

L. (No. 4)

v.

EMBL

137th Session

Judgment No. 4743

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr V. L. against the European Molecular Biology Laboratory (EMBL) on 16 March 2020 and corrected on 27 April, EMBL's reply of 21 July 2020, the complainant's rejoinder of 9 November 2020 and EMBL's surrejoinder of 8 February 2021;

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 close a complaint of harassment he had filed and two related matters.

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.

In December 2016, the complainant was informed by the Head of Human Resources (HR) that one of his subordinates would be transferred to another group with effect from 1 January 2017. On 18 January 2017, he sent a letter to the Director General in which, on the one hand, he

lodged an appeal against that transfer decision and, on the other hand, he lodged a complaint of “harassment/code of conduct violations” against the Head of HR. The complainant pointed out that this transfer, “without advance consultation” and without his agreement, followed the transfer of another member of his team, in June 2016, “orchestrated by the Head [of] HR”, and that the work of his research group was being seriously disrupted. He viewed it as part of a series of harassing actions taken against him by the Head of HR, and he referred to several other incidents involving the latter. In particular, he contended that the Head of HR had falsely accused him of preventing scientific collaboration between the two staff members who had been transferred out of his group, of reneging on an alleged promise to designate one of those staff members as first author of a scientific paper and of attempting to secretly record a meeting. In respect of the transfer of his subordinate, the complainant requested that the decision be reversed and he claimed moral damages and costs. For the harassment, and for “professional damage to [him], [his] group, and [his] group members”, he claimed moral damages and asked that his group be provided with the necessary resources to restore it to its status as of the beginning of 2016. He requested an investigation into the actions of the Head of HR and “other responsible officials”, but insisted that an independent investigator should be appointed with his agreement, because the Administrative Director, who would ordinarily have conducted such an investigation, was already investigating him (the complainant) for alleged misconduct and therefore had a conflict of interest.

The Director General replied on 31 January 2017 that he would consult the Joint Advisory Appeals Board (JAAB) regarding the complainant’s appeal against the transfer of his subordinate, and that a disciplinary procedure had been initiated in order to investigate his allegations against the Head of HR. This investigation was to be conducted by the Administrative Director, despite the complainant’s objection. Indeed, according to the Director General, the fact that the Administrative Director had investigated the complainant for alleged misconduct did not give rise to a conflict of interest, as this was part of his regular functions.

In April 2017, the complainant was notified of the opening of another disciplinary procedure against him, based on allegations of harassment made by several members of the Hamburg Unit in the course of the investigation of his complaint against the Head of HR. In September 2017, the external investigator who had been engaged to investigate these new allegations against the complainant sent him transcripts of the witness interviews she had conducted and invited him to comment. The complainant inferred from the transcripts that the content of his complaint against the Head of HR had been disclosed to one of the witnesses. On 30 October 2017, he wrote to the Director General to claim moral damages and costs for what he considered to be a serious breach of confidentiality in the investigation of his complaint against the Head of HR. He also requested that the Administrative Director be removed from his role as investigator in the procedure against the Head of HR.

By a letter of 30 November 2017, the Director General informed the Head of HR of the outcome of the disciplinary procedure that had been initiated against him on the basis of the complainant's allegations, namely that no disciplinary measure would be imposed as no harassment or code of conduct violation had been established. This letter was copied to the complainant. On 21 December 2017, the complainant submitted an appeal to the Director General challenging two implied decisions which, according to him, were evidenced by the letter of 30 November 2017. The first was a decision to close as unsubstantiated his complaint against the Head of HR without paying him material and moral damages. The second was a decision to reject the requests made in his letter of 30 October 2017, that is, to pay him moral damages and costs for breach of confidentiality and to remove the Administrative Director from his role as investigator. In respect of the latter decision, he contended that he had been deprived of a fair and transparent investigation of his allegations and that his right to confidentiality had been breached. Regarding the decision to close his complaint against the Head of HR, he argued that he had been denied due process because he had not been interviewed in the course of the investigation, nor had he been given an opportunity to comment on the evidence gathered by the Administrative Director. Moreover, the letter of 30 November 2017

