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

NINETY-SECOND SESSION

***In re* Flösser (No. 6) and Serrano** **Judgment No. 2081**

The Administrative Tribunal,

Considering the sixth complaint filed by Mr Hans Flösser and the complaint filed by Mr Luis Serrano against the European Molecular Biology Laboratory (EMBL) on 9 August 2000 and corrected on 3 November 2000, the EMBL's reply of 9 February 2001, which was corrected on 21 February, the complainants' rejoinder of 21 May and the Laboratory's surrejoinder of 28 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Many of the facts relevant to the present case are set out in Judgment 2057 (*in re* Argos No. 4 and others), delivered on 12 July 2001.

Since 1 January 1982 the EMBL has been using the system of the Coordinated Organizations[(1)] as a standard of reference for the adjustment of staff pay. Deeming that it was not bound by the decisions of the Coordinated Organizations or by the recommendations of their Coordinating Committee on Remuneration (hereinafter "Coordinating Committee"), the Council of the Laboratory adopted a resolution on 28 June 1995 rejecting the recommendations made in the Coordinating Committee's 40th report and approving, as from 1 July 1995 only, those contained in the 45th report but without applying the proposed downward adjustments. In Judgment 1682 (*in re* Argos and others) of 29 January 1998, the Tribunal quashed the Director-General's decisions rejecting the internal appeals which ten staff members, supported by one hundred and sixty-nine others, had filed against a memorandum notifying to them the Council's decisions. Following that judgment, the Council decided on 2 July 1998 not to alter the previously determined adjustments of their pay for 1995. However, in Judgment 1887 (*in re* Argos No. 3 and others) of 8 July 1999, ruling on an application for execution, the Tribunal sent the cases back to the EMBL and invited it to take the decisions set out in the judgment under 12, which provided inter alia that:

"The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded."

In an address to Laboratory staff in Heidelberg, Germany, on 8 October 1999 the Director-General explained the situation and stated his position. On 24 November 1999, the Council adopted a resolution in which it agreed, in principle, to fund salary adjustments as recommended in the Coordinating Committee's 40th and 45th reports, with effect from 1 July 1995.

Then, on 21 March 2000, it adopted a resolution on the execution of Judgment 1887, in which it decided to apply retroactively, for the period from 1 July 1995 to 30 June 1996, the adjustments recommended by the Coordinating Committee in its 40th and 45th reports, plus interest on arrears at the rate of 10 per cent a year as required by Judgment 1682. The following table was included in the resolution:

	40th Report	45th Report	EMBL [adjustment] 1995	Adjustment due

France	1.9 %	- 0.2 %	0.0 %	1.7 %
Germany	2.1 %	0.3 %	0.3 %	2.1 %
United Kingdom	3.5 %	- 0.1 %	0.0 %	3.4 %

In a written statement of 29 March notifying the Council's decision to all staff, the Director-General explained that the text of Judgment 1887 could give rise to significantly different interpretations. Two questions arose.

(a) First, should 1995 salaries be adjusted applying the indices recommended by the Coordinating Committee for that year (the option known as "salary adjustment"), or should they be increased to the level of salaries established by the Coordinated Organizations for 1995, which includes 1992-1994 increases not previously implemented in full by the EMBL (the option known as "salary level")? The Director-General observed that the Council was prepared to finance the first option, but that if the second option were adopted, the Laboratory itself would have to find the necessary resources. In the end, the Council chose the "salary adjustment" option.

(b) Secondly, should the increase in 1995 salaries be taken into account in determining the salaries for subsequent years (the so-called "consolidated" option), or should it be applied to 1995 only (the so-called "one-off" option)? The Director-General indicated that the "consolidated" option had been discussed in November 1999, but that in Judgments 1912 (*in re* Berthet No. 2 and others) and 1913 (*in re* Dauvergne and others), delivered on 3 February 2000, the Tribunal had dismissed the complaints filed by staff members of the Laboratory challenging their pay slips for 1996 and 1997, and had stated that it had "no reason to conclude that the salary levels decided upon for the [years 1996 and 1997] jeopardise the basic conditions of employment to the preservation of which the complainants are entitled". The Council took those judgments into account and decided that the adjustment for 1995 would be applied only to that year and would not affect the level of remuneration in subsequent years. The Director-General emphasised that the Council's decision had been taken with the sole objective of executing the previous judgments on the "correct legal basis".

