116th Session **Judgment No. 3282**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. G. I. against the European Organisation for Astronomical Research in the Southern Hemisphere (ESO) on 21 September 2011 and corrected on 14 October 2011, ESO's reply of 17 January 2012, the complainant's rejoinder of 27 February and ESO's surrejoinder of 16 May 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold an oral proceeding, 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 German national born in 1950, joined ESO on 1 September 2005 under a three-year fixed-term contract as a Quality Engineer, grade 9, in the Technology Division, ESO's Headquarters in Garching, Germany. One of his key functions was to provide "expert advice on Quality Assurance and Quality Management to ESO project managers and to external partner institutes to ensure the quality of their projects". The contract offer was sent on 1 August 2005, together with ESO's Staff Rules and Regulations and a copy of the Summary of the Rules and Regulations

of the CERN Pension Fund. The complainant acknowledged receipt of these documents in August 2005.

In his performance reviews for 2005, 2006 and 2007, the complainant's overall performance was rated "good". In February 2008, the complainant was offered a contract extension for a further period of three years ending on 31 August 2011, which he accepted. In 2008 his overall performance was again rated "good".

The complainant was reassigned to the Programme Office of the Director of Programmes with effect from 1 January 2009. In his performance review for 2009, he obtained the rating "satisfactory" for his overall performance, but in 2010 he again obtained the rating "good".

With effect from 1 February 2011 the complainant was reassigned to the Telescope Division. By a letter of 24 February 2011 he was offered a contract extension for a period of four months ending on 31 December 2011, which he accepted that same day. The offer referred to a discussion between the complainant and his new supervisor regarding his objectives for 2011, stating that these objectives were "subject for an extension" and would be reviewed in May 2011. All other contractual conditions remained the same. In the "Human Resources Action Form" pertaining to this extension, the new supervisor Mr M. stated that he had explained to the complainant that he was unable to make a recommendation to offer him a three-year contract extension, because he had only been his supervisor since 1 January 2011 and did not have sufficient evidence of the complainant's performance, but that he had arranged to meet with the complainant on a weekly basis in order to monitor closely his performance against the objectives set. Two short-term tasks were identified as being of particular importance for the complainant's performance assessment: Drafting the European Extremely Large Telescope's (E-ELT) "Reliability, Availability, Maintainability, Safety (RAMS) Strategy"; and drafting the E-ELT's Safety Strategy.

The complainant met with his supervisor on 11 and 28 March 2011 to discuss his revised objectives. The deadlines for drafting and finalising the two short-term tasks were set at 10 April and 1 June,

respectively. Another meeting took place between the complainant and his supervisor on 29 April 2011 to discuss the complainant's progress in drafting the two documents. His supervisor extended the deadlines for drafting and finalising the set of documents to the end of May and the end of June, respectively, and he sent the complainant an e-mail describing in detail the requirements for each document.

On 28 June 2011 the complainant met with his supervisor in the presence of the Director of Programmes. In a File Note dated 28 June addressed to Human Resources, the supervisor noted that he had made clear at the beginning of the interview that, as the two key objectives which had to be delivered by June 2011 had not been met, he had informed the complainant that an offer of contract extension would not be recommended.

By a letter dated 27 June 2011 the complainant was informed that, further to the letter of 24 February 2011 and the subsequent meetings with his supervisor, his contract would not be extended or renewed and that it would therefore expire on 31 December 2011. The decision had been made on the basis of the overall assessment of the complainant's performance, which was found to be "below the level of acceptable performance". It was pointed out that his contract had been extended for a period of four months in order to give him the opportunity to demonstrate significant improvements by 31 May 2011 and show his ability to work at the required level. However, no significant and consistent change had occurred and critical objectives had not been achieved.

On 19 August 2011 the complainant lodged an internal appeal against the decision not to extend or renew his contract and asking that it be extended until 31 December 2014. By a letter of 23 August 2011 the Head of Human Resources informed the complainant that his case would be referred to the Joint Advisory Appeals Board (JAAB). However, on 30 August he wrote to inform the complainant that he had made a mistake in his letter of 23 August, for which he apologised. He explained that, pursuant to Article VI.1.02 of ESO's Staff Rules, there was no possibility to appeal against a decision not to renew or extend a contract. Therefore, acting on behalf of the Director

General, he informed the complainant that his internal appeal was rejected. The present complaint impugns the decision of 27 June 2011, as supplemented by the decision of 30 August 2011.