contained no reasons to support the conclusion that his allegations were unsubstantiated. The complainant asked to be provided with the investigation report and any other information which had led the Director General to dismiss his complaint. He requested that his appeals be referred to the JAAB for a *de novo* investigation of his allegations, or that the investigation be reopened and entrusted to an independent person appointed by mutual agreement. For each appeal, he claimed material and moral damages as well as costs.

On 3 December 2019, the JAAB submitted its report to the new Director General, who had taken office earlier that year. It treated the complainant's letter of 21 December 2017 as effectively containing three separate appeals: firstly, an appeal against the decision to close the investigation on his complaint of harassment/code of conduct violations against the Head of HR without action; secondly, an appeal against the decision not to pay him damages for breach of confidentiality; thirdly, an appeal against the implied decision not to remove the Administrative Director from his role as investigator and replace him with another person.

The JAAB recommended that the first appeal be rejected as irreceivable. It found that the complainant had no cause of action to challenge the decision to close the investigation into his allegations against the Head of HR, because that decision concerned the Head of HR and did not affect the complainant's legal situation. Regarding the fact that the complainant had not been interviewed in the course of the investigation, the JAAB observed that he had provided an additional written statement, but none of his allegations had been corroborated by other evidence or witness statements. It considered that the investigation report and related evidence should not be shared with the complainant, who was only entitled to be informed about the result of the disciplinary procedure.

The JAAB considered that the second appeal was time-barred, because the Director General's letter of 30 November 2017 contained no decision on the complainant's claim to be paid damages for an alleged breach of confidentiality and the complainant had not challenged the failure to respond to that claim within the applicable time limit.

Lastly, with respect to the third appeal, the JAAB considered that the complainant's request to have the Administrative Director replaced as investigator was unjustified and had, in any case, been made too late, after the completion of the investigation. It therefore recommended that this appeal be dismissed as unfounded.

By a letter of 19 December 2019, the Director General informed the complainant that she had decided to dismiss his appeals for the reasons stated in the JAAB's report. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him material and moral damages, costs and such other relief as the Tribunal considers just and proper. He requests that EMBL be ordered to publish this judgment on its intranet.

EMBL requests that the complaint be dismissed as unfounded.

CONSIDERATIONS

1. In his letter of 21 December 2017, the complainant appealed against the following three decisions:

- (1) the implied decision to close his harassment/code of conduct complaint ("harassment complaint") against the Head of Human Resources (HR) as unsubstantiated without paying him material and moral damages;
- (2) the implied decision not to pay him damages for the alleged breach of confidentiality; and
- (3) the implied decision not to remove the Administrative Director from his role of investigator of his harassment complaint.

2. In the decision, dated 19 December 2019, which the complainant impugns, the Director General accepted the recommendation of the Joint Advisory Appeals Board (JAAB) to fully dismiss his internal appeals, emphasizing the following points with respect to each of the three decisions the complainant had challenged:

- (1) the decision to close the investigation into his harassment complaint against the Head of HR without action concerned the Head of HR and did not affect the complainant's legal situation, and his related claim for moral damages had no legal basis since no harassment was found;
- (2) the appeal against the decision not to pay damages for the alleged breach of confidentiality was irreceivable, having been lodged before the expiry of the 60-day period in which the Director General was required to take a decision, and, in any event, it was unfounded because there was no factual basis to support the allegation of breach of confidentiality;
- (3) the appeal against the implied decision not to remove the Administrative Director from his role of investigator was not supported by any evidence of bias or partiality.