On 12 May 2000 the complainants filed internal appeals with the Director-General against their pay slips for April 2000, the first individual applications of the Council's resolution. By letters of 17 May 2000, which are the impugned decisions, the Director-General rejected their appeals but granted them leave to go directly to the Tribunal.

B. As a preliminary remark, the complainants indicate that they endorse the Staff Association's decision, based on the wishes of the majority of staff, not to challenge the salary adjustment rate granted by the Council for 1995 (2.1 per cent in Germany). Furthermore, in the interests of the Laboratory's future and of their colleagues who are most under threat, they are not claiming everything to which they would be legally entitled.

The complainants have two pleas: an error of law and breach of the principle of good faith.

With regard to the former, they contend that Judgment 1682, as confirmed by Judgment 1887, requires the Laboratory to take into account the retroactive adjustment granted for 1995 to correct the salary levels for subsequent years to which adjustments were applied. They submit that in his written statement of 29 March 2000 the Director-General affirmed that this had been the EMBL's position in November 1999 and that it had changed only in the light of the construction put on Judgments 1912 and 1913 by the Council's legal advisers. Since there is nothing "obscure or wanting" about the decisions given in those judgments, the Laboratory is in breach of *res judicata*. Besides, the Laboratory's argument is devoid of merit because the earlier and the later judgments do not concern the same rules. Judgments 1912 and 1913 relate to the lawfulness of a new system of adjustment introduced on 4 July 1996, while the two earlier judgments address the application of the rules in force before that date.

Their second plea is breach of good faith. The Laboratory's attitude amounts to disregard, on the one hand, for incontrovertible rules by which it is bound and the general principles on salaries set in the case law, and, on the other, *res judicata*. The decision of 21 March 2000 also reflects bad faith in that the Laboratory's justification of it varied: it first cited financial and budgetary considerations and then later, legal grounds.

The complainants ask the Tribunal to quash the impugned decisions; to order the Laboratory to take into account the adjustment granted for 1995 so as to raise the salary levels for subsequent years "proportionately"; to grant interest on arrears at the rate of 8 per cent a year as from 1 July 1996. They claim costs.

C. In its reply the Laboratory denies that its position on the application of Judgments 1682 and 1887 has changed since November 1999. It contends that "it was never the Council's intention to apply Judgment 1887 on the basis of the 'salary levels' of the Coordinated Organizations rather than on annual adjustment indexes".

According to the EMBL, the issue is not one of *res judicata*, and the Laboratory does not deny that the Tribunal's rulings are binding. Indeed, it complied with them fully in applying the recommendations contained in the Coordinating Committee's 40th and 45th reports, and in so doing it can hardly be taxed with breaking rules or acting in bad faith. The nub of the case is whether the Laboratory is bound to extend the salary adjustment for 1995 to the following years. It concludes that no such obligation may be inferred from Judgments 1682 and 1887. Indeed, the Tribunal found in the latter that the Laboratory had to "apply the decisions for the period in question". In other words the obligations arising out of those judgments were limited to the year 1995. That also bears out the Tribunal's ruling in Judgment 1329 (*in re* Ball and Borghini) that the decision taken at each yearly adjustment, though based on the pay scales adopted in previous years, fully supersedes earlier decisions. Moreover, Judgments 1912 and 1913 confirmed that the remuneration levels for 1996 and 1997 were lawful. Lastly, to contest the salary levels for the years after 1995 would be to destroy the balance that it has been at pains to create taking account of all grades and duty stations and conducting a comparison with salaries in the Coordinated Organizations.

D. In their rejoinder the complainants submit that in Judgments 1912 and 1913 the Tribunal ruled not on salary levels but on the adjustment rates for 1996 and 1997 so it did not reverse its decisions on the adjustment due for 1995. They argue that if each of the salary scales for the various duty stations is raised by the same percentage, the balance referred to by the EMBL will not be affected. They note that the Laboratory is now citing practical reasons for its decision, whereas it had always maintained that it was taken on legal grounds. They accuse the EMBL of banking on the staff tiring and losing their resolve.

E. In its surrejoinder dated 28 August 2001, the EMBL is highly critical of Judgment 2057, delivered on 12 July, in which the Tribunal found partly in the complainants' favour and in particular, under 11, that:

"the Laboratory was bound to give all due effects to a decision it had itself taken to change the salary scales for 1995. Accordingly, and not withstanding Judgments 1912 and 1913, the complainants are right to claim that the adjustments granted for the period up to 30 June 1996 by the resolution of 21 March 2000 should be maintained beyond that period, and that subsequent adjustments of their pay should be recalculated as from 1 July 1996 on the basis of the amended salary scales that should have been in force at that date in view of the adjustments introduced by the above resolution."