B. The complainant submits that his complaint is receivable, as it challenges a final decision and the internal means of redress have been exhausted. He contends that Article VI.1.02 of the Staff Rules infringes his right to the guarantee of access to justice, by depriving him of the availability of an effective legal remedy. He argues that the Tribunal's holding in Judgment 2312, under 5, that internal appeal procedures are desirable but not necessary, is flawed. He considers that the right to the guarantee of access to justice must be observed not only in judicial but also in administrative proceedings.

In his view, there was no valid reason not to extend his contract, as his performance was not unsatisfactory over the last four months of his contract. The complainant argues that he had to deal with an objective which was impossible to attain and that he did not receive any support from his supervisor, which suggests that ESO purposefully set an unreachable goal in order to create a reason not to renew his contract. He points out that in 2009, when his performance was rated "satisfactory", he had five different supervisors. Moreover, he was not warned that his work was considered as unsatisfactory, as his 2010 performance review showed a rating of "good". Further, ESO failed to consider that product assurance is generally divided into two areas, namely quality assurance and RAMS. While he was appointed as Quality Engineer responsible for quality assurance, the Administration expected him to deal also with RAMS, which "necessarily was doomed to failure". He points out that, following his separation from service, ESO issued a vacancy notice for an engineer dealing exclusively with RAMS, something which he had several times pointed out to be necessary and which tends to confirm that the requirements of his post were not reasonable for one person. In his view, ESO misused its power.

Lastly, the complainant argues that ESO failed in its duty of care by not informing him earlier about the consequences of separating

from service before reaching retirement age with respect to his health insurance and pension entitlements.

The complainant asks the Tribunal to quash the impugned decision and to order that his contract be extended until 31 December 2014. Subsidiarily, he asks that the matter be remitted to ESO for a new decision on his appeal in light of the Tribunal's judgment.

C. In its reply ESO submits that the complaint is unfounded, as the decision not to extend or renew the complainant's contract was justified in light of his performance and was taken in conformity with the Staff Rules and Regulations. Recalling that the Director General's decision to renew or to extend a staff member's contract is discretionary, it contends that the exercise of that discretion is limited by ESO's interests, which call for the recruitment of personnel of the highest competence. In its view, the complainant's performance reviews reveal his supervisors' continuing concern with regard to his capacity to collaborate effectively with project managers and to bring accepted tasks to completion. For example, his 2009 Performance Review already pointed to difficulties with key management personalities and mentioned "weaknesses […] in the areas of forcing through to completion initiatives and ideas". Contrary to the complainant's allegations, his job description and his 2007 Performance Review show that conducting quality assurance and management reviews was part of his duties. ESO emphasises that RAMS issues were already mentioned in the list of the complainant's key objectives for the years 2008 and 2009. It submits that the complainant is distorting the facts by trying to suggest that, having been employed as a quality engineer, he was not supposed to deal with RAMS.

ESO asserts that at the end of the complainant's second term of contract, there were doubts as to whether his performance warranted a further three-year contract extension. He was given a four-month extension in order to enable him to do better, and his supervisor set precise objectives to allow him to know by which yardstick his performance was to be assessed. When it became clear that the

complainant's accepted objectives would not and could not be reached, the Director General decided, in the exercise of his discretion, not to renew his contract. ESO underlines that the complainant was aware and understood the reasons for the decision. When he was offered the four-month extension in February 2011, and again in March 2011, it was made clear to him that the delivery of the tasks agreed with his supervisor would be crucial for his future employment at ESO. However, the complainant proved unable to meet precise objectives of high importance, which he had agreed to deliver in a timely manner.

Lastly, ESO denies that it failed in its duty of care towards the complainant and asserts that he was duly informed about the ESO social security system, including its pension arrangements, when he entered its service.

D. In his rejoinder the complainant presses his pleas. He maintains that RAMS is not an instrument of quality assurance but a different and separate task requiring special training. As he was never trained or hired as a RAMS expert, but only as a Quality Engineer, the decision not to renew his contract based on his alleged unsatisfactory performance with regard to RAMS was, in his view, unjustified. He adds that the defendant has since decided to create two new Engineer positions, one for Quality Assurance and one for RAMS, which proves that he had to deal with an excessive workload.

E. In its surrejoinder ESO maintains its position in full. It submits that, having accepted the four-month contract and the tasks connected with it, and knowing their crucial importance for his continued employment, the complainant cannot now advance that he was not able to cope with these tasks in addition to his other duties. As regards the new structure comprising two new positions to which the complainant refers, ESO explains that this is due to the fact that the E-ELT project is now in a construction phase as opposed to a study phase, the result of which is an increase in the overall workload.

CONSIDERATIONS

1. The complainant impugns the decision not to renew his contract, notified to him by letter dated 27 June 2011 and confirmed by letter dated 30 August 2011. He requests the Tribunal to quash the two decisions and to order that his contract be extended until 31 December 2014. Subsidiarily, he asks that if it is not possible for the Tribunal to order the extension of his contract for that period, the case be sent back to ESO to be reconsidered in accordance with the findings of the Tribunal.

2. The complainant bases his complaint on the grounds that the decision not to renew his contract was vitiated by the following flaws:

(a) by not allowing for an internal means of redress prior to presenting a complaint before the Tribunal, the complainant's right to the guarantee of access to justice was infringed;

(b) he was not given a valid reason for the decision;

(c) he was not notified in a timely manner that his work was unsatisfactory;

(d) he was given work objectives which were impossible considering the time allowed, the budget available, and the support offered;

(e) the organisation failed in its duty of care towards him; and

(f) the organisation failed to properly exercise its discretion which constitutes a misuse of power.

3. The Tribunal is of the opinion that the complainant's claim that his right to the guarantee of access to justice was infringed, is unfounded. The guarantee of access to justice is a guarantee of access to a judge, which the complainant has in his ability to bring a complaint before the Tribunal. As noted in Judgment 2312, under 5:

> "the […] Staff Rules and Regulations do not provide an internal appeal mechanism for a person in the complainant's position. The Tribunal has frequently commented on the desirability and utility of internal appeal

> procedures which not only make the Tribunal's task easier but also substantially reduce its workload by bringing a satisfactory and less expensive resolution to many disputes at an earlier stage. In any case, the Tribunal remains the ultimate arbiter of the rights of international civil servants and it can, and will, exercise its jurisdiction in appropriate cases. That said, however, there is no merit to the complainant's contention that the absence of an internal appeal mechanism is in itself a fatal flaw which vitiates the initial administrative decision not to renew her contract."

The Tribunal encourages organisations to provide efficient internal appeal mechanisms which can provide a broad range of remedies, which may not otherwise be available before the Tribunal (see Judgments 158, under 4; 790, under 7; 2531, under 5; and 2616, under 15). "The only exceptions allowed under the Tribunal's case law to this requirement that internal means of redress must have been exhausted are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure […] (see, for example, Judgments 1491, 2232, 2443, 2511 and the case law cited therein, and 2582)" (see Judgment 2912, under 6). In this case, Article VI.1.02 of the Staff Rules provides that there is no internal remedy for decisions regarding non-renewal of contract and as such, the complainant has direct access to the Tribunal.

4. The complaint is founded. The impugned decision not to renew the complainant's contract was based on flawed reasoning. The letter, dated 27 June 2011, informing the complainant that his contract (previously extended for four months, expiring 31 December 2011) would not be renewed upon its expiration, stated inter alia:

> "[…] This decision has been made on the basis of an overall assessment of your performance which has been below the level of acceptable performance during the period of your contract.
>
> Your contract was extended for a period of four (4) months to give you the opportunity to demonstrate by 31 May 2011 significant improvements and to show your ability to work at the required level. These requirements were explained to you on 13 May 2011 by Mr [A. MP.]. Despite this, no significant and consistent change has occurred, and the potential to grow and develop yourself or the role in the long-term has not been demonstrated by you and critical objectives were not achieved.

