S. (No. 2)

v.

ESO

138th Session **Judgment No. 4823**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr T. J. S. against the European Southern Observatory (ESO) on 8 April 2022, ESO's reply of 6 July 2022, the complainant's rejoinder of 7 October 2022 and ESO's surrejoinder of 19 December 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 grant him a contract of indefinite duration.

Facts relevant to this case are to be found in Judgment 4822, also delivered in public this day, dealing with the first complaint filed by the complainant. Suffice it to recall that he 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 complainant's first complaint filed on 11 August 2021, which is the subject of Judgment 4822, also delivered in public this day.

The JAAB issued its opinion on 16 November 2021 after having heard the parties. It concluded unanimously that the non-renewal decision was not appealable according to Article VI 1.02 of the Staff Rules and

that the decision not to grant an indefinite contract – which was communicated to the complainant on 29 January 2020 – should have been appealed within sixty days from notification according to Article R VI 1.05 of the Staff Regulations. Since it was not, the appeal lodged on 17 May 2021 was irreceivable *ratione temporis*. Relying on the principle of duty of care, two of the three JAAB members recommended nevertheless that the complainant's situation be reconsidered and that measures be taken "to mitigate the impact of the end of contract". By letter of 11 January 2022, the Director General notified the complainant of his decision to follow the JAAB's unanimous recommendations and to reject the additional recommendation made by two of its members. That is the impugned decision in the present complaint.

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 under an indefinite contract. On a subsidiary basis, he requests that ESO be ordered to pay him an amount corresponding to four 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* and asks the Tribunal to dismiss it. Should the Tribunal decide on the merits of the complainant's two complaints, it requests not to be "punished twice for the same conduct".

CONSIDERATIONS

1. In Judgment 4822, also delivered in public this day on the first complaint of the complainant, the Tribunal explains the context that led to the filing by the latter of two complaints against ESO following the termination of his appointment as "User Support Astronomer" staff member on 30 September 2021. In that judgment, the Tribunal also explains why it considered that the two complaints should not be joined. The Tribunal refers to considerations 2 to 4 of Judgment 4822 in this regard. It is unnecessary to repeat those considerations in the present judgment.

2. In his second complaint, the complainant asks the Tribunal to set aside the decision of 11 January 2022 of the Director General which endorsed two unanimous recommendations of the Joint Advisory Appeals Board (JAAB), contained in its opinion of 16 November 2021, and rejected as time-barred his appeal against the decision not to grant him an indefinite contract. The complainant also seeks to set aside that decision inasmuch as it decided not to follow the third recommendation of the JAAB, which was not unanimous, concluding that the Organisation had not made "a sufficient and coordinated effort towards finding an alternative position" for him.

3. ESO raises the receivability of this second complaint as a threshold issue.

It contends that, as found by the JAAB, the final decision of the Organisation not to grant the complainant an indefinite contract was communicated to him on 29 January 2020. According to ESO, the letter of 18 March 2021, which formed the basis of the internal appeal lodged by the complainant on 17 May 2021, did not contain a new decision and was purely confirmatory of the 29 January 2020 decision. Given that this appeal was outside the prescribed period of sixty days indicated in Article R VI 1.05 of the Staff Regulations, it was time-barred such that this complaint is irreceivable pursuant to the terms of Article VII, paragraph 1, of the Statute of the Tribunal.

4. On the one hand, the Tribunal observes that Articles R II 1.16 and R II 1.17 of the Staff Regulations relevantly state the following on the duration of contracts and on indefinite contracts at ESO:

"**R II 1.16 Duration of contracts**

Except as provided for in Article R II 1.17, staff members shall receive on appointment a fixed-term contract of not more than three years duration. This contract may be extended for not more than 3 years' duration, once or more often, but shall not exceed a total period of 9 years. The Director General may exceptionally grant one fixed-term contract beyond the limit of 9 years.

R II 1.17 Indefinite Contract

A new contract of indefinite duration may be granted after 4 years' service if the nature of the post and the qualification of the [s]taff [m]ember justify it and on conditions and definitions laid down by the Director General. Exceptionally, the Director General may offer such a contract at the time of initial appointment or before the expiration of the period."

With respect to the internal appeal process, Articles R VI 1.02, R VI 1.05 and R VI 1.06 of the Staff Regulations provide as follows on the right of appeal, the time limit and the competence:

"**R VI 1.02 Right of appeal**

Internal appeals may be made by members of personnel individually or as a group. Such appeals shall not defer the effects of the disputed decision.

