L. (No. 7)

v.

EMBL

141st Session **Judgment No. 5097**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr V. L. against the European Molecular Biology Laboratory (EMBL) on 8 April 2022 and corrected on 25 May 2022, EMBL's reply of 29 July 2022, the complainant's rejoinder of 16 September 2022 and EMBL's surrejoinder of 15 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 to impose on him the disciplinary measure of a letter of warning.

Additional facts regarding the context of this case can be found in Judgment 4583, delivered on 1 February 2023, and Judgment 4743, delivered on 31 January 2024, concerning the complainant's sixth and fourth complaints, respectively. The complainant joined EMBL in 1991 as a fellow at EMBL's outstation in Hamburg, Germany. He became a staff member in April 1995 and in January 2003, he obtained an open-ended contract. At the material time, he was serving as a Senior Scientist and Group Leader.

On 18 January 2017, the complainant filed a harassment complaint against the Head of Human Resources (HR). On 31 January 2017, the Director-General, Professor I.W.M., informed the complainant of the decision to conduct an investigation regarding his allegations.

By a letter dated 24 April 2017, the Director-General informed the complainant that several harassment allegations had been brought against him by "some members of the EMBL Hamburg Unit", in particular from Ms J.H., Ms C.H., and Mr T.S., during the investigation into his harassment complaint against the Head of HR. Therefore, he had decided to initiate a separate investigation regarding these allegations.

The investigation report concerning the allegations against the complainant was finalized on 31 October 2017. In her report, the external investigator (the investigator) found that the evidence supported Ms J.H.'s allegation that "she felt harassed by [the complainant]", noting that he had behaved inappropriately towards Ms J.H. The investigator concluded that the complainant had created a hostile working environment for Ms J.H. "in connection with her decision to transfer", which "would appear to be in breach of applicable EMBL internal policies, including the Policy on Anti-Harassment, as well as the standards of conduct expected of international civil servants". She also concluded that the complainant's behaviour towards Ms J.H., in relation to a project developed by the department, "indicate[d] a lack of transparency, respect and honesty and would similarly appear to be in breach of internal EMBL policies, including the Code of Conduct and the standards of conduct for international civil servants". However, the investigator dismissed Ms C.H.'s allegations.

The complainant was invited to provide his comments on the report, which he did on 23 March 2018.

On 24 April 2018, the Administrative Director informed the complainant of the decision to convene the Joint Advisory Disciplinary Board (JADB) to assess his case.

In September 2018, while the disciplinary case was pending before the JADB, the Director-General initiated a separate procedure with a view to terminating the complainant's appointment on the grounds of

professional unsuitability in view of the deterioration of his working relationship with EMBL. In accordance with Staff Regulation R 2 6.02, applicable at the relevant time, a board was set up to examine this proposal and, in June 2019, it adopted its report unanimously recommending that the complainant's appointment be terminated. By a letter of 30 July 2019, the new Director-General, Professor E.H., who had taken office in January of that year, informed the complainant that she had decided to terminate his appointment for specified reasons of professional unsuitability. She further informed him that he was entitled to 36 months' notice, but that in accordance with Staff Regulation R 2 6.13 he was required to take special paid leave from 1 November 2019 until 30 July 2022, the end of his period of notice. His last day of work would therefore be 31 October 2019. The termination decision and the terms of the complainant's special paid leave were challenged in his sixth complaint, on which the Tribunal ruled in the abovementioned Judgment 4583.

On 17 November 2020, the JADB adopted its recommendations with respect to the disciplinary procedure initiated against the complainant concerning the harassment allegations brought against him. The JADB concluded that it was not "convince[d]" that the complainant had "engaged in misconduct regarding the collaboration between [Ms J.H.] and [Ms C.H.]" However, it concluded that "[the complainant] ha[d] harassed [Ms J.H.] in an unacceptable way" and that his interactions with her "need[ed] to be identified as 'harassment' and addressed as such". The JADB recommended issuing a written warning to the complainant, considering "the extent to which the harassment manifested, the course of events where de-escalation opportunities may have been missed and the fact that there is no record of prior harassment". It dismissed other allegations as unsubstantiated.

By a letter dated 4 December 2020, the Director-General informed the complainant of her decision to endorse the JADB's recommendations and to impose on him therefore a disciplinary measure of a written warning. The complainant was also informed that, pursuant to Staff Regulation R 2 5.19, applicable at that time, this disciplinary measure

would be recorded in his personal file "until the end of [his] employment at the Laboratory".

On 2 January 2021, the complainant lodged an internal appeal challenging the decision of 4 December 2020. This appeal was examined by the Joint Advisory Appeals Board (JAAB), which adopted its report on 21 September 2021. At the outset, the JAAB stated that it had considered "the direct subject of the appeal", which it identified as the Director-General's decision "to lodge a letter of warning as a disciplinary measure which [was] to be recorded in the complainant's personal file until the end of his employment". The JAAB further clarified that it did not consider "the harassment case itself which [had been] subject to the investigations of the [JADB]", emphasizing that it "ha[d] no mandate to investigate the recommendations of the JADB". The JAAB concluded that the decision to record the letter of warning in the complainant's personal file was justified. Nevertheless, considering that the complainant had not been subjected to further disciplinary measures, it recommended that the letter of warning be deleted from his personal file twelve months after its issuance in accordance with Staff Regulation R 2 5.04 applicable on the date of commencement of the disciplinary proceedings.

On 18 January 2022, the complainant was informed of the Director-General's decision to endorse the JAAB's recommendation to remove the letter of warning from his personal file, as of 4 December 2021. This is the impugned decision.