> The most critical objectives were
>
> - the development of the E-ELT Reliability, Availability, Maintainability and Safety (RAMS) strategy; and
> - the development of the Safety Policy and Procedure.
>
> […]."

The primary reason refers to the complainant's performance being below an acceptable level. The secondary reasons, stemming from the first, mention objectives that were not reached within a specified time, and the complainant's failure to demonstrate significant improvements. The Tribunal observes that the primary reason is not consistent with the complainant's Performance Reviews. The complainant was rated "good", namely that he consistently meets job requirements in his yearly Performance Reviews from 2005-2008. In 2009, after being reassigned from the Technology Division to the Programme Office of the Director of Programmes, he was rated "satisfactory", namely that he generally met the overall requirements of the job without serious shortcomings, but deficits in some areas. The complainant's assessment returned to "good" in 2010. Considering that, the Tribunal is of the opinion that ESO's claim that "[…] an overall assessment of [the complainant's] performance which has been below the level of acceptable performance during the period of [his] […] contract" is inconsistent with the record of the performance reviews, which shows not only that the complainant's performance was rated "good" for five of the six years of his contract (including his most recent year), but also shows an improvement in 2010 following his "satisfactory" rating of 2009. Furthermore, the complainant's performance was never assessed as "unsatisfactory", namely that his results did not meet requirements or were missing in critical areas. This inconsistency, by itself, is enough to consider the decision flawed. However, it is useful to note that the secondary reasons, ostensibly flowing from the primary one, are also flawed as they are tainted by contradictions and unreasonableness.

5. The Tribunal considers that, by letter dated 24 February 2011, the complainant was offered a four-month extension of

his fixed-term contract, from 1 September to 31 December 2011, which he accepted and signed on the same day. On 8 March 2011, the complainant signed an "Amendment to his Contract" assigning him to the Telescope Division as Quality Engineer, effective 1 February 2011. The complainant, in agreement with his new supervisor, Mr M., was given objectives in late February. Those objectives were modified in late March as evidenced by the e-mail of 29 March 2011 and were to be reviewed in May 2011. According to the Human Resources Action Form sent by Mr M. on 15 February and received by Human Resources on 28 February 2011, the reason given for the four-month extension of contract was listed as follows:

> "I interviewed [the complainant] on 24 February and explained that I would be unable to make a recommendation to offer an additional contract by 28 February as I had insufficient evidence of his performance. I have only been his line manager since 1 January 2011. I pointed out to [the complainant] that I would be closely monitoring his performance against his objectives and in particular would monitor his two short term tasks:
>
> - to draft E-ELT RAMS Policy –
>
> - to draft E-ELT Safety Procedure
>
> In addition I will obtain feedback of the training he has recently carried out. To allow me to monitor, I have arranged a weekly meeting."

However, ESO, in its decision of 27 June 2011, explicitly stated that the contract was extended to give the complainant the opportunity to demonstrate, by 31 May 2011, significant improvements. As in Judgment 2916, under 4, the Tribunal holds that "an organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better […]. Moreover, it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance […]." The Tribunal notes that the e-mail from Mr M., to the Head of Human Resources, dated 8 November 2011 stating inter alia: "I clearly remember informing [the complainant] that the decision on whether or not we would offer another contract would be based on his ability to achieve the objectives", cannot be considered evidence of an official written warning given to the complainant. It can be added that a written

warning of unsatisfactory performance must refer to a performance which has already occurred and which needs to be improved. Consistent case law states that "[a] staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation" (see Judgment 2414, under 23). The Tribunal is of the opinion that the complainant's claim that he was not given proper notice that his work was unsatisfactory and that as a consequence his contract was at risk of not being renewed, is founded.

