Ö. (Nos. 1 and 2)

v.

ESO

124th Session **Judgment No. 3847**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mrs B. Ö. against the European Southern Observatory (ESO) on 30 September 2015 and corrected on 5 November 2015, ESO's reply of 14 April 2016, the complainant's rejoinder of 30 May and ESO's surrejoinder of 23 June 2016;

Considering the second complaint filed by Mrs B. Ö. against ESO on 19 November 2015 and corrected on 14 December 2015, ESO's reply of 14 March 2016, the complainant's rejoinder of 31 May and ESO's surrejoinder of 25 June 2016;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

In both complaints, the complainant contests the non-renewal of her fixed-term contract.

The complainant began working for ESO in 2008 and held several fixed-term contracts of one year or less as a Paid Associate before being offered a three-year contract as an International Staff Member with effect from 1 January 2013. From 8 December 2014 until 1 July 2015 she was on maternity leave followed by parental leave. On 1 July she was due to return to work on a 50 per cent basis, but she did not return until

2 July, at which time she was handed a copy of a letter dated 27 May 2015 informing her that it was foreseen not to extend her fixed-term contract and that it would 'come to its natural end' on 31 December 2015.

ESO had sent the letter of 27 May 2015 to the complainant's home address, first by ordinary mail, then by registered post, but it had been returned undelivered. It was resent to the complainant twice by email before being handed to her personally when she returned to work on 2 July. In order to ensure that the six-month notice period for the decision not to extend her contract was fully respected, on 20 August 2015 ESO offered to extend the complainant's contract by three days until 3 January 2016.

Meanwhile, by letter of 21 July 2015 the complainant requested the Director-General to reconsider the decision not to extend her contract. On 20 August the Head of Human Resources replied on behalf of the Director-General that under Staff Rule VI 1.02 a decision not to renew or extend a contract is not appealable. This is the decision impugned in the first complaint.

The second complaint arises in relation to the offer made on 20 August to extend the complainant's contract for three days until 3 January 2016. By a letter dated 1 October 2015 the complainant requested that this decision be set aside and again challenged the decision relating to the non-extension of her contract. By letter dated 5 November the Head of Human Resources replied on behalf of the Director-General. She noted that the complainant had declined the offer of a three-day contract extension, and stated that the request concerning the non-extension of her contract was rejected as it was already the subject of another appeal. That is the impugned decision in the second complaint.

The complainant asks the Tribunal to set aside the impugned decisions and to order ESO to extend her contract indefinitely, to reinstate her and to make good any loss she has incurred due to the unlawful termination of her contract. She also claims costs.

ESO asks the Tribunal to dismiss both complaints as irreceivable and unfounded.

CONSIDERATIONS

1. Both of these complaints arose essentially out of the Director General's decision not to extend the complainant's contract of employment when it ended on 31 December 2015. Their factual circumstances are the same and their resolution depends upon the same legal principles and the same provisions of ESO's internal rules. The Tribunal therefore finds it convenient to join them in this judgment.

2. ESO raises receivability as a threshold issue. It contends that the first complaint, in particular, was out of time when it was filed with the Tribunal on 30 September 2015, because it was filed after the ninety-day time limit stipulated in Article VII of the Tribunal's Statute. Paragraphs 1 and 2 of Article VII state as follows:

> "1. 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.
>
> 2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published."

3. In Judgment 3311, considerations 5 and 6, the Tribunal observed that 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. The consistently stated principle that time limits must be strictly adhered to has been rationalized by the Tribunal in the following terms: time limits are an objective matter of fact and strict adherence to them is necessary for the efficacy of the whole system of administrative and judicial review of decisions. An inefficacious system could potentially adversely affect the staff of international organisations. Flexibility about time limits should not intrude into the Tribunal's decision-making even if it might be thought to be equitable or fair in a particular case to allow some flexibility. To do otherwise would "impair the necessary stability of the parties' legal relations". There are exceptions to this general approach, none of which is applicable to the present matter (see Judgment 2722, consideration 3).

4. In the complaint form of her first complaint, which was filed on 30 September 2015, the complainant identifies the Director General's letter dated 20 August 2015 as the impugned decision. She received it on 21 August 2015. However, the submissions in the first complaint, as well as those in the second complaint, show that the genesis of these complaints was with the Director General's decision contained in a letter to the complainant dated 27 May 2015. That was the decision by which ESO officially informed the complainant that her three-year fixed-term contract would not be extended on its expiry on 31 December 2015. The letter of 20 August 2015 was sent to her in response to her letter to the Director General dated 21 July 2015, in which she had sought to appeal the decision which was contained in the letter dated 27 May 2015. In this letter of 27 May 2015, the Head of Human Resources, on behalf of the Director General, relevantly stated as follows:

> "Further to our meeting on 21.05.2015, and on behalf of the Director General, I hereby confirm that an extension of your […] contract […] is not foreseen and [the contract] will come to its natural end on 31.12.2015.
>
> Please take this letter as the official notification foreseen under Article R II 6.01 b) and Article R II 6.03 of the Staff Rules and Regulations."

5. The Tribunal finds that the decision contained in the letter dated 27 May 2015 was the final decision for the purposes of paragraphs 1 and 2 of Article VII of the Tribunal's Statute. This is because although Chapter VI of ESO's Staff Rules provides for appeals against decisions of the Director General to be made through an internal appeals procedure, Staff Rule VI 1.02 excludes a decision not to renew or extend a contract from appeal. Such a decision is appealable directly to the Tribunal within ninety days under paragraph 2 of Article VII of the Tribunal's Statute.

6. It is noteworthy that the complainant seeks to set aside both the decision of 27 May 2015 and that of 20 August 2015 informing her that the first decision was a final decision. Since the decision of 27 May 2015 was a final decision, it was proper for the complainant to appeal to the Tribunal seeking to have it set aside. The letter of 20 August 2015, however, merely informed her, correctly, that she had no right to seek to have the decision of 27 May 2015 appealed through the internal

process. It did not convey any administrative decision. Accordingly, the aspect of the first complaint which seeks to set aside the decision of 20 August 2015 is unfounded.

7. The Tribunal notes the complainant's contention that Staff Rule VI 1.02 is invalid because it infringes her right to the guarantee of access to justice. The Tribunal refers to its statement on access to justice in Judgment 3282, consideration 3, which is equally applicable to the present case:

> "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:
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> > '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."

8. The question whether the first complaint is receivable turns on whether, pursuant to paragraph 2 of Article VII of the Tribunal's Statute, the complainant filed it within the stipulated ninety days following the decision not to extend her contract. The principle of good faith dealings which applies to the relations between international civil servants and the organisations that employ them prevents a staff member from thwarting timely notification by her or his conduct. Accordingly, in considerations 11 and 12 of Judgment 2152 the Tribunal stated as follows:

> "11. The requirement of good faith dealings is a two-way street. While staff members are under no obligation to assist the Administration in any actions the latter may wish to take against them, they do have a duty not to so conduct themselves as to deliberately frustrate normal dealings with their employer. The latter is entitled to assume that the employees will receive and accept written communications sent to them in the normal course of affairs.
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> 12. It is not in the interests of either the staff member or the Organisation that the latter should feel obliged to hire professional process servers or bailiffs in order to ensure that official notifications that are sent out are duly received."

9. In the present case, the evidence shows that the complainant was initially informed verbally of the decision not to extend her contract when she met with the Head of Human Resources on 21 May 2015. ESO states that, at that meeting, the Head of Human Resources informed the complainant of the decision "that her contract would not be extended in view of the reorganisation". Email exchanges between the complainant and the Head of Human Resources around that time confirm that they met and discussed the matter. In an email dated 22 May 2015 to the Head of Human Resources, the complainant expressed her appreciation for having been informed "regarding [her] contractual situation [...] so early". She acknowledged that "although the current situation/decision was always a possible scenario [...], it [hit] [her] hard [...]". She expressed her wish to meet with the Head of Human Resources again. By return message, the Head of Human Resources stated, among other things, that "the contractual situation will not change". In the meantime, the letter confirming the decision not to extend the complainant's contract was sent

to her on 27 May 2015, and, in another email message dated 19 June 2015, the Head of Human Resources, wrote as follows:

> "Since you have not come by I trust that you have been busy and perhaps out of town.
>
> Following our earlier talk we have to issue confirmation letters to you in regards to the no contract extension for you.
>
> As you may be on holiday and absent from you house, I am sending you a copy of the letter by email. The original was sent with ordinary mail but returned to us this week. I will have it sent next week again in case you have returned.
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> See you on the 1st July."

10. The evidence further shows that on 2 June 2015 the Head of Human Resources re-sent the letter of 27 May 2015 to the complainant's home address by registered post. However, on 18 June 2015 the postal services informed ESO that the letter was undeliverable. The complainant, who was on parental leave, had not given an alternative address where she could have been reached in the event that she was not at her home address as Article R II 4.41 of ESO's Staff Regulations requires. ESO then sent the letter to the complainant's official ESO email account on 19 June 2015 and transmitted it again to her by that same means on 29 June 2015 when she did not reply. ESO states that it was aware that the complainant used the account while she was on leave but the complainant did not activate the automatic response function which the system provided. That would have assisted ESO to determine whether she had accessed these email messages. As the complainant did not report for work after her leave on 1 July 2015 as scheduled, the letter was given to her in person on the following day (2 July). She signed the copy to acknowledge receipt of it and dated it 3 July 2015.

11. The foregoing series of events lead the Tribunal to conclude that by her conduct, the complainant did not act in good faith in her dealings with ESO and deliberately frustrated or thwarted all attempts by ESO to bring the letter of 27 May 2015 to her attention prior to giving it to her personally when she returned to work on 2 July 2015. In these circumstances, the Tribunal draws the inference that the complainant was notified of the decision not to extend her contract,

if not on 21 May 2015 (but see Judgment 3505, consideration 8), then by 19 June 2015 at the latest, and her denial of having seen it before 2 July 2015 is rejected. Accordingly, the first complaint is irreceivable under Article VII, paragraph 2, of the Statute of the Tribunal, as it was not filed within ninety days of the notification of the impugned decision. Premised on this finding and the finding in consideration 6 above, the first complaint will be dismissed.

12. The Tribunal will also dismiss the second complaint, which seeks to set aside the decision to extend the complainant's contract by three days to 3 January 2016. That decision was contained in another letter dated 20 August 2015. It is obvious that ESO's extension of the contract to 3 January 2016 was intended to ensure that it gave the complainant the six months' notice of non-extension pursuant to ESO's Staff Regulation R II 6.03. This provision, which is under the rubric "Expiry of fixed-term contract", states as follows:

> "A fixed-term contract shall expire at the end of the prescribed period. The Director General may extend it or not; his decision shall be notified to the staff member at least 6 months before the date of expiry [...]."

13. The Tribunal finds that the second complaint was without object when it was filed on 19 November 2015. This is because when the complainant purported to appeal the decision to extend her contract to 3 January 2016, ESO had already withdrawn the extension by letter dated 5 November 2015.

14. Inasmuch as the first complaint is irreceivable and the second complaint is without object, no practical purpose would be served by an oral hearing for which the complainant applies. That application is therefore dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 4 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