The complainant requests the Tribunal to set aside the impugned decision and to award him material and moral damages, as well as exemplary damages. He asks that EMBL be ordered to remove and destroy all documents relating to the disciplinary procedure from his personal file. Lastly, he seeks an award of costs and such other relief as the Tribunal considers just and proper.

EMBL asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant challenges the 18 January 2022 decision whereby the Director-General, Professor E.H., endorsing the JAAB's recommendation of 21 September 2021, partially allowed his appeal, lodged on 2 January 2021, against the 4 December 2020 decision whereby, in turn, the former Director-General, Professor I.W.M., following the opinion adopted on 17 November 2020 by the JADB, had issued him a letter of warning and established that this disciplinary measure would be recorded in his personal file until the end of his employment at the Laboratory. In the 18 January 2022 decision, the Director-General implicitly upheld the disciplinary measure of "written warning" but agreed to remove the letter of warning from his personal file as of 4 December 2021, i.e. twelve months after its issuance, in light of the statutory rules applicable on the date of commencement of the disciplinary proceedings.

2. At the outset, it is appropriate to recall the charge for which the complainant was sanctioned.

The disciplinary measure is based on the JADB's conclusion that:

> "The Board sees sufficient evidence supporting the occurrence of harassment by [the complainant] in the form of repeated, inappropriate and negative statements about [Ms J.H.] to third parties. It is perfectly reasonable that [Ms J.H.] felt intimidated and was affected by fear, stress and anxiety as a consequence of this harassment.
>
> The other allegations could not be substantiated."

In its findings, the JADB noted that the complainant had treated Ms J.H. "in an unacceptable way", through "statements to other group members about her mental health" which constituted "a serious offence". The JADB found that the complainant, in the said statements,

> "described [Ms J.H.] as acting 'emotional' and 'disturbed', and attributed [her] behaviour to her family situation. She rightfully considered it inappropriate and unethical for [the complainant] to discuss her private circumstances with others, and use [them] to denounce her."

In its findings, the JADB also noted that:

> "There have been conflicts regarding the publication of the Telomerase Project and the communication around it. [...] the witness statements suggest a lack of transparency and respect towards [Ms J.H.]."

However, in its final recommendations, the JADB focused only on the complainant's inappropriate statements, and expressly added that the remaining allegations could not be substantiated. Specifically, the finding of lack of transparency, contained in the investigation report, was not endorsed by the JADB, and was abandoned in its recommendations. Consequently, it is clear that the complainant was not sanctioned for a lack of transparency.

3. The Tribunal will now address the issue raised by EMBL in the initial part of its reply. EMBL contends that the complainant deals, albeit implicitly, with two different complaints: one against the disciplinary measure – which is the subject matter of the present litigation – and another against the termination of his contract – which is the subject matter of a different complaint before the Tribunal. According to EMBL, this approach is evident in the relief claimed by the complainant, which – by mentioning the loss of career prospects – appears concerned with the termination decision. EMBL argues that mixing the cases creates ambiguity which could be a source of confusion for the Tribunal and for the parties.

The Tribunal holds that the complainant has clearly established the scope of the present complaint, which is limited to the disciplinary measure of a written warning. He refers to the termination decision only to support his argument that he was sanctioned twice for the same facts, in breach of the *ne bis in idem* (double jeopardy) rule. Whether this plea is founded or not is a matter pertaining to the merits of the case, not its receivability, and will be addressed by the Tribunal later.

4. The complainant advances a number of arguments, grouped under three main headings, concerning, respectively, the proceedings before the JAAB, the investigation process, and the proceedings before the JADB. The three main headings are entitled:

(i) the JAAB procedure was flawed;

(ii) breaches of due process in the disciplinary procedure; and

(iii) the JADB proceedings were flawed.

5. Before addressing the complainant's arguments, it is appropriate to establish which were the applicable statutory rules *ratione temporis*, as EMBL Staff Rules and Regulations changed over time and differed when the alleged harassment occurred, when the disciplinary proceedings commenced, and when the disciplinary decision and the impugned decision were adopted.

According to the Tribunal's case law, when addressing a claim, an administrative authority must generally base itself on the provisions in force at the time it takes its decision, and not on those in force at the time the claim was submitted. Only where this approach is clearly excluded by the new provisions, or where it would result in a breach of the requirements of good faith, non-retroactivity of administrative decisions and protection of acquired rights, the above rule will not apply (see Judgments 3214, consideration 14, and 3034, consideration 33).

In the present case, in its recommendations, the JADB stated that the complainant's misconduct had to be assessed under the rules in force at the time it occurred and that, consequently, Internal Policy No. 67 entitled "Anti-Harassment Policy" effective July 2017 was inapplicable. Similarly, the JAAB, in its opinion, held that, regarding the insertion of the letter of warning in the complainant's personal file, the former rules (specifically: Staff Regulation R 2 5.04) rather than the new ones (specifically: Staff Regulation R 2 5.19) should apply, consistent with the principle of good faith.

The rationale underlying the JADB's recommendations and the JAAB's opinion is that the former rules were in force when the alleged misconduct occurred and the disciplinary proceedings began, and that the former rules were more favourable to the accused person.

The Tribunal concurs with this reasoning insofar as it concerns the assessment of misconduct, the disciplinary measure, and its further consequence, i.e. the recording of the disciplinary decision in the

personal file. Indeed, a general principle concerning disciplinary measures is that the applicable rules are those in force at the time the misconduct occurred, unless new rules are more favourable to the perpetrator, in which case the new rules apply.

However, regarding the statutory rules concerning the conduct of the disciplinary proceedings and internal appeals, the Tribunal maintains, in light of its case law, that the applicable rules were those in force when the proceedings were carried out and the related decisions were issued.

