NINETY-SECOND SESSION

***In re* Berthet (No. 3), Delius, Glöckner (No. 6), Robrahn and Stegmüller (No. 2)** **Judgment No. 2089**

The Administrative Tribunal,

Considering the complaints filed by Mrs Carmen Berthet (her third), Mr Hajo Barnim Rudolf Delius, Mrs Godefrida Cornelia Glöckner (her sixth), Mr Bernd Robrahn, and Mr Albert Stegmüller (his second) against the European Molecular Biology Laboratory (EMBL) on 6 November 2000, the EMBL's reply of 17 January 2001, the complainants' rejoinder of 23 April, and the Laboratory's surrejoinder of 28 May 2001;

Considering the applications to intervene filed by:

W. Ackermann

P. Bendall

J.-M. Bois

T. Creighton

M. T. Dauvergne

F. Dauvergne

H. Flösser

A. Gabriel

G. Griffiths

N. Hassler

H. Herzog

M. Holmes

E. Honig

N. Jagt-Gonzalez, van der

A. Jones

C. Kjär

M. Koch

R. Leberman

K. Leonard

C. Moritz

K. Müller

T. Poulsen

E. Schechinger

J. Schulze-Eyßing

J. Sedita

L. Serrano

A. Simon

J. Stegemann

C. Stettner

N. Strausfeld

J. Tooze

D. Tsernoglou

P. Tucker

H. Virta

A. Walter

O. Wernz

W. Winkler

H. Wittmann

J. Zimmermann

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. The complainants and interveners are all staff members, pensioners or pending pensioners of the Laboratory. They contest an amendment to Article 36 (on adjustment of benefits) of the EMBL Pension Scheme Rules which was adopted by the EMBL Council on 5 July 2000 and notified to all staff by the Administrative Director on 10 July.

The EMBL's Pension Scheme, introduced in 1978, had been modelled on that of the Coordinated Organizations [(1)] which the Laboratory used as a standard of reference for the adjustment of pensions. In 1986 the Working Group on the review of the Staff Rules and Regulations was charged with examining: (a) how to adapt the Pension Scheme Rules to the specific needs of the EMBL; and (b) alternative possibilities for financing a pension system. The Working Group recommended that the EMBL retain its current Pension Scheme and proposed certain amendments to the Rules to make the scheme consistent with actual practice. In particular, noting that the EMBL Council was already following the recommendation made by the Co-ordinating Committee of the Coordinated Organizations in its 150th Report (dated 4 April 1978), the Working Group decided not to propose any amendment to Article 36, which then read:

"Should Council decide on an adjustment of salaries in relation to the cost of living, it shall grant at the time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred.

Should salary adjustments be made in relation to the standard of living, Council shall consider whether an appropriate adjustment of pensions should be made."

The EMBL Council accepted this recommendation at its meeting in July 1986.

At its meeting held on 21 March 2000 the Council approved a resolution, inter alia, withdrawing the decision it had taken in July 1986 on the adjustment of pensions. That resolution also allowed for the amendment to Article 36. The Council approved the amendment to Article 36 at its meeting in July 2000. It now reads:

"Pensions currently being paid, and pensions whose payment is deferred, shall be adjusted annually through the application of a cost of living index to be determined by Council.

Where a cost of living index is used in considering the annual adjustment of salaries this shall be the index applied to pensions."

On 4 August the complainants filed identical internal appeals against the decision to amend Article 36 of the Pension Scheme Rules. In their appeals they requested authorisation to appeal directly to the Tribunal if the EMBL was unable to grant their requests. On 9 August the Administrative Director, on delegated authority from the Director-General, rejected the requests. He stated that it would not be appropriate to consider the appeals internally and authorised the complainants to appeal directly to the Tribunal. That is the impugned decision.