[...]

R VI 1.05 Time limit

Appeals shall be lodged within 60 calendar days of notification of the disputed decision.

When the Director General does not take action within 60 calendar days in response to a written request, the above-mentioned period shall run from the 60th day.

R VI 1.06 Competence

The Director General shall adjudicate the appeal. Before making his decision, he shall consult the Joint Advisory Appeals Board, the composition of which is given in Annex R B 2."

In his internal appeal of 17 May 2021, Articles R VI 1.02 and R VI 1.05 were indeed amongst the ones to which the complainant specifically referred in stating that he was directing his appeal against the 18 March 2021 decision of the Director General.

5. On the other hand, Article VII, paragraph 1, of the Statute of the Tribunal indicates the following concerning the irreceivability of a complaint in a situation where the impugned decision is not a final decision, or the staff member concerned has not exhausted the internal means of redress available to her or him:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations."

6. It is desirable to recall that, in Judgment 4742, consideration 6, the Tribunal wrote the following on the necessity to abide by the time limits set forth for internal appeals and on the consequences of not doing so:

> "The Tribunal has repeatedly emphasised the importance of the strict observance of applicable time limits when challenging an administrative decision. In Judgment 4673, consideration 12, it pointed out that a complaint will not be receivable if the underlying internal appeal was not filed within the applicable time limits (see also, in this regard, Judgment 4426, consideration 9, and Judgment 3758, considerations 10 and 11). According to the Tribunal's firm precedent based on the provisions of Article VII, paragraph 1, of its Statute, the fact that an appeal lodged by a complainant was out of time renders her or his complaint irreceivable for failure to exhaust the internal means of redress available to staff members of the organisation, which cannot be deemed to have been exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see Judgments 4655, consideration 20, and 4517, consideration 7)."

7. In the same vein, the Tribunal has recalled many times the reasons why it is important to strictly observe applicable time limits when challenging an administrative decision. For instance, in Judgment 4673, considerations 12 and 13, the Tribunal held as follows:

> "12. The Tribunal has repeatedly emphasised the importance of the strict observance of applicable time limits when challenging an administrative decision. In Judgment 4103, consideration 1, the Tribunal stated the following in this regard:
>
> > 'The complaint is irreceivable as the complainant failed to exhaust all internal means of redress in accordance with Article VII, paragraph 1, of the Tribunal's Statute. The complainant's grievance was time-barred when he submitted it [...] on 23 December 2014. Under Article VII, paragraph 1, of the Tribunal's Statute, a complaint will not be receivable unless the impugned decision is a final decision and the complainant has exhausted all the internal means of redress. This means that a complaint will not be receivable if the underlying internal appeal was not filed within the applicable time limits. As the Tribunal has consistently stated, the strict adherence to time limits is essential to have finality and certainty in relation to the legal effect of decisions. When an applicable time limit to challenge a decision has passed, the organisation is entitled to proceed on the basis that the decision is fully

> and legally effective (see Judgment 3758, [considerations] 10 and 11, and the case law cited therein).'
>
> (See also Judgment 4426, consideration 9, in this regard.)
>
> 13. As the Tribunal also recalled in Judgment 4184, consideration 4, 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 (see also, to the same effect, Judgment 3704, considerations 2 and 3). The rationale for this principle is that time limits are an objective matter of fact and strict adherence to them is necessary to ensure the stability of the parties' legal relations."

8. In his complaint, the complainant recognizes that the decision refusing to award him an indefinite contract was initially notified to him on 29 January 2020. But he disputes the finding of the 11 January 2022 decision of the Director General, and the related recommendations of the JAAB, that this was a final decision and that the decisions he challenged, namely the 18 March and 18 May 2021 decisions, were purely confirmatory. According to the complainant, the decision refusing to award him an indefinite contract could have been repealed – given the terms of the 29 January 2020 decision – and replaced by another one during the extension year of 1 October 2020 to 30 September 2021. He concludes that the 18 March 2021 decision was therefore a new decision of the Organisation that he could appeal within the required time limits, which he did by lodging his internal appeal on 17 May 2021.

9. The Tribunal disagrees. The clear and unambiguous terms of the 29 January 2020 decision indicate that this was a final decision. The Indefinite Appointment Advisory Board (IAAB) recommendation of 20 December 2019 that preceded this final decision confirms it also in unambiguous terms. Moreover, this is precisely how the complainant himself understood the situation; the 18 March 2021 letter of the Director General simply confirmed that this was indeed the situation, and it therefore cannot be considered as a new decision.

