

**G. (No. 2)**

**v.**

**ESO**

**131st Session**

**Judgment No. 4375**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. G. against the European Southern Observatory (ESO) on 3 April 2019 and corrected on 23 April, ESO's reply of 6 August, the complainant's rejoinder of 20 September and ESO's surrejoinder of 20 December 2019;

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 validity of a selection procedure in which he participated and the lawfulness of the ensuing appointment.

On 28 March 2018 ESO posted on its Intranet an internal vacancy notice for the position of Head of the Systems Engineering Department. The notice specified that the closing date for applications was 20 April 2018 and applicants were told to submit their letter of motivation and curriculum vitae (CV) via the internal web self-service application.

The complainant – who at the material time held the position of Head of the Instrument Systems Group under an indefinite contract – submitted his application on 20 April, as did two other staff members. Following an extension of the closing date to 30 April, which was not advertised through an internal announcement, a fourth candidate applied, Mr E. According to ESO, a malfunction in the internal web self-service application prevented this candidate from uploading his application

within the extended term. However, ESO asserts that Mr E. sent his application via e-mail on 30 April.

The Selection Board interviewed the candidates on 29 and 30 May, and on 4 June 2018. On 12 June it finalized its recommendation in which it found that Mr E. was the most suitable candidate and recommended his appointment. The Director General endorsed this recommendation and the complainant was officially informed of it on 29 June 2018.

On 1 August 2018 the complainant lodged an appeal with the Director General against the decision to appoint Mr E. He asked that the selection process be declared invalid and be opened anew. The Joint Advisory Appeals Board (JAAB) was established in September following the complainant's objection to one of its members. On 14 December 2018 the JAAB, after having heard the parties, recommended rejecting the appeal, though it identified some anomalies in the selection process for which it formulated a series of general recommendations for the Director General's consideration. By a letter dated 15 January 2019, which constitutes the impugned decision, the complainant was informed that the Director General had decided to reject his appeal as unfounded.

The complainant asks the Tribunal to set aside the impugned decision and draw all legal consequences, i.e. order that the selection procedure be reopened. He also claims an award of moral damages in an amount left to the Tribunal's wisdom, and legal costs.

ESO asks the Tribunal to dismiss the complaint. Alternatively, if the complaint succeeds, ESO asks the Tribunal to award damages instead of sending the case back to the organisation for the competition to be reopened, in accordance with Article VIII of its Statute. At the Tribunal's request, ESO forwarded a copy of the complaint to the successful candidate and invited him to submit his written comments. Mr E. decided not to make any statement.

## CONSIDERATIONS

1. The complainant impugns the ESO Director General's 15 January 2019 decision rejecting his 1 August 2018 appeal against the outcome of the selection process for the position of Head of the Systems Engineering Department.

2. The complainant impugns that decision on the following grounds:

- (I) There were flaws in the proceedings before the JAAB:
  - (a) the improper composition of the Board, violating ESO's rules and giving the appearance of partiality; and
  - (b) the Board made errors of law by relying on an "established practice" instead of ESO's statutory texts and by conflating the existing rules regarding "Vacancies for Staff Member positions" and "Reassignment for operational needs".
- (II) There were flaws in the selection process:
  - (a) lack of proper publication for the postponement of the closing date for submitting applications;
  - (b) retroactive extension of the closing date for applications;
  - (c) acceptance of an emailed application which did not comply with the instructions of the vacancy notice (i.e. "upload a letter of motivation and CV in English via the [internal] [w]eb [s]elf-[s]ervice application"); and
  - (d) selection of a candidate who did not fulfill the requirements listed in the vacancy notice.

3. The complainant submits that the JAAB was not properly composed as the member and the deputy member were appointed by the Director General only after the lodging of his appeal. He asserts that this violated Annex RB 2 to the Staff Regulations as well as the principle of impartiality. In the "[a]dditional observations and recommendations" section of the JAAB's report, the Board noted that "if the JAAB is established after an [a]ppeal is lodged, the suspicion might arise that it is tailored around the case, therefore lacking the necessary level of neutrality or anyway of credibility". It therefore recommended that the Director General clarify the Staff Regulations relating to the JAAB's procedure and "[a]ppoint the JAAB independent of contingent appeals and devise suitable ways to manage possible incompatibilities with specific appeals".

4. Provision 2.02 of Annex RB 2 to the Staff Regulations regarding "Appointment of members" states as follows: "Once a year, or more frequently if necessary, the Director General and the Staff Association

shall each appoint one member and a deputy member. The member appointed by the Director General and the one appointed by the Staff Association shall meet within 15 days of their appointment to draw up a list of 3 members of personnel from among whom the third member of the [JAAB] may be appointed when required.”

5. The Tribunal finds that, while it would be ideal to have a properly appointed JAAB prior to the lodging of any appeal, it recognizes that this is not always possible and there is no general requirement for that. The formation of an administrative internal body with quasi-judicial functions after receiving an appeal does not affect the body’s impartiality or appearance of impartiality. The principle of impartiality is secured by the balance of the JAAB’s members appointed by both the Director General and the Staff Association and their joint selection of additional members. The complainant was given the opportunity to contest the appointment of any of the members, and in fact did so, thus his right to a properly composed JAAB was preserved. It is important to note that, before the Tribunal, the complainant has not submitted evidence of partiality on the part of any JAAB member. In light of the above, and considering that there is no established ESO rule or regulation requiring the pre-formation of the JAAB at a specific moment in time, the Tribunal finds that, in the present case, the JAAB was properly composed.

6. The complainant argues that the JAAB’s report also suffered from errors of law. Specifically, he submits that the JAAB incorrectly relied on the alleged existence of an “established practice” instead of ESO’s statutory texts and conflated the rules regarding “Vacancies for Staff Member positions” and “Reassignment for operational needs”. Under the “[r]ationale” section of the JAAB’s report, the Board stated that “[t]he process that was followed, the *[i]nternal [v]acancy*, is not regulated or otherwise formally defined, rather it corresponds to an established practice. As such it can be assimilated more to a *Reassignment for operational needs*, regulated under [Staff Regulation] R II 1.23, than to a vacancy notice regulated under [Staff Regulation] R II 1.01” (original emphasis). It went on to state that “[i]n this case the *Reassignment for operational needs* was applied, although through an (internal) advertisement to enable a collegial comparative/competitive procedure, which, mimicking a normal recruitment, intends to favour the selection of the most suitable candidate among the widest possible group of

candidates in the ultimate interest of the Organization. In this perspective also the extension of the closure date [...] of the vacancy or having contacted, even selectively [...], potentially suitable candidates, per se cannot be considered [as] a breach of any rule, but rather [as] the exercise of an institutional prerogative or a good practice in the interest of the Organization by the Recruitment Manager” (original emphasis).

7. The relevant Staff Regulations, under “Section 1 – Appointment and Assignment”, provide as follows:

**“R II 1.01 Vacancies for Staff Member positions**

A vacancy notice shall be issued for each vacant post not to be filled by reassignment (Staff Regulations II 1.23 and 1.24) and for each new post. This notice shall give a brief description of the functions and responsibilities involved, specify the qualifications and experience required and indicate the grading of the post.

**R II 1.02 Publication of vacancies**

Subject to the provisions of Staff Regulations II 1.23, 1.24 and 1.27, vacancies shall be made known to the members of personnel of the Organisation. Those concerning posts in grade 5 and above shall be communicated as soon as possible to the Member States and may be published in such a way as to reach the greatest possible number of persons who might be interested.

[...]

**R II 1.23 Reassignment for operational needs**

If the operational needs of the Organisation so require, a staff member may be reassigned to a job other than that indicated in his contract, provided that he has the necessary qualifications and ability (or can acquire them by suitable training) and that the grade attached thereto is not lower than his present grade.

Under the same conditions the Organisation may also request him to agree to a transfer of duty station. If he refuses and no equitable solution can be found within 3 months after notification of the proposed transfer, his contract shall be terminated and termination indemnities will be paid according to Annex R A 11.01 h).

Under the same conditions and with his agreement, he may also be reassigned to a job of a lower grade.”

8. The Tribunal finds that the two Regulations cited by the JAAB in the “[r]ationale” section of its report regulate distinct processes for filling a vacancy and referring to both of them was fundamentally erroneous. As the Director General had not taken a decision to fill the vacancy via reassignment, Staff Regulation 1.23 could not be applied.

The decision to create and to post a vacancy notice falls under the provisions of Staff Regulations 1.01 and 1.02. Once that procedure had begun, ESO had an obligation to follow it properly in accordance with the rules and regulations that it had itself established and, if they do not exhaustively prescribe a procedure, in accordance with the Tribunal's case law (see, for example, Judgments 4153, consideration 5, 4001, consideration 15, and 1646, consideration 6), which eschews amendments to the competition rules not being properly publicized (see Judgment 1549, consideration 13). In the present case, the organisation does not challenge the complainant's assertion that the extension of the closing date for applications was not published in the same manner as the original vacancy notice, that is, on the Intranet. Therefore, the extension was unlawful and the acceptance of an application beyond the original closing date was also unlawful.

9. It follows that the impugned decision must be set aside, without there being any need to examine the other pleas put forward by the complainant to challenge the lawfulness of the selection procedure and the resulting appointment.

10. The disputed appointment of Mr E. to the position of Head of the Systems Engineering Department, which was taken at the end of an unlawful selection procedure, will also be set aside, but ESO must shield Mr E. from any injury that may result from the cancellation of an appointment that he accepted in good faith (see Judgments 4153, consideration 2, and 3130, consideration 10). In this respect, ESO argues that the cancellation of that appointment would be inadvisable, referring to Article VIII of the Statute of the Tribunal. According to ESO, this is so particularly in view of the potential disruption to the functioning of the Systems Engineering Department. The Tribunal observes that ESO is not prevented from assigning to Mr E. on an interim basis the duties of Head of that Department during the limited time which is necessary for that position to be filled by a lawful procedure.

11. The organisation's failure to ensure that the competition procedure was conducted lawfully warrants an award of moral damages, which the Tribunal assesses in the sum of 10,000 euros.

12. As he succeeds in part, the complainant is also entitled to an award of costs, which shall be set at 8,000 euros.

### DECISION

For the above reasons,

1. The impugned decision of 15 January 2019 is set aside, as is the decision to appoint Mr E. to the position of Head of the Systems Engineering Department.
2. ESO shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay him costs in the amount of 8,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 11 December 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