The Tribunal will address the complainant's pleas in light of the aforementioned reasoning.

6. Under the first main heading of his brief, listed in consideration 4 above, concerning the proceedings before the JAAB, the complainant contends, in brief, that by providing laconic reasons and stating that it had no mandate to investigate the JADB's recommendations, the JAAB misinterpreted its role as outlined by the Tribunal's case law. In the complainant's view, he was deprived of a fair internal appeal. However, he requests the Tribunal to address the case directly and not to refer it back to EMBL.

This plea is well founded.

In its recommendation of 21 September 2021 on the complainant's appeal, the JAAB stated the following:

> "The JAAB has NOT [sic] considered the harassment case itself which was subject to the investigations of the [JADB]. The JAAB has no mandate to investigate the recommendations of the JADB."

The Tribunal notes that this statement does not comply with the applicable rules and with the Tribunal's case law and, thus, the JAAB misconceived its role.

There are no statutory rules limiting the scope of the internal appeal on disciplinary matters or preventing the JAAB from addressing the proceedings and recommendations of the JADB. On the contrary, the statutory rules and regulations, in the version in force as from 1 January 2019 onwards, relevantly established that:

> "A disciplinary measure constitutes a decision which can be appealed to the Director-General pursuant to Chapter 6 of the Staff Rules and Regulations" (Staff Rule 2 5.06);
>
> "In respect of matters that concern him/her personally and adversely affect him/her, every member of personnel [...] shall have the right to appeal against any decision by the Director-General [...] An appeal may contest the conformity of the decision with the EMBL Staff Rules and Regulations, the conditions of a contract of employment or Internal Policies" (Staff Rule 6 1.01);
>
> "The JAAB may at any time take any measures, including any procedural or investigative measures, which it deems necessary for the examination of the case" (Staff Regulation R 6 1.16);
>
> "The JAAB shall make a detailed and structured report containing its recommendations [...]" (Staff Regulation R 6 1.17).

It is clear from these rules and regulations that the JAAB had a full mandate to address disciplinary matters and to review the JADB's recommendations.

It appears that, in the minds of the drafters of the JAAB's recommendation, the consideration that "the JAAB has no mandate to investigate the recommendations of the JADB" was based on the Tribunal's settled case law according to which it is not the Tribunal's role to reweigh the evidence before an investigative body, and the findings of such a body are entitled to considerable deference by it, unless they have been improperly established or reveal a manifest error (see Judgments 4703, consideration 8, 4291, consideration 12, 4091, consideration 17, and 3593, consideration 12). However, this case law concerns the role of the Tribunal itself, not that of an appeal body such as the JAAB. This case law is explained, inter alia, by the fact that it is not the Tribunal's role to conduct investigations similar to those conducted by an appeal body and by the idea that it is not best placed to assess the reliability of the statements of persons who may be heard in the course of an investigation. More generally, it refers to the particular features and limits of the Tribunal's judicial role. However, these specificities do not apply to appeal bodies and, as the Tribunal has held on several occasions, such a body is wrong, when, in defining its own role, it refers to restrictions that apply in certain cases to the judicial review of administrative decisions (see Judgments 3161,

consideration 5, and 3077, consideration 3). While the Tribunal's sole function is to review the lawfulness of these decisions and, ordinarily, it rules only on points of law, it is for the appeal bodies, which are vested with a power of review extending to a complete re-examination, to determine whether the decision submitted to them is, in their view, the correct decision or whether, on the facts, some other decision should be made (see Judgments 4923, considerations 4 to 6, 3161, consideration 6, and 3032, consideration 10). The power of internal appeal bodies extends to the overall re-examination of all matters submitted to them and is not subject to the same restrictions that might apply to the judicial review by the Tribunal. The only exception to this is where the rules governing the appeal body provide for such restrictions (see Judgments 5058, consideration 4, 3318, consideration 5, and 3077, consideration 3). The internal appeal bodies play a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from their composition, their extensive knowledge of the functioning of the organisation, and the broad investigative powers granted to them. By conducting hearings and investigative measures, they gather the evidence and testimonies that are necessary to establish the facts, as well as the data needed for an informed assessment thereof (see Judgments 5003, consideration 5, and 3423, consideration 12).

In the present case, as already noted, there were no restrictions on the JAAB's mandate in the area concerned, in light of the statutory law quoted above.

Additionally, the Tribunal notes that in the present case not only did the JAAB refuse to further investigate the case, it also refused to conduct a legal analysis of the proceedings before the JADB, in order to assess whether it complied with the applicable staff rules and regulations and whether the procedural flaws in the process alleged by the complainant had occurred.

It should be emphasized that this error of law, which resulted in the JAAB's refusal to fully review the disciplinary decision, had the effect of denying the complainant his right to have the merits of his internal appeal duly considered by that body. As a result, the complainant was not granted a fair and effective internal remedy.

This flaw, in itself, warrants the setting aside of the impugned decision.

7. Having found the impugned decision flawed due to the lack of a fair internal appeal, the Tribunal should ordinarily refer the case back to EMBL for the JAAB to properly examine the complainant's internal appeal. However, given the length of time since the events to which this case relates, and in accordance with the complainant's wishes, the Tribunal will not do so in this case and will itself determine the lawfulness of the disciplinary decision of 4 December 2020 (see, for example, Judgment 4923, consideration 7).

8. Under the second main heading of his brief, listed in consideration 4 above, the complainant advances a number of arguments contesting the lawfulness of the investigation process and the ensuing investigation report of 31 October 2017. His arguments are presented under the following subheadings:

(i) the disciplinary procedure was "initiated untimely";

(ii) the complainant's harassment complaint was provided to the alleged victims; and

(iii) the external investigator's investigation was flawed.

