JUDGMENT OF THE COURT (First Chamber)

14 October 2004 *

In Case C-409/02 P,

APPEAL under Article 56 of the Statute of the Court of Justice,

lodged on 18 November 2002,

Jan Pflugradt, represented by N. Pflüger, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

European Central Bank, represented by V. Saintot and T. Gilliams, acting as Agents, and B. Wägenbaur, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas, R. Silva de Lapuerta (Rapporteur), K. Lenaerts and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 March 2004,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

Judgment

1 In his appeal, Mr Pflugradt seeks annulment of the judgment of the Court of First Instance of the European Communities (Fifth Chamber) in Joined Cases T-178/00 and T-341/00 *Pflugradt* v *ECB* [2002] ECR II-4035 ('the judgment under appeal') dismissing his actions for annulment of two measures ('the contested measures') of the European Central Bank ('ECB'), the first, dated 23 November 1999, appraising the performance of the appellant ('the performance appraisal for 1999'), and the second, dated 28 June 2000, setting out a list of his main responsibilities ('the note of 28 June 2000').

Legal background

2 The Protocol on the Statute of the European System of Central Banks and of the European Central Bank (ECB) annexed to the EC Treaty (the 'ESCB Statute') includes the following provisions:

'Article 12

Responsibilities of the decision-making bodies

12.3. The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

...

Article 36

Staff

36.1. The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2. The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.'

3 On the basis of those provisions the Governing Council adopted, by decision of 9 June 1998 as amended on 31 March 1999 (OJ 1999 L 125, p. 32), the Conditions of Employment of the Staff of the ECB (the 'Conditions of Employment'), which provide inter alia as follows:

'9. (a) Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the application of these Conditions of Employment.

...

(c) No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law, and (iii) the rules contained in the EC regulations and directives concerning social policy which are addressed to the Member States. Whenever necessary, these legal instruments will be implemented by the ECB. EC recommendations in the area of social policy will be given due consideration. In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions.

10. (a) Employment contracts between the ECB and its members of staff shall take the form of letters of appointment which shall be countersigned by members of staff. The letters of appointment shall specify the terms of employment as required by Council Directive 91/533/EEC of 14 October 1991. ...

...

42. After all available internal procedures have been exhausted, the Court of Justice shall have jurisdiction in any dispute between the ECB and a member or a former member of its staff to whom these Conditions of Employment apply.

Such jurisdiction shall be restricted to the legality of the measure or decision, unless the dispute is of a financial nature, in which case the Court of Justice shall have unlimited jurisdiction.'

4 Pursuant to Article 12.3 of the ESCB Statute, the Governing Council adopted the Rules of Procedure of the ECB, as amended on 22 April 1999 (OJ 1999 L 125, p. 34), which provide inter alia as follows:

'Article 11

Staff of the ECB

11.1. Each member of the staff of the ECB shall be informed of his/her position within the structure of the ECB, his/her reporting line and his/her professional responsibilities.

...

Article 21

Conditions of Employment

21.1. The employment relationship between the ECB and its staff shall be determined by the Conditions of Employment and the Staff Rules.

21.2. The Conditions of Employment shall be approved and amended by the Governing Council upon a proposal from the Executive Board. The General Council shall be consulted under the procedure laid down in these Rules of Procedure.

21.3. The Conditions of Employment shall be implemented by Staff Rules, which shall be adopted and amended by the Executive Board.'

Background to the dispute

5 Mr Pflugradt has been employed by the ECB since 1 July 1998. He was appointed to the Directorate-General for Information Systems ('DG IS'), where from the time he was recruited he has worked as UNIX coordinator.

6 On 9 October 1998 the appellant agreed to the terms of a document entitled 'UNIX coordinator responsibilities', which contained a list of the various duties attaching to his post. Those duties included conducting appraisals with members of the UNIX team.

7 On 13 October 1998 the ECB sent the appellant a letter of appointment with retroactive effect to 1 July 1998.

8 On 14 October 1999 the Director-General of DG IS informed the appellant that he would not be responsible for preparing performance appraisals for members of the UNIX team.

9 On 23 November 1999 the appellant had an appraisal interview with his head of division. The head of division set out his assessment of the appellant in the latter's performance appraisal for 1999, which is the document contested in Case T-178/00.

10 On 12 January 2000 the appellant put forward several observations on the assessment made of him and wrote on his performance appraisal for 1999 that he reserved the right to reject an unfair appraisal.

