110th Session **Judgment No. 2964**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr T. S. B. against the European Molecular Biology Laboratory (EMBL) on 17 December 2008, EMBL's reply of 16 March 2009, the complainant's rejoinder of 20 April and the Laboratory's surrejoinder of 28 May 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Swedish national born in 1949, joined EMBL in April 1995 as a Budget Officer. He later held the position of Head of Finance and finally that of Internal Auditor. On 31 January 2007 the Laboratory terminated his contract for unsatisfactory performance with one year's notice. Having challenged that decision internally without success, he filed a complaint with the Tribunal on 25 April 2007. Shortly thereafter, however, an out-of-court settlement was reached between the parties, as a result of which the complainant withdrew his complaint. The settlement agreement, signed on 14 June 2007, stipulated inter alia that the complainant

would be granted paid leave from 15 June 2007 until 31 January 2008, that at the end of his contract he would receive a lump sum corresponding to 20 months' basic salary plus family allowance less social security deductions, and that he was to return "all property belonging to EMBL" by 15 June 2007.

The Laboratory provides accommodation in furnished apartments to some of its employees and guests. The complainant occupied one of these apartments as from April 1995. According to the terms of the lease which he signed with EMBL, jurisdiction to hear any dispute in connection with the lease is assigned to the Court of Heidelberg (Germany). By letter of 18 October 2007 EMBL notified the complainant that the lease on his apartment would expire on 31 January 2008 at the same time as his employment contract. On 24 January, noting that the complainant apparently had no intention of vacating the apartment, the Laboratory's Legal Adviser wrote to inform him that, should he fail to vacate the rented property by the end of the lease, EMBL would initiate legal proceedings without further notice and would terminate the settlement agreement. The complainant's lawyer replied by letter of 25 January 2008 that the notice of 18 October 2007 was ineffective and that the lease therefore remained in force for an indefinite period. Consequently, his client would not vacate the apartment.

On 12 February 2008 the complainant's lawyer wrote again to the Legal Adviser. He asserted that there was no connection whatsoever between the settlement agreement and the lease, and that the Laboratory's conduct in withholding payment of the lump sum so as to force the complainant to vacate the apartment was tantamount to extortion. He asked the Legal Adviser to confirm by 19 February that the Laboratory would honour the settlement agreement, failing which he would take legal action to enforce the agreement. That same day a letter was sent to the complainant by the Administrative Director, who asked him to vacate the apartment by 29 February 2008. He added that the lump sum would not be paid unless the complainant fulfilled his obligations under the settlement agreement.

Neither of these initiatives proved successful and, after a further exchange of correspondence, a lawyer acting for EMBL wrote to the complainant's lawyer on 25 March 2008 demanding a firm commitment from the complainant by 31 March to vacate the apartment within the next two months, failing which EMBL would terminate the settlement agreement.

On 29 April 2008 the complainant initiated proceedings before the Labour Court of Mannheim (Germany) seeking enforcement of the settlement agreement. However, during a preliminary hearing, the Court expressed serious doubts as to whether it had jurisdiction to hear the dispute, which prompted the complainant to withdraw his action.

He then lodged an internal appeal, on 17 July 2008, challenging the Laboratory's refusal to pay him the lump sum due under the settlement agreement. In its report dated 19 November 2008 the Joint Advisory Appeals Board considered that, in view of the purpose of the accommodation rented by the complainant, his apartment could be considered as EMBL property within the meaning of the settlement agreement. It recommended that the Director-General bring about an agreement, including a departure schedule for the complainant and a payment plan for the lump sum.

On 2 December 2008 the Director-General wrote to inform the complainant that he had decided to accept the Board's recommendations. He proposed that the complainant vacate the apartment before 2 March 2009 and stated that, as soon as he had done so, the lump sum would be paid to him. That is the impugned decision.

B. The complainant emphasises that his complaint is not about the validity or termination of the lease contract. In his view, the lease cannot be terminated under German law and, if the Laboratory believes otherwise, it must bring proceedings before the Court of Heidelberg, in accordance with the terms of the lease. He submits that neither the settlement agreement nor the lease stipulate that the lump sum is payable only if he vacates the apartment, and that by withholding payment of the lump sum EMBL is taking the law into its own hands. He adds that the amount withheld is disproportionate to the

value of the lease, particularly since he pays his rent regularly so that the Laboratory has suffered no loss.

He asks the Tribunal to order EMBL to pay the lump sum due to him under the settlement and indemnities on termination of contract, together with interest calculated from 1 February 2008. He requests that the Laboratory make "full and complete payments" for his health insurance and pension and that it pay him compensation for "misuse of [its] financial advantage over [him]" and costs. Lastly, he asks the Tribunal to rule that no deductions are to be made, either now or in the future, from his pension payments.

C. In its reply EMBL contends that the complaint is entirely irreceivable for failure to exhaust internal remedies. It points out that the complainant's internal appeal was expressly directed against "the threat [...] to terminate the [settlement] Agreement" contained in the letter of 25 March 2008. However, the Laboratory did not, by that letter, decline to pay either the lump sum, or interest thereon, or indemnities, or compensation, or indeed health insurance and pension contributions. Consequently, these claims were not the subject of his internal appeal and are therefore irreceivable in the context of the proceedings before the Tribunal. It adds that the complainant's claims with respect to health insurance and pension payments are in any case irreceivable for lack of gravamen, since the Laboratory has always made all the relevant contributions.

On the merits, EMBL submits that it has no duty to pay the amount specified in the settlement agreement as long as the complainant does not honour his obligation to vacate the apartment, which clearly results from the terms of the settlement agreement. It considers that it is entitled, under a general principle of law, to exercise a retention right over the lump sum in view of the complainant's refusal to fulfil his obligations under the settlement agreement.

EMBL explains that the apartments that it leases are intended to accommodate employees and guests on a temporary basis for periods not exceeding one year, although in the complainant's case the lease was extended throughout the period of his employment with

the Laboratory for personal reasons. The term "property" as used in clause 8 of the settlement agreement clearly includes the apartment rented by the complainant. Thus, by refusing to vacate the apartment, the complainant has breached his obligation under the settlement agreement to return "all property belonging to EMBL" by 15 June 2007.

According to the Laboratory, the link between the lease and the settlement agreement can also be inferred from clause 13 of the settlement agreement, by which the complainant undertook to release the Laboratory from "any claims [...] arising out of or relating to his employment with EMBL", because it was only by virtue of his status as an employee of EMBL that he was allowed to rent the apartment. It adds that the reference in the lease to the Court of Heidelberg is a mistake.

The Laboratory argues that the complainant's obligation to vacate the apartment also results from his employment contract. The notice of termination of the lease contained in the letter of 18 October 2007 is to be treated as an instruction from the Director-General, and the complainant's failure to comply with that instruction constitutes a breach of his contract which entitles the Laboratory to withhold payment of the lump sum. Moreover, the close connection between the lease and the employment contract implies that his right to occupy the apartment ended upon termination of the said contract.

EMBL emphasises that the complainant's continued occupation of the apartment is liable to have serious financial consequences for it. The income it derives from the apartments it leases is subject to a favourable tax regime, provided that they are leased only to employees or guests. Since the complainant is no longer either an employee or a guest of the Laboratory, it runs the risk of losing the benefit of that regime. In light of that risk, its decision to withhold payment of the lump sum cannot be deemed disproportionate.

Noting that the complainant has chosen not to avail himself of the numerous opportunities given to him to comply with his obligations, EMBL asks the Tribunal to order him to pay 6,000 euros to cover part of its legal expenses.

D. In his rejoinder the complainant reiterates his pleas. He submits that the apartment is not the "property" of EMBL within the meaning of clause 8 of the settlement agreement, since EMBL in fact leases it from its owner. To support his argument that there is no connection between the lease and the settlement agreement, he points out that he could not have returned the apartment on 15 June 2007, as the settlement agreement was signed only on 14 June 2007. He emphasises that the issue of whether or not he must vacate the apartment has nothing to do with the settlement agreement and can only be decided by the Court of Heidelberg, in accordance with the terms of the lease.

With regard to the scope of his internal appeal, he points out that in his submissions to the Joint Advisory Appeals Board he referred several times to EMBL's refusal to pay the amounts due under the settlement agreement, and that both the Board and the Director-General clearly understood the appeal as relating to the implementation of the agreement. According to him, the Laboratory's statements that it runs the risk of losing the benefit of a preferential tax regime and that it cannot lease apartments to third parties are false.

E. In its surrejoinder EMBL maintains its objections to receivability and likewise its position on the merits. It submits that the Joint Advisory Appeals Board clearly established a link between the complainant's obligation to vacate the apartment and the payment of the lump sum. It acknowledges that it does not own the apartment but argues that the word "property" as used in the settlement agreement includes leasehold property. Regarding the fact that it did not demand that the complainant vacate the apartment on 15 June 2007, it states that its practice is to allow departing staff members a reasonable amount of time to vacate their apartments.

CONSIDERATIONS

1. At the time the complainant joined EMBL in 1995, he leased an apartment from it for a one-year term. During his employment, the Laboratory granted the complainant a number of extensions of the

lease. The relevant provision in the lease for the purpose of the present dispute states that "[t]he Court of Jurisdiction for any dispute in connection with [the] lease has its seat in Heidelberg".

2. On 31 January 2007 EMBL terminated the complainant's employment with a notice period of one year. The complainant's internal appeal against this decision was unsuccessful and he filed a complaint with the Tribunal. On 14 June 2007 the complainant and EMBL entered into a settlement agreement and the complaint was withdrawn.

3. The settlement agreement provided that the complainant would receive a lump-sum payment at the end of his employment on 31 January 2008, that he would be granted paid leave from 15 June 2007 until 31 January 2008, that he would remain in the EMBL health insurance scheme until age 60 and that, subsequently, he would be entitled to an EMBL pension.

4. The agreement also provided that the complainant would "return all property belonging to EMBL the latest by 15 June 2007" and that with the fulfilment of the agreement all obligations between the parties would be concluded.

5. By a letter of 18 October 2007 the Laboratory advised the complainant that, as stated in the preamble to the lease, it only leased accommodation to its employees or guests. Therefore, as his employment contract was to expire on 31 January 2008, his lease would expire on the same date. However, the complainant did not vacate the apartment on 31 January and EMBL did not pay him the lump sum due on that date.

6. Ultimately, following an exchange of correspondence, EMBL advised the complainant that it would terminate the settlement agreement if a firm commitment that he would vacate the apartment within two months had not been received by 31 March 2008.

7. On 17 July 2008 the complainant filed an internal appeal against "the threat […] to terminate the [settlement] Agreement" contained in the letter of 25 March 2008. The Joint Advisory Appeals Board recommended that the parties should reach an agreement that would include a schedule for the complainant to vacate the apartment and for the payment of the lump sum. On 2 December 2008 the Director-General advised the complainant that he accepted the Board's recommendation. He proposed that in the light of the approaching holiday season the complainant vacate the apartment by 2 March 2009 and, upon the apartment being vacated, EMBL would pay the lump sum. The complainant rejected the proposal and filed his second complaint before the Tribunal.

8. The central issue in this dispute is whether the clause in the settlement agreement requiring the complainant to "return all property belonging to EMBL" by 15 June 2007 includes the delivery up of possession of the apartment the complainant leased from EMBL in April 1995. The complainant takes the position that the settlement agreement and the lease are two entirely separate matters. In his view, the notice to terminate the lease contained in the letter of 18 October 2007 is not valid under German law and any dispute in relation to the lease must be adjudicated in the Court of Heidelberg in accordance with the terms of the lease. He maintains that the payment of the lump sum is not contingent on his having vacated the apartment and that EMBL has wrongfully withheld the payment of the lump sum. He also contends that, since the Laboratory leases the building in which the apartment is located, the apartment is not the property of EMBL.

9. The Laboratory argues that the complaint is irreceivable for failure to exhaust internal remedies. Its submissions on the question of receivability are largely directed at the relief the complainant seeks. As will become evident, a consideration of these submissions is unnecessary because the determinative issue concerns the interpretation of the settlement agreement. On the merits, EMBL submits that it is under no obligation to pay the lump sum so long as the complainant does not honour his obligation under the settlement agreement.

10. The Tribunal rejects the complainant's assertion that the apartment is not "property" of EMBL as contemplated in the settlement agreement. In law, a leasehold interest is a property interest and, therefore, in the present case it comes within the relevant clause in the settlement agreement. As to the clause in the lease that "[t]he Court of Jurisdiction for any dispute in connection with [the] lease has its seat in Heidelberg", the Tribunal observes that the present dispute is not about the terms of the lease itself. It concerns the obligations arising under a clause in the settlement agreement which was entered into for the purpose of resolving all outstanding matters relating to the complainant's employment with EMBL. As the apartment is the property of EMBL, the complainant was obliged to give up vacant possession pursuant to the terms of the settlement agreement. Further, as he had failed to fulfil his obligation to vacate the apartment at the date the lump sum payment was due, EMBL was entitled to withhold payment of the lump sum.

11. Accordingly, the complaint will be dismissed. In these circumstances, no costs will be awarded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen

Catherine Comtet