3. Regarding the second and third-mentioned appeals, the complainant had, by letter dated 30 October 2017, requested the Director General to pay him moral damages for the alleged breach of confidentiality. He had made that request because he found out that his harassment complaint against the Head of HR had been disclosed, without his consent, to Ms H., who was interviewed as a witness during the investigation of that complaint, as well as in another investigation that was initiated after allegations of harassment were made against the complainant. The complainant also requested the Director General to remove the Administrative Director from investigating his complaint against the Head of HR on the grounds of alleged conflict of interest and retaliation. In his complaint brief, the complainant states that although the Director General did not expressly mention this in his letter of 30 November 2017 to the Head of HR (copied to him), he (the complainant) reasonably concluded that the closure of his complaint without addressing his requests for moral damages for breach of confidentiality and to remove the Administrator General from investigating his harassment complaint gave rise to implied decisions to reject those requests. He contends that, in the impugned decision of 19 December 2019, the Director General erred by accepting the

JAAB's recommendation to dismiss his internal appeals against those implied decisions.

4. Regarding the second appeal, in recommending that the complainant's request for moral damages for breach of confidentiality be rejected as irreceivable, the JAAB noted the provisions of Staff Regulation R 6 1.4, that "[a]ppeals shall be lodged within thirty calendar days from the date of notification of the disputed decision" and that "[w]hen the Director General does not take action within 60 calendar days in response to a written claim, the [thirty calendar days] period shall run from the sixtieth day". The JAAB reasoned, correctly, that the decision of 30 November 2017 was not an implied decision rejecting the complainant's 30 October 2017 request for moral damages for breach of confidentiality because when the complainant lodged his appeal on 21 December 2017, the 60-day period under Staff Regulation R 6 1.4 had not ended so that that appeal was irreceivable. Inasmuch as that appeal was irreceivable under this Staff Regulation, it is, pursuant to Article VII, paragraph 1, of the Tribunal's Rules, also irreceivable in the Tribunal, rendering it unnecessary to consider the merits of that aspect of the complaint.

5. Regarding his third appeal mentioned in consideration 2 of this judgment, in his submissions, the complainant essentially repeats allegations of conflict of interest and partiality, which, in his view, disqualified the Administrative Director from investigating his harassment complaint. In his harassment complaint, the complainant had asked the Director General not to appoint the Administrative Director to conduct the investigation but to appoint an independent investigator with his agreement. He alleged that the Administrative Director had a conflict of interest because he was the direct supervisor of the Head of HR and at the time was conducting another investigation which the Head of HR had requested into allegations against him (the complainant). The complainant also recalled that in August 2016, the Administrative Director gave him notice of disciplinary charges initiated against him by the Head of HR based on allegations that he (the complainant) had secretly recorded a meeting involving the Head of HR. The complainant

also requested that he, and members of his group, be protected from retaliation.

6. By letter of 31 January 2017, the Director General informed the complainant that he had instructed the Administrative Director to conduct the investigation into his harassment complaint against the Head of HR, stating that “[t]he fact that [the Administrative Director] investigated you in a disciplinary procedure does not involve any conflict [...] but is part of his regular [...] functions”. On 27 February 2017, he submitted a 70-page document detailing his harassment allegations and his written evidence. According to the complainant, prior to doing so he was not aware that within the first weeks of the commencement of the investigation, the Administrative Director had disclosed copies of his harassment complaint to the Head of HR and to staff members who were witnesses in other disciplinary procedures against him. The complainant first became aware of the disclosure when he was notified by the Director General in a letter of 24 April 2017 that the latter had been informed by the Administrative Director in a letter of 24 February 2017 that a disciplinary procedure had been initiated to investigate allegations of harassment made against him during the investigation by three of the witnesses he (the complainant) named to be interviewed in his harassment complaint.

7. The Tribunal’s case law states, in consideration 11 of Judgment 3958, that “[i]t is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his [or her] jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice. [...] [This rule] applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.”