10. Given its importance to the resolution of the dispute, it is useful to cite at length the 29 January 2020 letter from Human Resources to the complainant informing him of the final decision of the Director General:

> "[...]
>
> Further to our letter dated 6 September 2019 and following the meeting of [the IAAB] on 5 December 2019, this is to inform you of the decision taken by the Director General with regard to your contractual situation.
>
> After careful examination and discussion held by the IAAB, following its recommendation, the Director General has decided not to offer you an indefinite contract. Instead, you will be offered an extension of your current fixed-term contract for a period of one year up to and including 30.09.2021, in accordance with Article II 1.16 of the ESO Staff Rules and Regulations.
>
> As advised by your Director, [...] this outcome is based [on] your scientific output and standing which [were] regretfully not strong enough to enable a promotion to the Associate Astronomer level within the ESO Faculty – a prerequisite for the offering of an indefinite contract.
>
> However, the scope of the proposed contract extension is to give you the opportunity to further consolidate your experience and to propose ideas where your unique set of expertise and valuable knowledge can be applied elsewhere in the Organisation. All ideas are encouraged and welcome during this important period, therefore please [d]o not hesitate to share.
>
> To acknowledge receipt of this letter, please return one signed copy within two weeks of receipt.
>
> Please contact me if you wish to obtain any additional information related to your contract."

11. This letter is clear. It refers first to the recommendation of the IAAB of 20 December 2019. It then clearly states that "the Director General has decided not to offer you an indefinite contract" and it refers clearly to the fact that, instead, the complainant will be offered an extension of one year of his current fixed-term contract. The reason for not offering him an indefinite contract is stated. The reason for the fixed-term contract's limited extension is stated as well in a separate paragraph.

12. The recommendation of the IAAB to which this letter refers is no less explicit. In its internal memorandum of 20 December 2019, the IAAB indeed indicated that the recommendation for the complainant "[was] not to grant [him] an indefinite appointment". It added that "[h]is case will not be postponed to the next IAAB meeting in 2020". This recommendation emphasised that the complainant, in his "User Support Astronomer" position, had two distinct aspects to his role, namely functional responsibilities and scientific research, and that, in the Scientific Personnel Committee evaluation of 8 October 2019, it had been concluded that he had not yet reached the level required to recommend a promotion to the "Associate" level of the ESO Faculty.

13. As the Organisation stated in its pleadings, the ESO Astronomer Charter indicates in its Article 5.1.1 that the "Assistant Astronomer" level, in a post like that of the complainant, is the entry level for astronomers at ESO and that it is expected that persons in these positions will develop their career sufficiently to reach the "Associate Astronomer" level within six years from the start of their contract. As well, Article 6.3 of the Charter states that "[i]n general, indefinite contracts are only awarded to astronomers at or above the Associate level".

14. Not only was it clear for the Director General, the IAAB and the Organisation that a final decision was made on 29 January 2020 not to offer the complainant an indefinite contract, but the latter plainly understood the situation to be exactly that. In the letter the complainant sent on 9 March 2021 to the Director General prior to their meeting of 17 March, he notably wrote this:

> "[I]n a nutshell my situation is the following:
>
> [...] my scientific development has been very limited over this period, to the extent that I could not qualify for a Faculty position ([Scientific Personnel Committee] evaluation in [...] 2019), despite the very strong performance and competence I have developed in the operational side."

He even added what follows:

> "The net result is that I was not considered suitable for an indefinite contract. I was given an additional year to figure out where else in [ESO] my profile could fit, on a 80-20 basis."

15. Furthermore, in the 18 March 2021 letter that followed their meeting of the day before, the Director General specifically wrote this to the complainant:

> "Having heard from you, and considering all the elements that have been highlighted, I must tell you I am still of the opinion that the decision informed to you on 29 January 2020, following the IAAB of 5 December 2019, whereby you were not granted an indefinite contract in your current role, remains valid, and that your present exceptional contract of one year will therefore expire on 30 September 2021.
>
> This is not a decision I have taken lightly, but I believe that the correct signs and advice were given to you in recent years about this possibility, and that you have been given the appropriate help, advice, opportunities and support by your line managers, your Director, and the [A]dministration."

