

C.
v.
EMBL

136th Session

Judgment No. 4676

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. E. C. against the European Molecular Biology Laboratory (EMBL) on 6 September 2021, EMBL's reply of 10 January 2022, the complainant's rejoinder of 7 February 2022 and the Registrar's email of 31 March 2022 informing EMBL that the late filing of its surrejoinder was not accepted pursuant to Article 9, paragraph 4, of the Tribunal's Rules;

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 EMBL's refusal (i) to guarantee that the survivor's pension to which his wife will be entitled at the time of his death will be at least 35 per cent of his last salary; (ii) to award him a children's allowance for each of his wife's three children from her previous marriages; and (iii) to verify that his current pension was properly calculated.

The complainant joined EMBL in 1990. In 2002, he retired and started receiving a pension from the organisation. On 7 March 2016, he married Ms H.-R.

On 9 March 2020, he wrote to EMBL to ask whether he qualified to receive children's allowances for his wife's three children from previous marriages and to request a determination of the survivor's pension his wife would receive when he passed away. On 10 June 2020, he wrote to the Senior Human Resources Officer to enquire about the amount of his pension and to ask the organisation to investigate whether it had been correctly calculated. Soon after, on 20 June 2020, he made a written request for the payment of a children's allowance for each of his wife's three children. On 9 July 2020, he wrote to the Director General reiterating his requests.

The Senior Human Resources Officer responded to the complainant's enquiries by a letter of 31 July 2020. Regarding the survivor's pension, she explained that the complainant's wife would become entitled to receive a survivor's pension only if their union existed for at least five years, that is until 7 March 2021, and the pension she would receive at that point, pursuant to the provisions of Annex 1 to the Staff Regulations, would be approximately 753.07 pounds sterling. The Senior Human Resources Officer, nevertheless, noted that the relevant provisions provided for a dynamic calculation based on the length of their union. She thus explained that the calculation reflected the pension to which his wife would be entitled if their union lasted five years, and that the longer their union lasted, the larger his wife's survivor's pension would be. Regarding the children's allowances, she indicated that EMBL could not conclude, based on the documentation provided by the complainant, that his wife's children were his stepchildren, as he had not substantiated a *de facto* parental relation or their full financial dependency on him.

The complainant wrote back on 3 August 2020 seeking to counter the arguments contained in the 31 July 2020 letter and requesting that the Administration reconsider its decisions. On 16 September 2020, the Senior Human Resources Officer responded regarding the amount of the survivor's pension, fully maintaining the Administration's earlier position as conveyed in the 31 July letter. Subsequently, on 14 December 2020, the Senior Human Resources Officer asked the complainant to provide additional documents and information regarding his request for the children's allowance. The complainant replied on 28 December 2020,

providing some additional proof but mainly maintaining that he had already provided sufficient information and documents demonstrating that his wife's children were financially dependent on him.

On 18 May 2021, the complainant wrote to the Head of Human Resources requesting, as a matter of urgency, that EMBL pay the children's allowance for each of his wife's three children and that it verify the amount of his EMBL pension. In a letter of 24 May 2021, the Head of Human Resources reiterated that the Administration could neither establish that his wife's children were financially dependent on him nor that there was sufficient proximity between him and his wife's children to satisfy the minimum criteria of a relationship with a stepchild. Regarding the amount of his pension, the Head of Human Resources noted that the complainant had started receiving a pension in 2002 but had never appealed the decision determining its amount.

On 5 June 2021, the complainant lodged an appeal with the Director General against (i) EMBL's refusal to pay him a children's allowance for each of his wife's three children; (ii) the calculation of the survivor's pension to which his wife would be entitled when he passed away; and (iii) the refusal to verify that his pension had been properly calculated. On 9 July 2020, the Director General informed him that his appeal was referred to the Joint Advisory Appeals Board and asked him to approve the Board's composition. The complainant responded on 13 July 2021 expressing his mistrust that he could be given a fair hearing within EMBL, further to which, by a letter of 30 July 2021, the Head of Legal Services informed him that the Director General was willing to exempt him from the obligation to exhaust the internal means of redress and authorised him to proceed directly to the Tribunal. This is the decision the complainant impugns in the present complaint, filed with the Tribunal on 6 September 2021.