The Laboratory requests the Tribunal to reconsider this judgment in the context of the present complaint.

It submits that neither in national law nor in international civil service law is there any general principle or customary rule under which decisions on remuneration have to be considered as a series of consecutive decisions, each based on the previous salary level. The Council's decisions on salary adjustments for 1996 and 1997 were in line with a new pay policy based on modified adjustment rules and in effect established a new remuneration system. Finally, it submits that it may now reconsider its decisions on salary adjustments after 1995, and it asks the Tribunal to indicate clearly that Judgment 2057 "cannot be understood as implying the obligation to add the percentage increase for 1995 to subsequent salary adjustments".

CONSIDERATIONS

1. The staff and the EMBL have been embroiled in a dispute concerning salary adjustments, as related in Judgments 1682, 1887, 1912, 1913 and 2057.

In Judgment 1682, the Tribunal dismissed the claims concerning decisions prior to 1995 but allowed those concerning the refusal to adjust salaries in 1995. It sent the case back for the EMBL to examine the rights of the staff concerned in respect of the adjustment of their remuneration in 1995. Judgment 1887 concerned the execution of Judgment 1682.

However, in Judgments 1912 and 1913, delivered before the adjustment rates for 1995 had been recalculated, ruling on the EMBL's decisions on the salary adjustments for 1996 and 1997 the Tribunal found that the adjustment

rates had been determined in accordance with the applicable provisions and dismissed the complaints.

In a resolution adopted on 21 March 2000, the Council of the Laboratory decided to apply retroactively for 1995 the adjustments recommended by the Coordinating Committee. In a written statement of 29 March, the Director-General informed staff that the Council had decided inter alia that the adjustment for 1995 would apply only to that year and would not affect the level of remuneration for subsequent years. Some staff members challenged the first individual application to them of the Council's resolution, arguing that the adjustment granted for 1995 should have been taken into account in determining the salary scales in subsequent years.

In Judgment 2057, the Tribunal allowed the complaints in part and invited the Laboratory to recalculate the remuneration for 1996 and 1997 taking into account the adjustment granted for 1995.

In the present case the complainants appealed to the Director-General against their pay slips for April 2000, the first individual applications of the Council's resolution. In their view the adjustment granted for 1995 should have been taken into account in determining the salary scales for subsequent years. By letters of 17 May 2000, the impugned decisions, the Director-General dismissed their internal appeals and allowed them to come directly to the Tribunal.

2. In their submission the complainants ask the Tribunal to quash the impugned decisions and to order the Laboratory to take into account the 1995 adjustment and to raise the salary levels for the following years proportionately, with interest on arrears payable at 8 per cent a year as from 1 July 1996.

The Laboratory calls for the complaints to be dismissed on the ground that Judgments 1682 and 1887 concerned only the determination of remuneration for 1995, and that remuneration for 1996 and 1997 was set definitively in Judgments 1912 and 1913.

3. The present case has the same purpose as the complaint which gave rise to Judgment 2057. The latter does not carry the authority of *res judicata* in the present case, however, because the complainants are different and a judgment applies only to the parties to the dispute. The Tribunal is therefore not legally bound by *res judicata* here. Besides, the pleadings in this case are not quite the same.

The Laboratory criticises Judgment 2057, asserting that it is not in accordance with the law. It asks the Tribunal to reverse precedent, but has not filed an application for review. The Tribunal will examine below whether the Laboratory's objections are well-founded.

4. The complainants refer to their complaints as applications for the execution of Judgments 1682 and 1887. They claim that the above judgments concerned the adjustment of salaries for 1995 and that the resulting remuneration level should have served as a basis for subsequent adjustments.

But their complaints do not pass muster as applications for execution.

(a) In principle, only the parties to a judgment may avail themselves of it to apply for its execution.

In the present case, Mr Flösser was a party to both Judgment 1682 and Judgment 1887, whereas Mr Serrano was not. The latter, therefore, does not have *locus standi* to benefit from the execution of these judgments (see Judgment 1978, *in re* Bousquet No. 3 and others, under 4(a), and Judgment 1980, *in re* Cervantes No. 6 and others, under 5).

(b) Furthermore, the authority of *res judicata* applies only to issues addressed in a previous judgment (see Judgment 1978, under 4).

