

SEVENTY-EIGHTH SESSION

In re WALTER

Judgment 1395

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Anne Walter against the European Molecular Biology Laboratory (EMBL) on 21 March 1994 and corrected on 30 March, the Laboratory's reply of 2 May, the complainant's rejoinder of 3 June and the EMBL's surrejoinder of 7 July 1994;

Considering Articles II, paragraph 5, and VII, paragraphs 2 and 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, who is British and was born in 1943, joined the staff of the EMBL on 1 January 1975 on an established post as secretary to the Director-General at grade 6. She had several assignments from 1975 to 1986.

In 1986 she applied for a post as secretary in the Department of Cell Biology. By a letter of 27 October 1986 the Head of Personnel told her that the Interviewing Board had picked another candidate, that there was no other post available that warranted keeping her at her then grade and that she should accordingly leave the Laboratory or accept grade 4. He also asked her to improve her "attitude to work", about which there had been "complaints from staff", and to "adjust [her] conduct accordingly".

But in a memorandum of 21 November 1986 the Programme Coordinator of the Department of Cell Biology offered her a post as departmental secretary as from 1 February 1987 subject to six months' probation. In 1988, after a year on the job, the Coordinator recommended her for a salary step increase.

By a memorandum of 19 July 1993 the Coordinator informed the Head of Personnel that he had had "social reasons" for taking her on in 1987. Although she had served probation satisfactorily her work had since taken a turn for the worse and he suggested terminating her appointment.

In a memorandum of 23 July 1993 the Head of Personnel gave her twelve months' notice of dismissal to expire at 31 August 1994. He relieved her from duty immediately and put her on special paid leave under Staff Regulation R 2 6.08. By a memorandum of 27 July to the Head of Personnel she lodged an appeal against that decision.

In a fax dated 2 August she asked the Head of Personnel to state the reasons for termination and in a memorandum of 4 August he gave them.

In a report dated 25 November 1993 the Joint Advisory Appeals Board recommended reinstating her immediately and following the proper procedure if the Administration still wished to negotiate her "early departure".

By a memorandum of 22 December the Associate Director-General told her that since no suitable post could be found her "early departure" would take effect on 1 January 1994 and she was granted an indemnity in the amount of two years' salary. That is the decision she impugns.

By a memorandum of 13 January 1994 the Head of Personnel told her that the Laboratory might take her back, but at grade 5. In her reply of 14 January she said she was "ready to return to EMBL provided I am offered a suitable position ... at the same grade and step". In a memorandum of 19 January the Head of Personnel replied that the possibility of reemploying her did "not exist any more". On 15 February the Administration offered her another post, but she rejected the offer in a fax dated 7 March to the Director-General on the grounds that she would have to undergo six months' probation.

B. The complainant submits that section 2.1 of the Staff Rules empowers the Director-General alone to appoint staff to the Laboratory. But the decision of 23 July 1993 came from the Head of Personnel, who took it without

citing any delegation of authority. So the decision is ultra vires.

Besides, it was not substantiated. The complainant denies that the grounds for dismissal set out in Staff Rule 2.6.01 - "disciplinary reasons" or "dismissal for specified reasons of unsuitability" - applied to her, her work having always proved satisfactory. In any event the Administration failed to apply the right procedure for such dismissal.

The EMBL kept her off the premises after she had filed her appeal. But Staff Rule 2.5.05 allows that only during disciplinary investigation.

Lastly, she contends that the Administration was not free to impose conditions of employment at odds with those in her contract.

She wants the Tribunal to set aside her dismissal as decided on 23 July 1993 and confirmed on 22 December 1993; to declare that she is entitled to a post as secretary at grade 6, step 10; and to award her moral damages and at least 12,000 German marks in costs.

C. In its reply the EMBL seeks to correct what it sees as mistakes in the complainant's account of the facts. It contends that the reasons for her dismissal were set out in the letter of 4 August 1993 and it did not deny her access to the Laboratory.

The Administration followed the Appeals Board's recommendations and made her a worthwhile offer. It really tried to find a suitable post but many of the staff had misgivings about her. Having spurned its offers time after time, she showed unwillingness to co-operate.

The decision under challenge was taken by a competent authority: not only was the Head of Personnel acting on behalf of the Associate Director-General but the Director-General was told of the decision and got a copy of it.

The EMBL dismissed her, not for disciplinary reasons, but because her work had been consistently unsatisfactory, as it had warned her more than once.

