

ADMINISTRATIVE TRIBUNAL

JUDGMENT

of 30 November 2023

In Case ESMAT 1/2023

AC (N^o.2), Appellant,

represented by Annabel Champetier and Laure Levi, Members of the Brussels Bar

v

European Stability Mechanism

represented by David Eatough, General Counsel of the European Stability Mechanism and Rémi Cèbe, Member of the Paris Bar.

Concerning the appeal lodged by the Appellant on 28 February 2023, following the written procedure and the oral hearing held on 20 June 2023

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 Gerhard ULLRICH,

Renders the present **JUDGMENT**.

Considering that on 28 February 2023, the Appellant made a reasoned request for anonymity pursuant to Article 19 (2) of the rules of Procedure, to which the Tribunal has acceded.

Having examined the written submissions and decided in conformity with Article 8 of the Statute to hold an oral hearing, which was conducted jointly with the oral hearing in case 2/2022, which raises common issues of law and fact. Judgment 1/2023 concerns the Appellant's challenge to the decision that the fixed-term contract would be allowed to expire.

The delivery of the judgment in the present appeal has been delayed for reasons beyond the control of the Tribunal.

I. FACTS AND PROCEDURE

1. Facts relevant to this case may also be found in Judgment in Case ESMAT 2/2022.
2. On 17 March 2022, the Appellant received the performance rating decision for 2021, which was “In Progress”. The rating scale comprises: “Outperformance”; “Good Performance”; “In Progress”; and “Concern.” This was to the Appellant’s “biggest surprise”. There was no specific warning in 2021 that the Appellant’s continued employment was in jeopardy since the ESM had to decide on 15 September 2022 on the further employment after 15 March 2023. Even after the warning of 17 March 2022, no “personal development plan” was elaborated for achieving an improvement allowing the Appellant the time and resources to work towards a “Good Performance” rating in order to have a chance for a continued employment after 15 March 2023.
3. On 8 July 2022, the ESM notified the Appellant of the Managing Director’s final decision that the performance rating for 2021 should be maintained in accordance with the recommendation of the Advisory Committee of 9 June 2022.
4. On 19 August 2022, the Appellant’s first Appeal (Case 2/2022) was filed before the Tribunal, regarding the performance appraisal for the year 2021 (See Judgment in Case ESMAT 2/2022).
5. On 7 October 2022, the Managing Director of the ESM took the final decision not to renew the fixed-term employment of the Appellant.
6. On 1 July 2022 and until the end of the employment contract on 15 March 2023, the Appellant was on protracted sick leave.

Advisory Committee Procedure

7. On 4 November 2022, the Appellant requested an Advisory Opinion from the Advisory Committee of the ESM. The Appellant requested annulment of the decision of the ESM based on a manifest error of assessment, breach of the duty to state reasons and of the right to be heard. The Appellant also referred to a misconduct context.
8. On 23 November 2022 the ESM asked the Committee to dismiss the Appellant ‘s claims as unfounded or unsubstantiated on the grounds that the ESM did not commit any manifest error of assessment of the Appellant’s performance in 2021. The ESM is entitled not to renew a fixed-term employment on the grounds of an unsatisfactory evaluation, even if that evaluation is challenged before the Tribunal. The Appellant’s rating “In Progress “could legitimately be taken into account by the ESM when assessing the past performance.
9. On 2 January 2023, the Advisory Committee stated that the burden of proof for bias and prejudice rests with the Appellant. Despite the fact that over the last years the working conditions were very difficult and strained, there was no proof that the alleged decision was tainted by bias and prejudice. As to the alleged lack of a justification for the non-renewal of the employment, the Advisory Committee stated that the ESM had a wide discretion in taking the related performance appraisal decisions. The non-renewal of a fixed-term contract is not subject to any further justification. The Appellant was offered a possibility to present comments to the line manager which was done on 15 September 2022.

10. The first Appeal of 19 August 2022 against the performance appraisal of 2021 was pending before the Tribunal and had no suspending effect on the present appeal.
11. The Advisory Committee concluded that the decision of 7 October 2022 was taken in accordance with the ESM's applicable rules and the complaint should be dismissed as unfounded and unsubstantiated.
12. The Advisory Committee did, however, further recommend that in line with the Advisory Opinion for the first complaint of the Appellant of 19 August 2022, the ESM should provide a staff member whose performance is rated "In Progress" with a personal development plan establishing proper supervision and involvement of HR, measures and steps to be taken as well as the appropriate timeline. The requirement of providing such a personal development plan should be formalised in the applicable rules. The conditions that must be met to be granted a renewal or an indefinite employment agreement, should be communicated to the staff member clearly and in due course and the applicable rules should be updated and clarified.

Managing Director's Final Decision

13. On 30 January 2023, the ESM rendered its final decision. It referred to the Advisory Opinion and decided to dismiss the Complaint. The impugned decision was based on the recommendation of the Appellant's line manager of 12 September 2022 not to renew the employment based on the performance rating of "In Progress" for the year 2021 and on the lack of any performance progress in the mid-year review report of 2022. The decision further stated that performance and potential of the Appellant had not met the level required of a [senior official since joining the ESM in 2018. The Managing Director was unable to identify a positive trend for the future performance by the Appellant.

Appeal to the Tribunal – Positions of the Parties

14. On 28 February 2023, the Appellant filed an Appeal against the final decision of the ESM, seeking its annulment insofar as it confirmed the non-renewal of the Appellant's contract after its expiry on 15 March 2023. The Appellant further requests the payment of 75.000 Euros for moral injury and the reimbursement of costs.
15. The Appellant pleads primarily that there was a manifest error of assessment in the decision of 7 October 2022 not to extend the employment contract beyond 15 March 2023. If the reason for the non-renewal of the fixed-term contract was the unsatisfactory performance in 2021, the Appellant should have been warned in a timely manner of the unsatisfactory aspects of the work and an opportunity to improve should have been offered. After 17 March 2022 the Appellant was warned that the performance was "In Progress" and that the Appellant could expect that the contract will not be continued after 15 March 2023. Even after 17 March 2022 there was no possibility to improve offered to the Appellant. The strained personal relations with the line manager continued. Moreover, the Framework agreement of July 2021 had not been implemented before May 2022 and the difficult personal relations between the Appellant and the line manager continued. No personal development plan was established. No clear criteria had been set to improve the Appellant's performance. The meetings with the line manager were not intended to address alleged performance issues.

16. The ESM also did not take into account in its non-renewal decision the Appellant's "Good performance" in the years 2018, 2019 and 2020. The Appellant also pleads misuse of power of the ESM and refers to the whistleblowing reporting and mobbing and unfair treatment. The Appellant also claimed that there was breach of the duty to state reasons, breach of the right to be heard and an infringement of the duty of care.
17. On 20 April 2023 the ESM filed its Reply. It primarily pleads that the Tribunal lacks competence over the appealed decision of 30 January 2023. The submissions by the Appellant are related to the alleged bias and harassment. Since the internal investigation on these issues has not been concluded yet and no final decision was taken by the Managing Director the appealed decision cannot be reviewed. On the other hand, the ESM pleads that the Appeal is unfounded. The ESM entered into an analysis of the alleged manifest error of assessment committed by the ESM, as well as to the obligation to state reasons to the alleged misuse of power, the alleged violation of the right to be heard and the breach of the duty of care.
18. As to the issue of manifest error of assessment, the ESM stated that the allegations of harassment and bias and mobbing were not substantiated. The positive comments of the Appellant's co-workers are not relevant. The decision not to renew the contract cannot be annulled on the grounds that the Appellant was on sick leave which has not been caused by the ESM.
19. The claim of alleged misuse of power is unsound, there was no evidence that the decision was tainted by bias and prejudice. As to the duty to state reasons, these were clearly stated in the decision and the Appellant had ample opportunity to provide comments before the decision was taken. As to the alleged violation of the duty of care, the ESM stated that the personal interests of staff should not prevent the organisation from not renewing a contract if the interest of the service demands it.
20. In accordance with Article 8 of the Statute and Article 17 of the Rules of Procedure, these submissions were examined in a hearing which was held on 20 June 2023 jointly with case 2/2022. The parties developed their arguments further and answered questions of the Tribunal.

II. LAW

21. Article 6 of the Staff Rules provides in relevant part:

Article 6 (Term, Trial Period and Renewal)

"1. Members of staff shall be engaged either for a fixed term or for an indefinite period, as specified in their employment agreement."

"2. . . ."

"3. Upon expiration of its initial term, the employment agreement entered into for a fixed term may be renewed either (i) for a fixed term specified in an addendum to said agreement, which may differ in length from the initial term but may not exceed five years, or (ii) for an indefinite period. Upon expiration of its renewal term, as a rule, the employment agreement cannot again be extended for another fixed term but may be renewed for an indefinite period. In

exceptional circumstances, and if in the interest of the service, an employment agreement can be extended again for another fixed term, provided that the maximum total duration of the fixed-term employment agreements cannot exceed ten years. . . . (Emphasis in original.) Renewal of an employment agreement shall be at the sole option of the ESM and be subject to the acceptance of the relevant member of staff. The ESM shall notify the member of staff in writing of its desire to renew the employment agreement and the proposed renewal term, no later than three months before the expiration of the agreement's current term. The member of staff shall notify the ESM in writing of its acceptance within one month of receipt of the ESM's notice."

22. The ESM's Performance Development System (PDS) Booklet provides at Section 4.2:

"4.2 Contract renewals [footnote1 – This section does not yet include guidance for members of staff for whom a fixed term renewal of their initial contract has already taken place and for whom a decision in relation to a second contract renewal will need to be taken. This will become only relevant in 2016 and will then be reflected accordingly.]"

"The general guidance for contract renewals within the PDS is that the follow-up contract, whether it is indefinite or another fixed-term contract and its length depends on the position held and how this is expected to evolve in the long run, the potential of the individual and the performance."

"For each and every contract renewal the three criteria, position, potential and performance are considered on a case-by-case basis. The classification into a certain performance category as such does not entitle a member of staff to a contract renewal or a certain contract. Provided the criteria of position and potential are met, the following general guidance can be considered in the decision on contract renewals: members of staff in performance categories 3 and 4 can be considered for an indefinite contract; members of staff in category 2 can be considered for another fixed-term renewal and members of staff in category 1 should not be considered for another fixed-term renewal. The final decision in relation to a contract renewal is usually taken about six months before the expiry of the contract and is based on the evaluation of the three criteria mentioned above, at that point in time."

Admissibility

23. The Tribunal probed at the oral hearing the issue of the relationship between the ESM's whistleblowing procedures and the Tribunal's review of a challenge to a discretionary employment decision in which an appellant invokes allegations such as bias or behavioural misconduct in support of an allegation that such employment decision should be vitiated as improperly motivated. That relationship remains opaque. In this case, however, it is not necessary to decide the effect of ongoing whistleblowing proceedings on the Tribunal's own decision-making process because the Tribunal is able to decide the Appeal without reference to issues of alleged bias or harassment.

24. The Tribunal accordingly concludes that the Appeal is not, as the ESM asserts, inadmissible as premature.

Merits

25. The Appeal was filed by the Appellant on 28 February 2023 i.e. within the time limit of Art.7 (a) of the Statute of the Tribunal. It is directed against the final decision of the Managing

Director of ESM of 30 January 2023 not to grant the renewal or indefinite prolongation of the fixed-term contract of the Appellant as of 15 March 2023.

26. The final decision was based on the performance appraisal report for the year 2021, the mid-year review 2022 and on the whole career of the Appellant since joining the ESM in 2018.
27. Having annulled in Judgment 2/2022 the performance appraisal for the year 2021, the Tribunal considers that the impugned decision may, therefore, only be based on the 2022 mid-year review and on the overall performance appraisal reports for the years 2018, 2019 and 2020.
28. The decision not to renew a staff member's contract is a discretionary decision by the ESM. As such, it can be reviewed in case of abuse of that discretion. In reviewing the jurisprudence of various international administrative tribunals, it has been observed that "with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."¹
29. On the basis of the structural balance of powers, all international administrative tribunals recognise that the executive organ of an international organisation disposes of a certain power of appreciation to be able to fulfil these tasks. In a situation of that kind the judicial review must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been no manifest error of those acts or a misuse of powers or an infringement of legal principles (ILOAT Judgments 4427 par. 2, 4363 par. 10, 4301 par. 5; CJEU Judgments T-156/11 par. 136, C-402/05 P and C-415/05 P par. 282; UNAT Judgments 2010-UNAT-084 par. 40, 2015-UNAT-601 par. 43).
30. Furthermore, "in a variety of contexts, [an international organization] constrains its discretionary authority by adopting rules governing the particular exercise of discretion." *Elkjaer et al. (No. 2), Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-1 (January 30, 2023), para. 82.
31. In this case, the ESM has adopted rules that govern the renewal of a fixed-term appointment to an appointment of indefinite duration. Such decision must be supported by the existence of a position, the staff member's potential for a career with the ESM, and the staff member's performance. (Staff Rules, Article (3); PDS Booklet, Section 4.2.
32. These same standards are reflected in the practice of other international organizations. See, e.g., *Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-2 (December 24, 2021), paras. 77-81. When a staff member challenges a decision not to convert a fixed-term contract to one of indefinite duration, the Tribunal considers that the organization's "discretionary authority to decide on a staff member's suitability for conversion is ' . . . constrained by principles of fair treatment and by the applicable internal law.'" *Id.*, para. 78 (internal citations omitted). In cases challenging a non-conversion decision based on

¹ Reports of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992), and on Amendments to the Statute of IMF Administrative Tribunal (2009 and 2020), p. 19.

alleged failure to meet “performance” requirements, the IMF Administrative Tribunal “has emphasized that the fixed-term appointee ‘. . . is to be evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them.’” *Id.*, para. 79 (internal citations omitted).

33. In settled case law, the ILOAT found that a staff member whose performance is not considered satisfactory for an extension or renewal of a fixed-term employment has to be warned in a “timely manner” and in a clear and unambiguous statement that if the unsatisfactory aspects of the performance continue the consequence would be the termination of the employment (ILOAT Judgments 4603 par. 2, 4540 par. 11, 3679 par. 11, 3613 par. 27 and series of further relevant decisions).
34. As well as a preliminary warning, a staff member is entitled to have the necessary time to remedy this situation by setting objectives in advance so that the staff member will know the basis upon which future performance will be based in order to avoid that the future appointment is in jeopardy (ILOAT Judgments 4215 par.17, 3613 par. 27, 3282 par. 5, 3026 par.8, 2414 par. 23).
35. The mid-term review of 2022, delivered to the Appellant on 28 June 2022, comprises in principle a period of 6 months. This whole period can, however, not be counted as a period to improve. The Appellant was only informed of the “In Progress” rating for the appraisal period, which must be equated with a warning on 17 March 2022, that the continuation of the appointment was at risk (ILOAT Judgment 3911 par.16). It is only after that date that the Appellant should be granted sufficient time and clear objectives and guidance against which future performance will be assessed (ILOAT Judgment 3623 par. 27). Because the Appellant was on protracted sick leave since July 2022 there was not the necessary timeline to remedy the deficiency.
36. The Tribunal takes note that the Advisory Committee recommended to dismiss the complaint. Under the heading of “further recommendations” the Committee did however, as in the case 2/2022, turn the previous statement on its head by ascertaining that even after 17 March 2022 the Appellant was not given a performance improvement plan as provided for in point 7.2 of the Performance and Development System booklet. No clear objectives had been set.
37. The Appellant did not receive the necessary regular feedback and guidance from the line manager as to what the Appellant would have needed to improve the quality of the assessment. The monthly meetings were purely oral and were not documented. Even after 17 March 2022, there was no regular supervision and documentation of the performance. As the Advisory Committee stated, the working relations were seriously impaired already during the assessment period of 2021. These strained working relations continued in 2022.
38. The Advisory Committee did also quite rightly state that a staff member whose performance is “In Progress” (and whose employment is in jeopardy) should be provided with a proper supervision and involvement of the HR, and steps should be taken to improve performance as well as the appropriate timeline should be granted. The conditions the staff member of the ESM needed to meet to be granted a renewal on an indefinite employment agreement should be communicated clearly and in a timely manner, and the applicable rules in this respect should be updated and clarified.

39. The ESM Managing Director himself stated in his final decision of 30 January 2023 that the recommendations of the Advisory Committee on the renewal of a fixed-term contract will be thoroughly reviewed by the ESM. With regard to the recommendations on performance improvement plan, the Performance and Development System booklet has already been updated with effect from 1 January 2023. This statement comes, however, too late for the situation of the Appellant.
40. Irrespective of the missing prerequisites in order to substantially improve the quality of the Appellant's performance, the time of about three months between 17 March and the end of June 2022 cannot be considered as sufficient for the improvement of performance in relation to the negative appraisal for the whole year of 2021.
41. The too short timeline for an improvement of the performance was even confirmed by the ESM in the decision of 7 October 2022. The ESM Managing Director stated that the ESM offered to postpone the decision of renewal until the end of 2022. This would, however, been to no avail since the Appellant was on sick leave from July 2022 until 15 March 2023. The Appellant cannot be made liable for this impossibility to improve unsatisfactory aspects of performance due to continued sickness. The basic reason for the need to an approved timeline was the lack of due warning and the possibility to improve already during the appraisal period in 2021.
42. In relation to the 2022 mid-year review, it cannot be considered as a solid legal basis for the decision of 7 October 2022 not to grant a renewal or an indefinite contract after March 2023.
43. As regards the previous years' performance reports, the Managing Director of the ESM, in his decision of 7 October 2022, also took into account the whole career of the Appellant since joining the ESM in 2018. For 2018, 2019 and 2020, the performance of the Appellant was rated "Good". The Managing Director stated, however, that overall, the performance and potential demonstrated by the Appellant since joining the ESM did not meet the level required from the post held by the Appellant.
44. When taking the decision of 7 October 2022, the ESM overlooked the fact that the appraisal report of 2021 and the mid-year review report for 2022 infringed the legitimate expectation of the Appellant to have a timely warning. There was also no commensurate time and a guidance to improve during the 2021 assessment period, and after the "In Progress" decision on 17 March 2022. The decision of 7 October 2022 was, therefore, tainted with a serious defect and cannot stand.
45. Furthermore, in Judgment 2/2022 the Tribunal decided that the performance appraisal report of 2021 was null and void and could not stand.
46. Given the conclusions reached in this Judgment, it is not necessary for the Tribunal to consider the Appellant's further allegations that the decision of 30 January 2023 was taken by a breach of the duty to state reasons, the right to be heard and by infringement of the duty of care.
47. The Appellant does not have to bear the risk of not being able to improve performance during the period from 17 March 2022 until 15 March 2023 due to permanent sick leave status. The essential reason for the obligation of the ESM to offer the Appellant a trial period to do things better in 2022 was the illegality of the performance appraisal in 2021. A warning and a trial

period should have been already offered in 2021. The illegality of the decision of 7 October 2022 does, however, not lead to a postponement of the end of the fixed-term contract on 15 March 2023.

48. The Appellant had, however, lost by the illegality of the decision of 7 October 2022 a valuable opportunity to improve performance and demonstrate the suitability for a renewal of the contract from 15 March 2023 onwards. This reasoning follows the consistent case law of the ILOAT (see ILOAT Judgments 4062 par. 17, 3911 par. 18, 3613 par. 52, 3282 par. 9, 2992 par. 15).
49. The loss of this opportunity must be fairly redressed by ordering the ESM to pay the Appellant the salary and allowances which the Appellant would have received by granting sufficient time to improve performance. The negative ratings in the performance appraisal report for 2021 and the Mid-year appraisal for 2022 are commensurate to a period of one year to demonstrate the suitability for the post. The ESM is therefore, ordered to pay to the Appellant the amount of one year's salary and allowances.
50. The Appellant seeks moral damages in the amount of 75.000 Euros for the reparation of moral injury.
51. In accordance with the consistent case law of the ILOAT, moral injury is constituted e.g. by emotional distress, anxiety, stress, anguish and hardship (ILOAT Judgments 4631 par.2, 4626 par.4,4382 par. 21).
52. Because of the very difficult and stressed working relation, a Framework agreement was concluded in order to improve the relations and communications issues between the Appellant and the line manager. The agreement was concluded on 16 June 2021 and should be finalised within six to eight months. The review had not, however, taken place by May 2022. The Advisory Committee stated in the Advisory Opinion that the working relations between the Appellant and the line manager continued to be very stressed and the contact between the Appellant and the line manager were reduced to an absolute minimum in order to avoid possible tensions. The HR was aware of this situation but did not intervene.
53. The amount for moral damages cannot be ascertained by using mathematical methods. By taking into account the professional status of the Appellant and the seriousness of the injury as well as the fact that the illegal circumstances were dragging on for two years the moral injury must be considered as being extensive. These stressful circumstances caused should therefore be fairly compensated by an award of moral damages in the amount of 50.000 Euros.
54. The Tribunal adopts the approach of the IMFAT as regards the compensation for "intangible injury" and its quantification, see, e.g., *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3, paras. 445-446 "When the [organization] fails to observe its legal obligations in a manner that adversely affects a staff member, the Tribunal may make an award of compensation for intangible injury to remediate the harm to the staff member." "Intangible injury, by its nature, will be difficult to quantify. . . . The Tribunal . . . will identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the [aggrieved staff member]."

55. As the Appellant succeeds with the Appeal, the ESM must bear the costs incurred by the Appellant.

Decision

For these reasons the Tribunal ORDERS

1. The impugned decision of 30 January 2023 is set aside.
2. The ESM shall pay the Appellant material damages in the amount of one year's salary and allowances.
3. The ESM shall pay the Appellant moral damages in the amount of 50.000 Euros.
4. In accordance with Article 14(3) of the Tribunal's Statute, the ESM must bear the reasonable costs incurred by the Appellant in the proceedings.

Virginia MELGAR, (President)

(signed)

Celia GOLDMAN

(signed)

Gerhard ULLRICH

(signed)