L. (No. 3)

v.

EMBL

130th Session **Judgment No. 4295**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr V. L. against the European Molecular Biology Laboratory (EMBL) on 1 June 2018 and corrected on 3 July, EMBL's reply of 14 November 2018, the complainant's rejoinder of 1 March 2019 and EMBL's surrejoinder of 7 June 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges a finding made in the decision not to impose a disciplinary measure against him.

At the material time, the complainant was working at EMBL's Unit in Hamburg, Germany. On 9 August 2016 the Administrative Director informed the complainant that the Head of Human Resources, Mr B., had reported that he had "recorded meetings without letting the people participating know" that he had done so. On that ground, the Administrative Director had decided to initiate a disciplinary procedure against him.

On 14 August the complainant requested further clarification about the allegation made against him. The Administrative Director replied on 15 August stating that, on 10 June 2016, at the beginning

of a meeting between the complainant, Mr B. and Mr W. (the Head of EMBL's Unit in Hamburg), Mr B. had discovered that the complainant "was about" to record the discussions. Another staff member, Ms K., had informed the Administrative Director that the complainant had admitted to having recorded a meeting with her and Mr W. in September 2015. On 31 August 2016 the complainant provided explanations, denying that he had ever secretly recorded conversations during his service at EMBL.

The complainant was invited to attend an oral hearing by a letter of 5 September. Attached to the letter was the written testimony signed by Mr B. and Mr W., stating that on 10 June the complainant had admitted that he was recording the meeting. Hearings were held on 15 September 2016 and on 16 January 2017.

On 8 May 2017 the Director General informed the complainant that, after careful evaluation of the facts, and notwithstanding that there was evidence that the complainant had recorded the beginning of the meeting on 10 June 2016 without the participants' prior consent, he had decided that no disciplinary measure would be imposed on him. On 2 June 2017, the complainant lodged an appeal against one "aspect" of that decision. In particular, he stated that he could not accept the finding that there was evidence that the recording took place.

The Joint Advisory Appeals Board (JAAB) issued its report on l9 February 2018. It concluded that the appeal was clearly irreceivable as the said finding did not constitute a decision. It therefore recommended dismissing the appeal. By a letter dated 8 March 2018, the Director General informed the complainant that he had decided to endorse the JAAB's recommendation and to dismiss his appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him material and moral damages, as well as costs. He asks the Tribunal to order that all documents and materials related to the disciplinary procedure at issue in these proceedings be removed from his personal file.

EMBL submits that the complaint is irreceivable and, subsidiarily, that it should be dismissed as entirely unfounded.

CONSIDERATIONS

1. This complaint stems from the Head of Human Resources' report to the Administrative Director that the complainant was recording meetings without the participants' knowledge. On 9 August 2016, the Administrative Director informed the complainant that this allegation had been made and that a disciplinary procedure was opened. In his 15 August 2016 response to the complainant's request for clarification regarding the allegation, the Administrative Director stated that the Head of Human Resources reported that at a 10 June 2016 meeting he and the Head of the Hamburg Unit had with the complainant, it was discovered that the complainant "was about" to record the discussions. The Administrative Director added that Ms K. (a subordinate in the complainant's research group) reported that the complainant had recorded a meeting she had attended in September 2015 without her knowledge. He advised the complainant that the recording of a meeting without the consent of the participants constitutes a violation of Staff Rule 1 3.04 and the EMBL Code of Conduct and may result in disciplinary measures being taken.

2. The Administrative Director initiated an investigation and upon the completion of the investigation he submitted the evidence and information gathered during the investigation to the Director General for his consideration. On 8 May 2017, the Director General wrote to the complainant regarding the "Finalisation of the disciplinary measures procedure/allegations of in recordings" and informed the complainant that "[a]fter careful evaluation of any and all facts of this case, [he had] decided that no disciplinary measure will be imposed concerning the claims of recording the beginning of a meeting without prior consent on 10th June 2016". Relevantly, as will be discussed below, in section II(h) under the heading "Considerations" the letter states:

> "Notwithstanding that:
>
> g) [...]
>
> h) there is evidence that the recording took place;
>
> i) [...]."