B. The complainants contend that the amendment to Article 36 is invalid and constitutes "an arbitrary breach of contract". The Staff Rules and Regulations, which includes those on the Pension Scheme, are part of the individual employment contract of staff members. Citing Judgment 61 (*in re* Lindsey), the complainants submit that provisions which refer to the individual terms and conditions of employment may not be changed unilaterally to the detriment of a staff member; this means that the new, detrimental method of adjusting pensions can only be applied to new staff members joining the Pension Scheme. The EMBL has not put forward any valid reason to justify the change in how pensions were to be adjusted. They submit, citing the Tribunal in Judgment 1821 (*in re* Allaert and Warmels No. 3), that the mere desire to save money, and this at the staff's expense, is not, by itself, a valid reason to deviate from an established practice of adjustment.

The decision to deviate from the policy of identical adjustments to both salary and pensions violates the principle of equality of treatment and leads to discrimination against pensioners. It also creates discrimination between pensioners who receive a pension immediately upon retiring from the Laboratory and those who left the employment of the Laboratory but whose pensions are "pending" until retirement age. The latter's pensions will be lower than the former's, having been adjusted solely on the basis of the cost-of-living increase, whereas the former's will be based on the latest salary which will have been adjusted on the basis of the standard-of-living increase as well. They also claim that there is discrimination in terms of pensioners' contributions to the health insurance scheme.

Lastly, they argue that the amendment breaches the principle of good faith. The policy of the Coordinated Organizations to adopt identical rates of adjustment for both salaries and pensions had been followed for twenty-two years, and on this basis some staff members, among them three of the complainants, had transferred their pension rights into the EMBL Pension Scheme.

The complainants request the Tribunal to quash the amendment to Article 36 and to order the Laboratory to adjust pensions from 1 July 2000 onwards through the application of both the cost-of-living index as well as the standard-of-living index as formerly adopted by the EMBL from the Coordinated Organizations Pension Scheme; to order the Laboratory to pay at least 10 per cent interest on the amounts to be paid retroactively to the pensioners; and to order the payment of at least 20,000 German marks for costs.

C. Although the former Article 36 had been in force for twenty-two years, the Laboratory submits that it was applied only recently, when the EMBL actually began paying pensions. Furthermore, while the EMBL Pension Scheme was modelled on that of the Coordinated Organizations, there was never a binding commitment to follow the latter's recommendations in the interpretation of the EMBL Pension Scheme. When the Working Group carried out the comprehensive review of the Pension Scheme and its rules in 1986, its entire Report, and not only the part concerning Article 36, was accepted by the Council.

When the Council adopted the 1999 pension adjustment it was not fully aware of the 1986 decision, and only took account of the consumer price index. Following an appeal, an adjustment was made taking account of both cost-of-living and standard-of-living indexes. The Council agreed at that time, however, that Article 36 would henceforth be amended. Moreover, there were financial and legal complications since the Laboratory did not have a pension fund and it was only in January 2001 that one was established. The proposed amendment was referred to the Standing Advisory Committee, whose advice led to the decision to make a cost-of-living adjustment mandatory, even in the absence of a salary increase. Adjustment on the basis of standard of living was always discretionary, even under the previous wording of Article 36.

The amendment to Article 36 does not constitute an arbitrary breach of contract. The standard contract provisions provide that the Staff Regulations may be altered following a decision by the EMBL Council. It is clear from the reference in the standard contract clauses to the Staff Regulations that the Pension Scheme Rules in general, and the pension adjustment procedure, are not part of a staff member's personal contract. The defendant organisation adds that the amendment to Article 36 does not infringe the principle of acquired rights either, since the rules on adjustment of pensions provided for in the original wording of Article 36 cannot be considered as a fundamental and essential term in consideration of which staff members accepted appointment. The EMBL cites the case law of the Tribunal in Judgment 832 (*in re* Ayoub) in support of its argument. The complainants' pension rights have not been affected in substance by the amendment. In fact, the Council's decision replaces pension adjustments by reference to salary adjustments with a mandatory and automatic adjustment by reference to a cost-of-living index. Consequently, the purchasing power of pensions is maintained independently of any decisions taken on the adjustment of salaries. The amendment was made in consideration of the long-term interest of the financial health of both the Scheme and pensions.

