

ORDER
of 24 March 2023

In Case ESMAT 3/2022

AB, Appellant,

represented by Laure Levi, Member of the Brussels Bar

v

European Stability Mechanism

represented by David Eatough, General Counsel of the European Stability Mechanism

Concerning the Appeal lodged by the Appellant on 11 October 2022

The Administrative Tribunal of the European Stability Mechanism

Composed, in accordance with Article 8(1) of the Statute, of Virginia MELGAR, President of the Tribunal, and members Celia GOLDMAN and Kieran BRADLEY,

Adopts the present ORDER

I. FACTS AND PROCEDURE

1. On 18 May 2022, the Appellant, who was then employed by the European Stability Mechanism (“ESM”), concluded a Termination Agreement (the “Agreement”) with the ESM, according to which the Appellant’s contract terminated with effect from 15 June 2022.
2. According to the Appellant, the ESM failed to activate an agreed out-of-office email message and discontinued the Appellant’s email account prematurely, before the end of the contract, and removed the Appellant from an electronic platform used in the course of their work to interact with external parties. The Appellant was also de-registered from a seminar due to take place before the end of the contract.
3. Following representations by the Appellant, the ESM took remedial action on some of the Appellant’s complaints.
4. The Appellant sought compensation for damage allegedly caused by the ESM’s actions. Though negotiations were conducted, these did not result in an agreement on compensation.

5. The Appeal in the present case was lodged on 11 October 2022. The Appellant is alleging that the ESM's conduct breached the terms of the Agreement, that the ESM has recognised its wrongdoing, and that the ESM should be ordered to pay compensation, as well as "the reimbursement of all the legal costs incurred and fees of the retained legal counsel and the order that the [ESM] to pay all the costs".
6. On 24 October 2022, the Appellant made a reasoned request for anonymity pursuant to Article 19(2) of the Rules of Procedure, to which the Tribunal has acceded.
7. The ESM lodged its Reply on 7 December 2022. It claims that the Appeal is inadmissible as out of time, and is in any case unfounded. It denies that its conduct constitutes a material breach of the Agreement, or that it ever recognised wrongful conduct on its part.
8. The Tribunal issued Order No 1 of 12 December 2022. This reads in part:

"[1] Article 2(2) of the Statute of the Administrative Tribunal of the European Stability Mechanism ("Jurisdiction") provides that "an appeal to the Tribunal shall only be admissible if it is directed against an express or implied decision of the Managing Director pursuant to Article 26(3) of the Staff Rules rejecting, wholly or in part, an internal appeal". The only exception allowed is for an appeal against a decision of the Managing Director pursuant to Article 23(1) of the Staff Rules; neither party has contended that the present case falls within Article 23(1) of the Staff Rules.

[2] Prima facie, the present appeal is not directed against "an express or implied decision of the Managing Director pursuant to Article 26(3) of the Staff Rules rejecting, wholly or in part, an internal appeal".

9. The Tribunal ordered the parties, in accordance with Article 16(1)(a) of the Tribunal's Rules of Procedure, to present observations indicating the basis for the Tribunal's jurisdiction in the present appeal.
10. The Appellant and the ESM both filed observations within the time limit set.
11. On 23 February 2023, the ESM requested that the Tribunal provide it with the Appellant's observations on the Tribunal's jurisdiction in the present proceedings "so that it may be in a position to submit further observations or rebuttals, if need be."
12. The Tribunal's consideration of the present appeal has been delayed by the indisposition of one of the judges for a two-month period.

II. LEGAL BACKGROUND

13. Article 2(1) of the Statute reads as follows:

"The Tribunal shall have jurisdiction in any dispute between the ESM, on the one hand, and members or former members of staff, or their respective successors in interest (each an 'Appellant'), on the other hand, regarding the legality of an act or decision of the ESM adversely affecting the Appellant."

