

**EIGHTY-FOURTH SESSION**

***In re* Calvio, Dargemont,  
Gamberi and Pantopoulos**

**Judgment 1720**

**The Administrative Tribunal,**

**Considering the complaints filed by Miss Cinzia Calvio, Miss Catherine Dargemont, Miss Chiara Gamberi and Mr. Costas Pantopoulos against the European Molecular Biology Laboratory (EMBL) on 16 August 1996 and corrected on 28 August, the EMBL's reply of 28 November 1996, the complainant's rejoinder of 10 March 1997 and the Organisation's surrejoinder of 26 May 1997;**

**Considering Articles II, paragraph 5, and VII 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. On 8 September 1992 the EMBL applied to the Commission of the European Communities to take part in the Communities' project for research and development known as the Human Capital and Mobility Programme (HCMP). The purpose of it is to improve training for young research workers in countries of the European Union by awarding them fellowships. There are two kinds of fellows: "institutional" ones, who apply to some institution picked by the Commission to take part in the programme; and "individual" fellows, who apply to an institution of their own choosing. The Commission carries out and funds the Programme. It approves the list of applicants and makes over funds for the fellowships to the institutions, which then pay stipends to the fellows.**

**On 5 January 1993 the European Economic Community (EEC) and the Laboratory signed an agreement on arrangements for cooperation under the programme. The complainants, who were born in 1965 or 1966, are post-doctoral research workers. The Laboratory chose them to take part in the Programme as institutional fellows. They began work at dates ranging from 1 February to 1 September 1993. Their final contracts, signed from June until September, were for two years and described them as "visitors".**

**On 14 October 1993 the Laboratory issued a paper about the internal taxation of fellowships. It explained that institutional fellows participating in HCMP were paid at the rate applied by the EMBL and by the European Molecular Biology Organization (EMBO), which, like the Laboratory, is at Heidelberg, in Germany. The paper also explained that the difference between the EMBO/EMBL rate and the higher one in the Community was accounted for by the internal tax. On 16 November several fellows sent a petition to the Council of EMBL asking delegates to decide that fellowships should "continue" to be free of tax. The Council set up a working group, which stated in its report of 1 December that it was unable to determine whether the internal tax had a sound legal basis. It recommended that the Council endorse the "proposal" to levy the tax and apply it as from 1 October 1993.**

**At the Council's 20th Ordinary Session, held on 9 and 10 December 1993, the Director-General promised to apply as fair as possible a policy to fellows. In a memorandum of 11 April 1994 he informed group leaders that individual fellows would no longer be subject to internal tax and that previous deductions from their pay would be refunded. On 15 April the Commission asked the EMBL to alter the contracts of HCMP fellows so as to state the gross amount of the fellowship and details of any deductions. It pointed out that the only deductions allowed were those set out in the contract between the Laboratory and the Commission. In a memorandum of 21 February 1995 to institutional fellows the Head of Personnel explained the new method of reckoning their pay, which was still subject to internal tax. For most of them it meant higher pay. By a**

letter of 19 July the Director-General told them that their pay would continue to be reckoned in this way.

On 18 August 1995 the complainants lodged appeals with the Director-General pleading that they were being discriminated against and that there was no legal basis for the internal tax. By a letter of 16 October the Director-General dismissed their appeals as time-barred and gave them leave to go straight to the Tribunal. The complainants having declined his offer he told them by a letter of 6 November 1995 that he was willing to refer their case to the Joint Advisory Appeals Board. In its report of 21 March 1996 the Board held that the Laboratory was entitled to apply the internal tax to HCMP fellowships. It recommended that the Director-General put them on a par by either taxing or exempting both categories. By letters of 20 May 1996, the impugned decisions, the Director-General informed the complainants that he was rejecting their appeals.

**B.** The complainants submit that all HCMP research workers at the EMBL should be treated alike, whether they are "individual" or "institutional" fellows. They knew nothing of the internal tax until they read a note of 17 May 1993, and the EMBL has never given any reason for its discriminatory treatment of institutional fellows.

Citing the Staff Rules and Regulations, the Headquarters Agreement between the Federal Republic of Germany and the Laboratory and their own contracts, they submit that "visitors", being neither staff members nor paid out of the Laboratory's funds, should not be subject to the internal tax. Furthermore, the EMBL is in breach of its agreement with the EEC.

They seek repayment of all the amounts withheld in internal tax from the date at which each of them joined EMBL to 20 May 1996. They claim interest thereon at the rate of 8 per cent a year. They ask for a ruling that the EMBL must ensure that they are not subject to internal tax after that date. They seek a joint award of costs of at least 20,000 marks.

**C.** In its reply the EMBL submits that the complaints are irreceivable in part. The complainants may seek repayment only of the amounts withheld after 19 July 1995, when the Director-General decided to maintain the internal tax on institutional fellowships. But they are out of time in claiming reimbursement of the amounts deducted from the beginning of their fellowships until 19 July 1995: they knew from the outset that they were subject to internal tax and so should have appealed against their first pay slips within thirty days, the time limit in Article R 6 1.04. Their petition of 16 November 1993 is not an appeal within the meaning of R 6 1.01, particularly as they failed to sign it.

The Laboratory's pleas on the merits are subsidiary. Citing Annex R.D.1 to the Regulations, it contends that visitors are staff members and that under Article 4.2.01 of the Rules, fellowships are subject to internal tax. Furthermore, the tax is warranted by the principle of equal treatment for all research fellows working at the Laboratory.

When the EEC concluded the agreement with the Laboratory it did not object to fellows' being paid at the EMBO/EMBL rate; so it tacitly consented to the internal tax. The complainants derive no support from the provisions of the agreement between the Laboratory and the EEC.

**D.** In their rejoinder the complainants submit that they were unable to appeal in time because the Laboratory had not told them how much their stipends would come to. Citing the agreement between the EEC and the Laboratory, they observe that they are entitled to full payment of those stipends. By taxing them the Laboratory is guilty of unjust enrichment. They rebut all the other arguments submitted in the reply and press their pleas.

**E.** In its surrejoinder the EMBL maintains that the complaints are partly irreceivable. It submits on the merits that the rule against unjust enrichment has never before been applied in a context like this one. In any event the complainants are not direct beneficiaries of the funds made over to the Laboratory; so that rule is immaterial. The agreement between the Laboratory and the EEC conferred no rights on the complainants and so affords no basis in law for their claim to higher stipends than the figures given in their contracts.

## CONSIDERATIONS

1. The policy of the European Union is to encourage training for young scientific research workers by funding fellowships under a project called the Human Capability and Mobility Programme (HCMP). Some of the fellowships are "individual", being granted directly to young people who have applied to a scientific institution. Others are "institutional" and are awarded in two phases: the European Union names institutions to which research workers may apply under the Programme; the chosen institution then puts applications to the European Commission and successful candidates are awarded fellowships. In 1993 the European Molecular Biology Laboratory (EMBL) signed an agreement with the European Economic Community for the acceptance of institutional fellows under the HCMP.

2. The complainants are young research workers who have been granted institutional fellowships with the Laboratory. They have signed contracts with the EMBL on their pay and other conditions of employment. After deduction of an "internal tax" but before deduction of social security contributions monthly pay came to 3,689 Deutsche marks for three of them and to 3,837 for the fourth. The four complaints may be joined since they raise the same issue, namely whether the Laboratory may deduct the internal tax from institutional fellowships awarded under the HCMP.

3. The background to the legal issues is as follows. Under the Headquarters Agreement concluded on 10 December 1974 between the Federal Republic of Germany and the EMBL, the salaries and emoluments of EMBL staff are exempt from German income tax, but are "subject to a tax, for the benefit of the Laboratory, on salaries and emoluments paid by the Laboratory". Section 4.2 of the Staff Regulations sets out the method of reckoning and levying the tax.

4. On 17 May 1993 the Personnel Section of the Laboratory issued an information sheet stating that HCMP fellows were deemed to be staff members and so were subject to the internal tax. A note of 14 October 1993 explained that the purpose of that policy was to ensure that all fellows received the same stipend or at least to avoid disparities in pay between people who were at the same stage in their career and doing comparable work. The tax applied - said the note - to both institutional and individual fellowships; that was in line with the rules and would put institutional fellowships on a par with the regular fellowships paid by the Laboratory - at the so-called EMBO/EMBL rate - and bring individual fellowships to much the same level. A working group met on 18 August 1993. On 1 December 1993 it issued a report saying that it was unable to determine whether there was any basis in law for taxing HCMP fellows. It said, however, that it was aware that the Administration's policy was to ensure equal treatment and that the tax did close the gap between highly paid and other fellows. It concluded that the policy was sound, though it recommended that decisions should not be applied retroactively and that the fellows should be told beforehand just how they would be affected.

5. The decisions that followed upset the fellows, and some of them signed a petition asking, among other things, that their fellowships should continue to be tax-free. The Council of the Laboratory discussed the subject on 9 and 10 December 1993. It saw difficulties and discrepancies in having two rates for fellowships according to the source of funding and in applying the Laboratory's own "internal taxation" system. The Director-General then promised to work out a policy that would be "as legal and as fair as possible". On 11 April 1994 a Laboratory memorandum went out saying that individual fellows were to be exempt from internal tax and the amounts wrongfully deducted would be refunded to them.

But institutional fellows were not exempt. Although in a memorandum of 21 February 1995 the EMBL put their stipend up to 4,490.74 marks a month, on the basis of the HCMP rate of 6,325.10 marks, it continued to levy the internal tax, set at 1,490 marks. In a letter of 19 July 1995 to the institutional fellows the Director-General explained his decision to keep the internal tax for them but exempt the individual fellows. The four complainants and one other institutional fellow appealed against the decision on 18 August 1995.

On 16 October 1995 the Director-General rejected their appeals and proposed waiving the internal procedure, which entailed referral to the Joint Advisory Appeals Board. But at their insistence he put the case to the Board. In its report of 21 March 1996 it held that the Laboratory, though entitled to tax them like staff members, should put institutional and individual fellows on a par. It saw two options: either taxing all of them, which would mean taxing individual fellows retroactively, or else taxing no one, which would mean paying back to the institutional fellows the sums levied from 1993 to 1996. It preferred the second option as being likelier to prevent any dispute, particularly with the European Commission.

But the Director-General did not agree. On 20 May 1996 he told the individual fellows that they were to be retroactively taxed and, to make for equality of treatment, asked them to consent to the Laboratory's levying the sums due on their pay. None of them did. By a decision of the same date he rejected the institutional fellows' appeals on the grounds that there was no question of letting them benefit from the mistake made in 1994 to the advantage of individual fellows: all fellows would thenceforth be paying the internal tax.

6. It is that final decision of 20 May 1996 that the complainants are now challenging. They contend that it is in breach of the rules on internal taxation and of the rule that requires equal treatment for everyone in like case. They seek the quashing of the decision and repayment of the amounts wrongfully deducted from their pay, plus interest.

7. The Laboratory replies that their complaints are irreceivable. They are barred from claiming repayment of the amounts levied in internal tax on their monthly stipends because they failed to challenge in time their monthly pay slips.

8. The plea fails. A strong line of precedent has it that time limits, though necessary in law, are not supposed to set traps: they are to be applied with the good faith that must govern relations between an international organisation and its staff. True, only on 18 August 1995, and not when they got their first pay slips, did the complainants appeal against the policy decision of 19 July 1995. But the material issue had been identified, and moot, for a long time: were they subject to internal tax or were they not? The Joint Advisory Appeals Board observed too - and the Laboratory does not deny - that fellows were advised not to appeal "before the legal issues had been clarified". The conclusion is that the complainants' claims are beyond doubt receivable.

9. On the merits the main issue is whether the Laboratory may lawfully levy an internal tax on HCMP fellows whom it takes on as research workers. The complainants contend that it may not. They are, they say, not members of its staff, who are subject to the tax under the Headquarters Agreement and the organisation's rules. Besides, their pay is funded not by EMBL but by the European Commission. They are, they observe, "visitors", who are not on the Laboratory's payroll. It gets 12 per cent of the amount allocated to HCMP fellows against the costs of research and administration.

10. That view does carry some weight and indeed is probably the one most in keeping with the intent of the agreement between the European Economic Community and the Laboratory, as is plain from a letter of 11 September 1995 sent by Directorate General XII of the Commission. Yet the general conditions set by the Commission for the fellowships state that research workers still pay social security contributions and taxes out of their stipends and shall be told of their tax liabilities, which vary from one country to another. So the issue is whether, apart from and subject to the construction to be put on the Laboratory's agreements with the European Economic Community - which only the Court of Justice of the European Communities may determine - fellows were taxable under the rules applying to the Laboratory.

11. On the evidence the German inland revenue office at Heidelberg takes the view that the fellows' stipends are not subject to income tax but it does not say whether they may be subject to the internal tax. That is a matter to be settled in the light of the Headquarters Agreement concluded between the Laboratory and the Federal Republic of Germany on 10 December 1974. Article 18 of that Agreement stipulates that "the staff members [in the other language versions 'les membres du personnel' and 'die Mitglieder des Personals'] shall be subject to a tax, for the benefit of the Laboratory, on salaries and emoluments paid by the Laboratory" and that "such salaries and emoluments shall be exempt from German income tax"; and Article 20 requires that "The Council shall decide the categories of staff members to whom the provisions of ... Article 18 shall apply".

12. Article 4.2.01 of the Laboratory's Staff Rules says that "Members of the personnel shall be subject to an effective system of internal taxation on their salaries and emoluments", and section 4.2 of the Staff Regulations confirms that rule by setting a scale of internal taxation. Annex R.D.1 to the Regulations divides "members of the personnel" into two categories: established staff members and non-established staff, who are called supernumeraries, or fellows, or visitors or non-graduate trainees, and are not ordinarily paid out of the Laboratory's own budget.

13. If all those provisions are read together the upshot is that HCMP fellows, whether treated as "fellows" or

"visitors", are "members of the personnel". As such they are exempt from German income tax but subject to the internal tax. The Headquarters Agreement does use the simpler term "staff members" to denote what the Staff Regulations describe as "established members of the personnel, called staff members". But the intent of the Staff Regulations is plain enough: it is to bring within the ambit of the generic term "members of the personnel" anyone working at the Laboratory under an agreement signed with the Director-General.

14. The complainants were under contract with the EMBL. As was said in 2 above, they signed contracts that set their monthly pay and in three of the four cases stated that the amounts were "after deduction of internal tax". Although the funds are a subsidy from the European Commission, it is still the EMBL that pays the fellows and has contractual relations with them. So it was empowered under the Headquarters Agreement and its own rules to levy in the complainants' pay the internal tax that all "members of the personnel" must pay because of their exemption from income tax.

15. The complainants' plea of breach of equal treatment does have some relevance in view of the stand that the Laboratory adopted for some time towards the individual fellows but has now abandoned *de jure*, if not *de facto*. As the Joint Advisory Appeals Board said, the Laboratory might decide either to tax or not to tax individual fellows but it had to put individual and institutional fellows on a par. But its former, mistaken, policy of bestowing a large tax benefit on individual fellows afforded no reason for bestowing it on institutional fellows as well. Since the internal tax is in keeping with the rules, the complainants' plea of breach of equal treatment is devoid of merit, as is the plea of "unjust enrichment" in their rejoinder.

### DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

*(Signed)*

Michel Gentot  
Julio Barberis  
Jean-François Egli

A.B. Gardner