3. On 2 June 2017, the complainant lodged an appeal with the Director General challenging the 8 May 2017 decision in which he stated that he accepted the decision that no disciplinary measure would be imposed in relation to the allegation concerning the 10 June 2016 meeting. However, he could not accept the Director General's conclusion in section II(h) of the letter that "there is evidence that the recording took place" and, "therefore [he] appeal[ed] that aspect of [the Director General's] decision and request[ed] that [the Director General] decide in a new letter instead that there was no evidence that any recording took place, and on this ground decide that no disciplinary measure will be imposed".

4. In keeping with the EMBL Staff Rules and Regulations, the Director General forwarded the complainant's appeal to the JAAB. In its 19 February 2018 report to the Director General, the JAAB found that the final decision resulting from the disciplinary procedure concerned the application of disciplinary measures and did not concern the existence or non-existence of evidence; the decision did not cause any injury to the complainant; and the decision had no effect on the complainant's rights and obligations, nor did it change his position. The report stated, moreover, that the finding of the existence of evidence did not constitute a decision and had no bearing on the final decision. The JAAB concluded that the appeal was not brought against the final decision which was a positive decision not to impose any disciplinary measure that was accepted by the complainant and, accordingly, the appeal was clearly irreceivable. The JAAB recommended the dismissal of the appeal. In his 8 March 2018 decision, the Director General accepted the JAAB's recommendation and dismissed the appeal as irreceivable. This is the impugned decision.

5. In relation to the issue of receivability, the complainant submits that the JAAB erred in its analysis of the receivability of the appeal. First, he contends that the JAAB's statement that he "appeal[ed] against the fact that 'there is evidence that the recording took place', which did not give rise to the decision in question", is not accurate. He argues that the Director General found evidence that the recording took place and considered this finding in reaching the final decision. The complainant stresses that he "did not challenge that aspect of the decision not to impose a disciplinary measure but did

challenge that aspect of the decision that found he had made a secret recording". Thus, he was seeking an amendment of the final decision in order to clear his good name and professional reputation. The complainant also disputes the JAAB's conclusion that the Director General's 8 May 2017 decision did not cause him any injury.

6. At this juncture, it is convenient to make two observations. First, a ruling by an internal appeal body on its own competence or the final decision maker's acceptance of the ruling cannot give the Tribunal competence to hear a complaint beyond that provided in its Statute. As well, it is for the Tribunal to determine if it is competent to hear the complaint (see Judgments 1509, consideration 14, and 3247, consideration 19). Thus, a consideration of the complainant's submissions regarding the flaws in the JAAB's receivability analysis is unnecessary. Second, as the Tribunal reiterated in Judgment 4145, consideration 5, Article II of the Tribunal's Statute requires that "for a complaint to be receivable the staff member must have a cause of action and the impugned decision must be one that, by its nature, is subject to challenge" (see also Judgment 3426, consideration 16).

7. In his pleadings, the complainant stresses that in his appeal he only challenged "that aspect of the decision that found he had made a secret recording". It is evident and not disputed that the complainant takes the position that the statement in section II(h) of the 8 May 2017 letter forms part of the decision articulated in that letter under the heading "Decision". This position is flawed as it disregards the distinction between a finding of fact and a decision. As the Tribunal reiterated in Judgment 3861, consideration 5, and the cases cited therein, "the term 'decision' means an act by an officer of an organisation which has a legal effect". A finding of fact, however, forms part of the reasons articulated in arriving at the decision. In Judgment 3997, consideration 7, the Tribunal stated that "the Tribunal's jurisdiction is a challenge to a final decision with operative legal effect and not a challenge to the reasons underpinning that decision." The Tribunal added, as consistently held in the case law, that "[o]bviously if there is a final decision with an operative legal effect then a challenge to that decision can also impugn the reasoning leading to it".

8. The 8 May 2017 letter was divided into three sections: Procedure, Considerations and Decision. It is noted that the statement in section II(h), at issue in this proceeding, was one of the ten considerations in the section under the heading "Considerations". On this basis alone, it is evident that the statement was one of the considerations underpinning the decision and not a decision. Moreover, on the face of it, it is clear that the statement "there is evidence that the recording took place" is a finding of fact and not a decision as contemplated in Article II of the Statute of the Tribunal. As for the decision itself, it was beneficial to him and, in that respect, he has no cause of action. It follows that the complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 24 June 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