14. Article 2(2) of the Statute provides that:

“Except for an appeal against a decision by the Managing Director of the ESM (the ‘Managing Director’) pursuant to Article 23(1) of the Staff Rules, an appeal to the Tribunal shall only be admissible if it is directed against an express or implied decision of the Managing Director pursuant to Article 26(3) of the Staff Rules rejecting, wholly or in part, an internal appeal.”

15. Article 2(3) of the Statute reads as follows:

“The Tribunal shall not have any powers beyond those conferred upon it by this Statute. Nothing in this Statute shall limit or modify the powers of the organs of the ESM under the Treaty establishing the ESM (the ‘Treaty’), including the lawful exercise of their discretionary authority in the adoption of general or individual decisions, such as the establishment or amendment of conditions of employment of the staff of the ESM. Consequently, the Tribunal shall only have full jurisdiction with regard to disputes of a financial character or, with regard to disputes of a character other than financial, when the parties have agreed to submit the dispute to the full jurisdiction of the Tribunal”.

16. Article 2(4) of the Statute stipulates:

“The Tribunal shall, if necessary, settle any issue concerning its jurisdiction.”

17. Article 19(2) of the Rules of Procedure reads in relevant part:

“An Appellant may make a reasoned request that his or her identity, including his or her name, position and any other information permitting the identification of the individual, or that of any other named individual or any other confidential information not be made public by the Tribunal. ... In response to a reasoned request by any of the parties ..., the Tribunal shall adopt appropriate measures in that respect, including the redaction of the above-mentioned information.”

18. Article 20 of the Rules of Procedure provides:

“By reasoned order, the Tribunal may dismiss at any time an appeal that is manifestly inadmissible, outside the jurisdiction of the Tribunal or manifestly lacking in any basis in law.”

19. Article 23(1) of the Staff Rules lays down the range of disciplinary measures the Managing Director of the ESM may impose on a staff member, in accordance with the rules set out in Article 23(2) to (4) of the Staff Rules.

20. Article 24(1) of the Staff Rules reads as follows:

“[m]embers or former members of staff and their respective successors in interest (each, a ‘Complainant’) may challenge any individual act or decision of the ESM that adversely affects their rights. The Complainant shall submit to the Managing Director a request for an advisory opinion of an advisory committee (the ‘Advisory Committee’).”

21. Article 26(3) of the Staff Rules provides that, following the conclusion of the Advisory Committee procedure:

“[t]he Managing Director shall notify his or her final decision to the Complainant within 30 calendar days of the advisory opinion. In the absence of notification of a decision by the Managing Director within this deadline, the complaint shall be deemed to be rejected. The final decision shall be communicated to the Advisory Committee. If the final decision deviates from the recommendations of the advisory opinion, the Managing Director shall provide the reasons for such deviation.”

22. Article 12 of the Agreement reads as follows:

“[I]f [the Appellant] has reasons to believe that the ESM is in a material breach of this Agreement or of its obligations as an employer, [they] shall provide the ESM with no fewer than 14 calendar days' notice to afford it an opportunity to respond to and/or remedy its alleged non-performance of its obligations under this Agreement or as an employer. If after 14 calendar days, [the Appellant] is still of the opinion that the ESM was in a material breach which has not been remedied, or which is incapable of remedy, the ESM acknowledges that [the Appellant] shall have the right to seek any legal or equitable relief that may be available to [them], including recourse to the Administrative Tribunal of the ESM”.

23. Article 14 of the Agreement reads as follows:

“This Agreement shall be governed by the internal law of the ESM. Except in circumstances where Article 9 of this Agreement applies, nothing in this Agreement shall prevent [the Appellant] from exercising [their] rights as a member or former member of staff with regard to the Administrative Tribunal of the ESM and does not prevent the ESM from taking any legal or equitable relief that may be available to it.”

III. POSITIONS OF THE PARTIES

24. In their appeal, the Appellant states that “the Agreement (article 12) provides for the jurisdiction of the Tribunal”.

