different procedure is provided for, with the intervention of a different body, which is a Board appointed by the Chair of the Council, with no investigative powers. The two procedures are not equivalent and interchangeable, as they apply to different situations, respectively misconduct and professional unsuitability, and they entail different steps and safeguards for the official concerned. It is, therefore, crucial to establish which was the proper procedure to be followed in the instant case. The Tribunal finds that albeit misconduct and professional unsuitability may sometimes overlap, the organisation does not have an unfettered discretionary power to choose the procedure it prefers on a case-by-case basis. Whenever an official's conduct amounts potentially to misconduct, the proper procedure to be followed is the disciplinary one, since misconduct must be first proven beyond reasonable doubt. Since a specific disciplinary procedure exists, which is adversarial in nature and therefore better safeguards the right of defence of the official involved, it is this procedure that must be followed whenever unsuitability involves serious misconduct which could lead to dismissal.

5. Having established that in instances of misconduct the proper procedure to be followed is the disciplinary one, it must now be assessed whether in the present case the complainant's conduct as described in the termination decision constituted misconduct. For this

purpose, it is appropriate to recall, firstly and in brief, that the termination decision of 30 July 2019 is grounded centrally on the complainant's attitude, and only marginally on his professional aptitude. The latter was never doubted by EMBL, which recognized the complainant's professional achievements, experience, and expertise. It is true that, in the procedure which preceded the issuance of the 30 July 2019 decision, reference was also made to the complainant's lack of managerial skills, but this argument is not contained in the 30 July 2019 decision, and therefore it cannot be taken into account. Thus, the only element evoking professional unsuitability, encapsulated in the 30 July 2019 decision, is the complainant's failure to establish satisfactory working relationships with other staff members. However, as discussed shortly, even this failure is not regarded in the 30 July 2019 decision as a neutral fact stemming from the complainant's personality or aptitude, but rather as the effect of the complainant's misconduct. More specifically, the 30 July 2019 termination decision pivots on the complainant's behaviour in his relationship with EMBL and with fellow officials. The relevant parts of that decision read as follows:

“[...] The Council even added that not dismissing you would reinforce the existing inappropriate working environment, further hinder research, and reflect poorly on the reputation of the Laboratory. [...]

The deterioration of your working relationship is substantiated by the tensions with another group leader and the unfriendly environment in your group, resulting in the departure of two of its members, as well as by allegations of harassment and the disciplinary procedure opened against you. Your personality has created tensions at all levels of the Hamburg outstation and adversely affected your working relationships with colleagues. The difficulties with you have an impact on the functioning of the Laboratory. The promotion of science and collaboration is part of the mission of EMBL, and anyone who acts in a manner contrary to these goals necessarily acts against the interests of EMBL as well as contrary to his/her duty of loyalty and integrity towards the organisation.

As regards the perversion and abuse of internal procedures causing a waste of EMBL's resources, it has to be noted that since 2015, you have lodged twelve appeals [...] You have also been involved in disciplinary procedures. One of them was filed by you against the Head of Human Resources. Another one was opened after allegations of harassment against you and the outcome of an investigation on that matter. [...] While not denying the absolute right of appeal, this propensity to launch unjustified and abusive



appeals has caused and is causing a significant waste of EMBL resources, and it hampers the proper functioning of the EMBL administration.

Finally, the loss of trust and confidence towards the administration and management of EMBL is characterized by your belief that EMBL acts in bad faith, is harassing you and has leagued against you. Furthermore, the loss of trust is also illustrated by you threatening (i) the Administrative Director [...], (ii) the Chair of the Board [...], and (iii) the Chair of the Council [...]

[...] I would like to make it clear that this decision is not about your scientific performance, medical capacity, or right to appeal. It is about your duties of loyalty and integrity, as a senior official of EMBL, towards your colleagues, subordinates and peers, EMBL administration and management, and the Laboratory as a whole.

This overall situation is very disruptive to the work of the Laboratory as a whole, and the Hamburg outstation in particular. It has created tensions at the Hamburg outstation, and beyond, affecting the discussions within the scientific community at EMBL. This would get worse should you remain in post until the end of your employment contract with EMBL [...]"

Thus, the termination decision is grounded on:

- inappropriate working environment;
- tensions with another group leader;
- the unfriendly environment in the complainant's group;
- the personality of the complainant that has allegedly created tensions;
- the complainant's breach of the duties of loyalty and integrity towards the organisation;
- the complainant's involvement in disciplinary and harassment procedures;
- the alleged perversion and abuse of appeal proceedings; and
- the threats allegedly made by the complainant against the Administrative Director, the Chair of the Board, and the Chair of the Council.