The complainant asks the Tribunal to order EMBL to (i) guarantee for his wife a survivor's pension sufficient for her to survive and to provide for her three children and which, as specified in the Staff Rules and Regulations, "shall not be less than 35 [per cent] of the pension scheme member's last salary" which, in his case, would be 3,765 pounds per month; (ii) pay him a children's allowance for each of his wife's three

children, retroactively from the date of their marriage; and (iii) investigate as regards the amount of his pension and order EMBL to reimburse him any arrears.

EMBL asks the Tribunal to dismiss the complaint. It submits that the complainant does not have a cause of action to claim a higher survivor's pension for his wife and his claim in this respect is premature, that he does not fulfil the conditions for receiving children's allowances, and that his claim for a higher pension is time-barred.

CONSIDERATIONS

1. In his complaint form, the complainant makes three claims for relief that he formulates as follows:

“[A] guarantee of survivor[’s] pension for my wife [Ms H.-R.] sufficient for her to survive and provide for her three children. I would request the amount specified in the EMBL Staff Rules and Regulations: ‘the survivor’s pension shall not be less than 35 [per cent] of the pension scheme member’s last salary’, which would be 3765 [pounds sterling]/month in my case. In contrast, the EMBL would decrease this amount by 80 [per cent] due to the difference in our ages.

[A] provision of child allowance for the three children of my wife by former marriages, backdated to when we married.

[An] investigation of the magnitude of the EMBL pension that I am currently receiving and reimbursement for any arrears. I do not have the information required to assess the magnitude of this.”

2. The complainant is a former staff member of EMBL. He retired from EMBL in 2002 and he has been receiving a pension from the organisation since then. He is 83 years old. The complainant married his current wife, Ms H.-R., on 7 March 2016. She is 38 years old.

3. In the complaint form, the complainant identifies the impugned decision as being one dated 30 July 2021. But this seems inaccurate based on the Tribunal’s review of the proceedings, which rather indicate the following.

As for the first and the second claims for relief pertaining to the survivor's pension for his wife and the payment of the children's allowance, the complainant's request was initially made on 9 March 2020, reiterated on 20 June 2020 and 9 July 2020, answered and denied by EMBL on 31 July 2020, made again by the complainant on 3 August 2020, and denied again by EMBL on 16 September 2020 and 24 May 2021, respectively. Prior to that, on 14 December 2020, EMBL had requested additional information regarding his wife's children, to which the complainant responded on 28 December 2020. The complainant then made an "official" request to EMBL in this regard on 18 May 2021, which EMBL rejected, as already noted, on 24 May 2021.

As for the third claim for relief pertaining to the amount of his pension, the complainant first asked EMBL to investigate the issue on 10 June 2020. He reiterated this request on 9 July 2020, and he then made his "official" request to EMBL for this third claim on 18 May 2021, together with his request for the second claim (the children's allowance), already mentioned, which request was also denied by EMBL on 24 May 2021.

It is regarding these decisions of 31 July 2020, 16 September 2020, 14 December 2020, and 24 May 2021 that the complainant filed an appeal with the Director General of EMBL on 5 June 2021. In answer, the Head of Legal Services informed him, on 30 July 2021, that the Director General was agreeable to exempt him from the obligation to exhaust the internal appeals procedure and authorized him to challenge the decisions directly before the Tribunal pursuant to Staff Rule 6 1.06. This Staff Rule provides that:

"The Director General may, in agreement with the concerned member of personnel, or any other person who is entitled to rights under the present Rules and Regulations, exempt the latter from the obligation to exhaust the internal appeals procedure by authorising him/her to challenge a decision directly before the ILOAT."

4. Accordingly, the Tribunal understands the impugned decision as rather being the decision of EMBL dated 24 May 2021, which denied the complainant's claims and confirmed the three prior decisions of 31 July, 16 September, and 14 December 2020.

5. With respect to the first claim for relief concerning a “guarantee of survivor[’s] pension for [his] wife”, Ms H.-R., the complainant misunderstands and misconceives the role of the Tribunal. This might be thought to be a request to now declare the rights of his spouse. But according to established case law, it is not for the Tribunal to make declarations of the nature sought (see, for example, Judgment 4602, consideration 5), nor to provide complainants with guarantees such as the one claimed here.

Furthermore, given that the complainant is still alive, the relief sought in this regard is premature. As correctly indicated by EMBL, the amount of any entitlement to the survivor’s pension in case of the complainant’s death has not been decided and cannot be decided at this juncture. A definite amount will only be set when the date of a potential entitlement of the complainant’s survivor is known. Before then, there is simply no decision that has an effect on the complainant’s rights and obligations or on the rights and obligations of anyone holding or deriving rights through him under Article II, paragraph 6(b), of the Statute of the Tribunal (see, for example, Judgment 1203, consideration 2).

6. The Tribunal further observes that EMBL has so far simply reminded the complainant of the rules and regulations that are binding upon the Administration and applicable to him as pensioner. The Tribunal notes that in Annex 1 to the Staff Regulations of EMBL dealing with the Pension Scheme, Article 18.1(iv) under the heading “Conditions of entitlement”, Article 19.3 under the heading “Rate of pension”, and Article 20 under the heading “Reduction for difference in age”, which all pertain to the establishment and the calculation of a survivor’s pension, notably provide for the following:

“Article 18 – Conditions of entitlement

1. A person shall be entitled to a survivor’s pension if he/she is the surviving life companion:

[...]

(iv) of a former pension scheme member drawing a retirement pension, if they had been in a union for at least one year at the time when the pension scheme member left the [EMBL]; this condition as to a minimum period of the union prior to the

pension scheme member's leaving the [EMBL] shall not apply if the union had existed for at least five years at the time of death.

The five-year periods mentioned in Articles 18.1 (iii) and (iv) above shall be extended to ten years if the pension scheme member had retired before the normal retirement age.

[...]

Article 19 – Rate of pension

[...]

3. The survivor's pension shall not be less than 35% of the pension scheme member's last salary or stipend (uprated by the subsequent pension adjustments for deferred or retired pensioners); nor shall it be less than the salary for grade 2 step 0.

[...]

Article 20 – Reduction for difference in age

Where the difference in age between the deceased pension scheme member and the surviving life companion (the latter being the younger), less the length of time they have been in a union, is more than ten years, the survivor's pension, calculated in accordance with the preceding provisions, shall be subject to a reduction, per year of difference, amounting to:

- 1% for the years between ten and twenty;
- 2% for the years twenty up to but not including twenty-five;
- 3% for the years twenty-five up to but not including thirty;
- 4% for the years thirty up to but not including thirty-five;
- 5% for the years from thirty-five upwards."

These provisions are applicable and their legality has not been challenged. The principles of statutory interpretation that the Tribunal follows are also well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 4393, consideration 4, 4178, consideration 10, 3310, consideration 7, and 2276, consideration 4).

In the present case, Article 18.1(iv) of Annex 1 to the Staff Regulations clearly states that the entitlement to a survivor's pension for a surviving life companion in a situation such as that of Ms H.-R. requires that the union existed for at least five years at the time of death of the pension scheme member. Article 19.3 of Annex 1 further provides that the survivor's pension shall then not be less than 35 per cent of the

pension scheme member's last salary, but Article 20 of Annex 1 clearly indicates that when there is a difference in age between the deceased pension scheme member and the surviving life companion, the survivor's pension is subject to a reduction calculated per year of difference. In a situation of a difference of 44 years, such as in the complainant's and Ms H.-R.'s case, this may indeed entail a potentially significant reduction.

Given the wording of these provisions of the Staff Rules and Regulations, the complainant's request that his life companion be guaranteed to receive a survivor's pension higher than the one calculated, as for example, in the 31 July 2020 decision of EMBL is unfounded. In any event, for the time being, it remains that the complainant does not have any cause of action as regards this premature request.

Accordingly, the relief sought by the complainant in his first claim must be denied.