Lastly, the Laboratory says it is willing, if she returns to the United Kingdom, to meet the costs of her removal, to grant her a repatriation allowance in the amount of three months' basic salary and to pay her 4,683.90 marks a month in unemployment compensation should she fail to find a job.

D. In her rejoinder she argues that the EMBL failed to do as the Appeals Board had recommended: it neither negotiated with her nor tried to find a suitable post. Failing reinstatement she will accept damages of not less than one million marks.

E. In its surrejoinder the Laboratory maintains that it treated her fairly and in keeping with the Board's recommendation. But she was not fit for any post that was vacant. Reinstating her is not a desirable option.

CONSIDERATIONS:

1. The complainant joined the Laboratory on 1 January 1975 as a secretary at grade 6. She worked in several departments and for the last six-and-a-half years in the Department of Cell Biology.

2. On 23 July 1993 the Head of Personnel handed her a memorandum which said:

"As Mr. K. Simons, Programme Coordinator 'Cell Biology', has already informed you and given reasons for in person, we are terminating our contract with you according to Staff Regulation Article R 2 6.07 using a 12 month period of notice to the 31st August 1994 as a pose to [recte instead of] a 3 month period of notice.

At the same time, we would like to inform you that you are freed from your work duties and need not be present in the Laboratory until the end of the contract, i.e. you will receive Special Paid Leave (Staff Regulation R 2 6.08).

If you are unable to find employment once the contract has ended, you have the right to unemployment benefit from the EMBL-Unemployment Insurance.

A possible compensation payment lies at the discretion of the Director General according to R.A.8.g)2)."

3. On 27 July 1993 the complainant lodged an internal appeal against termination of contract. In a memorandum to her dated 4 August 1993 the Head of Personnel set out her alleged shortcomings and told her:

"Taking all these points into account the decisive reason that finally led to your dismissal was the inadequate standard of your professional knowledge for a secretary at EMBL taken together with the fact that there was no possibility of transferring you within the Laboratory to a lower-graded position (i.e. as typist/secretarial help) in accordance with Staff Regulation 2 1.22."

4. In its report of 25 November 1993 the Joint Advisory Appeals Board concluded that her dismissal was "invalid" and that her expulsion from the Laboratory was contrary to the Rules and Regulations and the sort of sanction that could be justified only in "severe disciplinary cases", which hers was not. The Board was in favour of a "negotiated settlement" with her and in the meantime her "rapid reinstatement". By a memorandum of 22 December 1993, however, the Associate Director- General informed her:

"Despite every effort ... it has not been possible to reach any positive solution about finding a position for you."

That is the decision impugned.

5. The EMBL contends in its reply to the complaint that the complainant was not dismissed for disciplinary reasons and that no disciplinary action was taken against her during her employment. Indeed the Head of Personnel told the Joint Advisory Appeals Board that she was dismissed under Rule 2.6.06 for reasons of "unsuitability". The reference should presumably have been, not to 2.6.06, which is headed "Suppression", but to 2.6.01, which is about "Reasons for termination".

6. Rule 2.6.01 states:

"Appointments shall terminate on account of ... g) dismissal for specified reasons of unsuitability."

That means, first, that the reasons must be "specified" in some form that enables the staff member to understand them clearly and, secondly, that the statement of them must be prior to the actual dismissal. It is, after all, a general principle of law that the staff member must be afforded a proper opportunity, again prior to dismissal, to answer any allegations of unsuitability. In this case the reference in the Head of Personnel's memorandum of 23 July 1993 to a mere oral statement of reasons was insufficient. So too was the statement of reasons in the Head of Personnel's memorandum of 4 August 1993 since by then the complainant had already been given notice of dismissal. The conclusion is that she was never given a proper opportunity of answering the allegations against her, the decision to dismiss her cannot stand, and she must therefore be reinstated.

7. She is also entitled to an award of damages for moral injury in view of her seniority and her humiliation by being told that she "need not be present in the Laboratory until the end of [her] contract". In the circumstances the Tribunal sets the amount of such damages at 10,000 German marks. It also makes an award of costs.

DECISION:

For the above reasons,

1. The Associate Director-General's decision of 22 December 1993 is quashed.
2. The Laboratory shall reinstate the complainant as from the date of termination and on the same terms and conditions.
3. It shall pay her 10,000 German marks in damages for moral injury.
4. It shall pay her 8,000 marks in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.