9. Under the first subheading listed in consideration 8 above, the complainant contends that both the "investigation" and "disciplinary" proceedings were "initiated untimely", on 24 April 2017, in violation of the applicable provisions, given that the Head of HR was aware of the alleged misconduct as of June 2016 or at least as of September-October 2016.

This plea is unfounded.

With regard to the allegation that the investigation was belated, the Tribunal notes that the Staff Rules and Regulations applicable at relevant times do not establish a specific time limit for the commencement of an investigation into harassment allegations.

It is worth noting, that Staff Regulation R 2 5.01, in the version in force at the relevant time (2017), concerns only the initiation of the disciplinary proceedings.

With regard to the allegation that the disciplinary proceedings were "initiated untimely", the Tribunal notes that Staff Regulation R 2 5.01, in the version in force at the relevant time (2017), read that:

> "[d]isciplinary measures [...] shall be initiated within 60 days after the offence was noted".

In the present case, disciplinary proceedings were initiated on 24 April 2017, as the Administrative Director noted the offence for the first time in February 2017 during interviews of Ms J.H. and of Ms C.H. in the proceedings concerning the harassment complaint lodged by the complainant. The complainant's contention that the organization took earlier note of his alleged offence is unproven. The complainant affirms that "[s]hortly after 10 June 2016, Ms [J.H.] met with the Head [of] HR and 'shared with him her difficulties with [the complainant] and her anxieties [...] that she felt '"intimidated"' and '"threatened"' [...]'".

There is no evidence in the record that such a meeting took place, as the complainant affirms, "shortly after 10 June 2016". The complainant has not provided the Tribunal with such evidence. The investigation report only states that "[a]fter [the complainant] had been formally informed of the decision to transfer Ms [J.H.] at the meeting on 10 June 2016, Ms [J.H.] met the Head [of HR] [...]. She shared with him her difficulties with [the complainant] and her anxieties." Thus, it is not established when the meeting between Ms J.H. and the Head of HR occurred, only that it took place after 10 June 2016, not specifically "shortly" thereafter. Additionally, the harassment episodes for which the complainant was sanctioned do not match with what was discussed during the said meeting between Ms J.H. and the Head of HR.

The complainant also relies on an email exchange of 30 September 2016 between Ms C.H. and Ms J.H. This exchange, however, was expressed in vague terms, and, crucially, it did not involve the authority competent to take note of the offence and to initiate disciplinary proceedings.

The complainant also relies on an email exchange of 19 October 2016 between Ms C.H. and the Head of HR. Neither did this document refer to the specific harassment episodes against Ms J.H. for which the complainant was sanctioned.

In conclusion, in the absence of counter-evidence, the Tribunal is satisfied that the disciplinary proceedings were initiated within the established deadline.

10. Under the first subheading listed in consideration 8 above, the complainant also alleges that Ms J.H. never lodged a harassment complaint against him and that she was "pressured" to be interviewed.

These arguments are unfounded.

11. For the purpose of assessing whether the disciplinary proceedings were commenced in due time, the complainant's argument that Ms J.H. never lodged a harassment complaint against him is irrelevant, as harassment may well amount to misconduct and an organization may pursue it by its own motion, even in the absence of a report by the alleged victim. Moreover, it is well settled in the case law that an international organization has a duty to provide a safe and adequate working environment for its staff members and that given the serious nature of allegations of harassment, an organization has an obligation to investigate them (see, for example, Judgment 5008, consideration 3).

The contention that Ms J.H. was "pressured" by the Administrative Director to be interviewed does not establish a legal flaw in the process. Ms J.H. released a written statement on 27 February 2020, addressed "to whom it may concern", which was in possession of the complainant, who submitted it to the JADB. The JADB refused to consider it. In her statement, Ms J.H. affirms: "I felt pressured by EMBL Administrative Director [...] to participate in the interviews, he literally told me 'I can force you but it would be better if you co-operate'. This I also shared with various people from EMBL and [the external investigator], however, it was never included in the transcripts."

It is unnecessary to establish how the complainant obtained this statement or to consider whether obtaining it was, as EMBL puts it, unethical, illegal, or possibly "amount[ing] to witness subornation". The Tribunal will ponder this written statement only for the purpose of addressing the complainant's plea that Ms J.H. was unlawfully pressured. The Tribunal holds that, at most, she was pressured to participate in the interviews but not with regard to the content of her statement. The fact that Ms J.H. affirms that she felt pressured "to participate in the interviews" does not imply that she lied in her answers or that her testimony was not credible.

12. Under the second subheading listed in consideration 8 above, the complainant contends that, prior to the commencement of disciplinary proceedings against him, he had lodged a harassment complaint, the content of which was shared by EMBL with Ms J.H. and Ms C.H.; this amounted, in his view, to a breach of confidentiality and may have undermined their credibility and that of other witnesses.

This plea is unfounded.

As EMBL notes in its reply, Ms J.H. and Ms C.H. were informed of the complainant's harassment complaint because they were interviewed regarding it as part of the investigation. During these proceedings, facts emerged that might amount to harassment perpetrated by the complainant, prompting the initiation of disciplinary proceedings against him. In these circumstances there was no unlawful breach of confidentiality. In any event, failure to respect confidentiality in an investigation process, even if it were proven, does not constitute a conclusive flaw in the proceedings that would justify setting aside the disciplinary decision. A breach of confidentiality, if proven, might only arguably entitle the complainant to moral damages (see, for example, Judgment 4858, consideration 14).