11 On 10 March 2000 the appellant applied, under Article 41 of the Conditions of Employment, for an administrative review of the performance appraisal for 1999 on the ground that it was based on factual errors and therefore infringed his contractual rights. He also requested another appraisal for 1999, to be conducted by other persons who would be unbiased.

12 On 10 April 2000 the Director-General of DG IS rebutted the appellant's claims that the performance appraisal for 1999 contained factual errors and turned down the request for another appraisal procedure to be initiated.

13 On 9 May 2000 the appellant submitted a complaint to the President of the ECB under the grievance procedure, based essentially on the grounds relied on in the context of the administrative review procedure.

14 On 8 June 2000 the President of the ECB dismissed that complaint.

15 By note of 28 June 2000 the Director-General of DG IS sent the appellant a list of his main responsibilities, stating that that list would provide the basis for his annual appraisal. That document was the subject of the action in Case T-341/00.

The judgment under appeal

16 Having joined the two cases (T-178/00 and T-341/00), the Court of First Instance first found that, in his action in Case T-178/00, Mr Pflugradt was seeking annulment of the performance appraisal for 1999 first, in so far as it withdraws from him the responsibility for appraising members of the UNIX team and, second, in so far as it contains various assessments of his work.

17 In dismissing those claims, the Court held, in paragraphs 49 and 53 of the judgment under appeal, that although the employment relationship between the ECB and its staff is of a contractual nature and although the binding force of contracts precludes the ECB as an employer from imposing alterations to the conditions under which employment contracts are performed without the consent of the staff members concerned, that principle applies only to the essential elements of the employment contract.

18 In that connection, the Court of First Instance held in paragraph 54 of the judgment under appeal:

'The ECB, like any other institution or undertaking, has management powers in the organisation of its services and in the management of its staff. As a Community institution it even enjoys wide discretion in the organisation of its services and in the assignment of its staff to perform its public service responsibilities (see, by analogy, the judgments of the Court of Justice in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 17, and Case C-294/95 P *Ojha* v *Commission* [1996] ECR I-5863, paragraph 40; and the judgments of the Court of First Instance in Case T-33/90 *Von Bonkewitz-Lindner* v *Parliament* [1991] ECR II-1251, paragraph 88, and Case T-176/97 *Hick* v *ESC* [1998] ECR-SC I-A-281 and II-845, paragraph 36). It may therefore over time develop its employment relationships with its staff in the best interests of the service in order to arrive at an effective organisation of work and a consistent allocation of the various duties among members of the staff and to

adapt to varying needs. A member of staff recruited to a post for an indefinite period which might last until he reached the age of 65 cannot reasonably expect that every aspect of internal organisation will remain unchanged for his entire career or that he will retain throughout his career the responsibilities allocated to him at the time of his appointment.'

19 In paragraphs 58 to 60 of the judgment under appeal, the Court of First Instance then held:

'58 It is common ground that despite the alteration of his responsibilities the applicant retained his job as UNIX coordinator, falling within the category of professionals and Grade G, with the relevant remuneration.

59 It is clear from the job description of 5 October 1998 that the post of UNIX coordinator is essentially of a technical nature, and that the staff-related and administrative duties are merely secondary. Thus, withdrawal of the duty of appraising members of the UNIX team did not by itself result in downgrading, as a whole, the applicant's duties clearly below the responsibilities corresponding to his job. In that regard it is appropriate to point out that it is common ground that the applicant has never had to conduct appraisals for members of the UNIX team, as that responsibility was withdrawn from him even before the ECB embarked upon the first round of annual appraisals for its staff. In those circumstances the alteration in question does not represent a downgrading of the applicant's job and cannot therefore be regarded as infringing an essential element of the employment contract.

60 Consequently, the applicant's complaints are unfounded. That plea must therefore be rejected.'

20 In dismissing the plea concerning the assessment made in the performance appraisal for 1999, the Court of First Instance held, in paragraphs 68 to 71 of the judgment under appeal:

'68 Although he claims that the performance appraisal for 1999 is based on material factual errors, the applicant is seeking in fact to challenge the validity of the assessments made by his superiors of his work during 1999.

69 It is not, however, for the Court to substitute its assessment for that of the persons responsible for appraising the applicant's work. The ECB, like other institutions and bodies of the Community, enjoys wide discretion in appraising the work of members of its staff. Judicial review by the Court of the assessments contained in the annual performance appraisal of a member of the ECB staff relates only to possible procedural irregularities, manifest factual errors in such assessments and any misuse of power (see, by analogy, Case T-63/89 *Latham* v *Commission* [1991] ECR II-19, paragraph 19).

