S.

v.

ESO

138th Session **Judgment No. 4822**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. J. S. against the European Southern Observatory (ESO) on 11 August 2021 and corrected on 10 September, ESO's reply of 21 December 2021, the complainant's rejoinder of 21 March 2022 and ESO's surrejoinder of 1 June 2022;

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 the decision not to renew his fixed-term contract.

The complainant joined ESO in October 2006 as a non-established member of the personnel. In this capacity, he was employed during three years as a "Fellow" and during five years as a "Paid Associate". By letter of 11 June 2014, he was offered a three-year fixed-term contract, starting on 1 October 2014, to work as a "User Support Astronomer" staff member at the "Assistant Astronomer" level within the ESO Faculty in the Organisation's Directorate of Operations.

The Faculty is an inter-directorate structure made up of astronomers across ESO and from all Directorates whose objective is to implement the Organisation's primary mission to promote and organize astronomical research in the Member States. According to the ESO Astronomer Charter, the "Assistant Astronomer" position is the entry level for ESO astronomers who are expected to reach the next "Associate Astronomer" level within six years from the start of their contract. According to paragraph 6.3 of the Charter, indefinite contracts are only awarded to astronomers "at or above the Associate level".

By letter of 31 March 2017, ESO offered the complainant an extension of his fixed-term contract for a further three years, up to and including 30 September 2020, which he accepted and signed on 11 April 2017. The letter indicated that, in order for him to reach the "Associate Astronomer" level within the Faculty, the Scientific Personnel Committee strongly recommended "that [he] increase[d] [his] scientific output over the coming years to strengthen [his] scientific standing".

In 2019, the fifth year of his regular employment as a staff member, the complainant became eligible for the award of an indefinite contract. The Indefinite Appointment Advisory Board (IAAB) met on 5 December 2019 and issued a negative recommendation concerning him on 20 December. It nevertheless suggested that the Director General should consider the possibility of a one-year contract extension offering the complainant an opportunity to apply for other positions outside the Faculty.

On 29 January 2020, the complainant received two letters concerning his contractual situation. In the first letter, he was informed that, following the recommendation of the IAAB, the Director General had decided not to offer him an indefinite contract but a one-year extension of his current fixed-term contract instead, until 30 September 2021. The purpose of the proposed contract extension was to give him "the opportunity to further consolidate [his] experience and to propose ideas where [his] unique set of expertise and valuable knowledge [could] be applied elsewhere in the Organisation". As to the decision not to grant him an indefinite contract, it was based on the fact that his

"scientific output and standing" were not "strong enough" to enable a promotion to the "Associate Astronomer" level. In the second letter, he was offered the contract extension and was advised that the administrative matters related to his departure would be communicated to him separately. The complainant signed the two letters on 14 and 19 February 2020, respectively.

On 9 March 2021, he requested to meet with the Director General to discuss his contractual situation. A meeting was held on 17 March.

On 18 March 2021, the Director General informed the complainant that, having considered all the elements that had been highlighted during the meeting, he was still of the opinion that the decision not to grant him an indefinite contract remained valid and that his contract would therefore expire on 30 September 2021. The complainant was also advised that Human Resources would shortly contact him to outline the arrangements and terms for the end of his contract. On 26 March 2021, the Head of Human Resources informed him of his entitlements and benefits in connection with his departure from ESO.

On 17 May 2021, the complainant lodged an appeal with the Director General against the 18 March 2021 decision, as implemented by the 26 March 2021 decision, "to not renew [his] fixed-term contract and not award an indefinite-term contract to [him]". He requested that those decisions be rescinded and that he be allowed to continue working for ESO under a renewed contract or an indefinite contract. The Director General replied on 18 May 2021, informing him that, with regard to his appeal against the decision not to grant him an indefinite contract, the Joint Advisory Appeals Board (JAAB) would be asked to examine his case. With regard to his appeal against the decision not to renew his contract, he was advised that Article VI 1.02 of the Staff Rules precluded any internal appeal and that he could only challenge that decision by filing a complaint directly with the Tribunal. That is the impugned decision.

In the present complaint, filed on 11 August 2021, against the decision not to renew his fixed-term contract, the complainant asks the Tribunal to set aside the impugned decision and draw all the legal consequences flowing therefrom, that is to order his reinstatement

"together with the renewal of his fixed-term contract or [grant him] the benefit of an indefinite contract". On a subsidiary basis, he requests that ESO be ordered to pay him an amount corresponding to two years of his last emoluments. He also seeks an award of moral damages in an amount left to the Tribunal's wisdom, and costs.

