

NINETY-SECOND SESSION

In re Flösser (No. 7), *Hassler* (No. 2), *Herzog* (No. 2), *Müller* (No. 2),
Schechinger (No. 4), *Walter* (No. 3), *Wernz* (No. 2) and *Winkler* (No. 2)

Judgment No. 2082

The Administrative Tribunal,

Considering the seventh complaint filed by Mr Hans Flösser, the second complaints filed by Mr Norbert Hassler, Mr Hans Herzog and Mr Konrad Müller, the fourth complaint filed by Mr Erich Schechinger, the third complaint filed by Ms Anne Walter, and the second complaints filed by Mr Otto Wernz and Mr Wolfgang Winkler against the European Molecular Biology Laboratory (EMBL) on 4 April 2001, the EMBL's reply of 17 April, the complainants' rejoinder of 23 May, and the Laboratory's surrejoinder of 7 June 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. Facts relevant to the present case are set out in Judgment 1986 (*in re Flösser* No. 5 and others) delivered on 12 July 2000 in which the complainants challenged what they characterised as the Director-General's "decision not to make a substantive decision" regarding their requests for the inward transfer of their pension rights accrued under the German social security pension insurance scheme - administered by the *Bundesversicherungsanstalt für Angestellte* ([U](#)) (BfA) - to the EMBL scheme. Although the Tribunal held their complaint to be irreceivable and dismissed it, the Tribunal noted that the Laboratory had conceded that "the complainants [would] have available to them the full right to appeal" when a final decision was reached following review of the matter by the EMBL Council.

On 8 August 2000 the Administrative Director informed the complainants that on 24 November 1999 the EMBL Council had decided to abolish Article 12 of the Pension Scheme Rules applicable to staff of the EMBL, thus making it impossible to accept any inward transfers from other pension schemes after that date. Consequently, their requests for transfer of accrued pension rights were evaluated in the light of Article 12 as it existed when the requests were first made. At the relevant time paragraph 1 of Article 12 read:

"Article 12 - Inward and outward transfer of pension rights

1. A staff member who enters the service of the Organization after leaving the service of a government administration or national organization, or any international organization, or a firm, may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer.

In such a case the Organization shall determine, by reference to his grade on confirmation of appointment and to the Instructions for the implementation of these Rules, the number of years of reckonable service with which he shall be credited under its own pension scheme."

The Administrative Director further informed the complainants that they did not meet the requirements of Article 12 and that their request to transfer funds from their previous pension scheme had been rejected.

On 24 August the complainants appealed against this decision to the Joint Advisory Appeals Board. In the report of its session held on 14 November 2000, the Board stated that it considered the appeal to contain a legal issue outside its competence and that the dispute should be put before the Administrative Tribunal of the International

Labour Organization. In his decision of 9 January 2001 the Director-General informed the complainants that he accepted most of the findings in the Board's report, that he was upholding the Administrative Director's decision of 8 August 2000, and that the complainants could appeal to the Tribunal. That is the impugned decision.

B. The complainants argue that the question in law to be decided by the Tribunal is whether Article 12 of the EMBL Pension Scheme Rules, in force when they first sought its application, permits their request for the inward transfer of their previously accrued pension rights. They point out that at the time each joined the EMBL there were no Instructions for the implementation of Article 12, nor were there any provisions for the outward transfer of pension rights within the BfA scheme. It was not until 1994 that provisions for outward transfer of pension rights were made in the BfA scheme but the EMBL still had not drawn up any Instructions for the implementation of Article 12. To their knowledge, the Instructions have never been drawn up, despite the fact that the Director-General was required to do so under Article 43 of the Pension Scheme Rules.

They submit that a literal reading of the text of Article 12, in all three official languages, shows no express time limit, and that under general principles of administrative labour law an employer may not invoke a time limit which is "not foreseen in a clear text". Furthermore, they contend that in cases of doubt, a text drafted by the employer must be interpreted in favour of the employee. They consider that if the EMBL had intended to place a time limit on the inward transfer of pension rights then it should have drafted a text similar to that in the pension rules of the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), which limits transfers by the wording "on becoming established with the Agency". They also claim that there is "a problem of discrimination and equality of treatment" because outward transfers have been allowed under Article 12, whereas inward transfers have been refused.

They request the Tribunal to order the Laboratory: to draw up the necessary Instructions for implementing former Article 12 of the Pension Scheme Rules; to enter into an agreement with the BfA that it is "necessary and sufficient" to transfer the amounts corresponding to each complainant's accrued pension rights; to advise and inform each complainant of the exact consequences of such a transfer and to make each transfer subject to the sole condition of the respective complainant's agreement; and to award each complainant an equitable indemnity for legal fees and costs.

C. In its reply the Laboratory submits that the absence of Instructions for the implementation of Article 12 would have presented no bar for an inward transfer of pension rights if such a request had been made by the complainants when the EMBL's own pension scheme was created or upon entering into the Laboratory's service. As the Laboratory interprets Article 12, in all three languages, the request for an inward transfer must be made "at the point of entry to the service of the Laboratory". It disagrees that there is a problem of discrimination: outward transfers have been allowed where they comply with Article 12, but there have been no cases of inward transfers complying with that article. It is not relevant to provide the rules in force at other organisations, as those rules are not binding on the Laboratory.

It presses the arguments it made on the merits in the case leading to Judgment 1986.

D. In their rejoinder the complainants submit that the Laboratory has missed the point as to why they have referred to the rules of other organisations. They agree that it is only the EMBL's Article 12 that applies in this case. They have cited the rules of other organisations simply to prove that it was not impossible to add clear text regarding a time limit, but that the EMBL did not do so in drafting its Article 12, nor has it explained why it did not.

They argue that the EMBL never intended to include a time limit in Article 12. Had it intended to do so, it would have needed to introduce transitional measures for employees already at the Laboratory prior to 1978, the year its own pension scheme was created. However, no such provisional measures were introduced. Lastly, they ask the Tribunal to set a time limit for the execution of this judgment, stating that the EMBL has never shown diligence in this matter and that they have had to wait many years for a substantive decision.

E. In its surrejoinder the EMBL states that it does not need to explain why its Article 12 is not identical to that of other organisations. It has already demonstrated that this provision establishes "clear, sequential and logical time limits" that were not met by the complainants. The complainants arguments have done nothing to refute this fact. Staff members already employed by the Laboratory prior to the creation of its pension scheme could have requested inward transfers of accrued pension rights if their previous employer's scheme allowed for such requests; no such requests were received. The EMBL submits that the accusation that the Laboratory has lacked diligence is

incorrect and refuted by Judgment 1986.

CONSIDERATIONS

1. This case is the sequel to Judgment 1986 in which the Tribunal dismissed as irreceivable the complainants' complaint on the ground that the decision then impugned was not materially different from earlier decisions, to the same effect, which had not been timely appealed to the Tribunal. All of those decisions had been to defer any decision on the merits of the complainants' requests regarding the possible transfer of their accrued pension rights under the BfA scheme into the Laboratory's own pension scheme. In this judgment the Tribunal noted that the Laboratory had indicated that the complainants would enjoy the right of appeal when a final decision had been taken.
2. The complainants are all present or former staff members of the EMBL who joined the Laboratory at various dates between 1975 and 1982. Prior to joining the EMBL, they had all contributed to the BfA scheme.
3. In 1978, the EMBL established its own pension scheme. The pertinent provisions of the Pension Scheme Rules relating to that plan are contained in Articles 12 and 43. Article 12 is reproduced under A above. Article 43 reads as follows:

"Article 43 - Detailed implementation

Instructions for the implementation of these Rules shall be drawn up by the Director-General.

..."

4. Prior to 1995 the BfA scheme had no provision for outward transfers so that the complainants were obliged to leave their previous contributions in that scheme and could not transfer them into the EMBL pension scheme. With the change of German legislation outward transfers from the BfA scheme became possible. In November 1997 the complainants applied to the Director-General for information as to the formalities required for such transfers; they also asked him what the practical results of these would be. It was the Laboratory's failure to deal with the merits of those requests which ultimately gave rise to Judgment 1986.
5. On 8 August 2000, by a decision later confirmed on appeal to the Director-General and now impugned, the Laboratory refused those requests.
6. The relevant paragraphs of that decision read as follows:

"The first paragraph of Article 12 of [the EMBL Pension Scheme (EMBLPS)] Rules is clear both in content and meaning. To make a transfer into EMBLPS a staff member who *enters* the service of EMBL may arrange payment of amounts accrued under a previous scheme *in so far as that scheme allows such a transfer*. In such a case the reckonable service in EMBLPS shall be determined by reference to his grade on *confirmation of appointment*.

It follows that a staff member wishing to transfer funds into the EMBLPS must on entering EMBL's service (i.e. on joining EMBL) have transferable funds from a previous scheme, may elect in principle to transfer them and will then, on confirmation of appointment (i.e. once probation is completed), have determined by EMBL the reckonable service the funds will purchase. At that point the staff member can finally decide whether to transfer funds or retain pension entitlement in the previous pension scheme. The point of such transfer arrangements is to allow a seamless transition between schemes when changing employer and on receiving a confirmed appointment from the new employer.

Thus for any request to transfer funds into EMBLPS to succeed the individual must on entering EMBL's service have transferable funds from a previous scheme and must elect to transfer them at the time of receiving a confirmed appointment. On entering EMBL's service you had no transferable funds available and at the time your appointment was confirmed could not elect to make a transfer. The fact that many years later in 1995 changes in German legislation opened the possibility of making transfers out of the German pension scheme cannot lay retroactive obligations on EMBL to accept transfers into its pension scheme.

In summary you did not meet the requirements of Article 12 of the EMBLPS Rules, which was the Rule in force at the appropriate time.

Accordingly, I have to decline your request to transfer funds from your previous pension scheme into EMBLPS."

7. It should be noted that the Laboratory has now repealed Article 12 but that such repeal did not take effect until well after the complainants had made their requests for transfer.

8. Furthermore, despite the apparently mandatory wording of Article 43, the Director-General has never drawn-up the implementing Instructions envisaged by that text.

9. One looks in vain in the text of Article 12 for any words of temporal limitation governing the exercise of the right, which that provision confers on an employee, to request the transfer of his rights under a previous pension scheme. The text does not state, as some similar rules do, that the rights must be exercised at the time the employee becomes established (see for example Judgment 473 *in re* Haas). Nor does it set a specific period of time for making the necessary request (see for example Article 12 of the Pension Scheme Rules of the Coordinated Organizations. ⁽²⁾)

10. It is trite law to state that time limits cannot be presumed but must be either expressly stated or so clearly implied from the context as to leave no room for doubt. In the impugned decision, the EMBL appears to infer two such limits: first, that the right to transfer must exist at the time the employee joins the Laboratory; and second, that the right must be exercised at the time the employee is confirmed in his appointment i.e. upon the expiry of probation. Neither inference is permissible.

11. The first sentence of Article 12 is perfectly neutral as regards time. It does not state that an employee "on entering" the service of the Organisation has the stated rights; they are conferred unreservedly upon any employee "who enters" such service. The condition that the previous pension scheme allow such transfer need only be fulfilled at the time the request to transfer is made. It is simply irrelevant to inquire whether or not at some prior time the previous scheme permitted outward transfers.

12. Likewise, the reference to the "grade on confirmation of appointment" in the second paragraph is manifestly for the sole purpose of allowing the Laboratory to determine the consequences of the inward transfer and does not create a condition precedent to the making of it. Once the request for inward transfer is made the EMBL "shall" determine, by reference to the two stated criteria, the number of years of reckonable service to be credited to the employee under the pension scheme.

13. It has not been suggested that the failure of the Director-General to draw up the Instructions necessary for the establishment of the second reference point can, in any way, defeat the complainants' rights. The failure to meet a condition, whose fulfilment depends entirely upon the Laboratory, results simply in the condition being treated as not having been required. Thus, the consequence of that failure is that the determination must now be made by reference only to each complainant's grade at the date of confirmation of his or her appointment. It is therefore not necessary to give effect to the complainants' request that the Tribunal now order the Director-General to draw up the requisite Instructions; Article 12 having been abolished, it is in any event doubtful that any such Instructions could now be validly drawn up. Since the complainants have been trying unsuccessfully to exercise their rights since 1997, the Tribunal will set time limits within which the parties must act.

14. The impugned decision must be set aside and the Laboratory will be directed to calculate the number of years of reckonable service to be credited to each complainant by reference only to each one's grade at date of confirmation of appointment and to advise each complainant of such amount within ninety days of the delivery of the present judgment, after which each complainant shall have a further ninety days in which to elect whether or not to proceed with such transfer. The complainants should have their costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the Laboratory is ordered within ninety days of delivery of the present

judgment to advise each complainant of the number of years of reckonable service which would be credited to the latter upon the transfer into the EMBL Pension Scheme of the amounts standing to his or her credit in the BfA scheme.

2. Each complainant shall then have ninety days in which to advise the Laboratory as to whether or not that complainant wishes to effect such transfer.

3. The EMBL shall pay the complainants' costs in the global amount of 5,000 euros.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

1. Federal Insurance Office for Salaried Employees

2. 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).