7. With respect to the complainant's second claim for relief, namely concerning the children's allowance, Annex 1 to the Staff Regulations dealing with the Pension Scheme, under the heading "Family related allowances", provides, notably in Articles 28.1(i) and 28.2, for the following:

"Article 28 – Conditions

1. The family allowance, children's allowance and dependant's allowance, granted under the [EMBL]'s Staff Rules and Regulations shall be paid:
 - (i) to the recipient of a retirement pension, at the age of entitlement, or later;

[...]

2. The amount of the allowances shall be the same as for serving members of personnel.

[...]"

With regard more specifically to the children's allowance, the Staff Rules and Regulations also include the following provisions dealing with the situation of dependent children:

“R 4 1.13 SM-F

Dependent children are born within or outside of a union, in legal guardianship, step and adopted children who are financially dependent on the staff member [...]

[...]

R 4 1.14 SM-F

Documentary evidence will be required to establish whether a child is dependent. The allowance will be paid only after receipt of the documentary evidence but with effect from the date of birth or the start of dependence.

[...]

R 4 1.15 SM-F

A staff member [...] shall declare the amount of any other allowances paid in respect of his/her dependent children (Regulation R 4 1.13). They shall be deducted from those paid by the Laboratory.

[...]”

8. As these provisions indicate, documentary evidence is required to establish whether a child is dependent, and any allowance is paid only after receipt of such evidence. This applies to “step and adopted children who are financially dependent on the staff member”.

From its review of the record, the Tribunal observes that the three children for whom the complainant is claiming a children’s allowance are the children of his wife, Ms H.-R., from previous marriages. It also appears that these children do not reside with the complainant and Ms H.-R. but rather with other respective family members.

In the decisions it provided to the complainant, in response to his request for the children’s allowance, on 31 July 2020, 14 December 2020, and 24 May 2021, EMBL emphasized that in its assessment, there was insufficient documentation to substantiate the required financial dependence of these children on the complainant. EMBL pointed to the fact that the custody of the three children was neither with the complainant’s life companion nor with the complainant, that the proofs of payments submitted were rather of a random nature and did not cover all the years for which a children’s allowance was being requested, namely dating back to the marriage of the complainant with Ms H.-R.,

and that a sufficient level of proximity between the complainant and the children was not established.

Given the documentary evidence provided in this regard by the complainant in his complaint and/or his rejoinder, which is either incomplete or indicative of transfers of amounts made to beneficiaries other than the children, the Tribunal has no basis to interfere with the assessment made by EMBL in its findings that the complainant did not submit convincing evidence establishing that the children of his wife were his stepchildren and that they were financially dependent upon him. The onus of providing convincing evidence to support this claim lies with the complainant and the Tribunal considers that he has not discharged his burden of proof.

The complainant's second claim is unfounded.

9. Finally, turning to the complainant's third claim, regarding the amount of the pension he has been receiving since his retirement in 2002, the Tribunal observes that, according to EMBL, a detailed calculation of this pension was provided to the complainant on 23 July 2002. The Tribunal understands from the record that the complainant has indeed received since 2002 his monthly pension entitlement as indicated in this detailed calculation, without any contestation whatsoever on his part.

While the complainant argues in his rejoinder that this letter of 23 July 2002 is, in his belief, fraudulent, he provides no evidence that supports this assertion. The claim for relief sought by the complainant in this regard is simply unsubstantiated and, accordingly, unfounded.

10. In addition, given that since 2002 the complainant did not avail himself of any internal remedies by which he could have challenged the amount of his pension, any challenge to the amount of this pension, established in 2002, would be long time-barred, as rightly indicated by EMBL in its reply. Again, the Tribunal has consistently stated in its case law that a complainant must comply with the time limits and the procedures set forth in the organisation's internal rules and regulations (see, for example, Judgment 3947, consideration 4). In the present case, it is not disputed that the prescribed internal procedures

for appeals within EMBL were not followed or abided by the complainant.

The Tribunal has often stated that time limits are binding and an objective matter of fact, and that it should not entertain a complaint filed out of time, since any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations that is the very justification for a time bar (see Judgment 3482, consideration 4). And pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, a complaint before the latter shall not be receivable unless the person concerned has exhausted the means of redress that are open to her or him under the applicable staff regulations.

The relief sought by the complainant in his third claim must therefore be denied as well.

11. In the result, the complaint is either not receivable or unfounded, and it should be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