25. In their observations of 15 December 2022, the Appellant asserts that “Article 14 of the Termination agreement explains how the parties intended to settle their dispute in the execution of said termination agreement.” The Appellant argues that the absence of a settlement between the parties, which they describe as “the point in dispute brought before the Tribunal”, resulted from a communication from the ESM’s legal counsel of 30 August 2022 rejecting a proposal from the Appellant and considering the negotiations closed. In the Appellant’s view, “this is the decision which could be considered, if need be, as the decision provided by Article 2.1 of the statutes of the Tribunal”.

26. The Appellant continues: “[b]y the terms of [the] Termination agreement, the parties have decided to submit their dispute to the full jurisdiction of the Tribunal as provided by Article 2.3 of the statutes of the Tribunal. This is what Article[s] 12 and 14 of their Termination agreement provide[]”. The Appellant concludes that “the Tribunal has well jurisdiction to know [their] appeal”.

27. In its Reply of 7 December 2022, the ESM also asserts that the jurisdiction of the Tribunal is based on Article 12 of the Agreement, and adds that the Tribunal is competent, by virtue of Article 2 of the Statute, to “settle any issue concerning its own jurisdiction”.
28. In its observations of 19 December 2022, however, the ESM recalls the terms of Article 14 of the Agreement, noting that “[t]he Termination Agreement did not expressly provide for a direct challenge before the Tribunal directed against a ‘material breach’, not remedied or incapable of remedy”. In its view, “the ‘legal and equitable relief’ that was available to [the appellant] ... included
- i) a request for an advisory opinion of the Advisory Committee, and
 - ii) a ‘final’ decision, to be notified to the Appellant following the advisory opinion of the Advisory Committee, and which could be challenged before the Tribunal.”
29. The ESM noted that the Appellant had not submitted any request for an advisory opinion, the Advisory Committee had not delivered any such opinion, and the Managing Director had not taken any “final” decision. Recalling that, in accordance with Article 2(3) and (4) of its Statute, “the Tribunal shall not have any powers beyond those conferred upon it by [the] Statute” and that it is empowered to “settle any dispute concerning its own jurisdiction”, the ESM stated that it shared “the view of the Tribunal” that prima facie the appeal is not directed against an express or implied decision of the Managing Director.
30. The ESM added that “if the Organisation could, upon request, authorise an appellant to submit directly an appeal to the Tribunal without exhausting the available internal remedies, and if the Appellant had submitted such a request, the Organisation would have authorised [them] to submit [their] appeal directly to the Tribunal”.

IV. FINDINGS OF THE TRIBUNAL

31. Article 2 of the Statute is headed “Jurisdiction”. Article 2(1) then defines the material jurisdiction of the Tribunal, that is, “any dispute between the ESM ... and members or former members of staff ... regarding the legality of an act or decision of the ESM adversely affecting the Appellant”. These are the substantive matters which the Tribunal may examine when it is validly seized of an Appeal in accordance with Article 2(2) of the Statute.
32. While Article 2(2) of the Statute refers to the inadmissibility of an appeal which is not directed against a decision of the Managing Director, the absence of such a decision goes in effect to the Tribunal’s jurisdiction, in that it is not seized of a “dispute ... regarding the legality of a ... decision of the ESM adversely affecting the Appellant”. In the present case, prior to Order No 1, both parties considered that the Tribunal had jurisdiction to rule on the present Appeal notwithstanding the absence of a decision of the Managing Director. It is for this reason that the Tribunal in its Order No 1 requested the parties to present observations indicating the question of its “jurisdiction” to decide on the present Appeal.
33. It is generally accepted that international courts and tribunals may, and in case of doubt must, verify their jurisdiction to decide a proceeding brought before them. As the European Court of Justice noted in its second judgment in the *Foglia v Novella* proceedings, it must be “in a

position to make any assessment inherent in the performance of its own duties in particular order to check, as all courts must, whether it has jurisdiction.”¹

34. The Tribunal considers that, as a general rule, it may decide the question of whether it has jurisdiction or not in a given case without necessarily hearing the views of the parties. This follows in particular from Article 20 of the Statute, which provides that it may dismiss an Appeal which is outside its jurisdiction “at any time”. The words “at any time” would be deprived of their useful effect if it were considered that the Tribunal were obliged in any case to hold a hearing on an Appeal, notwithstanding its obvious lack of jurisdiction in the proceedings.
35. In the circumstances of the present case, where the parties asserted in their Appeal and Reply respectively that the Tribunal had jurisdiction on the basis of Article 12 of the Agreement without, however, providing a rationale for their shared position, the Tribunal decided, exceptionally, to seek the views of the parties before adopting the present Order.
36. For the avoidance of doubt, the observation of the Tribunal in Order No 1 that the appeal in the present proceedings is not directed against an express or implied decision of the Managing Director of the ESM was merely a prima facie finding which it was open to the parties to overturn by providing evidence to the contrary. It was not a “view of the Tribunal” as the ESM appears to believe.
37. The Tribunal takes the view *in limine* that the provisions governing its jurisdiction should be given the widest possible interpretation, as recourse to the Tribunal will often be the only means at the disposal of a staff member, or former staff member as in the present case, to vindicate their rights as against the ESM.²
38. The questions which arise here are, firstly, whether it has jurisdiction to decide the present Appeal on the basis of the Agreement and, if not, secondly, whether the Appeal is admissible in the light of the requirements of Article 2(2) of the Statute.
39. In their observations, the Appellant did not explicitly address the issue raised by the Tribunal in Order No 1 as to whether an internal appeal under Article 24(1) of the Staff Rules was necessary, as they consider that the jurisdiction of the Tribunal is founded on the Agreement.
40. For its part, the ESM has expressed contradictory views in its Reply and its observations. The Tribunal takes the latter as expressing its definitive position.
41. In the first place, the very wording of Article 12 of the Agreement stands as an obstacle to any dispensation from the requirement that an Appellant request an opinion of the Advisory Committee. Article 12 provides that, under certain conditions, an Appellant has “the right to seek any legal or equitable relief that may be available to [the Appellant], including recourse to the Administrative Tribunal”. It does not in terms provide jurisdiction for the Tribunal directly to hear the Appellant’s appeal, but merely refers to “relief that may be available to” the Appellant by virtue of any other pertinent legal instruments, *in casu* the Statute of the Tribunal and the ESM Staff Rules, and under the conditions laid down in those instruments. In particular, the use of the term “including recourse to the Administrative Tribunal” (emphasis added) would be inappropriate if it were intended that an Appellant could rely on a clause

¹ Case 244/80, EU:C:1981:302, paragraph 19.

² See, for the CJEU, Case 25/62 *Plaumann v Commission* EU:C:1963:17.

such as Article 12 of the Agreement to found direct jurisdiction of the Tribunal by-passing the need for an Advisory Committee procedure and a final decision of the Managing Director.

42. Similarly, the recognition in Article 14 of the Agreement that the Agreement does not affect the Appellant's "rights as a member or former member of staff with regard to the Administrative Tribunal of the ESM", does not create direct jurisdiction where none existed before.
43. Second, it seems clear, and the parties have not explicitly argued to the contrary, that a bilateral agreement between the ESM and a soon-to-be-former staff member, such as the Agreement at issue, could not have the legal effect of amending the scope of the Tribunal's jurisdiction as laid down in the Statute. According to Article 16 thereof, the Statute may only be amended by the Board of Directors of the ESM after consultation of the Full Tribunal and the Managing Director. The Statute does allow one explicit exception to the requirement that the complainant present an internal appeal, but that does not relate to a challenge to the implementation of a termination agreement, and the parties have not pointed to anything in the wording, scheme or objectives of the Statute or Staff Rules which would justify a second, implicit, exception.
44. The Tribunal therefore concludes that it does not have jurisdiction to decide the present Appeal on the basis of the Agreement of 18 May 2022.
45. As regards the Statute, the wording, scheme and objectives of Article 2 indicate that in every case, whether the staff member is challenging the imposition of a disciplinary measure under Article 23(1) of the Staff Rules, or any other "individual act or decision of the ESM which adversely affects [the staff member's] rights", the Tribunal may only be seised of the legality of a "final decision" of the Managing Director.
46. This analysis is comforted by the articulation of Article 2(1) and 2(2) of the Statute. While the material jurisdiction of the Tribunal includes "acts" of the ESM, it may only be seised of the legality of such acts by means of an Appeal against a "decision" of the Managing Director. It follows from these two provisions read together that a (former) staff member who wishes to challenge "acts" of the ESM may only do so by requesting the opinion of the Advisory Committee in accordance with Article 24 of the Staff Rules which will result in a "decision" of the Managing Director, explicit or implicit. This interpretation is wholly consistent with Article 24, which allows a (former) staff member to "challenge any *individual act* or decision of the ESM that adversely affects their rights" (emphasis added).
47. Nothing in Article 2, which defines exhaustively the "jurisdiction" of the Tribunal, suggests that the Tribunal enjoys jurisdiction by virtue of any other provision, instrument or arrangement.
48. The acknowledgment of a requirement that a staff member in the position of the Appellant in the present case be obliged to resort to the Advisory Committee procedure and await a final decision from the Managing Director prior to seising the Tribunal of an Appeal would not constitute an excessively formalistic interpretation of the relevant procedures. On the contrary, as noted by the Administrative Tribunal of the Inter-American Bank Group in a recent judgment regarding equivalent pre-litigation procedures, "[t]hese procedures seek to provide the [defendant organisation] with the opportunity, at different stages in the procedure, to

resolve the dispute between it and the employee in a mutually acceptable manner”.³ Such a precocious resolution of a dispute can, moreover, usually be effected with significantly less expenditure in time and financial resources for both parties than recourse to the Tribunal. Both the Advisory Committee and the Managing Director have the possibility to take a different view from the officer or service within the ESM who took the first contested decision.

49. Moreover, the Advisory Committee which, though chaired by a person external to the ESM, is otherwise composed of members of staff of the ESM, may in principle be in a better position in certain cases fully to grasp the nuances of an appellant’s grievance than the members of the Administrative Tribunal, who are necessarily outsiders and largely dependent on the parties for their understanding of the operation of the ESM and the working practices and conditions of its staff. In the present case, for example, the staff members sitting in the Advisory Committee might have been able to appreciate more exactly the practical repercussions on the legal position of the Appellant of the alleged failings of the ESM with regard to their email account, their removal from the electronic platform, and their de-registration from a seminar, which are all matters that might have been relevant had the Tribunal had to consider the merits of the present Appeal.
50. The Appellant has not pointed to any practical impediment or reason of principle which would have prevented them presenting a request for an opinion of the Advisory Committee, or rendered such a request nugatory.
51. The Appellant has nonetheless argued in their observations that the ESM’s “decision” of 30 August 2022 rejecting their proposal for agreed compensation could be considered as “the decision provided by Article 2.1 of the statutes of the Tribunal”.
52. It is obvious that any such disagreement between the Appellant and the ESM regarding the payment by the ESM of monetary compensation to its former employee falls in principle within the material jurisdiction of the Tribunal under Article 2(1) of the Statute. That is, however, not in itself sufficient for the Tribunal to be validly seised of such dispute.
53. In the first place, this “decision” is not the object of the Appeal. Instead the Appellant requests:

“[t]he recognition that the [ESM] breached the Termination Agreement
The financial compensation of the Appellant[’]s prejudice further to these breaches
The reimbursement of all the legal costs incurred and fees of the retained legal counsel and the order that the [ESM] ... pay all the costs”.
54. Second, the Appellant has not provided the text of any such contested decision to the Tribunal. If the Appellant were indeed challenging a statement of position of the ESM of 30 August 2022, then they would have been obliged under Article 13(1)(d) of the Rules of Procedure to include this with the Appeal lodged with the Tribunal.
55. The Appellant has not sought to argue that this “decision” was taken by the Managing Director. In their Appeal, the Appellant explicitly indicates that the communication was provided by the ESM’s “legal counsel”, without identifying the legal counsel in question. This “decision” was not therefore the “final decision” of the Managing Director taken within 30 days of his having received the opinion of the Advisory Committee within the meaning of

³ IDBAT Case 104, *Veléz Grajales v IDB*, judgment of 9 September 2022, paragraph 65.

Article 26(3) of the Staff Rules. It follows that such a “decision” could not in any case be challenged on the basis of Article 2(2) of the Statute.

56. The Appellant further contends that there exists an agreement between the parties “to submit their dispute to the full jurisdiction of the Tribunal as provided by Article 2.3 of the statutes of the Tribunal” and that such agreement gives the Tribunal jurisdiction in the present case: “[t]his is what Article 12 and 14 of their Termination agreement provides”.
57. The third sentence of Article 2(3) of the Statute concerns the circumstances in which the Tribunal may exercise “full jurisdiction”. This is an exceptional form of jurisdiction, that the Tribunal may only exercise if the parties have come to an explicit agreement to this effect in advance of the Tribunal’s coming to judgment.
58. In order for the third sentence of Article 2(3) of the Statute to come into operation, however, the Tribunal must first be seised of an Appeal which is admissible and over which it has jurisdiction. Article 2(3) does not, as the Appellant appears to believe, override the requirements of Article 2 of the Statute. Nothing in the Agreement indicates that the parties have agreed that the Tribunal be entitled to exercise “full jurisdiction” in the context of the present Appeal.
59. While acknowledging in its observations that the Tribunal does not have jurisdiction to decide the present appeal in accordance with Article 2(2) of the Tribunal’s Statute, the ESM has stated that “if the Organisation could, upon request, authorise an appellant to submit directly an appeal to the Tribunal without exhausting the available internal remedies, and if the Appellant had submitted such a request, the Organisation would have authorised them to submit [their] appeal directly to the Tribunal”.
60. The Statute does not provide for such a possibility. The jurisdiction of the Tribunal and the admissibility of Appeals are determined by the Statute, as interpreted by the Tribunal. They are not at the disposal of the parties, and may not be bestowed on the Tribunal as an act of grace by one of them, or even by both parties acting in concert.
61. In the present case, it is clear, and is not disputed by either of the parties, that the Appeal is not directed against a decision of the Managing Director adopted pursuant to either Article 23(1) or Article 26(3) of the Staff Rules. It follows that the Appeal does not comply with the requirements of Article 2(2) of the Statute of the Tribunal, and is therefore inadmissible too.
62. In these circumstances, the request of the ESM of 23 February 2023 to have sight of the Appellant’s observations on the Tribunal’s jurisdiction is moot.

V. RULING ON COSTS

63. Nothing in the circumstances of the present case would justify the Tribunal acceding to the Appellant’s requests for the reimbursement of costs. These requests are therefore rejected in their entirety.

For these reasons, the Tribunal ORDERS

The Appeal brought by AB against the ESM on 11 October 2022 is dismissed, as the Tribunal has no jurisdiction to rule on this matter on the basis of the Termination Agreement between the parties of 18 May 2022, and the Appeal is inadmissible with respect to the requirements of Article 2(2) of the Statute.

The Appellant's requests for the reimbursement of costs are rejected in their entirety.

Virginia MELGAR, President
(signed)

Celia GOLDMAN
(signed)

Kieran BRADLEY
(signed)