Judgment 1682 addressed only remuneration for 1995. It said nothing about the amount to be taken into account in any adjustment of pay for subsequent years.

As an application for execution, the complaint is therefore devoid of merit, as the Laboratory rightly argues.

(c) The complaint must, however, be examined in accordance with its real legal nature.

The complainants are in fact relying on the following rule, which is recognised by international organisations and

the Tribunal and is based on the principle of the stability of administrative decisions: a decision determining salaries must be challenged immediately, if this is not done, it will serve as a basis for subsequent adjustments. The same applies if it is challenged but upheld; if the challenge succeeds, however, it is the final decision which will serve as the basis thereafter. Furthermore, unless there is a valid reason for proceeding otherwise, the adjustment will be applied to the most recent pay scales (see Judgments 1329, under 9, 1682, under 3, and 2057, under 8). The complainants say that the salary levels resulting from Judgment 1682 should be used for adjustments for subsequent years, with each adjustment taking as a basis the salary scales for the previous year. The Council's decision of 21 March 2000 is in breach of these principles.

In rebuttal, the Laboratory argues that the salary levels for 1996 and 1997 were determined definitively by the Laboratory and approved by the Tribunal in Judgments 1912 and 1913, so the issue has been resolved once and for all.

The conclusion is that the purpose of the complaint is not the execution of Judgments 1682 and 1887.

It must therefore be entertained as an ordinary complaint against a decision taken by the Laboratory.

(d) There is nothing to prevent it being treated as such. The parties have amply covered all the issues. Moreover, the Laboratory waived the obligation to exhaust the internal means of redress. In these circumstances, it would be sheer pedantry to send the case back.

5. Since the Laboratory's intention was to allow all staff to benefit from Judgments 1682 and 1887, Mr Serrano has every right to demand their execution. There is therefore no doubt about his *locus standi*, and indeed the defendant does not challenge it.

6. The Laboratory argues that since Judgments 1912 and 1913 carry the authority of *res judicata*, the level of salaries for 1996 and 1997 has been set once and for all.

However, they carry the authority of *res judicata* only in respect of the issues raised in them.

Analysis of Judgments 1912 and 1913 shows that it was the lawfulness of the rates of adjustment which was at issue, not the basic level of pay to which the rates would apply. The Tribunal's finding that the salary levels yielded by the adjustment did not impair their rights suggested that staff sustained no unlawful injury in this respect. But the Tribunal gave no ruling on the level of pay which was to serve as a basis for applying the adjustment, because that issue had not been raised before it. At the time the exact level of salaries for 1995 had not yet been set and a new decision by the Laboratory on the matter was awaited, following Judgments 1682 and 1887.

On this point, the Tribunal cannot depart from what it said in Judgment 2057, under 8 to 11.

The conclusion is that in Judgments 1912 and 1913 there was no ruling on the salary scales which were to serve as a basis for the adjustments, so the question of *res judicata* does not arise.

7. The issue to be resolved therefore is whether the complainants are barred from objecting to the EMBL's failure to take into account the corrected level of salaries for 1995 in determining the salaries for 1996 and 1997, because they did not first challenge their salaries for 1996 and 1997 (see above under 4(c)) when they were originally fixed.

But in view of the circumstances, to make such a demand on them would be pedantic and wanting in good faith. As the parties were aware at the time, the salary levels for 1995 were under challenge and the principle upon which the challenge was based had been upheld by the Tribunal. Moreover, any change in salary levels will ordinarily affect pay in subsequent years. The staff therefore had good reason to believe that a change in pay for 1995 would have a "knock on" effect on the level of salaries used as a basis for calculating pay in the future. Moreover, the Laboratory could be in no doubt that this was what staff would expect. In these circumstances, and having given them no indication to the contrary, the Laboratory could not require staff to challenge each new determination of their salaries on the conditional and hypothetical basis that any successful challenge to the remuneration for a previous year (in this case 1995) should automatically be carried through to the salary levels taken into account in subsequent years. What is more, in his written statement of 29 March 2000, the Director-General mentioned that the so-called "consolidated" option had been envisaged, but that the Laboratory had abandoned it following the delivery of Judgments 1912 and 1913 (see A above).

It was therefore accepted by implication that the issue of the salary levels to be taken as a basis for the 1996 and 1997 adjustments could be reviewed after a decision was handed down on the salary adjustment for 1995.

The complainants were therefore not barred from demanding to benefit from the knock on effect at the first individual application to them of the Council's resolution of 21 March 2000.

