C.

v.

EMBL

134th Session **Judgment No. 4497**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. C. C. against the European Molecular Biology Laboratory (EMBL) on 21 November 2019 and corrected on 27 December 2019, EMBL's reply of 17 April 2020 and the email of 24 June 2020 whereby the complainant informed the Registry that he did not wish to file a rejoinder;

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 contests the decision to summarily dismiss him for serious misconduct.

In December 2017, the complainant joined EMBL, under a three-year fixed-term contract, as a web developer.

On 9 July 2019 the Administrative Director informed the complainant that allegations of misconduct had been brought to his attention a few days earlier and that a preliminary investigation was initiated. The alleged misconduct related to possible violations of the Code of Conduct and Internal Policies Nos. 54 and 60. In particular, the allegations referred to comments the complainant had made on 12 and 25 June 2019, as well

as possible inappropriate use of IT facilities. In accordance with Staff Rule 2 5.09, he was suspended with pay with immediate effect.

On 19 July the Administrative Director informed the complainant that the preliminary investigation had been finalised. He attached the preliminary investigation report and invited the complainant to exercise his right to reply by 26 July. In the report, the Head of Human Resources found that the following allegations were established: on 12 June 2019 the complainant made a "Nazi comment" to his colleague; on 25 June he wrote an offensive message on a card for a colleague (Mr M.), who was leaving EMBL; in 2018, he hacked email account of a colleague, sent impersonated emails from his colleagues' email accounts or used a script pretending he was them, and was continuously accessing his colleagues' computers without their authorisation. More generally, his behaviour towards colleagues was disrespectful and inappropriate. Hence, he appeared to have breached the Code of Conduct and Internal Policies Nos. 54, 60 and 67.

On 28 July Mr M. wrote to the Ombudsperson stating that he did not consider the complainant to be a "homophobic person". The following day, the Administrative Director informed the complainant that, based on the preliminary investigation report, there was a reasonable basis on which to commence a disciplinary procedure against him to investigate the alleged misconduct further and consider whether a disciplinary measure should be imposed. A summary of the interviews conducted by the Head of Human Resources and a senior legal officer was attached to the report. The complainant was invited to a hearing with the Director General and the Administrative Director on 14 August to present his case and test the evidence against him. The hearing took place on the proposed date in the presence of the Director General, the Administrative Director, a senior legal officer, a representative of the Staff Association and the complainant.

Having received the minutes of the hearing, the complainant provided his comments on 20 August, explaining that some of the wording used in the minutes did not adequately reflect what he said and affirming that some facts were incorrect.

By a letter of 23 August 2019, the Director General notified the complainant that, based on the nature of the misconduct and the incompatibility of his conduct with his role as a member of the IT Services Department, he was dismissed without notice. The Director General stated that it was established that the complainant had violated the Code of Conduct and Internal Policies Nos. 60 and 67 by making inappropriate comments to colleagues in June 2019. She also stated that the complainant had also violated Internal Policy No. 54 by hacking some colleagues' emails in 2018, by impersonating emails from colleagues' accounts in October 2018 and by continuously accessing some of his colleagues' computers without their authorisation. With respect to Mr M.'s statement, the Director General noted that it was sent at the complainant's request and therefore considered that the latter had tried to influence Mr M. to change the views he had expressed earlier to the Ombudsperson on his behaviour in general. The Director General added that, in application of Staff Regulation 4 1.68, no indemnities would be paid to the complainant. That is the impugned decision.

The complainant asks the Tribunal to award him compensation in the amount of 115,721.42 euros, which is equivalent to his gross remuneration plus "allowances and contribution" from the date of his dismissal, that is to say 31 August 2019, until the end of his contract, which was due on 17 December 2020. He also asks the Tribunal to allow him to benefit from EMBL's Health Insurance Scheme for the period between his dismissal and the end of his initial contract, to grant him unrestricted access to the EMBL premises like any other visitor, and to grant him the status of "alumni of EMBL" with all benefits attached. He further asks the Tribunal to order EMBL to ensure that his professional "email address should be forwarded to [his] personal email address", as is usually the case for employees leaving EMBL, and to order EMBL to prepare a letter of recommendation on his professional abilities. In addition, he seeks moral damages for the distress the disciplinary procedure has caused to him, and the negative effects it had on his mental and physical health. Lastly, he claims costs.