8. Nothing in the circumstances of the Administrative Director's administrative supervision of the Head of HR or in the former's role in other cases involving the complainant, or in any related circumstances in the present case leads the Tribunal to conclude, as the complainant submits, that by investigating the complainant's harassment complaint against the Head of HR, the Administrative Director had taken on conflicting roles which prevented him from discharging his duty with integrity and impartiality. The complainant has adduced no evidence to discharge his burden to prove that there was a conflict of interest or partiality which disqualified the Administrative Director from investigating his harassment complaint against the Head of HR. Neither has he made out a case from which it may be concluded that there was retaliation against him on the part of the Administrative Director, which disqualified the latter from conducting the investigation. Additionally, in the circumstances of this case, the fact that the Administrative Director gave copies of the complainant's harassment complaint to the Head of HR and the witnesses he named in that complaint, apparently without redacting statements therein which reflected negatively on their professional standing, does not in itself lead the Tribunal to find (as the complainant urges) that it was "impossible to conclude that the investigation was carried out impartially, fairly and with the highest degree of integrity, as required by basic principles of due process". Moreover, there is no authority that supports the complainant's submission that his identity should not have been disclosed to the witnesses as the only information that needed to be provided to them was that the investigation concerned allegations of harassment against the Head of HR. The complainant's challenge to the Director General's decision in the impugned decision on the third internal appeal is therefore unfounded.

9. However, in recommending that the first appeal, mentioned in consideration 2 of this judgment, be rejected as irreceivable, the JAAB misapprehended the relevant consideration and addressed the wrong question when it concluded that "the final decision to close the investigation on [the harassment] complaint against the Head of Human Resources without action concerns the Head of Human Resources and

does not affect [the complainant's] legal situation [...] [and therefore] the complainant 'has no cause of action for challenging a disciplinary sanction or a refusal to impose one''. This conclusion was an error of law (given the scope of the complainant's grievance, discussed shortly) which is particularly obvious by reference to the Tribunal's case law, relevantly stated as follows, for example, in consideration 6 of Judgment 4547:

“6. [T]he Tribunal considers that a decision of an international organisation finding that a harassment complaint is unfounded and rejecting a claim for compensation for the material or moral injury allegedly suffered by the staff member who lodged that complaint is an administrative decision that may adversely affect her or him. As stated above (in consideration 3), the Tribunal has on several occasions held that any staff member who lodges such a complaint is entitled to know whether the person named in the complaint has been found to have committed acts of harassment and, if so, to be informed how the organisation intends to compensate her or him for the material and/or moral injury suffered (see, in this respect, aforementioned Judgments 3965, consideration 9, and 4541, consideration 4). Consequently [...] the complainant was entitled to challenge in an internal appeal both the decision of 9 November 2017 informing her that the case had been closed because there had been no harassment and the decision of the Director of HRD of 16 January 2018 confirming that initial decision. [...]

[...] The [appeals body] could not find that internal appeal irreceivable simply because it considered that the complainant had not been a party to the investigation into the conduct complained of. This is a completely different situation from a case in which the person who lodged the harassment complaint seeks to challenge the disciplinary penalty imposed by the organisation concerned on the perpetrator of the misconduct once it has been established by an investigation, where the Tribunal has held that the complainant had no legitimate interest in impugning the disciplinary penalty imposed (see aforementioned Judgment 4541, consideration 4, which refers to Judgment 3096, consideration 15).

[...]

The [appeals body] therefore committed an error of law in making the recommendations it did in this case.”

The above case involved an allegation of harassment and not merely a report of misconduct. So too, in this case, the complainant, while advertent to misconduct proceedings in the letter of 18 January 2017, was raising harassment for the purposes of obtaining relief arising from

the harassment. As consideration 15 of Judgment 4207 shows, this reasoning holds just as well where, as in the present case, at the material time, there were no specific provisions in the organization's rules that articulated a comprehensive procedure to deal with harassment claims.