There has been no breach of the principle of equality of treatment. Pensions are not necessarily linked to a trend of increased salaries relating to a higher standard of living. In addition, the adjustment of pensions based on salary adjustment did not guarantee a full cost-of-living adjustment. The new procedure, which provides that guarantee, cannot be considered arbitrary or discriminatory. It is also reasonable that pensions may vary between a pensioner that deferred his pension for a period and a pensioner that received his pension immediately upon retirement. Nor was there a discriminatory effect on pensioners' health insurance contributions.

The Laboratory submits that the revision of its Pension Scheme, which includes the amendment made to Article 36, did not breach the principle of good faith. It is not obligated to follow the rules and practices of the Coordinated Organizations in pension scheme matters, and it must review regularly the financial stability of its Pension Scheme. This serves its own interest as well as that of the staff. The Council has taken care to protect the legitimate interest of pensioners to have a stable pension system which provides them with an adequate measure of protection from cost of living changes occurring after their retirement.

D. In their rejoinder the complainants submit that the Laboratory has failed to establish concrete reasons why detrimental changes to the pensions' annual adjustment method were adopted by the Council. They argue that the decision of the Council in 1986 cancelled any discretionary right to decide on granting a standard-of-living adjustment. Benefits to pensioners have been reduced and acquired rights affected. A mandatory cost-of-living adjustment will not necessarily be an advantage for pensioners since the cost-of-living index will be decided by the Council.

They add that the EMBL Pension Scheme is a part of the individual terms and conditions of contract, particularly for those staff members who already had an indefinite contract when the Pension Scheme came into force: those staff members had the possibility either to participate in the Laboratory's Scheme or to remain with the respective national social security system. Their choice was made on the basis of the Pension Scheme Rules in force at the time and they might have opted differently if they had known that, after twenty-two years of contributions, the rules were to change.

E. In its surrejoinder the Laboratory states that the complainants have failed to recognise that Article 36, in its original version, did not contain any right for pensioners to be granted a pension adjustment identical to salary adjustment. The amendment must be seen in the context of a comprehensive review of the Pension Scheme. The new Article 36 has clearly improved the legal right of pensioners to be granted an automatic pension adjustment which guarantees the purchasing power of pensions.

The pension adjustment procedure is not a part of the individual employment contract. The right of an international

organisation to modify its pension scheme rules has been generally recognised. The staff members' right to maintain the substance of their pension rights does not amount to a contractual right to unchanged pension scheme rules. The Tribunal's case law does not lead to the interpretation that, owing to the fact that Article 36 remained unchanged for many years, it cannot be changed now.

CONSIDERATIONS

1. The complainants are all staff members or pensioners of the EMBL. The interveners are pensioners, pending pensioners, or staff members of the Laboratory; their claims to intervener status not being contested and their interest in the complaint being patent, the requests for intervention are granted.

2. The complaint attacks a decision of the EMBL Council amending Article 36 of the EMBL's Pension Scheme Rules. While the Tribunal cannot grant the claim for quashing that amended article and the complaint is, to that extent, irreceivable, the Tribunal will treat it as a complaint against the application of the amended article in breach of the complainants' acquired rights. There is no other objection to receivability.

3. The Pension Scheme was introduced by the Laboratory in 1978. It was an unfunded scheme and pensions, when they became due (which was not until quite recently), were to be paid out of the EMBL's budget. The original version of Article 36 provided for the periodic adjustment of pensions as mentioned under A above.

4. Thus, cost-of-living adjustments to pensions were tied to cost-of-living adjustments to salaries both in frequency and amount. However, standard-of-living adjustments were left to Council's discretion and did not have to be made to pensions even when they were made to salaries.