70 In the present case, as the applicant has failed to establish the existence of circumstances of that nature his complaints cannot be accepted.

71 Moreover, the reasoning in the performance appraisal for 1999 is sufficiently precise to satisfy the requirements of Article 253 EC, applicable under Article 34.2 of the ESCB Statute to decisions taken by the ECB.'

21 Second, the Court of First Instance found that Mr Pflugradt, in his submissions in Case T-341/00, sought to obtain the annulment of the decision contained in the note of 28 June 2000 in which the ECB, in his opinion, altered his responsibilities.

22 In paragraphs 81 and 82 of the judgment under appeal, the Court of First Instance accepted that that note constituted a measure adversely affecting the applicant and therefore declared the application admissible.

23 However, it dismissed those submissions on the merits, holding in paragraphs 89 and 90 of that judgment:

'89 First, as the Court has held in paragraph 54 in relation to Case T-178/00, the applicant cannot reasonably expect to retain until retirement age certain specific duties which may have been allocated to him when he was appointed by the ECB. Therefore the applicant's claims with regard to his allegedly exclusive areas of responsibility must be dismissed.

90 Second, as regards whether the ECB manifestly exceeded the limits of its organisational authority by unilaterally altering the applicant's responsibilities, it should be noted first that it is not disputed that those alterations were made in the interest of the service. Secondly, the applicant has not supported his arguments with detailed evidence sufficient to demonstrate that those alterations affect essential aspects of his employment contract by reducing his responsibilities as a whole clearly below those which correspond to his post and that they therefore constitute a downgrading of that post. On the contrary, it is plain that the applicant retains his essential duties with regard to the UNIX systems and the coordination of the UNIX specialists. The applicant's complaints regarding an alleged downgrading of his post must therefore be rejected.'

Forms of order sought

24 Mr Pflugradt claims that the Court should:

— annul the judgment under appeal;

— annul the performance appraisal for 1999;

— annul the note of 28 June 2000 in so far as it alters the responsibilities of the appellant;

— order the ECB to pay the costs.

25 The ECB contends that the Court should:

— dismiss the appeal;

— order Mr Pflugradt to pay the costs.

The appeal

26 The many arguments put forward by Mr Pflugradt must be regarded as constituting claims that the Court of First Instance made errors of law, distorted pleas, arguments and evidence, disregarded the rules of evidence and that its judgment was vitiated by contradictory grounds.

27 It is logical to group these claims into three sets of pleas concerning, respectively, the contractual nature of the employment relationship between the ECB and its staff, the misapplication of the principles governing the Community civil service and the facts on which the performance appraisal for 1999 was based.

The pleas concerning the contractual nature of the employment relationship between the ECB and its staff

28 Mr Pflugradt submits that, as the legal relationship between the ECB and its staff is of a contractual nature as provided by the first sentence of Article 9(a) of the Conditions of Employment, defined pursuant to Article 36.1 of the ESCB Statute, the Court of First Instance could not, without committing an error in law, base its determination of the ECB's powers of organisation on the case-law on the rules on assignment of officials and other servants referred to in Article 283 EC.

29 As a preliminary point, it must be observed that, under Article 36.2 of the ESCB Statute and Article 42 of the Conditions of Employment, the Court's jurisdiction in disputes between the ECB and its staff is restricted to the legality of the measure or decision, unless the dispute is of a financial nature.

30 In the present case, it is common ground that the dispute brought before the Court of First Instance by Mr Pflugradt was not of a financial nature. Accordingly, it had only to rule on the legality of the contested measures, that is to say, to determine whether those adopting the measures had respected the legal obligations incumbent upon them, and was not required to rule on whether the measures taken by the ECB were within the terms of the employment contract at issue and its implementing rules.

31 It must be borne in mind that the employment relationship between the ECB and its staff is defined by the Conditions of Employment, adopted by the Governing Council, on a proposal from the Executive Board of the ECB, on the basis of Article 36.1 of the ESCB Statute. They provide, in Article 9(a), that '[e]mployment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment'. Article 10(a) of those conditions provides that '[e]mployment contracts between the ECB and its members of staff shall take the form of letters of appointment which shall be countersigned by members of staff'.