6. The Tribunal also finds that the objectives given to the complainant were unreasonable in the circumstances. ESO asserts that on 24 February 2011 the complainant signed the letter offering an extension of contract which stated, inter alia, that "[t]he objectives agreed with [the complainant's] supervisor are subject for an extension and will be reviewed in May 2011". The Tribunal notes that the only written document submitted to it, which details the complainant's objectives, is the e-mail attachment sent on 29 March 2011, which lists the modified objectives. Following a discussion with the complainant, the complainant's supervisor sent him an e-mail dated 29 April 2011, stating inter alia: "I feel it necessary to explain exactly what I would expect to see in the RAMS Strategy and the instructions for the project". He went on to describe what he required of the complainant. On the same day Mr M. sent an e-mail to the Human Resources Department regarding that letter and the preceding discussion with the complainant. In the e-mail to Human Resources he mentioned having told the complainant that "if [the complainant] could not provide the required support and procedures, [Mr M.] would have to get this carried out elsewhere, probably through a contractor". Mr M. also stated that he "took time explaining the requirement" but that he was "unsure that [the complainant] really understood and therefore [he] undertook to draft a note of explanation". Specifying that he set the deadline for the draft at the end of May and for the final version at the end of June he noted that he "suspect[ed] this will be difficult to achieve". The Tribunal is of the opinion that this, combined with the fact that the complainant repeatedly stated that his

work as Quality Assurance Engineer was different from the work done by RAMS specialists, point towards the conclusion that the complainant was given inappropriate objectives in light of his skills and experience upon his transfer to the Telescope Division. As such, it appears that these were not objectives which were given as an opportunity to improve unsatisfactory performance, but almost could appear as objectives given to guarantee failure. As the Tribunal has ruled before "[a]n opportunity to improve requires not only that the staff member be made aware of the matters requiring improvement, but, also, that he or she be given a reasonable time for that improvement to occur" (see Judgment 3026, under 8).

7. The Tribunal is of the opinion that ESO breached its duty of care in its treatment of the complainant. When attempting to support the argument, for example in the document entitled File Note received by Human Resources on 29 June 2011, that the impugned decision was based on unsatisfactory performance ESO selected a few comments in past performance reviews which indicated areas in which the complainant needed to improve, without considering that the overall assessment, regardless of those minor comments, was still "good". Further, ESO does not appear to have taken into consideration the complainant's particular situation, such as his history of good service with the organisation, when deciding only to extend his contract for four months, nor his particular area of expertise when assigning him objectives that were outside his experience. "Relations between an organisation and its staff must be governed by good faith. Furthermore, an organisation must treat its staff with due consideration and avoid causing them undue injury. In particular, it must inform them in advance of any action that may imperil their rights or rightful interests. […] The complainant's personal interests have undoubtedly been harmed and some redress for the material and moral injury she suffered is warranted" (see Judgment 2116, under 5).

8. The Tribunal finds that by taking all the elements of this case together, it could lead one to believe there was a misuse of power. However, there is no evidence of malice. It should be noted

that international organisations must not only act fairly but, in the interest of transparency and good faith, they must also appear to act fairly. In light of the above, the Tribunal sets aside the decisions of 27 June and 30 August 2011. The complainant has asked the Tribunal to order that his contract be extended until 31 December 2014. Considering reinstatement could raise substantial practical difficulties because of the time that has elapsed since the complainant's separation from service, the complainant is "entitled to full compensation for the material and moral injury he sustained" (see Judgment 1386, under 26).

9. As the complainant "lost a valuable chance of having the contract renewed" for a further three-year extension which would have brought him to his retirement age, the Tribunal orders ESO to pay the complainant material damages in the amount equivalent to two years' salary, including all benefits, entitlements and emoluments plus interest at a rate of 5 per cent per annum, less any amounts he has earned in that period (see Judgments 972 and 2306, under 10 and 11). He is also entitled to moral damages in the amount of 20,000 euros and costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The decisions of 27 June and 30 August 2011 are set aside.
2. ESO shall pay the complainant material damages in the amount equivalent to two years' salary, including all benefits, entitlements and emoluments plus interest at a rate of 5 per cent per annum, less any amounts he has earned in that period.
3. It shall pay him moral damages in the amount of 20,000 euros.
4. It shall also pay him costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet