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

SIXTIETH ORDINARY SESSION

In re GIESER

Judgment No. 782

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Manfred Gieser against the European Molecular Biology Laboratory (EMBL) on 23 April 1986, the Laboratory's reply of 19 June, the complainant's rejoinder of 23 July the Laboratory's surrejoinder of 22 August, the complainant s further brief of 15 September and the Laboratory's comments thereon of 10 October 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article R 2.1.15 and Section 6.1 of the EMBL Staff Rules and Regulations in force up to 31 December 1985 and Annex RD.4.04 of the Staff Regulations in force since 1 January 1986;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a citizen of the Federal Republic of Germany born in 1939, worked from 1965 for a firm in Heidelberg known as Horst Schulz under an appointment without limit of time. In 1976 the firm got a contract to install sanitary equipment on EMBL premises and the complainant was overseer. When the work was nearly over, in 1977, the Laboratory expressed interest in employing him. After talks with senior staff, the content of which is in dispute, the then Director of Administration, Mr. Bach, offered him on 8 November 1977, and he accepted on 14 November, an appointment as a fitter. He took up duty on 1 December. The duration of the contract was stated to be "three years to begin with" and there was a period of six months' probation. On 5 June 1978 his supervisor, Mr. Vrugt, who was the chief maintenance engineer, wrote to the Director of Administration praising his work and observing in a postscript that before taking up duty he had been adamant that EMBL should soon convert his fixed-term appointment into an indefinite one. He was granted an extension of appointment from 1 December 1980 to 30 November 1983. On 21 February 1983 his supervisor wrote to the Personnel Section to confirm that his work was good and recommend giving him an indefinite appointment. On 23 February the Director-General wrote to tell him that his situation would be "taken into account in future discussions on offers of indefinite contracts" and in the mean time offered him another extension, from 1 December 1983 to 30 November 1986. He accepted the offer on 15 July 1983. On 24 November 1983 he was promoted to grade 5-7 as from 1 December 1983. 8y a minute of 5 November 1985 the Head of Personnel informed him that there would be neither an indefinite appointment nor any further extension. He appealed on 3 December 1985 under Section 6.1 of the Staff Rules and Regulations claiming an indefinite appointment. In a minute of 28 January 1986, the impugned decision, the Director-General replied that under Article 6.1.02 there was "no appeal against any decision ... not to renew a contract" and that his appeal was therefore rejected.

B. The complainant alleges breach of a binding promise that he would get an indefinite appointment on satisfactory completion of probation. The promise was made to him orally by the then Director of Administration, Mr. Bach in the presence of the Technical Director, Mr. Beer, and the chief maintenance engineer, and it was on the strength of it that he left his former employer. Mr. Bach was competent to make the promise because it was to him that the Director-General delegated authority, from 1975 to 1982, to sign contracts with members of the staff. He belongs to the service staff and, as his supervisor said in the minute of 21 February 1983 to the Personnel Section, it would make sense to keep on someone like him with sound experience of the maintenance work.

Furthermore, he qualifies under Annex RD.4.04 to the Staff Regulations in force since 1 January 1986, which entitles staff members like himself to "fixed-term contracts during the first nine years of employment, thereafter indefinite contracts ... if this is in the interests of the Laboratory and justified by the skills and experience of the individual staff member". He reckons he will earn elsewhere about 1,500 Deutschmarks a month less and, failing the grant of an appointment for another 18 years up to the age of 65 his loss will come to 312,000 Deutschmarks, discounting wage increases. He claims an indefinite appointment or damages in that sum, and 10,000 Deutschmarks

in costs.

C. The Laboratory replies that the complaint is devoid of merit. Though Mr. Bach was competent to commit it at the time, the complainant offers no evidence of any promise by him. Many similar contracts have been concluded with staff which state that their duration is "three years to begin with" and which have never been converted into indefinite appointments. That reflects Article R 2.1.15 of the Regulations in force up to 31 December 1985: "Members of the personnel shall receive on appointment a fixed-term contract of not more than three years' duration. This contract may be renewed or extended once or more often to cover a maximum total period of not more than nine years..." The complainant may not rely on the postscript to his supervisor's minute of 5 June 1978 since his supervisor had no authority to commit the EMBL. The quality of his work is immaterial. He accepted freely and without reservation the extensions of his appointment. He cannot prove he was enticed away from his former employer. It would be wasteful to give both him and the other fitter on the EMBL staff indefinite appointments since only one of them is needed. Both the old and the new Regulations say that after several years indefinite contracts "may" be granted: there is no obligation.

D. In his rejoinder the complainant develops his pleas. He submits in the main that he was enticed away from his former employer by a valid and binding promise of an indefinite contract. Though he accepted extensions he did so only on the understanding that an indefinite appointment would be forthcoming and that he was not waiving his right to one. The EMBL is mistaken in saying it needs only one fitter. Besides it should have given him priority over the other one because of its promise.

E. In its surrejoinder the Laboratory enlarges on the case made out in its reply, to which it submits that the complainant has offered no convincing answer. It says it did not need to

entice him with any promise since there were many applicants for his post. Mr. Bach denies he ever made the promise alleged. Besides, an oral promise, unsupported by evidence, does not carry the authority of a written one.

F. In a further brief the complainant submits that the Laboratory has wittingly submitted a mistaken statement of the facts and that his membership of its pension scheme, which, by its own account, is open only to staff with an indefinite contract, shows that he was considered to hold such a contract. In further comments the Laboratory rejects his representation of the facts and observes that it offered membership of the pension scheme to all staff, not just those with an indefinite contract.

CONSIDERATIONS:

The right to rely on a Promise

1. According to the rules of good faith anyone to whom a promise is made may expect it to be kept, and that means that an international official has the right to fulfilment of a promise by the organisation that employs him.

The right is conditional. One condition is that the promise should be substantive, i.e. to act, or not to act, or to allow. Others are that it should come from someone who is competent or deemed competent to make it; that breach should cause injury to him who relies on it, and that the position in law should not have altered between the date of the promise and the date on which fulfilment is due.

It does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour.

The promise the complainant relies on

2. For a dozen years the complainant worked for a firm known as Horst Schulz in Heidelberg. His job was to fit sanitary equipment and he held an appointment without limit of time. In 1976 and 1977 the Laboratory got Schulz to do some fitting work. It was then that the complainant came to know the organisation and that -- so he says -- it offered him a job. He agreed, and on 8 November 1977 it appointed him as a fitter for a period starting on 1 December 1977 and to last three years "to begin with" ("zunachst"). It gave him further three-year appointments in 1980 and 1983, but on 5 November 1985 the Head of Personnel told him that his appointment which was to expire on 30 November 1986, would not be extended, let alone replaced with an indefinite one. The complainant appealed, and the Director-General rejected his appeal on 28 January 1986.

He filed the complaint on 23 April 1986. He contends that he is entitled to an indefinite appointment by virtue of a promise he was given before taking up duty. He seeks either such an appointment or 312,000 Deutschmarks in damages, and 10,000 Deutschmarks in costs.

3. As proof of the promise he cites statements by Mr. Bach, the Director of Administration, Mr. Beer, the Technical Director, and Mr. Vrugt, his original supervisor.

As the Director of Administration Mr. Bach had authority to recruit, and it was he, says the complainant, who promised he would in time get an indefinite appointment. The organisation has asked Mr. Bach what he said in his talks with the complainant in 1977 and in his written reply of 21 May 1986 he states that he had authority to sign contracts, even indefinite ones with staff other than scientists; that the talks took place nine years ago, that he has since recruited some 150 people and seen over 500 job applicants, and that he cannot remember exactly what he said to everyone; that he would be surprised if he had said anything but what was provided for in the Staff Rules and Regulations, namely that a fixed-term appointment might be converted into an indefinite one, and that in his personal relations with the Director-General at the time he realised it was better to keep to the terms of written contracts. This summing-up of Mr. Bach's statements does not prove that the promise was made: at most they suggest that the Administration had the possibility of an indefinite appointment in mind.

Mr. Beer was present at the time. In a letter of 8 November 1985 to the complainant he says he well remembers that when the complainant changed employers an indefinite appointment had been "in Aussicht gestellt". The words mean neither that such an appointment had been just considered, nor, as the complainant submits, that any promise was actually made, but that a hope or expectation was raised. So construed Mr. Beer's statement is more favourable to the complainant's case than Mr. Bach's, but it still does not bear out his allegation of a promise.

The third witness of what was said in 1977 is Mr. Vrugt, and he supports the complainant's case without qualification. On 5 June 1978 he addressed to Mr. Bach a report praising the complainant's work during the trial period and proposing the grant of a step. In a postscript he observed (1) that the complainant had accepted a temporary appointment only on condition that he would later be granted an indefinite one, (2) that, according to the department of administration and personnel, for essential staff duties a temporary appointment would be converted into an indefinite one after two periods of employment or when an indefinite one could be granted, and (3) that, since that applied to the complainant's duties, he had been assured that his original appointment would be converted into an indefinite one. The postscript was unsigned, but at the Laboratory's request Mr. Vrugt certified it in 1985 to be true.