32 It must be found that those provisions are comparable to those of the Staff Regulations of the European Investment Bank ('EIB') regarding which the Court concluded that the system adopted for the employment relations between the EIB and its employees is contractual and is accordingly founded on the principle that individual contracts concluded between the EIB and each of its employees constitute the outcome of an agreement resting on mutual consent (Case 110/75 *Mills* v *EIB* [1976] 955, paragraph 22, and Case C-449/99 P *EIB* v *Hautem* [2001] ECR I-6733, paragraph 93).

33 It must therefore be held that the employment relationship between the ECB and its staff is contractual rather than governed by public service regulations.

34 However, the contract at issue was concluded with a Community body, entrusted with public interest responsibilities and authorised to lay down, by regulation, provisions applicable to its staff. It follows that the consent of the parties to such a contract is necessarily circumscribed by all manner of obligations deriving from those particular responsibilities and incumbent upon both the management bodies of the ECB and its staff. It cannot be disputed that the Conditions of Employment are intended to meet those obligations and enable the ECB, in accordance with the third recital of the Conditions of Employment, to secure 'the service of staff of the highest standard of independence, ability, efficiency and integrity ...'.

35 On that point, according to Article 9(a) of the Conditions of Employment, the employment contracts are issued in conjunction with those conditions. Accordingly, by countersigning the letter of appointment provided for by Article 10(a) of the Conditions of Employment, staff agree to be bound by those conditions without being able to negotiate individually any of their terms. Consent is thus to an extent limited to acceptance of the rights and obligations laid down by the Conditions of Employment. It must be borne in mind that, as regards the interpretation of those rights and obligations, Article 9(c) of the Conditions of Employment provides that the ECB is to show due regard for the authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions.

36 It is true that the employment contracts of members of the ECB staff may contain other terms agreed to by the member of staff concerned following discussion, relating, for example, to the essential features of the tasks entrusted to him. However, the existence of such terms does not in itself preclude the exercise by the management bodies of the ECB of their discretion to implement the measures

entailed by the public interest obligations deriving from the particular responsibilities entrusted to the ECB. Those bodies may for instance be compelled, in order to meet such requirements of the service, and in particular to enable it to adapt to new needs, to take unilateral decisions or measures liable to alter inter alia the implementing conditions of employment contracts.

37 It follows that, in exercising that discretion, the management bodies of the ECB are not in any different position from that in which the management bodies of other Community bodies and institutions find themselves in their relations with their staff.

38 Against that background, the Court of First Instance, confining itself to considering the legality of the contested measures as it was bound to do, was right to see its role as the assessment of legality in the light of the principles applicable to all staff of other Community bodies and institutions. The Court of First Instance has, therefore, not disregarded the contractual nature of the position of the ECB staff members. Moreover, the Court of First Instance did not make an error of law in holding, in paragraph 59 of its judgment, that the alteration of the duties in question did not infringe an essential element of the employment contract.

39 In that light, contrary to Mr Pflugradt's contentions, the Court of First Instance, in dismissing the arguments relied on in that connection, disregarded neither the 'principle of institutional balance' nor 'the rules of evidence', nor did it distort the arguments relied on by the applicant in that case.

40 The pleas relied upon relating to the contractual nature of the employment relationship between the ECB and its staff must, therefore, be rejected.

The pleas concerning the application of the principles governing the assignment of staff

41 Mr Pflugradt submits that, even while, mistakenly, in his view, applying the principles governing the assignment of staff to the staff of the ECB, in the light of the law on the Community civil service, the Court of First Instance breached those principles.

42 It should be recalled that the Court of Justice has held that the Community institutions have a broad discretion to organise their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, provided such assignment is made in the interest of the service and conforms with the principle of assignment to an equivalent post (see *Lux* v *Court of Auditors*, cited above, paragraph 17; Case 19/87 *Hecq* v *Commission* [1988] ECR 1681, paragraph 6; and *Ojha* v *Commission*, cited above, paragraph 40).

43 For the reasons set out in paragraph 34 of this judgment, the ECB must, similarly, have a wide discretion to organise its departments to suit the responsibilities entrusted to it, and, consequently, having regard to those responsibilities, to define or redefine the duties which are assigned to its staff, provided that that discretion is exercised solely in the interest of the service and giving due consideration to the grade and classification which each member of staff may claim under the Conditions of Employment.

44 In pointing out, in paragraph 58 of the judgment under appeal, that it was common ground that despite the alteration of his responsibilities the applicant retained his job as UNIX coordinator, falling within the category of professionals and Grade G, with the relevant remuneration, the Court of First Instance confined itself to finding,

without making any error of law, that, in the redefinition of his duties, due consideration was given to the grade and classification Mr Pflugradt had enjoyed previously.