ESO considers that the complaint is irreceivable *ratione temporis*. It requests the Tribunal to dismiss the complaint.

CONSIDERATIONS

1. From 1 October 2014 to 30 September 2021, the complainant was a staff member of ESO holding the post of "User Support Astronomer" at the "Assistant Astronomer" level within the ESO Faculty in the Organisation's Directorate of Operations. During that seven-year period, he was employed under a three-year fixed-term contract, renewed once for another three years, and, afterwards, exceptionally, for another year. His appointment as "User Support Astronomer" with ESO and his contractual relationship with the Organisation terminated on 30 September 2021 at the expiry of the final extension of his fixed-term contract, as provided for in Article II 6.01 of the Staff Rules and Article R II 6.01 of the Staff Regulations.

2. The complainant filed two complaints with the Tribunal regarding his contractual situation at ESO. The first complaint, which is the subject of the present judgment, was filed on 11 August 2021 and pertained to the impugned decision of 18 May 2021. In his complaint, the complainant emphasized that this decision was not made based on an opinion of the internal appeals board of the Organisation since appeals against decisions not to renew a fixed-term appointment cannot be submitted to the internal appeal procedure but must rather be taken directly to the Tribunal pursuant to Articles VI 1.02 and VI 1.04 of the Staff Rules.

In the relief claimed in this first complaint, the complainant asks the Tribunal to set aside the impugned decision and, as a consequence, to order his reinstatement "together with the renewal of his fixed-term

contract or the benefit of an indefinite contract" or, on a subsidiary basis, the payment of an amount corresponding to two years of his last emoluments, and to order ESO to pay him compensation in an amount to be fixed by the Tribunal for the moral injury he allegedly suffered because of its illegal decisions and the treatment it subjected him to in breach of its duty of care, and costs.

3. The second complaint of the complainant is the subject of Judgment 4823, also delivered in public this day. This second complaint was filed with the Tribunal on 8 April 2022 and relates to the impugned decision of 11 January 2022 of the Director General that followed the recommendations of the Joint Advisory Appeals Board (JAAB) regarding an appeal that he lodged on 17 May 2021. In that decision, the Director General concluded, as recommended by the JAAB, first, that the decision not to renew the complainant's fixed-term contract was not appealable by virtue of Article VI 1.02 of the Staff Rules, and second, that the appeal of the complainant against the decision not to grant him an indefinite contract was time-barred because it was filed after the period prescribed in Article R VI 1.05 of the Staff Regulations. However, the Director General also indicated that he was not following the JAAB's majority recommendation based on a finding to the effect that the Organisation had not made a sufficient and coordinated effort towards securing alternative positions for the complainant, in breach of its duty of care. The Director General explained that, in his view, the Organisation was under no obligation to do so in a matter involving the expiry of a fixed-term contract and that, in any event, it had complied with its obligations.

It is worth observing at this stage that the claims for relief in this second complaint are slightly different than the ones listed in his first complaint. While the complainant is still asking the Tribunal to set aside the impugned decision, that of 11 January 2022 instead of the one of 18 May 2021, he is asking for an order of reinstatement "together with the benefit of an indefinite-term appointment", or subsidiarily, for the payment of an amount corresponding to four years of his last emoluments instead of two. His claims for compensation for moral injury and legal costs are worded in similar terms in both complaints.

4. The Organisation asked that the two complaints be joined because it considers that they rest on the same facts and originate from the same decision of 29 January 2020. But, while it is true that the facts in each of these complaints are part of a same continuum of events, the legal issues raised in each of them are different. The two complaints also do not pertain to the same impugned decision. The provisions of the Staff Rules and Regulations involved are furthermore not the same, and the processes that led to the impugned decisions identified by the complainant were not the same either. Finally, the reasons developed by the parties, notably on the issues of receivability, are different from one complaint to the other.

Accordingly, the complaints will not be joined. But, if necessary, the Tribunal will refer to the two judgments to avoid any potential overlapping.

In this regard, the Tribunal observes that one of the motivations for the request for joinder of the Organisation is pecuniary. In the proceedings it filed in the second complaint, ESO mentioned that a joinder "would absolve [the Organisation] from having to pay twice the Tribunal's substantial court expenses irrespective of the outcome of the proceedings".

The starting point in dealing with this issue is whether the cost to the organisation is a relevant consideration in determining whether there should be joinder. The principles applied by the Tribunal on the general issue of joinder have developed over a period of more than 45 years. As discussed in Judgment 4753, consideration 3:

> "Plainly the Tribunal can, and often does, consider related complaints at the same session and by the same panel of judges. The joinder of two complaints is a legal device deployed by the Tribunal in order that one judgment can be rendered, and orders then made disposing of the joined complaints. When considering the scope and purpose of a joinder, it must be borne in mind that while such an order can be made in relation to multiple complaints by one complainant, they can also be made in relation to complaints by two or more individuals who, in substance, raise the same grievance. This latter situation illustrates the need for such orders to be made only in quite explicit circumstances and to be guided by focused principles and not loosely expressed generalities. This is particularly important given the *res judicata* effect of the Tribunal's judgments. It would be wrong, in

> principle, to burden one individual with the legal outcome of proceedings where her or his complaint has been joined with the complaints of others in which legal issues have arisen and are resolved, but not legal issues raised by that individual."

And later in consideration 6:

> "The question that arises is whether it is appropriate to join the two complaints. The touchstone for formal joinder has historically been that the complaints involve the same or, more recently, similar questions of fact and law, and it is not sufficient that they stem from the same continuum of events. [...]"

The cost to the organisation of multiple judgments has no part to play in the exercise of the discretionary power concerning joinder. It is an irrelevant consideration.

Additionally, while ESO pleads that having only one judgment would protect the Organisation "against the cost[s] and administrative demands of unnecessary litigation issues", the Tribunal cannot ignore that ESO itself acknowledged that "it is the law of its Staff Rules and Regulations which provide that different procedures apply for challenging the Director General's decisions not to grant [the] complainant an indefinite contract and not to extend his fixed-term contract beyond the one year granted". In other words, there are two different and separate complaints filed not because of unnecessary litigation issues raised by the complainant, but because of the way the Staff Rules and Regulations of ESO are organized.

That said, the Tribunal notes, however, that, while arguing that the submission of two complaints was not chosen by him since he had no other alternative than to follow the procedural paths imposed by the Organisation, the complainant still disputes the assertion of ESO that it should not "be punished twice for the same conduct". As a result, he maintained the separate claims for relief sought in both complaints even though there was clearly some overlapping between the two. Conceding there was indeed some overlapping here would have been the expected and logical position to adopt on the part of the complainant. It is regrettable to see that he did not do so.

5. ESO raises the receivability of the first complaint as a threshold issue.

It contends that the decision which the complainant impugns, namely that of 18 May 2021, was not the final one taken by the Organisation about the non-renewal of the complainant's fixed-term contract. It maintains that the final decision in this regard was rather reached much earlier, that is, on 29 January 2020.

6. The question of whether a decision is a final decision is of fundamental importance to the operation of the Tribunal's Statute. The Statute defines and limits the Tribunal's jurisdiction. Article VII, paragraph 1, requires a decision to be a final decision before the jurisdiction of the Tribunal is enlivened. Once it is, time limits are triggered: see Article VII, paragraph 2. The question of whether a decision is a final decision is essentially a legal question arising from the language of the Statute.

Returning to the facts of this case, the 18 March 2021 communication, by which the Director General informed the complainant that he was still of the opinion that the decision not to renew his fixed-term contract beyond 30 September 2021 remained valid, was only confirmatory. And, on 18 May 2021, regarding the non-renewal of his fixed-term contract, the Director General simply informed him that there was no internal appeal against a decision not to renew or extend a contract under Article VI 1.02 of the Staff Rules and that such a decision could only be challenged directly before the Tribunal.

As a result, be it for the final decision of 29 January 2020 or, for the sake of argument, even for that of 18 March 2021, ESO argues that the complainant did not commence proceedings in the Tribunal within ninety days following the notification of the decision of the Organisation not to renew or extend his contract, which renders it irreceivable pursuant to the terms of Article VII, paragraph 2, of the Statute of the Tribunal.

7. On the one hand, the Tribunal has already recalled twice, in Judgments 4741, consideration 11, and 1734, consideration 3, that Article VI 1.02 of the Staff Rules is clear and unambiguous. It provides that an appeal cannot be lodged against a decision of ESO not to renew or extend a fixed-term contract, such that a staff member can only appeal this decision before the Tribunal.

On the other hand, as also mentioned in Judgment 4741, consideration 12, the Tribunal has indicated on many occasions that, "[w]ith respect to Article VII, paragraph 2, of the Tribunal's Statute, the Tribunal's case law requires strict adherence to the ninety-day time limit on the grounds that time limits are an objective matter of fact and that strict adherence is necessary for the efficacy of the whole system of administrative and judicial review of decisions" (see Judgments 4354, consideration 7, 3947, consideration 5, and 3559, consideration 3).

8. The Tribunal has repeatedly emphasised the importance of the strict observance of applicable time limits. In Judgment 3847, consideration 3, involving again ESO, it notably stated that "the time limits for internal appeal procedures and the time limits in the Tribunal's Statute serve the important purposes of ensuring that disputes are dealt with in a timely way and that the rights of parties are known to be settled at a particular point of time. The consistently stated principle that time limits must be strictly adhered to has been rationalized by the Tribunal in the following terms: time limits are an objective matter of fact and strict adherence to them is necessary for the efficacy of the whole system of administrative and judicial review of decisions. An inefficacious system could potentially adversely affect the staff of international organisations. Flexibility about time limits should not intrude into the Tribunal's decision-making even if it might be thought to be equitable or fair in a particular case to allow some flexibility. To do otherwise would 'impair the necessary stability of the parties' legal relations'" (see, to the same effect, Judgment 4673, consideration 13).

9. In the present case, the record indicates that the relevant provisions of the Staff Rules and Regulations were specifically referred to in the initial offer for an appointment made by ESO to the complainant and in the initial contract that he accepted and signed. They were transmitted as well to him by an internal memorandum in June 2014, at the beginning of his fixed-term appointment. As the Tribunal recalled in Judgment 4741, consideration 13, "officials are expected to know their rights and the rules and regulations to which they are subject, and ignorance or misunderstanding of the law is no excuse (see, in this regard, Judgments 4673, consideration 16, 4573, consideration 4, 4324, consideration 11, and 4032, consideration 6)".

10. In his complaint, the complainant points to the circumstance that "ESO adopted a provision in its Staff Rules which provides that there can be no appeal against a decision of non-renewal of [an] appointment (see [Article] VI 1.02), but another [provision], of the Staff Regulations, which bears the same number (VI 1.02) specifies that the members of the personnel have a right of recourse, individual or collective", such that, in his view, the Staff Rules and Regulations are far from being clear on this issue.

The Tribunal disagrees. These two provisions are plainly included in separate documents, one being the Staff Rules for Article VI 1.02, and the other being part of the Staff Regulations. In addition, the latter bears, in reality, a slightly different number, namely Article R VI 1.02.

11. Furthermore, the letter of 29 January 2020 by which the complainant was informed by the Organisation that his fixed-term contract would not be renewed beyond 30 September 2021 was unambiguous. It specifically indicated that ESO was offering him a "final extension of [his] fixed-term contract as an [i]nternational [s]taff [m]ember for the period of one year up to and including 30.09.2021". The complainant accepted this contract extension in writing. He then understood full well that this was a final decision. In the letter he sent afterwards to the Director General on 9 March 2021, he specifically wrote that "my current appointment will end on September 30, 2021". In that letter, he was asking to meet the Director General to discuss a pragmatic solution

that would "relax in [his] case the faculty status requirement for [his] current position" to allow him to continue working within the Organisation.

12. This letter of 9 March 2021 led to the meeting of 17 March 2021 and the letter of the following day of the Director General. The latter wrote to the complainant on 18 March 2021 that, pursuant to this meeting and the letter of 9 March 2021, "[he was] still of the opinion that the decision informed to [him] on 29 January 2020, [...] whereby [he was] not granted an indefinite contract in [his] current role, remains valid, and that [his] present exceptional contract of one year will therefore expire on 30 September 2021". The Director General added that this was not a decision he had taken lightly, and that "correct signs and advice" had been given to the complainant in recent years.

13. Yet, despite this, in his rejoinder, the complainant suggested that the non-renewal of his fixed-term contract beyond 30 September 2021 was not final but a mere possibility because the one-year extension of his appointment was meant to give him an opportunity to apply for other positions within ESO outside the Faculty. In the same vein, he alluded to the remarks of his supervisors in mid-January 2020 to the effect that, for the time after and the way forward, the Organisation was contemplating a plan to allow him to keep his employment.

But this misreads the clear terms of his one-year contract extension which indicated that it was a final one, as well as the terms of the decision rendered on 29 January 2020 indicating to the complainant that the Director General had decided not to offer him an indefinite contract and instead an extension of his current fixed-term contract for a period of one year up to and including 30 September 2021, as stipulated in the final extension.

14. The Tribunal also notes that, similarly, in his Performance Management and Professional Development (PMPD) annual review for 2020-2021 that was completed and discussed with him in November 2020, his supervisor noted twice that the complainant's contract with ESO would expire at the end of September 2021. Nevertheless, the

complainant expressed no disagreement even though he was entitled to do so under the applicable Staff Rules and Regulations.

15. In addition, the Tribunal considers that the assertion of the complainant to the effect that the 18 March 2021 confirmation of the Director General was rather a new decision is ill-founded. There is no new decision when a previous one is purely confirmed. In Judgment 3870, consideration 4, the Tribunal recalled that "for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) and not a purely confirmatory decision, the following conditions are to be met: the new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and it must relate to different issues from the previous one or be based on new grounds (see Judgments 660, 2011, [consideration] 18, and 3735, [consideration] 4)".

From that standpoint, the Tribunal finds that the 18 May 2021 decision cannot be reasonably read as altering the prior decision of 29 January 2020 or as being different in substance from it.

16. Moreover, the mere circumstance that a discussion took place on 17 March 2021 between the complainant and the Director General after the final decision was reached, at the request of the former, is not an indication that the Organisation took a new decision. The Tribunal observes in this regard that, in the letter of the Head of Human Resources of 26 March 2021, notified to him after the letter of the Director General of 18 March 2021, the complainant was informed of his entitlements and benefits in connection with his departure from ESO, and it was specified that this was "[f]ollowing [the] letter dated 29 January 2020 informing [him] of the final extension of [his] fixed-term contract expiring on 30 September 2021".

In this context, the reference of the complainant to an email dated 24 March 2021 of another member of the staff [Mr A.Z.], stating that, in answer to an email of the same day of the complainant advising him that "my meeting with the [Director General] went as I probably had

expected, no change, my contract ends in September", he was "sorry and sad that [...] the decision [was] now final", does not amount to a contrary indication from which it could be inferred that the decision of 29 January 2020 was not the final decision or that the one of 18 March 2021 was a new one.

17. Similarly, the assertion of the complainant to the effect that the Organisation set a sort of procedural trap for him in being unclear and ambiguous as to the final extension of his fixed-term contract to 30 September 2021 is unfounded. There was no misunderstanding as to the position of the Organisation concerning the final extension of the complainant's fixed-term contract and he was not misled in any way by ESO about his situation or his status.

18. To try to justify that the final decision must be the one dated 18 May 2021 by which the Organisation informed him that an internal appeal against a decision not to renew or extend a fixed-term contract is not possible, the complainant further pleads that the refusal to award him an extension of his fixed-term appointment or an indefinite-term contract could have been repealed and replaced by another decision during the extension year. He adds that, even if the Staff Rules and Regulations did not contemplate that an appeal could be submitted to the JAAB, nothing prevented him from requesting the Director General to review his decision and the latter from responding to this request, and therefore make a final decision as he did on 18 May 2021.

This argument is devoid of any merit. The complainant cannot point to any provision in the Staff Rules and Regulations that contemplates the possibility of presenting a "request for review" of an earlier decision made by the Director General. This avenue or recourse simply does not exist at ESO and this cannot form the basis of an assertion that the letter of 18 May 2021, reminding the complainant that a decision not to renew or extend a fixed-term contract could only be challenged directly before the Tribunal, with no indication that this was simply a confirmatory decision, therefore showed that the Director General was, at that time, allegedly responding to a "request for review".

19. All in all, no matter how the record in this case is analysed, the Tribunal considers that the complainant was advised of the final decision of the Organisation not to renew or extend his fixed-term contract on 29 January 2020. This was confirmed to him on 26 March 2021 in writing. The complainant understood very well that that was the situation. In the best scenario for the complainant, this was made clear to him on 18 March 2021. Given that no "request for review" existed under the Staff Rules and Regulations and that, certainly, the 17 May 2021 internal appeal of the complainant cannot be qualified as such concerning the non-renewal decision, and considering that it was clearly indicated that such a decision could only be appealed before the Tribunal, the complaint filed by the complainant on 11 August 2021 was far beyond the ninety-day period foreseen in Article VII, paragraph 2, of the Tribunal's Statute and was therefore out of time.

20. As a result, the complaint must be dismissed as irreceivable, without the need for the Tribunal to address the other grounds raised by the complainant on the merits of the case.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

JACQUES JAUMOTTE

CLÉMENT GASCON

MIRKA DREGER