5. In 1986, the Council adopted a report recommending the adoption of the practice followed by the Coordinated Organizations of adjusting salaries and pensions together in accordance with both the standard of living and the cost of living. In 1999, following a recommendation of the Joint Advisory Appeals Board, the Council accepted that the effect of the 1986 decision had been to bind the Laboratory to follow the practice followed by the Coordinated Organizations in adjusting both salaries and pensions in accordance with both cost-of-living and standard-of-living adjustments. Internal appeals brought by both staff members and pensioners were considered favourably by the Appeals Board.

6. In March 2000, the Council decided to adjust the 1999 pensions as they had been adjusted in the past, but also to withdraw its 1986 decision on the adjustment of pensions. In July 2000 it adopted the amended version of Article 36 which is the gist of the case. The text as it now reads is mentioned under A above.

7. This text makes a cost-of-living adjustment mandatory for pensions even if no such adjustment is made to salaries; no provision is made for standard-of-living adjustment to pensions.

8. The complainants argue that the amendment violates the policy adopted by the Council in 1986 and that such a policy had been in practice since 1978; they claim it is still in force. The amendment constitutes an arbitrary breach of the employment contract and their acquired rights: provisions of the Staff Rules and Regulations, which include the Pension Scheme Rules, cannot be changed "one-sidedly" to the detriment of the staff member. The mere desire to save money is not a valid reason to deviate from an established practice. The amendment breaches the principle of equality of treatment under both the pension and health insurance schemes and the principle of good faith. The complainants claim: (1) the quashing of the amendment to Article 36 and an adjustment of their pensions from 1 July 2000 onwards, using both the cost-of-living index and the standard-of-living index; (2) at least 10 per cent interest on the amounts to be paid retroactively; and (3) at least 20,000 German marks in costs.

9. Most of the complainants' arguments can be disposed of summarily. In the face of the express wording of the former Article 36, it is simply untenable to argue that the Laboratory could, by following the practice of the Coordinated Organizations in previous years, bind itself to do so for all time. Even if the 1986 decision of the Council did have the effect of obliging the EMBL to follow the Coordinated Organizations' practice in the future (a matter on which the Tribunal expresses no opinion), there can be no doubt that the same body that had the authority to adopt such a decision had equally the authority to decide to withdraw it. It may be noted as well that that decision, taken in March 2000, was not made the subject of an internal appeal or of a complaint before the Tribunal. Nor can it be seriously argued that the decision to adopt the amended Article 36 was arbitrary: it was

taken in the context of a major revision of the Pension Scheme and its Rules which involved the funding of pensions which had previously been unfunded and the Council had considered, from the actuarial assessment about future costs, the possible consequences of not doing so. There is no evidence that the amended Article 36 breaches the principle of equality of treatment or that the Council acted other than in good faith and after full notice to, and consultation with, the Staff Association.

10. The true thrust of the complainants' case, and the only aspect which requires serious consideration, is that the amendment breaches certain of their acquired rights. The complainants lay particular emphasis on Judgment 61 in which the Tribunal stated the following:

"12. The terms of appointment of international civil servants and, in particular, those of the officials of the [Organisation], derive both from the stipulations of a strictly individual character in their contract of appointment and from Staff Regulations and Rules, which the contract of employment by reference incorporates. Owing, inter alia, to their increasing complexity, the conditions of service mainly appear not amongst the stipulations specifically set out in the contract of appointment but in the provisions of the above-mentioned Staff Regulations and Rules. The Staff Regulations and Rules contain in effect two types of provisions, the nature of which differs according to the objects to which they are directed. It is necessary to distinguish, on the one hand provisions which appertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and subject to variation, and, on the other hand, provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment. Provisions of the first type are statutory in character and may be modified at any time in the interest of the service, subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them. Conversely, provisions of the second type should to a large extent be assimilated to contractual stipulations. Hence, if the efficient functioning of the organisation in the general interest of the international community requires that the latter type of provisions should not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his consent but only in so far as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment.