10. The foregoing case law confirms that upon the conclusion of the investigation, the complainant was entitled to a response from the organization regarding his claim of harassment. It was incumbent upon EMBL to have the complainant's harassment complaint investigated as such, regardless of the decision on the disciplinary proceedings against the Head of HR, and to inform the complainant of the outcome of his harassment complaint. As this was not done, the Director General committed an error of law which finds no justification in EMBL's submission to the effect that, as the reporter of the alleged misconduct against the Head of HR, the complainant was only a witness and the decision to close the investigation, which was part of the disciplinary procedure against the Head of HR, only concerned the latter. Indeed, this reasoning is patently incorrect, given that the complainant was not simply reporting misconduct but was alleging that he himself was the victim of harassment by the Head of HR. Accordingly, the complainant's challenge to the Director General's decision on the first of the internal appeals mentioned above is well founded and the impugned decision will to this extent be set aside.

11. The complainant submits that the JAAB committed a breach of due process by not providing him with a copy of the investigation report and the evidence gathered by the Administrative Director during the investigation of his harassment complaint against the Head of HR. The complainant received the decision to close the complaint by copy. In his appeal of 21 December 2017 against that decision he requested to be provided with a copy of the investigation report and any other written communication and information (including witness interviews and transcripts) the Director General received from the Administrative Director that led her to dismiss his harassment complaint "after an alleged thorough investigation". In its opinion, which the Director General accepted in the impugned decision, the JAAB stated that "[b]y

no means should the investigative report and all the evidence regarding the disciplinary procedure against [the Head of HR] be provided to [the complainant] as a disciplinary procedure is confidential and in his role as alleged victim he is only to be informed of the result of the disciplinary process". This statement was in error and contrary to the well-established case law which governs such disclosure, by reference to consideration 6 of Judgment 4663, citing the following statements in Judgments 4471 and 4217:

"In Judgment 4217, consideration 4, the Tribunal emphasised the importance of disclosing an investigation report similar to the one which the complainant had requested in the present case and noted that the fact that the complainant was ultimately able to obtain a copy of the report during the proceedings before the Tribunal did not remedy the flaw tainting the internal appeal process:

'4. The Tribunal considers that [the organisation concerned] erred in refusing to grant the complainant's request for a copy of the report established [...] at the end of the investigation in respect of the supervisor mentioned in her harassment complaint.

The Tribunal has consistently held that a staff member must, as a rule, have access to all the evidence on which the competent authority bases its decision concerning her or him (see, for example, Judgments 2229, under 3(b), 2700, under 6, 3214, under 24, or 3295, under 13). This implies, among other things, that an organisation must forward to a staff member who has filed a harassment complaint the report drawn up at the end of the investigation of that complaint (see, for example, Judgments 3347, under 19 to 21, and 3831, under 17).

[...]

Although it is true that [the organisation concerned] produced a redacted copy of the investigation report as an annex to its surrejoinder, by refusing to provide the complainant with the report in question during the internal appeals procedure it nevertheless unlawfully deprived her of the possibility of usefully challenging the findings of the investigation. In this case, the fact that the complainant was ultimately able to obtain a copy of the report during the proceedings before the Tribunal does not remedy the flaw tainting the internal appeal process. Indeed, the Tribunal's case law recognises that, in some cases, the nondisclosure of evidence can be corrected when this flaw is subsequently remedied, including in proceedings before it (see, for example, Judgment 3117, under 11), that is not the case where the document in question is of vital importance having regard to the subject

matter of the dispute, as it is here (see Judgments 2315, under 27, 3490, under 33, 3831, cited above, under 16, 17 and 29, or 3995, under 5).’
(See also, to this effect, Judgments 4471, consideration 23, and 3995, consideration 5.)

Lastly, in Judgment 4471, consideration 23, the Tribunal stated that the disclosure of extracts of a preliminary investigation report is generally not sufficient and an organisation is required to disclose the entire report, even if this means redacting it to the extent necessary to maintain the confidentiality of some aspects of the investigation, linked in particular to protecting the interests of third parties.”