45 In that regard, Mr Pflugradt cannot validly plead before the Court of First Instance the illegality of the individual decisions classifying him and other members of staff of the ECB, given that the contested measures are, in any event, unrelated to those decisions. The appellant cannot subsequently complain that the Court of First Instance failed to rule on that plea of illegality, nor rely on a breach of the rules of evidence on that point.

46 Mr Pflugradt submits further that, as the ECB did not plead the interest of the service, the Court of First Instance disregarded the rules on the burden of proof in stating, in paragraph 90 of the judgment under appeal, that the applicant had not disputed that those alterations were made in the interest of the service.

47 However, it must be observed that, by that statement, the Court of First Instance merely found that the parties had not differed on the question whether the contested measures were taken in the interest of the service. As he was disputing the legality of those measures it was for Mr Pflugradt and not for the ECB to argue before the Court of First Instance that those measures did not fulfil the conditions to be met in order for them to be legal and, in particular, that they were not taken in the interest of the service. As he failed to do so, the appellant has no ground for claiming that the Court of First Instance thereby disregarded the rules regarding the burden of proof.

48 Mr Pflugradt claims, further, that the Court of First Instance gave contradictory grounds for its reasoning in paragraphs 59 and 90 of the judgment under appeal. In paragraph 59 the Court of First Instance held that the alteration made by the

performance appraisal for 1999 to the duties assigned to Mr Pflugradt did not concern an essential element of the employment contract, in so far as it concerned appraisals for members of the UNIX team. Although it then took the view that that was a sufficient ground to hold that the appraisal was not illegal because of the withdrawal of that duty, it did not thereby intend to preclude the possibility of accepting, where a withdrawal concerned another element of the contract, that such a withdrawal might have another ground related to the interest of the service. Accordingly, in assessing, in paragraph 90 of the judgment under appeal, the legality of the note of 28 June 2000 in the light inter alia of considerations relating to the interest of the service, the Court of First Instance in no way vitiated that judgment by contradictory grounds.

49 Thus, the pleas relating to the application of the principles governing the assignment of staff must also be rejected.

The pleas concerning the facts on which the performance appraisal for 1999 was based

50 Mr Pflugradt submits that, contrary to the finding of the Court of First Instance, he did not dispute the appraisal made of him by the ECB in its performance appraisal for 1999, but the facts on which that appraisal was based.

51 It is true that, in paragraph 68 of the judgment under appeal, the Court of First Instance held that, although he claims that the performance appraisal for 1999 is based on material factual errors, the applicant was seeking in fact to challenge the validity of the assessments made by his superiors of his work during that year.

52 However, that analysis, however ambiguous it may be, cannot be considered, contrary to the submissions of the appellant, to distort his arguments or breach the rules of evidence. First, where an applicant calls into question the facts on which an appraisal is based, he necessarily intends to dispute its validity.

53 Second, the Court of First Instance, having recalled, in paragraph 69 of the judgment under appeal, that its review could relate only to possible procedural irregularities, manifest factual errors in such assessments and any misuse of power, held, in paragraph 70, that the applicant had failed to establish the existence of circumstances of that nature. Thus, contrary to the appellant's submissions, the Court of First Instance, in finding that the existence of manifest factual errors had not been established, did rule on his plea alleging material factual errors, of which it was for the applicant in that case to adduce the evidence. The Court of First Instance thus in no way presumed those appraisals were lawful or disregarded the rules of evidence.

54 Moreover, the Court of First Instance did not commit an error of law in holding that it was not for it to substitute its assessment for that of the persons responsible for appraising the applicant's work (Case 29/70 *Marcato* v *Commission* [1971] ECR 243, paragraph 7, and Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359, paragraph 13).

55 Finally, if Mr Pflugradt intended to contest before the Court of Justice the factual allegations on which the performance appraisal for 1999 was based, such a plea is inadmissible in this appeal. According to Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal is to be limited to points of law (Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 40.

56 Accordingly, the pleas concerning the facts on which the performance appraisal for 1999 was based must also be rejected.

57 It follows from the foregoing that Mr Pflugradt's appeal must be dismissed in its entirety.

Costs

58 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 70 of those rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs. However, by virtue of Article 122 of those rules, Article 70 is not to apply to appeals brought by officials or other servants of the institutions. Since the ECB has applied for an order for costs against the appellant and his appeal has been unsuccessful, he must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Mr Pflugradt to pay the costs.

Signatures.