...

18. After being a member of the Pension Fund of the [Organisation] until 31 December 1959, complainant was affiliated on that date to the United Nations Joint Staff Pension Fund. Since then his rights as an insured person are determined no longer by organs of the [Organisation] but by the Joint Staff Pension Board and by the General Assembly of the United Nations. Moreover, while the contributions payable by him since 1 January 1960 have been barely higher than those for which he was previously liable, the contribution of the [Organisation] to the Joint Fund are markedly lower than those which the [Organisation] used to make to its own Fund. In addition, under the old scheme the maximum amount of complainant's pension corresponded to 60 per cent of his insured earnings, whereas under the new scheme it corresponds to only 54,5 per cent. Actually, it is doubtful whether, taken in isolation, these various changes seriously impaired a right that could have induced complainant to enter the service of the [Organisation], but taken in conjunction the changes did have this effect. Therefore by making the changes applicable to complainant the [Organisation] infringed the terms of his appointment."

11. Thus, the Tribunal held that it was "doubtful" that either "markedly" lower employer contributions to a staff pension fund or a reduction of about 9 per cent in pension (from 60 per cent of insured earnings to 54.5 per cent) would by themselves be enough to impair seriously an employee's acquired rights, but that taken in combination they were.

12. The Tribunal returned to the question of acquired rights in Judgment 832 (*in re* Ayoub). It said:

"13. In Judgment 61 (*in re* Lindsey) the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment.

That calls for some explanation.

Although there will be breach of an acquired right only if one of two conditions is fulfilled, the two are in fact but

one. Disturbance of the structure of the contract posits impairment of a fundamental term, and the latter the former.

A somewhat broader framing of the doctrine is wanted so that it will cover not just terms of appointment that were in effect at recruitment but also terms that were brought in later and were calculated to induce the staff member to stay on.

The reference to a 'term of appointment in consideration of which the official accepted appointment' was never meant to import a subjective test: did this term or that actually make the staff member sign on or decide to stay? What the Tribunal had in mind was a term of the sort that might sway his decision.

In some instances only the existence of a particular term of appointment may form the subject of an acquired right. But there are other contingencies in which the arrangements for giving effect to the term may also give rise to such a right.

Stated in that way the doctrine is broader than the rule against retroactivity. Whereas the doctrine looks to the future as well as to the past, the rule merely forbids altering what already belongs to the past.

So before ruling on the plea the Tribunal must in each case determine whether the altered term is fundamental and essential.

14. There are three tests it will apply.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

15. How do the three tests apply to the present case?

The complainants argue an acquired right to application of the old scale of pensionable remuneration as prescribed in Article 3.1.1 of the Staff Regulations before the recent amendments. So they are relying not on the contract or on any decision but on a rule, their right to the safeguarding of their conditions of service is not an unqualified one, and what matters especially is the reasons for and consequences of the amendments to 3.1.1.

Pensionable remuneration has greatly altered with circumstances. The Assembly made it equivalent to net salary, to semi-gross salary and then to gross salary, with due regard to the weighted average of post adjustment. Contributions and benefits have changed time and again. Indeed the reckoning of the pension depends on such factors as the cost of living, currency rates and rates of tax in the country of the pensioner's residence. Those are variables that may preclude the creation of acquired rights. The financial plight of the Fund has over the years become alarming. To treat pensionable remuneration as a fundamental condition of service, an acquired right, and therefore inviolate, might be to overlook the real difficulties facing the Fund and the agencies.