EMBL’s statement that, in its reply before the JAAB, it provided the complainant with all the evidence on the basis of which the Administrative Director made his report, “i.e. the statements and the interviews of the witnesses who were heard during the investigation”, and its submissions that as the complainant was only a witness he did not have an absolute right to access all the evidence and that the documents which were shared with him were more than sufficient to give him a clear understanding of the reasoning behind the decision to close the case clearly do not accord with the applicable case law. Inasmuch as the Director General relied upon the investigative report in making the decision to close the complainant’s harassment complaint, a copy of that report, albeit redacted to the extent necessary to maintain the confidentiality of some aspects of the investigation linked in particular to protecting the interests of third parties, should have been provided to the complainant. This should have been done at least during the internal appeals procedure so as not to unlawfully deprive him of the possibility of usefully challenging the findings of the investigation. It follows from the foregoing that the complainant’s plea that the JAAB committed a breach of due process by not providing him with a copy of the investigation report is well founded and the impugned decision will also be set aside to the extent that in it the Director General also accepted the JAAB’s conclusion that the complainant’s right to due process had not been breached.

12. The complainant’s reliance upon Judgment 4241, consideration 12, to support his submissions that, as the victim of harassment, he should have been interviewed in the course of the

investigation, given an opportunity to clarify his complaint and explain any discrepancies raised by witnesses, and given transcripts of the witness interviews to enable him to identify any discrepancies before the investigation was completed, is misplaced. In the first place, the procedural step which the Tribunal determined was not followed in consideration 12 of Judgment 4241 was contemplated in a guiding provision (Article 24 of the Investigation Process). No such provision is cited by the complainant in the present case. In the second place, in consideration 12 of Judgment 4241, the Tribunal did not find that the person who had lodged the harassment complaint ought to have been called again by the investigative body to clear discrepancies, but the three persons whom she had accused of harassment. Accordingly, the complainant's further submission that these failures show that the Director of Administration did not act with integrity is unfounded.

13. The complainant's submission that the JAAB denied him an oral hearing, in breach of Staff Regulation R 6 1.09, which stated that "[t]he Board shall give a full hearing to the appellant", is unfounded. According to the Tribunal's case law, the general principles applicable to an appeal body do not require that a complainant be given an opportunity to present oral submissions in person or through a representative. All that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities (see, for example, Judgment 3447, consideration 8). The complainant submitted his written appeal in full and in a manner that permitted him an opportunity to present his case to satisfy "a full hearing" pursuant to Staff Regulation R 6 1.09, which permitted the JAAB to have been fully informed about the case without conducting oral proceedings.

14. The complainant submits that unreasonable delay in the internal appeal process deprived him of the opportunity to prove his harassment case. He lodged the complaint in January 2017 and the Director General issued the impugned decision on 19 December 2019. The Tribunal accepts EMBL's submission that there was no unreasonable

delay, having regard to the circumstances, particularly as delay was in part due to extensions requested by the complainant.

15. The complainant has obviously suffered moral injury given the unsatisfactory manner in which EMBL dealt with his harassment/code of conduct complaint without seeming to have considered it with the seriousness the Tribunal's case law requires. This and the breach of due process found in consideration 11 of this judgment entitle the complainant to an award of moral damages for which he will be awarded 20,000 euros. However, the complainant's request for an order of such other relief as the Tribunal considers just and proper given the facts and circumstances of the case is too vague to be receivable (see, for example, Judgment 4719, consideration 7, and the case law cited therein). As the complainant prevails in this complaint, he will also be awarded costs in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision, dated 19 December 2019, is set aside to the extent stated in consideration 10 of this judgment, as well as to the extent that the Director General accepted the JAAB's conclusion that the complainant's right to due process was not breached.
2. EMBL shall pay the complainant moral damages in the amount of 20,000 euros.
3. EMBL shall pay the complainant costs in the amount of 10,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER