

**JUDGMENT**

of 30 November 2023

In Case ESMAT 2/2022

AC, Appellant,

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

v

European Stability Mechanism

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

Concerning the appeal lodged by the Appellant on 19 August 2022, following the written procedure and the oral hearing held on 20 June 2023

**The Administrative Tribunal of the European Stability Mechanism**

Composed, in accordance with Article 8(1) of the Statute, of Virginia MELGAR, President of the Tribunal, and members Celia GOLDMAN and Gerhard ULLRICH,

Renders the present **JUDGMENT**.

Considering that on 14 October 2022, the Appellant made a reasoned request for anonymity pursuant to Article 19(2) of the Rules of Procedure, to which the Tribunal has acceded.

Having examined the written submissions and decided in conformity with Article 8 of the Statute to hold an oral hearing which was conducted jointly with the oral hearing in case 1/2023, which raises common issues of law and fact. This Judgment concerns the Appellant's challenge to the 2021 performance appraisal rating.

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

## **I. FACTS AND PROCEDURE**

1. The Appellant was initially appointed as an official for a fixed term of three years, from 16 March 2018 to 15 March 2021, in a division of the ESM. The Appellant's employment contract was subsequently renewed for two years, until 15 March 2023. The Appellant asserts that it came as a surprise that the initial employment contract was not transformed into an indefinite contract at the time of the mid-year review of performance in 2020, despite the "Good" feedback on the appraisal. In accordance with Art. 6(3) Staff Rules, upon the expiration of the second term employment contract, the contract cannot, as a rule be extended for another fixed term but may be renewed for an indefinite period. (The decision taken at the conclusion of the second fixed term is the subject of the Appellant's challenge in Judgment 1/2023).
2. Under the Performance and Development System (PDS), the performance assessment of the Appellant for the years 2018, 2019 and 2020 was rated as "Good". The rating scale comprises: "Outperformance"; "Good Performance"; "In Progress"; and "Concern."
3. After the 2020 mid-year review, XY was appointed as the Appellant's line manager. Later, a mediation took place at the Appellant's request, in order to improve the relationship with the line manager.
4. As a result of the mediation, on 16 June 2021 a "Framework for working together and improving the relationship" was put in place. This plan addressed primarily relationship issues and set out obligations not only for the Appellant but also for the line manager in order to improve the objectivity of the performance assessments. The Framework plan provided for a general review after six to eight months, that is, between mid-December 2021 and mid-February 2022. The review was, however, delayed by three to five months and was carried out only in May 2022.
5. On 3 March 2022, the line manager completed the Appellant's 2021 Performance and Development System ("PDS") year-end review document. The Appellant did not agree with the rating of "In Progress" proposed by the line manager and provided comments in response.
6. On 17 March 2022, the Appellant was notified by the Head of HR that the Managing Director had confirmed the rating proposed by the line manager, that is, "In Progress". The Appellant declares that this rating came "to [the Appellant's] biggest surprise".

### **Advisory Committee Procedure**

7. On 11 April 2022, pursuant to Article 25 of the Staff Rules, the Appellant requested an Advisory Opinion on the 2021 performance appraisal rating, contending that the rating "In Progress" did not reflect the Appellant's achievements in 2021.
8. The Appellant further stated that there was never an agreement on objectives between the line manager and the Appellant. There was also no warning that the contractual employment was in jeopardy, and no timely objectives were set in advance so that the Appellant would know the yardstick by which future performance would be assessed.
9. In submissions to the Advisory Committee, the Appellant stated that the performance in 2021 with the rating "In Progress" did not reflect the Appellant's efforts and achievements in 2021.

The Appellant claimed that mediation was requested to better interact with the line manager during 2021. The decision of 17 March 2022 to rate the Appellant's performance as "In Progress" should be annulled. The performance evaluation for 2021 should reflect that, as in the previous three years and previous jobs, the Appellant is a qualified and experienced official. The respective end-of-year bonus and annual salary adjustment should be corrected accordingly and with retroactive effect. The fixed term contract should be converted into an indefinite term contract in the next review in line with colleagues who received indefinite term contracts after two years of "Good" performance. In addition, the Appellant requested that the performance objectives be refined, and that the Appellant benefit from a safer working environment.

10. The ESM requested that the Advisory Committee dismiss the submissions of the Appellant as unfounded and the allegations of unfair treatment as inadmissible.
11. On 9 June 2022, the Advisory Committee rendered its Advisory Opinion. The Advisory Opinion concluded that appraisal reports are discretionary acts, and that the Committee cannot substitute its own judgment for that of the organisation.
12. In the absence of sufficient evidence establishing that this discretionary decision should be set aside, the Advisory Committee recommended that the Appellant's challenge to the appraisal report of 2021 be dismissed as unfounded.
13. As to the misuse of power and the request for mediation, the Advisory Committee held that the requests were insufficiently substantiated. The Committee noted that the Appellant expressed feelings of stress and unhappiness resulting from bullying and harassment. The Committee held that it was not the right forum to give a view as to the existence of behavioural misconduct. The Appellant should use the internal mechanisms established by ESM for such complaints. For the present proceedings of the Advisory Committee, those claims were inadmissible.
14. Under the heading of "Any other recommendation(s) as to the final decision to be taken by the Managing Director", the Advisory Committee made the following observations in relation to the decision of 17 March 2022.
15. The Committee observed that no detailed development plan as provided for in section 7.1 of the Performance and Development System (PDS) booklet had been set out and the Appellant did not receive a clear explanation of what was expected to be eligible for permanent status. Based on the rating of "In Progress" for 2021, the Advisory Committee observed, the Appellant was at high risk that the contract conversion in September 2022 would be refused.
16. The Committee further stated that it is of paramount importance that the Appellant have had a proper chance to improve the performance and needed to be given a realistic chance to do so.
17. The Committee noted also that the relationship between the Appellant and the line manager deteriorated over time and was seriously impaired. The Framework agreement of 16 June 2021 was not executed within the agreed time. A timely review could have been of particular importance for the Appellant. Since the conclusion of the Framework agreement, both the Appellant and the line manager had been reducing exchanges to a strict minimum in order to limit possible tensions.

## **Managing Director's Final Decision**

18. Following the Advisory Committee's Opinion of 9 June 2022, on 8 July 2022, the ESM Managing Director took the final decision to dismiss the Appellant's claims against the challenged 2021 performance rating decision as unfounded. In order to provide additional time to consider the upcoming renewal of the Appellant's employment, the ESM offered to decide on the renewal not six but three months before the expiration of the contract on 15 March 2023. The Managing Director rejected as inadmissible the Appellant's claims of misuse of power and behavioural misconduct of the line manager.

## **Appeal to the Tribunal - Positions of the Parties**

19. On 19 August 2022, the Appellant filed with this Tribunal an Appeal against the Managing Director's final decision. The Appellant claims lack of timely warning of alleged unsatisfactory aspects of performance so that remedial steps could be taken. In addition, there was no specific warning in 2021 that the Appellant's continued employment was in jeopardy since the ESM would decide on 15 September 2022 as to the employment after 15 March 2023.

20. In its Reply of 15 December 2022, the ESM submits that the Appeal is not admissible on the ground that it is based on allegations of bias and harassment by the Appellant's supervisor. The Appeal is "premature" because the whistle-blowing procedure initiated on 4 November 2022 by the Appellant for addressing bias and harassment allegations has not yet been exhausted.

21. In the alternative, the ESM argues that the Appeal is unfounded. In accordance with a general legal principle of international administrative law, the performance of a staff member is a discretionary decision and the control by the tribunals is limited. A tribunal will only interfere if the discretionary decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, or if it was taken in breach of a rule of form or procedure, or if there was an abuse of authority.

22. In the submission of 3 March 2023, the Appellant disputes these arguments. At no point did the Appellant request the annulment of a decision pertaining to the whistle-blowing procedure, which had not even been initiated at the time that the Appeal was filed with the Tribunal. Additionally, the alleged misbehaviour of the Appellant's line manager was not a part of the Appeal but was only intended to "shed light" on the context in which the contested decision was taken. The present Appeal is directed only against the year-end review of 2021 performance and the rating "In Progress".

23. In accordance with Article 8 of the Statute and Article 17 of the Rules of Procedure, a hearing was held on 20 June 2023 jointly with case 1/2023. The parties developed their arguments further and answered questions of the Tribunal.

## II. LAW

### Admissibility

24. The Appeal of 19 August 2022 is directed against the final decision of the Managing Director of the ESM on 8 July 2022 confirming the performance evaluation of the Appellant for the year 2021 with a rating of “In Progress”.
25. The Tribunal probed at the oral hearing the issue of the relationship between the ESM’s whistleblowing procedures and the Tribunal’s review of a challenge to a discretionary employment decision in which an appellant invokes allegations such as bias or behavioural misconduct in support of an allegation that such employment decision should be vitiated as improperly motivated. That relationship remains opaque.
26. In this case, however, it is not necessary to decide the effect of ongoing whistleblowing proceedings on the Tribunal’s own decision-making process because the Tribunal is able to decide the Appeal without reference to issues of alleged bias or harassment. Accordingly, the Tribunal concludes that the Appeal is not, as the ESM asserts, inadmissible as premature.

### Merits

27. The Tribunal notes that Article 14 of Staff Rules establishes that:

#### *“Appraisal*

*1. Members of staff are entitled to periodic review of their performance by, and feedback from, their line management.*

*2. The performance review cycle shall at least include:*

*(a) a year-end review during the period from December to February, which comprises a self-assessment, a review, target setting and definition of objectives; and*

*(b) a shorter mid-term review in June and July, which comprises a self-assessment, a mid-term review and progress update of targets and objectives.*

*3. The Managing Director may by general administrative order further specify the appraisal process, including for the purpose of updating and improving staff skills to meet the needs of the ESM, the conditions on which the ESM promotes and supports learning and development of its members of staff”.*

28. The Performance and Development System (PDS) Booklet develops further on appraisals and states that the mark “In progress” is defined as follows:

“Individual is working towards delivering the level of performance or demonstrating the behaviours expected of their role and as a member of staff of the ESM.” (PDS, Section 3.4.)

29. The following measures are to be taken in case of an “In Progress” rating:

In Progress:

- *Identification of specific training requirements*

- *Access to institution-wide training opportunities*
  - *External coaching support for extended leadership team and ad-hoc HR support for staff*
  - *The individual should be provided with a detailed personal development plan, which facilitates the development of both behavioural and technical skills. Regular feedback should be given on progress (PDS, Section 7.1.)*
30. The performance report is a discretionary decision by the ESM. As such, it can be reviewed for abuse of that discretion. In reviewing the jurisprudence of various international administrative tribunals, it has been observed that “with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures” (Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992, 2009, 2020).)
31. Further, “on the basis of the structural balance of power all international administrative tribunals recognise that the executive organ of an international organisation disposes of a certain power of appreciation to be able to fulfil these tasks. In a situation of that kind the judicial review must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been no manifest error of those acts or a misuse of power or an infringement of legal principles” (ILOAT Judgments 4427 par. 2, 4363 par. 10; 4301 par. 5; UNAT Judgments 2010-UNAT-084 par. 40, 2015-UNAT-601 par. 43).
32. In respect of challenges to performance assessments, international administrative tribunals have distilled the following principles.
33. In settled case law, a staff member whose performance is not considered satisfactory for an extension or renewal of a fixed-term employment has to be warned in a “timely manner” that he/she risks termination of employment if the performance did not improve (ILOAT Judgment 3911 par.16).
34. As to the unsatisfactory aspects of the performance “a reasonable time to improve “should be granted together with the necessary guidance (ILOAT Judgment 4603 par. 2, 4540 par. 11, 3679 par. 11, 3613 par. 27 and further relevant decisions). In its judgment *Ms. “JJ”, Applicant v. International Monetary Fund, Respondent*, Judgment No. 2014-1 of February 25, 2014, paras. 50-58, the IMFAT considered whether supervisors provided adequate, timely, and constructive feedback, as well as necessary guidance and training to help remedy performance shortcomings. In its Judgment *CD v. International Bank for Reconstruction and Development*, Decision No. 483 (2013), para. 20, the WBAT considered performance assessment must take into account all relevant and significant facts so as to ensure an “observable and reasonable basis” for the challenged rating.
35. Furthermore, “in a variety of contexts, [an international organization] constrains its discretionary authority by adopting rules governing the particular exercise of discretion.” (see *Elkjaer et al. (No. 2), Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-1 (January 30, 2023), para. 82.

36. In this case, the ESM's *Performance and Development System (PDS) Booklet*, Section 3.4, describes an "In Progress" rating as "Individual is working towards delivering the level of performance or demonstrating the behaviours expected of their role and as a member of the staff of the ESM." The *Performance and Development System (PDS) Booklet* goes on to prescribe, at Section 7.1 (Development priorities per performance category), particular duties of managers. In the context of an "In Progress" rating, these are: "Identification of specific training requirements"; "Access to institution-wide training opportunities"; "External coaching support for extended leadership team and ad-hoc HR support for staff"; "The individual should be provided with a detailed personal development plan, which facilitates the development of both behavioural and technical skills. Regular feedback should be given on progress."
37. One of the possible measures taken that may be within the range of special measures foreseen by the PDS Booklet, is the mediation/facilitation which could be assimilated to the external coaching.
38. The ESM argues that it is not true to say that the Appellant submitted a request for mediation. Instead, a facilitated discussion took place at the initiative of the Head of HR. In the view of the ESM, the relationship of the Appellant with the line manager deteriorated due to the Appellant's resentment towards the ESM for not having renewed the appointment for an indefinite period in 2021.
39. The ESM states that following some comments from the Appellant regarding the difficulties the Appellant encountered to agree with the line manager on the 2021 objectives, and to have a constructive dialogue, a meeting took place on 2 March 2021 between the Appellant and the Head of HR to improve the situation. In this context, it was envisaged to use the help of an external expert from the Centre for Effective Dispute Resolution (CEDR) with which the ESM works in relation to alternative dispute resolution, including mediation, facilitation and training. On 3 March 2021, a meeting took place between the Head of HR and the Appellant's line manager during which details about alternative dispute resolution were discussed, including the possibility of having a mediation or facilitation.
40. Afterwards, the ESM claims that it was agreed that the discussions between the Appellant and the line manager would be facilitated by the external expert from CEDR (the Facilitator) to find a common understanding on how to move forward. From April to early June 2021, discussions took place between the Facilitator, the Appellant and the line manager, and a "Framework for working together and improving the relationship" was drawn up. The content of this Framework was discussed and agreed by the line manager and the Appellant. Regular meetings took place between the Appellant, the line manager and the Talent Management (TM) Team Lead.
41. The ESM furthermore states that in accordance with the recommendations of the Advisory Committee in its 9 June 2022 opinion, and pursuant to the email exchanges between the Appellant and the line manager, on 20 June 2022 the Head of HR asked the members of the Talent Management team to review the Appellant's objectives from a "SMART" (specific, measurable, achievable, relevant, time-bound) perspective and make recommendations to the line manager to improve them.
42. The ESM explains that in particular, the TM Team Lead followed up with the Appellant's line manager to ensure that the objectives were established in accordance with the ESM Rules

and were 'SMART'. The TM Team Lead, after having thoroughly reviewed the set objectives, concluded that they were consistent with the best practice and proposed only some minor changes in relation to the performance and development goals, notably regarding the level of priority, which needed to be adjusted in some cases. The objectives for 2022 and their possible adjustments were offered to be discussed in June at the 2022 Mid-Year Review meeting.

43. On 28 June 2022, the (TM) Team Lead attended the 2022 Mid-Year Review meeting to help with the discussions between the Appellant and the line manager.
44. All these measures are considered sufficient by the ESM to comply with the internal rules on how to deal with the mark 'In Progress'.
45. The Tribunal does not accept the ESM's arguments. The working relationship between the Appellant and the line manager deteriorated in 2021. A mediation process was undertaken between the Appellant and the line manager. As a result, a "Framework" for working together and improving the relationship was put in place on 28 July 2021. A general review was foreseen after six to eight months. This review had however not taken place at the time the Advisory Committee heard the Appellant on 24 May 2022. The process provided for in the Framework plan was not documented and the Appellant was not clearly informed what was expected to comply with the requirements of the job. After the conclusion of the Framework plan, the Appellant and the line manager were "reducing exchanges to the strict minimum in order to limit possible tensions".
46. It is the opinion of the Tribunal that the ESM failed to take appropriate and specific measures to tackle the 'In progress' rating. For example, no specific development plan was agreed, no external or internal training plan was established, the mediation/facilitation put in place was a measure to ensure a proper dialog between the Appellant and the line manager, not an external coaching measure as foreseen by the PDS. A rating of 'In progress' should normally be followed by a monitoring and the setting of short-term objectives that can be checked regularly. There is no documented evidence (most of the meetings were oral) that the objectives were explained in a sufficiently clear manner to the Appellant.
47. As the Advisory Committee pointed out: no detailed development plan, as provided for in section 7.1 of the Performance and Development System (PDS) booklet, has been set out and the Appellant did not receive a clear explanation of what was expected for being eligible for a permanent status.
48. The Tribunal underscores that in this case explanations and support measures were particularly pertinent because the continued employment of the Appellant was at stake. As outlined by the Advisory Committee opinion: based on the rating of "In Progress" for 2021, the Appellant was at high risk that the contract conversion in September 2022 would be refused.
49. As the Advisory Committee further observed, it is of paramount importance that a staff member, such as the Appellant, who has been rated "In progress", has a proper chance to improve the performance and must be given a realistic chance to improve.



50. It is also to be noted that the only measure put in place (the mediation/facilitation process) that translated into the Framework agreement of 16 June 2021, was not executed within the agreed time. A timely review could have been of particular importance for the Appellant.

51. Therefore, the Tribunal decides that without the adoption of measures foreseen in the PDS Booklet, the Appellant did not have a proper chance to do better. The Appellant's 2021 performance appraisal rating of 17 March 2022 cannot stand.

The Tribunal takes note that the Appellant did not apply for moral damages.

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

### **Decision**

For these reasons, the Tribunal ORDERS

1. The impugned decision of 8 July 2022 is set aside.
2. In accordance with Article 14(3) of the Tribunal's Statute, the ESM must bear the reasonable costs incurred by the Appellant in the proceedings.

Virginia MELGAR, (President)

(signed)

Celia GOLDMAN

(signed)

Gerhard ULLRICH

(signed)