The cut in pensionable remuneration does of course harm the complainants' interests. International civil servants quite understandably put stock in their retirement benefits and quite rightly want an income that, even if it will not sustain the same standard of living, will at least be comfortable. The decisions impugned do mar the outlook, in some cases seriously. But that is not enough to establish breach of an acquired right. The decisions plainly do not affect everyone to the same extent. Because of promotion or increments some are likely to get at least as much on retirement as they would have got under the old scale on retirement by 1 April 1985. What is more, the reduction in pensionable remuneration affects only senior officials and staff in lower grades fare better under the new scale than they did under the old. Despite the new scale international civil servants still stand to get bigger pensions than the best-paid national civil servants. And on 18 December 1985 the Assembly approved transitional measures that help some staff.

The Tribunal concludes that because the altered term is in the rules and because of the reasons for the amendment, and notwithstanding the financial injury to the complainants, there was no breach of an acquired right. Yet if the injury increased because of decisions that are not now before the Tribunal there might be further review."

13. In that case the Tribunal refused to find a breach of acquired rights even where there was no doubt of "financial injury" and the outlook for the pension income of the complainants was "mar[red] ... seriously".

14. How does the present case measure up against the three tests enumerated in Ayoub? The source of the claimed right is not in the article itself, for the former Article 36 was clear that adjustments for standard of living (as well as those for cost of living) were at the discretion of the Council. It is not in the complainants' terms of employment, for their contracts are silent on the matter. Nor can it be said to arise from the Council's decision of 1986, for there is nothing in that decision which speaks to its permanency; it was in fact withdrawn in March 2000 and the complainants did nothing to appeal or lodge a timely complaint against that action. The most the complainants can invoke is a "practice" in that for a relatively limited number of years the Laboratory did in fact adjust pensions in line with adjustments to salaries to reflect changes in both cost of living and standard of living. While the Tribunal does not preclude the possibility of a practice becoming the source of an acquired right, such a finding would require a great deal more than is present in this case.

15. The second test looks at the reason for the change. Here, despite the complainants' assertion to that effect, it is manifest that the change was not made "merely" to save money; the Tribunal's decisions have, however, always recognised the legitimacy of financial considerations. Far from being a mere money-saving measure, the establishment of a funded pension scheme will require increased employer contributions and substantial additional expenditure by the Laboratory and its aim is to provide much greater security for the pensions both of the complainants and of all future pensioners. It is to no avail that the complainants criticise the effectiveness of the change or the accuracy of the calculations on which it was based, for those are not matters within the Tribunal's competence. As long as there is no suggestion in the evidence - and there is none - that the stated reasons are simply a screen to hide an ulterior motive, the Tribunal will not attribute such motive to the Laboratory.

16. Finally, the third test looks at the impact of the change and the consequence of allowing an acquired right. The claimed right would ensure that pensions were always adjusted in exactly the same way as salary scales, whereas the change would keep the base pension at the salary scale in effect at the time of leaving the Laboratory but require an obligatory adjustment to that base to keep pace with the cost of living. In a time of salary inflation and strong economic growth, the first is clearly to the advantage of pensioners for their incomes will rise in conjunction with the working force. However, there is no guarantee that this will always be the case as, in periods of deflation or recession, standard-of-living adjustments may even have a negative impact. To simplify, it is not self-evident that the change which is contested will adversely affect the complainants and it is by no means inconceivable that they will, in fact, receive better pensions under the amended article than they would have had under the old one. The Tribunal does not have to decide whether the periodic adjustment of pensions should be viewed as an acquired right. Even assuming that it were, such a right could go no further than the maintenance of the purchasing power of the pension paid at the time of entitlement and that is precisely what the amended article seeks to do. To accept that pensions must always be adjusted to keep in line with post-retirement salary increases would be to expose pension funds to an uncertain and unmeasurable future liability which might well in the end wipe out the funds themselves.

17. The Tribunal concludes that the complainants have not established that the application of amended Article 36 to them would result in a breach of their acquired rights and their complaints must, in consequence, be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 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. 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).

Updated by PFR. Approved by CC. Last update: 15 February 2002.