It is significant that the termination decision asserts that: "this decision is not about your scientific performance, medical capacity, or right to appeal. It is about your duties of loyalty and integrity, as a senior official of EMBL".

Staff Regulation R 2 5.01 defines “misconduct” as follows:

“Misconduct is a conduct on the part of a member of personnel which is incompatible with his/her obligations and duties under the Staff Rules and Regulations, his/her contract, the Code of Conduct, any other relevant administrative issuances including the internal policies or which is materially or morally damaging to the Laboratory.

Without restricting the generality of the previous paragraph the following are specific examples of misconduct:

- a. Use of official position, authority, or property for pecuniary gain or advantage for member of personnel or others;
- b. Any form of scientific misconduct;
- c. Abuse of authority or trust;
- d. False statement, misrepresentation or fraud, whether oral or written, pertaining to official matters;
- e. Violation of any applicable law;
- f. Disrespectfulness, such as refusal to obey instructions from a superior;
- g. Conduct which renders the member of personnel unable to perform his/her duties properly, for example being intoxicated when on duty or unauthorised absence from duty;
- h. Non-declared conflict of interests;
- i. Harassment;
- j. Retaliation”.

Having regard to the wide definition of misconduct provided for by the Staff Rules and Regulations, the Tribunal is satisfied that the facts described in the termination decision align with said legal definition. The termination decision refers to: i) abusive behaviour in the form of abuse of the right to appeal and consequent abuse of the organisation’s trust; ii) material and moral damages caused to EMBL (waste of resources for dealing with the complainant’s appeals); iii) episodes of harassment; iv) breach of the complainant’s duties of loyalty and integrity; and v) threats from the complainant to a number of officials and members of internal bodies. Thus, the facts as described in the termination decision amount to a charge of misconduct.

Accordingly, a disciplinary procedure should have been initiated and followed through.

6. In light of the foregoing findings, the impugned decision, as well as the termination decision, must be set aside. The decision which placed the complainant on special leave was a direct consequence of the termination decision and must also be set aside accordingly. The complainant has nonetheless the right to retain the salary and all other monetary allowances he received during the notice period, whilst he was placed on special leave and was therefore still in service.

7. The complainant does not seek reinstatement and therefore the Tribunal shall not order it.

8. The complainant asks for an award of material damages equivalent to his salary and emoluments from the date the unlawful termination became effective until his ordinary retirement age (65 years) or even later (until the age of 68 years). The Tribunal observes that the complainant held an open-ended contract. According to Regulation R 2 6.08 “[a]n open-ended contract may be terminated at any time by either party”. According to Regulation R 2 6.10 “[t]he retirement age shall be 65 years. Service shall automatically cease on the last day of the month in which the 65th birthday falls. However, on an exceptional basis, a staff member may by mutual agreement with the Director General and in the interest of the Laboratory, carry on working until the age of 68.” In light of these Regulations, there is no evidence that the complainant’s appointment, had it not been unlawfully terminated, would have been extended until he would have reached the age of 68 years, as such extension is exceptional. Nor is there any certainty that, had the complainant’s appointment not been unlawfully terminated, it would have lasted until the ordinary retirement age of 65 years, as an open-ended contract may be terminated at any time. Nonetheless, the complainant lost a valuable opportunity to have his open-ended contract prolonged until his retirement age of 65 years. Considering that when the unlawful termination became effective (July 2022), the complainant was 62 and had three more years until reaching the ordinary retirement age, the Tribunal determines the material damages (under all heads, including loss of pension rights and interest) in the sum of 150,000 euros.

9. The complainant seeks moral damages in the amount of 150,000 euros relying on the argument that EMBL “has intentionally destroyed his career”. In the circumstances of the case, moral injury may be considered proven and the damages will be set at 10,000 euros.

As relief of moral damages, EMBL will also be ordered to remove the unlawful termination decision of 30 July 2019 from the complainant’s personnel file.

10. Having regard to the Tribunal’s case law, the complainant is not entitled to exemplary damages.

11. The complainant is entitled to costs set at 8,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision, as well as the termination decision of 30 July 2019, are set aside.
2. EMBL shall pay the complainant material damages in the sum of 150,000 euros.
3. It shall pay him moral damages in the sum of 10,000 euros.
4. It shall also pay him costs of 8,000 euros.
5. EMBL shall remove the termination decision of 30 July 2019 from the complainant’s personnel file.
6. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