16. Notwithstanding what these documents all indicate, in his submissions, the complainant raises several arguments to dispute that a final decision was reached on 29 January 2020, none of which are founded.

17. The complainant maintains that the decision refusing to grant him an indefinite-term contract could have been repealed and replaced by another decision during the extension year based on the wording of the 29 January 2020 decision. But this argument merely confirms that, whilst that decision could potentially have been repealed, as long as this did not occur, it was, indeed, a final decision binding upon the parties. And clearly, the 18 March 2021 letter of the Director General not only did not repeal the prior decision of 29 January 2020, but it essentially confirmed it.

18. Furthermore, the complainant cannot reasonably argue that the 18 March 2021 decision was a new decision since there was simply nothing new in what the Director General confirmed on that date to the complainant. Firm and constant precedents of the Tribunal have it that

a letter such as the 18 March 2021 letter of the Director General to the complainant does not amount to a new decision and can only be understood as a purely confirmatory decision. 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)".

19. The assertion of the complainant to the effect that, in the abovementioned extract of the 18 March 2021 letter of the Director General, the latter refers to the "possibility" that the exceptional extension contract of one year will expire on 30 September 2021 is a misreading of what the Director General undeniably states. The possibility he refers to is one going back to the "correct signs and advice" given to the complainant "in recent years", and not to the fact that the decision not to grant him an indefinite contract was not firm but open to review.

20. Similarly, the reference of the complainant to the email dated 24 March 2021 of a colleague stating that "the decision is now final" cannot be understood as an indication by ESO that the 29 January 2020 decision not granting him an indefinite contract was not final when that statement is read in its proper context. The email did not relate to the decision informing the complainant that he was not granted an indefinite contract but was rather in answer to another email sent the same day by the complainant himself, where he was referring to his meeting with the Director General and where he was stating that his contract (which can only be, on that date, his renewed fixed-term contract for one year) would end in September 2021. This statement can therefore only be read and understood as referring to the non-renewal of his fixed-term contract, certainly not to the fact that the Organisation

had decided, back on 29 January 2020, not to grant him an indefinite contract.

21. Equally, the assertion of the complainant that the 29 January 2020 decision was only a preparatory decision which had to be followed by a final decision based on the review of his scientific output experience and ideas during the extension year is in direct contradiction with what the letter of 29 January 2020 otherwise states and what the IAAB recommendation expressly indicated.

22. Likewise, the Tribunal finds without merit the complainant's assertion that, since the Director General did not conclude and mention forthwith, in his 18 May 2021 decision referring to his internal appeal to the JAAB, that the challenged decision of 18 March 2021 was merely a confirmatory decision that could not be submitted to the JAAB, it could be inferred that it was not clear then that the 29 January 2020 decision was indeed final. Pursuant to the applicable provisions of the Organisation pertaining to "Disputes and Appeals", in such a situation, the Director General simply had no choice but to refer the issue to the JAAB before making his decision on the adjudication of an internal appeal. This is precisely what Article R VI 1.06 of the Staff Regulations imposes upon him.

23. Finally, the assertion of the complainant, to the effect that, through its behaviour of failing to warn him immediately on 18 May 2021 that his appeal was time-barred, the Organisation acted in breach of its duty of good faith and put the latter in a procedural trap, is simply unsupported by the record. That is also irrelevant, since the time limit for lodging an appeal had expired long before that letter was sent, such that procedural guidance would not have served any purpose at that point in time.

Moreover, the complainant was aware of the relevant provisions of the Staff Rules and Regulations of the Organisation, to which he indeed made specific reference in his internal appeal. It is worth recalling that, upon accepting his appointment as "User Support Astronomer", the complainant was provided with these detailed Staff Rules and Regulations.

He was expected to know about them and to follow them. 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)".

24. Overall, to follow the arguments put forward by the complainant, one would need to read into the final decision of 29 January 2020 a preparatory aspect that is not there and read into the confirmatory decision of 18 March 2021 a new decision aspect that is not present. The Tribunal cannot distort in such a way these clear and unambiguous writings.

The complaint inasmuch as it concerns the decision not to grant the complainant an indefinite contract is irreceivable. As a result, his claims for relief for material or moral damages stemming from this decision are irreceivable as well.

25. In the 16 November 2021 opinion, two JAAB members, relying on the principle of duty of care, recommended nevertheless to the Director General that the complainant's situation be reconsidered and that measures be taken "to mitigate the impact of the end of [his] contract". Given that the JAAB had unanimously concluded that the internal appeal was time-barred concerning the final decision not to grant an indefinite contract to the complainant, it appears obvious that the recommendation of the two members that measures be taken could only refer to a pecuniary compensation for the material or moral injury suffered by the complainant.