Turning to the issue concerning the credibility of the witnesses, the contention that their awareness of the complainant's harassment complaint might have undermined their credibility is mere speculation, also in light of the circumstance that Ms J.H. and Ms C.H. had not been accused of harassment against the complainant in his harassment

complaint. Thus, they had no reason to retaliate against him or to lie in their interviews. And, in fact, this reason has not been demonstrated or even alleged by the complainant.

13. Under the third subheading listed in consideration 8 above, the complainant contends that the investigation process conducted by the external investigator was flawed. This plea is threefold:

(i) the complainant was not interviewed despite his request on 17 October 2017 to which the investigator replied with an interlocutory answer on 18 October 2017, and, shortly thereafter, issued her investigation report on 31 October 2017;

(ii) he was provided only with the interview summaries of Ms J.H. and Ms C.H., and he was denied access to the interview summaries of other witnesses; and

(iii) the investigator erred in concluding that the complainant had engaged in harassment beyond reasonable doubt, as harassment does not occur if there are reasonable explanations or managerial necessity for the conduct.

With regard to the first argument listed above, EMBL replies that the investigator repeatedly invited the complainant to an interview, that he declined her invitations and submitted a written statement instead, and that, in any event, in light of the Tribunal's case law, the complainant had no right to be interviewed.

The complainant's pleas are unfounded.

The parties have not provided the Tribunal with a complete copy of the investigation report and of the correspondence between the investigator and the complainant. Based solely on the evidence in the record, provided in this respect by the complainant, it appears that on 17 October 2017 the complainant asked to be interviewed, that the investigator replied on 19 October 2017 "[t]his is to acknowledge receipt of your email, and to let you know that I am consulting the EMBL Administrative Director", and that shortly thereafter the investigator issued her report without explicitly allowing or disallowing the complainant's request.

However, the failure to interview the complainant during the investigation, in the specific circumstances of this case, does not vitiate the disciplinary decision.

The investigation process was carried out and finalized under the Staff Rules and Regulations in the version in force as of 1 January 2017, according to which, in the relevant part:

> "Staff Rules [...] 2 5.04 Before taking any disciplinary measures other than a warning or a written reprimand, the Director-General shall consult a Joint Advisory Disciplinary Board, [...] which shall give a hearing to the member of the personnel concerned."

In light of this provision, it was not mandatory for EMBL to interview the complainant at the investigative stage, which was only a preliminary step, as he could still be interviewed at the stage of the proceedings before the JADB.

As to the second argument, the Tribunal notes that the complainant received the investigation report and was able to comment on it on 23 March 2018, and on 24 April 2018 the Administrative Director notified the complainant that he had convened the JADB. These steps took place under the Staff Rules and Regulations in the version in force as of 1 January 2018, which contained the same Staff Rule 2 5.04 quoted above.

In light of these elements, there is no evidence that the complainant was denied access to the interview summaries of witnesses.

The Tribunal notes that the JADB indicated in its recommendations that the hearing before it was recorded, the minutes were submitted to the parties for their review, and the written statement of the witness proposed by the complainant was read during the hearing and annexed to the minutes of the hearing. The Tribunal is, thus, satisfied, that due process was ensured at the stage of the disciplinary proceedings.

The complainant's third argument, listed above, concerning the standard of proof in the investigation process, will be addressed later, given that the complainant makes similar remarks regarding the JADB's recommendations.

14. Under the third main heading of his brief, listed in consideration 4 above, the complainant alleges that the proceedings before the JADB were flawed, advancing the following arguments:

(i) in response to his comments of 23 March 2018 on the investigation report, the then Director-General on 17 July 2018 submitted to the JADB a lengthy and defamatory statement, concluding that the complainant had engaged in harassment, and relying on facts that had been excluded by the investigator. This amounted to a pre-judgment and to a lack of impartiality by the subject who was also due to be the decision-making authority and who should have awaited the JADB's recommendations before drawing conclusions;

(ii) the JADB failed to assess whether the investigation process complied with due process;

(iii) the JADB, in turn, committed several procedural errors as:

  (a) despite an express request by the complainant, the JADB did not invite witnesses he requested for the hearing and did not permit cross-examination, in violation of Staff Regulation R 2 5.10 and of Internal Policy No. 62 entitled "Procedures for EMBL Hearings";

  (b) it failed to compel the Administration to produce relevant and critical evidence requested by the complainant (emails relating to allegations in autumn 2016 between senior officials and the alleged victims), in violation of hearing procedures, section 10.2. of Internal Policy No. 62;

  (c) it did not consider relevant and material evidence, specifically emails in September and October 2016, demonstrating coordination by the Head of Outstation and the Head of HR with Ms J.H. and Ms C.H. to pursue misconduct charges against the complainant, and Ms J.H.'s written statement of 27 February 2020;

(iv) the JADB, together with the investigator, did not establish that the complainant had engaged in misconduct to the requisite standard (beyond reasonable doubt); the investigator wrongly

applied the Anti-Harassment Policy in force as of July 2017; the JADB's conclusion was undermined both by the submissions of the Director-General and by the "defamatory statements" made by the Legal Head, Mr P.V., in an email addressed to the JADB on 11 August 2020;

(v) the double jeopardy rule was violated, as the complainant was sanctioned twice for the same facts, through a written warning and termination of his appointment; and

(vi) the JADB did not act expeditiously, as the procedure lasted more than two and a half years.

15. Before addressing these arguments, the Tribunal notes that the JADB was convened on 19 April 2018 and it delivered its recommendations on 17 November 2020. It carried out its mandate over approximately 32 months, during which the applicable Staff Rules and Regulations changed significantly in parts relevant to the present case. One version was applicable as of 1 January 2018, and a different version was applicable as of 1 January 2019. In light of the Tribunal's reasoning in consideration 5 above, each step was governed by the version of the Staff Rules and Regulations in force when each step was taken.

16. The arguments listed under (i) in consideration 14 above, alleging a pre-judgment by the Director-General that affected the independence and impartiality of the JADB, are unfounded. The then Director-General submitted his comments to the JADB on 17 July 2018, under the Staff Rules and Regulations in force as of 1 January 2018, which relevantly contemplated, in Staff Regulation R 2 5.10, the participation of an EMBL representative in the proceedings before the JADB. Under these provisions the decision-making authority was the Administrative Director and not the Director-General (Staff Regulation R 2 5.12: "The Administrative Director shall decide on the measure to be applied"). As a result, the Director-General (at the time Professor I.W.M.) could lawfully represent the Laboratory before the JADB, as at that time – July 2018 – he was not due to be the decision-

making authority. However, when the disciplinary decision was issued on 4 December 2020, a new version of the Staff Rules and Regulations, applicable as of 1 January 2019, was in force. The decision-making authority in disciplinary matters was changed from the Administrative Director to the Director-General (Staff Regulation R 2 5.18), who, in addition, was also the officer in charge of deciding appeals against disciplinary measures (Staff Rule 2 5.06). Thus, what in effect occurred was that Professor I.W.M., in his capacity as Director-General, was fully entitled to represent the Laboratory before the JADB in 2018, which he did, but, later, in 2020, he was also responsible for issuing disciplinary measures under the new statutory rules, which he did by adopting the 4 December 2020 disciplinary decision. While he lawfully represented the Laboratory in 2018, when later called to adopt the disciplinary decision, he could have recused himself given his prior expression of opinion on the matter, but he did not. Thus, the 4 December 2020 decision might give rise to a suspicion of partiality. However, the complainant does not contend that the 4 December 2020 decision was flawed due to the Director-General's failure to recuse himself. He raises his pleas of breach of impartiality only concerning the proceedings before the JADB and the Director-General's submissions to the JADB. In his brief he states "[t]he JADB procedure was thus irretrievably tainted by the prejudgment expressed by Prof[essor] [I.W.M.] in his statement submitted to the JADB". The Tribunal cannot assess *ex officio* the unlawfulness of a decision for reasons not submitted by the complainant. Additionally, the Tribunal notes that the complainant bears the burden of proving that Professor I.W.M. was prejudiced against him or prejudged the case through his submissions to the JADB, and he has not discharged this burden. Indeed, the complainant has not provided the Tribunal with a full version of the 17 July 2018 submissions of Professor I.W.M. to the JADB. The version in the record consists of two pages containing only paragraphs 1 to 6 and 90 to 92 of said submissions. Nothing stated in those two pages supports the conclusion of a pre-judgment to the complainant's detriment. Furthermore, there is no evidence that the JADB's conclusion that the complainant committed harassment only in

a very narrow scope was prejudiced and influenced by the Director-General's submissions.

17. The argument listed under (ii) in consideration 14 above, alleging a failure of the JADB to assess whether the investigation process complied with the principles of due process, is unfounded. As already noted, there was no breach of due process as the complainant had the opportunity to test the evidence and to be heard before the JADB.

18. The arguments listed under (iii) in consideration 14 above, that the JADB did not invite witnesses requested by the complainant for the hearing, did not permit cross-examination, and did not allow further evidence requested or produced by the complainant, are unfounded.

The complainant contends that Staff Regulation R 2 5.10 of the Staff Rules and Regulations in force as of 1 January 2018 (and, thus, when the JADB was convened in April 2018), was applicable. This Staff Regulation provided for cross-examination of witnesses as follows:

> "The [JADB] shall give a full hearing in camera to the member of personnel and his representative, to the representative of the Laboratory, to the witnesses cited by the parties and any other witnesses whose evidence is considered relevant by the [JADB] and cross-examinations shall be allowed. A record shall be kept of all statements heard and shall be communicated to and approved by the parties."

The Tribunal notes that the complainant requested to cross-examine witnesses and identified an additional witness, Mr P.H., in a request submitted to the JADB on 30 April 2019. The hearing before the JADB took place on 27 May 2019.

In 2019, the Staff Rules and Regulations entered into force as of 1 January 2019 were applicable, whereas their former version relied upon by the complainant was no longer applicable. The new Staff Rules and Regulations no longer provided an unfettered right of the parties to cross-examine witnesses or to cite their witnesses. The new Staff Rules and Regulations relevantly provided:

"The JADB shall give a full hearing, in accordance with the internal policy on hearings" (Staff Regulation R 2 5.15);

"The JADB may request further investigations to be carried out by the Administrative Director or an external investigator if necessary" (Staff Regulation R 2 5.17).

In turn, Internal Policy No. 62 relevantly provided:

"10.1. The board may request any evidence it considers necessary or relevant to gather facts required to prepare its recommendation. This includes inter alia to hear witnesses or expert witnesses, to request or read documentary evidence, and to inspect objects.

10.2. The board must also permit the parties' requests to take evidence, unless a request for evidence is obviously inappropriate as evidence of a fact relevant to the decision, or the fact to be proven is already proven or of no relevance to the decision.

10.3. A request by a party must show a connection between the fact to be proved and the evidence specified.

10.4. If the majority of the board rejects a request for evidence, grounds for the decision must be provided in writing.

[...]

11. Witnesses

11.1. Witnesses are to be heard by the board in the presence of both parties and their presence minuted.

11.2. After questioning by the board, both parties shall be given an opportunity to question the witness."

In light of the rules, regulations and Policy applicable *ratione temporis*, the complainant had no absolute right to cross-examine witnesses, to list further witnesses, to request disclosure of documents, or to produce documents. The hearing of witnesses, as well as the collection of further documentary evidence, was subject to the JADB's decision. The JADB was permitted to reject the parties' requests if it deemed them "obviously inappropriate as evidence of a fact relevant to the decision, or the fact to be proven is already proven or of no relevance to the decision".

Section 11 of Internal Policy No. 62 concerning the hearing of witnesses does not imply that witnesses must always be heard and cross-examined, but only establishes the procedure to be followed in cases where the JADB allows the hearing of witnesses.

In the present case, the JADB held the hearing on 27 May 2019, allowed the complainant to submit the written testimony of Mr P.H., and dismissed the complainant's other requests, providing exhaustive reasons. It noted, in brief, that:

(i) all relevant matters were discussed with the complainant and his counsel during the 27 May 2019 hearing, which was recorded; the minutes of the hearing were distributed with the possibility to respond/comment;

(ii) the written statement of Mr P.H. was read during the hearing and was appended to the minutes; this statement was considered by the JADB;

(iii) further witness statements provided by the complainant on 26 May 2020 and on 7 July 2020 were not considered because they were presented after the deadline for the submission of documents and because the JADB could not thoroughly verify or carefully examine these new statements;

(iv) the JADB weighed the benefits of further interviews with Ms J.H. and Ms C.H. against their expressed wish not to be interviewed again and, on balance, decided that all relevant questions had been asked by an impartial person – the external investigator – and that, therefore, the benefits of additional interviews were not justified compared to respecting the alleged victims' personal needs; and

(v) the JADB had no reason to believe that relevant documentation had been withheld by any party involved in the case and concluded that all requested information had been fairly provided.

The Tribunal is satisfied that the JADB's reasons for rejecting the complainant's requests were sound and lawful, and that the complainant has not established to what extent the testimonies were not exhaustive or credible, or why there was a need for an interview of Mr P.H., after his written statement had been allowed. The Tribunal also notes that at least part of the additional documentation the complainant submitted to the JADB concerned the allegation that he had impeded collaboration

between Ms C.H. and Ms J.H., an allegation that the investigation report had already abandoned and for which he was not sanctioned. Thus, this documentation was irrelevant. As for Ms J.H.'s written statement of 27 February 2020, irrespective of how the complainant obtained it, the Tribunal notes that it does not disprove the previous statements rendered by Ms J.H. As for the complainant's request to the JADB for disclosure of emails by staff involved in the transfer of Ms J.H. and in the project she was working on when she changed groups, this request was vague and appeared to be a fishing expedition.

Crucially, the complainant was sanctioned only for his inappropriate language concerning Ms J.H. in his communications with other staff. This charge was supported by the evidence already before the JADB. Thus, the complainant's request for additional evidence relating to a different charge was superfluous.

In the circumstances of the case, the Tribunal is satisfied that due process requirements were respected, as the complainant was given the opportunity to test the evidence relied upon and to produce evidence to the contrary. Moreover, cross-examination of witnesses is not considered by the Tribunal's case law to be a mandatory requirement for the lawfulness of the investigation and the disciplinary proceedings (see Judgment 4770, consideration 6, and the case law cited therein).

19. The Tribunal will now address the complainant's arguments listed under (iv) in consideration 14 above, that neither the external investigator, nor the JADB, nor the disciplinary decision, nor the impugned decision established that he had harassed Ms J.H. beyond reasonable doubt.

The complainant also contends that the investigator unlawfully applied a harassment policy adopted after the events at issue occurred, specifically Internal Policy No. 67.

He adds that the JADB's independence and impartiality were compromised by the Director-General's submissions to the JADB and by an email sent to the JADB by the Legal Head.

These arguments are unfounded.

In its recommendations, the JADB acknowledged that Internal Policy No. 67 was first issued in July 2017, after the disciplinary proceedings had been initiated in April 2017. The JADB expressly grounded its recommendations only on the EMBL rules applicable at the time of the alleged transgressions (EMBL Staff Rules and Regulations, Code of Conduct, and Internal Policy No. 62), and on the Tribunal's case law on harassment. The disciplinary decision endorsed these recommendations. Thus, the investigation report's reliance on Internal Policy No. 67 had no bearing on the outcome of the case.

The complainant's doubts concerning the JADB's impartiality and independence are mere speculation. The questions regarding the Director-General's submissions have already been addressed and rejected in consideration 16 above.

The complainant further questions the JADB's independence, alleging that after he had submitted Ms J.H.'s written statement of 2020 to the JADB, the Legal Head, Mr P.V., made "defamatory statements" against the complainant and his counsel in an email dated 11 August 2020 to the JADB. In the complainant's view, "[t]hese attacks irretrievably prejudiced and compromised the independence of the deliberations of the JADB".

The Tribunal considers this allegation mere speculation unsupported by evidence.

As to the standard of proof required in disciplinary matters, the Tribunal recalls that its case law has consistently found that a staff member accused of wrongdoing is presumed to be innocent and is to be given the benefit of the doubt (see Judgments 4858, consideration 17, 4491, consideration 19, and 2913, consideration 9). The burden of proof rests on an organization to prove the allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be imposed (see Judgments 4858, consideration 17, and 4364, consideration 10). In respect of the standard of proof, the Tribunal stated that the relevant legal standard is beyond reasonable doubt (see, for example, Judgment 4362, consideration 7). Part of the Tribunal's role is to assess whether the decision-maker properly applied the standard when

evaluating the evidence (see, for example, Judgment 3863, consideration 8).

The fact that an organization, in finding that misconduct occurred, fails to use the exact wording "beyond reasonable doubt" does not necessarily imply that misconduct has not been proven to the requisite standard. It is for the Tribunal to assess whether an organization could consider misconduct to be proven to that standard even though the decision-making authority did not expressly use the term "beyond reasonable doubt" (see, for example, Judgment 4364, consideration 10).

In the present case, the Tribunal is satisfied that, in light of the applicable framework concerning harassment and the evidence gathered by the investigator, the JADB and the decision-making authority were right in concluding that the complainant had engaged in harassment towards Ms J.H. beyond reasonable doubt, within the narrow scope described in the JADB's recommendations. The Tribunal finds no element to question Ms J.H.'s credibility and the veracity of her interview. Additionally, the complainant does not clarify why the other witnesses should not be credible. He fails to adduce any evidence in this respect and he has not even provided the Tribunal with the summaries of the witness statements or the minutes of the JADB's hearing, when all issues were discussed, the written statement of the additional witness requested by the complainant was read, and the hearing was recorded.

As to the complainant's argument that the investigator failed to apply the "beyond reasonable doubt" standard of proof, the Tribunal notes that the role of an investigative body is to conduct a fact-finding investigation, that is to gather evidence and to recollect the facts in light of the evidence available. It is not the investigator's role to reach a conclusion of whether misconduct occurred beyond reasonable doubt. This evaluation is reserved to the decision-making authority (see, for example, Judgment 5008, consideration 9).

20. In his arguments listed under (v) in consideration 14 above, the complainant alleges a breach of the double jeopardy rule. In his view, he was sanctioned twice for the same facts, through the disciplinary measure of a written warning and the termination of his appointment.

This plea is unfounded.

The Tribunal recalls that, according to its precedents, the double jeopardy rule precludes imposing further disciplinary sanctions for acts which have already attracted a disciplinary sanction, but it does not prevent both disciplinary and non-disciplinary consequences from attaching to the same acts. That rule, therefore, does not prevent an organization from taking measures of various kinds, each corresponding to its interests in a particular area, in response to the same act or conduct by an official (see Judgments 4400, consideration 28, 3725, consideration 9, 3184, consideration 7, and 3126, consideration 17). In short, the double jeopardy rule prohibits that a person be tried and sanctioned twice for the same charge based on the same facts.

In the present case, the termination decision was motivated by the complainant's alleged unsuitability and was grounded, inter alia, on his involvement in harassment cases. In Judgment 4583, rendered on the complainant's sixth complaint against the termination decision, the Tribunal held, in essence, that the termination decision was grounded on misconduct, and that EMBL should have conducted disciplinary proceedings. Thus, EMBL erred in terminating the complainant's appointment via the procedure provided for termination of contract for professional unsuitability.

Given that Judgment 4583 found that the termination decision was grounded on the complainant's misconduct, including, inter alia, his "involvement in disciplinary and harassment procedures", it can be inferred that the Tribunal considered the termination decision to be a hidden disciplinary sanction.

Considering the true motives for that termination decision, which was, in essence, a hidden disciplinary sanction, the complainant is right in stating that EMBL sanctioned him twice for the same facts. However, the termination decision was set aside in Judgment 4583. Since it no longer exists, there are no longer two active sanctions for the same fact. In these circumstances, the disciplinary measure cannot be annulled for breach of the double jeopardy rule.

21. In his arguments listed under (vi) in consideration 14 above, the complainant contends that the JADB's procedure was unreasonably lengthy, lasting more than two and a half years. He seeks moral damages in this respect.

The Tribunal notes that the excessive duration of the JADB's procedure, even if proven, does not establish a legal flaw warranting the setting aside of the decision, but it can serve as grounds for a request for moral damages.

However, the allowance of a claim for moral damages requires that the claimant prove the moral prejudice he suffered.

In the present case, even if the duration of the JADB's process was excessive, the complainant has not established to the Tribunal's satisfaction that he suffered a moral prejudice. The claim for moral damages will be rejected in this respect.

22. In his rejoinder, the complainant advances a new plea, contending that the disciplinary proceedings against him were "likely taken in retaliation for [the] [c]omplainant's harassment complaint filed against the Head [of] HR on 18 January 2017".

This plea is unfounded, as the complainant's allegation is vague and unsubstantiated. A mere assumption or suspicion of retaliation does not meet the requisite standard of proof, the onus of which is borne by the complainant (see Judgments 4867, consideration 5, 4391, consideration 13, and 4363, consideration 12).

23. The complainant requests an award of moral damages of 50,000 euros for the delay in the procedure and for the fundamental breach of his right to a fair internal appeal procedure.

While this claim, as already stated in consideration 21 above, is unfounded to the extent it is grounded on the delay in the procedure, it is instead well founded to the extent it is grounded on the infringement of the complainant's right to a fair internal appeal.

The Tribunal has acknowledged in consideration 6 above the occurrence of such an infringement.

The error of law committed by the JAAB regarding the scope of its competence resulted in the complainant being denied his right to have the merits of his internal appeal duly examined by that body. Consequently, the complainant's right to an effective appeal was breached, which caused him, in the circumstances of the case, a manifest moral injury warranting redress. The Tribunal finds it fair to award him moral compensation in the sum of 5,000 euros.

24. In conclusion, the impugned decision will be set aside for lack of a fair internal appeal. The disciplinary decision is lawful and is upheld, along with its insertion in the complainant's personal file for one year. The complainant is entitled to moral damages for the reasons and in the amount established in consideration 23 above.

25. In light of the outcome of the case on the main claims, the complainant is not entitled to material damages or exemplary damages.

26. Since the complainant partly succeeds, he is entitled to costs, which – given his partial success and representation by counsel before the Tribunal – will be set at 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 18 January 2022 is set aside.
2. EMBL shall pay the complainant moral damages in the sum of 5,000 euros.
3. It shall also pay him 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 2025, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 10 February 2026 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.