The Tribunal finds that the making of the oral promise is established. There is no reason to question the impartiality of what Mr. Vrugt said some six months after the complainant got his first appointment and indeed confirmed later. Indeed Mr. Vrugt is still on the staff and plainly has no reason to oppose the Laboratory by misrepresenting the facts.

In any event to hear evidence from Mr. Bach, Mr. Beer and Mr. Vrugt would serve no purpose. Mr. Bach and Mr. Beer would have nothing to add to their written statements on a matter that was discussed years ago and that did not affect them closely anyway. And in all likelihood Mr. Vrugt would merely repeat what he wrote in 1978 and confirmed in 1985.

4. What makes Mr. Vrugt's affirmations the more cogent is the position the complainant was in when he accepted the Laboratory's offer in 1977. By then he had been with a private firm for a dozen years and, being the good employee no-one denies he is, could look forward to staying on with them for good. It therefore seems most unlikely that he would have given up a safe job for an unreliable one, even at a higher wage. As Mr. Vrugt says, the complainant joined the Laboratory only on the condition that he would get an indefinite appointment, at least eventually, and the condition was accepted.

5. On 4 January 1978 the complainant wrote to the Laboratory to say that, having an appointment for only three years and no certainty of completing ten, he wanted to stay affiliated to a West German insurance scheme. The Laboratory argues that that showed he had no expectation of an indefinite appointment, but it is mistaken. He wrote the letter only one month after taking up duty, during the trial period. Before he was sure his new employer was satisfied with him he was understandably loth to give up entitlements he had acquired under his own insurance scheme in return for what was then a mere possibility of obtaining benefits at the Laboratory.

Besides, having read a staff circular, the complainant did join the Laboratory insurance scheme on 1 January 1982 with retroactive effect from 1 December 1977, and most of the contributions he had paid to the German scheme since 1 December 1977 were transferred. Though none of this is enough to establish the promise of an indefinite appointment, it does bear out the conclusions the Tribunal draws from the other evidence as to the existence of such a promise.

6. The Laboratory pleads that when the fixed-term contracts were concluded the complainant signed without reservation. The plea fails.

Having just been given the promise the complainant had no reason in 1977 to say that he was expecting an indefinite appointment, particularly since the first one-was stated to be for three years "to begin with", implying there would be others.

Again, in 1980, there was no need for him to declare his acceptance of the second appointment to be conditional. Mr. Vrugt's postscript says that only after two extensions of his appointment was he to get an indefinite one.

In a letter of 23 February 1983 the Director-General told the complainant that because of "the current structural and organisational situation in connection with the intended revision of the Staff Regulations" he could not for the time being agree to the proposal of an indefinite appointment, but would reconsider the matter in future discussions on offers of such appointments. So the complainant had no reason to fear that in accepting a further three-year appointment then he was putting his indefinite appointment at risk.

7. The Tribunal concludes that the complainant may rely on the promise of an indefinite appointment. The promise meets the conditions set out in 1 above. It was substantive. It was made by someone in authority or at least by someone he might deem to have authority. The breach of it causes him the injury he alleges. And the relevant passages of the Staff Regulations were not amended between 1977 and 1985. It was therefore in breach of the Laboratory's duty to end his contract on the expiry of the third extension and he is entitled to an indefinite appointment.

He is willing to accept instead damages amounting to 312,000 Deutschmarks. The Laboratory has done away with one of two posts for fitters and given the other one to someone else.

It therefore appears advisable to let the Laboratory choose between the grant of an indefinite appointment and damages. The amount of damages the complainant claims -- 312,000 Deutschmarks -- is questionable. He explains that he has multiplied the sum of 18,000 Deutschmarks, the yearly loss of earnings he reckons he will incur should he be employed by a private firm, by 18, the number of years during which he expected to work for the organisation. But besides being wrong (18 x 18,000 = 324,000) the total takes no account of changes that may occur in the organisation and on the German labour market. In any case, even if he expected a loss of 18,000 Deutschmarks a year he would at most be entitled to the lump sum equivalent.

The Tribunal sets damages ex aequo et bono at 150,000 Deutschmarks, and the Laboratory shall pay him that amount unless it grants him an indefinite appointment.

Costs

8. Since the complainant wins and may get substantial damages, his claim to 10,000 Deutschmarks in costs is not excessive.

DECISION:

For the above reasons,

1. The Laboratory shall either grant the complainant an indefinite appointment or pay him 150,000 Deutschmarks in damages.

2. It shall pay him 10,000 Deutschmarks in costs.

3. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner

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