26. The Director General rejected that recommendation in the impugned decision of 11 January 2022, explaining, on the one hand, that the Organisation was under no obligation to explore alternative employment opportunities at the expiry of the complainant's fixed-term contract extension and, on the other hand, that it had nonetheless showed proper diligence by exceptionally extending his fixed-term contract by one year and by reaching out to several managers at ESO

headquarters to assess whether there were any needs within the Organisation for the complainant's expertise.

27. The Tribunal will not follow the argumentation of the complainant in this regard for the following three reasons.

28. First, when it indicated that it was considering a third element in the internal appeal of the complainant, the two members of the JAAB focused only on the obligation expressed by both parties to make an effort in trying to find an alternative position matching with the complainant's set of expertise and valuable knowledge within the Organisation. In this regard, the two members expressed the view that the decision made by the Director General in the letter of 29 January 2020 contained an element which related in essence to "a change of the conditions of the [complainant's] employment contract", as opposed to the non-granting of an indefinite contract. In their view, a new scope of the one-year extension of the fixed-term contract was contemplated, aiming at an effort towards finding another position within ESO matching the expertise and skills of the complainant. According to them, this new scope imposed an obligation on both the complainant and the Organisation to actively contribute to its realization. From this, they reached the conclusion that the complainant's internal appeal contained a third decision element "related to the issue of 'duty of care' in the context of case law established by [the Tribunal]" and "based on the sections written under item III", that is, the Staff Regulations R VI 1.02, R VI 1.04 and R VI 1.05, which concerned notably the changes to the conditions of his employment contract.

But this premise was incorrect. The internal appeal of the complainant did not refer to a failure of the Organisation to actively contribute to the new scope of the one-year contract extension to which two members of the JAAB alluded. One cannot read in the paragraphs of the internal appeal to which the two members of the JAAB referred (namely paragraphs 19 to 22) any indication in this regard. Also, while in paragraph 1 of his internal appeal, the complainant specifically referred to Articles R VI 1.02, R VI 1.04 and R VI 1.05 of the Staff Regulations, he did not refer to Article R VI 1.03, the provision to

which the two JAAB members pointed that refers to an appeal pertaining to matters relating to the contestation of "the conformity of [a] decision to the [...] conditions of an employment contract" or to "the failure of the Director General to act upon a written request for a decision on a right or entitlement [...] under the [...] conditions of his/her employment contract".

29. Second, in articulating the violations by ESO of the duty of care owed to him, the complainant listed no less than seven bases upon which he was relying to support the alleged breaches, and as a result, his claim for compensation in an amount left to the wisdom of the Tribunal for the moral injury he allegedly suffered. But none of these alluded to the alleged failure to which the two members of the JAAB referred concerning the limited efforts made by the Organisation to actively contribute to discharging its obligation to make a sufficient and coordinated effort toward finding an alternative position for the complainant. The only time the complainant, and only indirectly, alluded to this "failure to abide by its obligation to actively contribute to an effort towards finding another position within ESO" was in his rejoinder. But this claim was never made or raised before by the complainant, and the latter could not add a new claim of this nature in the context or at the stage of his rejoinder (see, for example, Judgment 4761, consideration 10, and the case law cited therein).

30. Third, while the complainant alleges having suffered a moral injury because of the breach by the Organisation of its duty of care, he provides no support of any nature whatsoever to justify the existence of his prejudice. The Tribunal's case law relevantly states that a complainant seeking compensation for moral damages must provide clear evidence of the alleged unlawful act, of the injury suffered and of the causal link between the unlawful act and the injury, and that she or he bears the burden of proof in this regard (see, for example, Judgments 4556, consideration 12, 4158, consideration 4, 4157, consideration 7, 4156, consideration 5, and 3778, consideration 4). In Judgment 4801, consideration 7, the Tribunal recalled that specification of the moral injury caused by the unlawful act at issue and evidence supporting its

existence preconditioned any award of moral damages. In a situation where, like here, a complainant merely refers to broad statements that remain unsubstantiated, compensation for alleged moral injury cannot be granted by the Tribunal.

31. It follows that the complaint is both irreceivable with regard to some of the claims for relief and unfounded with respect to others, and it must therefore be dismissed in its entirety.

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