The Tribunal based its ruling in Judgment 2057 on this consideration, and is bound to confirm it in the present case.

8. Consistent precedent has it that an organisation is ordinarily free to determine the pay of its staff, provided that it respects certain requirements arising from general principles of international civil service law (see Judgments 1912, under 13, and 1913, under 11). Furthermore, if the organisation has a rule granting certain rights to staff members in relation to their level of salary, it may not depart from that rule in individual decisions without amending it in accordance with the prescribed procedure.

That is why in Judgment 1682 the Tribunal invited the Laboratory to set pay scales for 1995 in accordance with the rule which makes reference to the decisions of the Coordinated Organizations on salary adjustments.

Until 1996, Article R 4 1.01 of the Staff Regulations stated:

"When reviewing remuneration, the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decisions taken by Council as laid down in Annex R.A.1."

On 4 July 1996 the Council amended this provision, which has since read as follows:

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

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

"The Council,

- stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;

- stating that the reference to the relevant decisions of the Coordinated Organisations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;

- herewith replacing its decision of December 9, 1981,

decides that:

1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations in Germany.

2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organisation and in Member States.

3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organisations.

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

Moreover, in Judgments 1912 and 1913 the Tribunal recalled that:

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

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

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

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

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

The texts adopted in 1996 show that the Laboratory intended to introduce a measure of flexibility in its linkage to the Coordinated Organizations with regard to the rate of adjustment. However, these make no allusion to any possibility of the Laboratory not basing the adjustment on the previously acquired salary level, which is the normal procedure. The new methodology did not modify the procedure and staff could accordingly expect in good faith that the adjustments adopted with reference to the Coordinated Organizations' system, which was supposed to maintain purchasing power, would be based on the previously acquired salary level.

The decision to apply the new methodology did not respect the rule in force as it might reasonably be understood by the staff of the Laboratory.

Nor in the way the Laboratory saw fit to apply it, did the new methodology comply with the requirement of stability, foreseeability and clarity established by the case law. Indeed, the staff could not be expected to foresee that the Laboratory would suddenly stop according them the previously acquired salary level.

There is no comparison between this situation and that of organisations which have completely changed the pay system with a view to achieving a certain level of coherence (see, for example, the case of the European Patent Organisation in Judgment 1663 (*in re* Bousquet No. 2 and others)).

The conclusion is that the Council's resolution of 21 March 2000 does not respect the rights of the staff members. The individual decisions applying the resolution to the complainants must therefore be set aside, as they deny their right to the maintenance of the level of pay previously acquired.

But the Tribunal cannot, as the complainants appear to be requesting, rule on the years following 1996 and 1997 since the present complaint does not challenge any actual decision in that regard.

9. In its surrejoinder the EMBL asserts that if it were to be compelled to review for the two periods in question the level of pay to be taken into account for the application of the adjustment rate, it should also be accorded the possibility to revise the rate, which, it says, has already been determined with a view to ensuring purchasing power parity.

As matters now stand it is not possible to rule in fact and in law on the pertinence of this plea. Suffice it to say, in general terms, that both parties have a duty to act in good faith.

10. Any amounts due shall bear interest at the rate of 8 per cent a year.

The case law shows that the rate of interest on arrears has been reduced from 10 to 8 per cent to take account of developments in the financial markets and the absence of any significant inflation in the States whose currency is decisive for international organisations. In Judgment 1682, ruling on the salary adjustments for 1995, the Tribunal applied an interest rate of 10 per cent. This is specified under 9 in that judgment, which in this respect carries the authority of *res judicata*. Judgment 1887 on the execution of the above judgment could not modify that rate. However, Judgment 2057, which among other matters deals with pay levels for the following years, and which was adopted on 3 May 2001, had to apply the new rate. This change in the case law is not unfavourable to the

Laboratory.

Interest on arrears must be calculated from the due date of each payment, and not globally from 1 July 1996, as claimed by the complainants.

11. The conclusion is that the complainant's pleas succeed, as did those of the complainants in the case which gave rise to Judgment 2057.

12. Having succeeded, the complainants are entitled to costs, which are set at 4,000 euros.

DECISION

For the above reasons,

1. The impugned decisions are set aside.

2. The case is sent back to the Laboratory for new decisions in accordance with 8, 9 and 10 above.

3. The Laboratory shall pay the complainants a total of 4,000 euros in costs.

4. Their other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

James K. Hugessen

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

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