EMBL asks the Tribunal to reject the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant commenced employment with EMBL in December 2017. He was summarily dismissed on 23 August 2019. He impugns in these proceedings the decision to dismiss him without notice and without consultation with the Joint Advisory Disciplinary Board (JADB), which pursuant to Staff Rule 2 5.06, he can do directly with the Tribunal.

2. In order to deal with one decisive argument raised by the complainant in his pleas, it is only necessary to outline the administrative steps taken by EMBL which led to the decision to dismiss him. On 4 July 2019 the Administrative Director was informed of alleged misconduct by the complainant. By letter dated 9 July 2019 the Administrative Director wrote to the complainant informing him that he had decided to conduct a preliminary investigation under Section 2.5 of the Staff Rules and Regulations and, in particular, under Regulation R 2 5.04. The investigation was undertaken by the Head of Human Resources and resulted in a report dated 19 July 2019. The report contained, as annexures, the summary of interviews undertaken by the Head of Human Resources and a senior legal officer with five other staff members. Generally, the summary of what was discussed in the interviews was either a little under or a little over a page of relatively closely typed text. The complainant was sent a copy of this report under cover of a letter of 19 July 2019, again from the Administrative Director, and was told that he had a right to reply to the letter by 26 July 2019. The complainant did not respond to the report as he had been invited.

3. The Administrative Director again wrote to the complainant on 29 July 2019 advising him that: "[i]n keeping with Rule 2 5.03 of Staff Rules and Regulations, [he] hereby notify [him] about the initiation of a disciplinary procedure against [him]". The letter noted the allegations against the complainant were specified in the investigation report. The letter went on to say: "[i]n order to provide you with the possibility to present your case and test the evidence against you, you are invited for a hearing with the Director General and myself on 14th of August 2019".

The hearing took place attended by, from the Administration, the Director General, the Administrative Director and the senior legal officer who had participated in the interviews. The minutes of the hearing are in the material before the Tribunal and are constituted by approximately three pages of relatively closely typed text. In the documentation just referred to, what occurred on 14 August is described as a hearing. Whether it truly was a hearing is contestable in that someone (who is not clear from the minutes) was raising with the complainant the facts founding the charges against him and the complainant was responding. It cannot be fairly said that the complainant was given the opportunity to test the evidence at least in the traditional sense of questioning individuals who gave an account of events unfavourable to him or furnishing evidence refuting the evidence of the Administration. As the Tribunal said in Judgment 2786, consideration 13: "[d]ue process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary".

4. The minutes of the hearing held on 14 August 2019 concluded: "[t]he hearing was closed and [the complainant] was informed that he will be provided with the minutes of the hearing and the [Director General] will take a decision on further steps in the procedure. According to the [Staff Rules and Regulations], this may range from submitting the case to the JADB for further procedure, to a dismissal without notice." Thus, at this time, the Director General had not addressed the question of whether the JADB should be consulted. A little over a week later, the complainant was dismissed by letter from the Director General dated 23 August 2019. For reasons which are important, and this will become apparent shortly, the Director General does not, in her letter, characterise the complainant's conduct as "particularly serious misconduct" nor does she expressly address the question of whether she should have consulted the JADB.

5. In his brief the complainant notes, correctly, that "[t]he Director General chose to dismiss [him] without notice according to Article 2 5.04 from the Staff Rules and Regulations [...] without

consulting the Joint Advisory Disciplinary Board”. He later contends in his brief that “[he] was dismissed without a proper process in front of [his] peers, in front of the Joint Advisory Disciplinary Board”.

6. In its reply, EMBL discusses the above issue under the heading “On the absence of consultation of the JADB”. After setting out the terms of Staff Rule 2 5.04, EMBL simply says: “[c]onsidering the seriousness of the misconduct, the Director General was allowed to not consult with the JADB. Indeed, being a member of the IT Services, the complainant could use his status within the Laboratory in order to access other members’ [personal] computers.” The second sentence is irrelevant to the issue being addressed. The first sentence is really descriptive of the power to impose a disciplinary measure without consultation with the JADB but is quite unclear about whether the Director General had formed a view about the character of the serious misconduct.

7. Staff Rule 2 5.04 provides:

> “The Joint Advisory Disciplinary Board (hereafter JADB) must be consulted before taking any disciplinary measure other than a written warning or a written reprimand. Notwithstanding the previous paragraph, if the Director General considers that a member of personnel is guilty of a particularly serious misconduct, he/she may decide to dismiss the member of personnel without notice and without consulting the JADB. The Director General shall hear the member of personnel before taking such a decision, in accordance with Regulation R 2 5.09 b.”

Two things can be noted about this provision. The first is that it mandates consultation with the JADB before a disciplinary measure is taken (other than a written warning or reprimand) subject to a proviso. The proviso is that if the Director General is of the opinion that the staff member’s conduct is a particularly serious misconduct, the staff member can be dismissed without notice and without consulting the JADB. The word “particularly” signifies that the conduct in question has to be more than serious misconduct. That is to say, it needs to be serious misconduct but of a higher order of seriousness. As noted earlier, the Director General does not, in her letter of 23 August 2019, characterise the complainant’s conduct as “particularly serious misconduct”

nor does she expressly address the question of whether she should consult the JADB. While she does at various points in the letter and in her conclusion describe some of the complainant’s conduct and his overall pattern of behaviour as serious misconduct, she does not say she is satisfied that it is of the higher order of seriousness spoken of in Staff Rule 2 5.04. It would be inappropriate to infer she held that view because of the action she took. The operation of a proviso only enlivened by the formation of an opinion such as that found in Staff Rule 2 5.04 should generally not be based on facts inferred from other facts in the absence of clear proof that the relevant opinion was formed. There is no such proof in the present case.

8. Under Staff Regulation 2 5.20, the JADB is comprised of a person appointed by the Administration, a person appointed by the Staff Association and a third person chosen and agreed to by those two. Fairly clearly, it is intended to be a representative body whose members may well bring a range of divergent thoughts and opinions to a consideration of the conduct of the staff member concerned and thus enhance the disciplinary process by providing input to the Director General. In this case, she should have consulted the JADB and her failure to do so renders unlawful the decision to dismiss the complainant.

9. It is unnecessary to address the other arguments of the complainant in his pleas. The decision of 23 August 2019 to dismiss the complainant should be set aside. He does not seek an order of reinstatement but seeks financial compensation for lost income between the time of his dismissal and the conclusion of his initial contract in December 2020. He seeks a range of ancillary relief much of which the Tribunal has no power to grant. The complainant’s approach to relief, particularly material damages, is based on the premise that he would not have been dismissed in due course. No such assumption can be made in the circumstance of this case. The proven misconduct (much of which was admitted though the complainant sought to explain the conduct) was serious. Some allowance must therefore be made for the real prospect that the complainant would have been lawfully dismissed

and well before the end of his contract. An appropriate amount for material damages is 15,000 euros.

Moral damages are sought by the complainant for the mental stress of the entire disciplinary procedure and the negative effects it had on him. But the bringing and the prosecution of the charges in disciplinary proceedings were a product of his own conduct for which EMBL cannot be held liable in damages.

10. The complainant was not legally represented but is entitled to costs which are assessed in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The decision of 23 August 2019 to summarily dismiss the complainant is set aside.
2. EMBL shall pay the complainant 15,000 euros material damages.
3. EMBL shall pay the complainant 1,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