Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

13 April 2018 *

(Civil service — Officials — Members of the temporary staff — Members of the contract staff — Remuneration — EEAS staff posted to a third country — Article 10 of Annex X to the Staff Regulations — Annual assessment of the allowance for living conditions — Decision reducing the allowance for living conditions in Ethiopia from 30% to 25% — Failure to adopt general implementing provisions giving effect to Article 10 of Annex X to the Staff Regulations — Liability — Non-material damage)

In Case T-119/17,

Ruben Alba Aguilera, an official of the European External Action Service (EEAS), residing in Addis Ababa (Ethiopia), and the other EEAS officials and agents whose names are listed in the annex,[1] represented by S. Orlandi and T. Martin, lawyers,

applicants,

v

European External Action Service (EEAS), represented by S. Marquardt and R. Spac, acting as Agents, and by M. Troncoso Ferrer, F.-M. Hislaire and S. Moya Izquierdo, lawyers,

defendant,

APPLICATION pursuant to Article 270 TFEU seeking (i) the annulment of the EEAS decision of 19 April 2016 reducing, as of 1 January 2016, the allowance for living conditions paid to European Union staff posted to Ethiopia; and (ii), compensation in respect of the non-material damage allegedly suffered by the applicants,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, I. Labucka and I. Ulloa Rubio (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 December 2017,

gives the following

* Language of the case: French.

1 The list of other EEAS officials and agents is appended only to the version notified to the parties.

Judgment

Legal framework

1 Article 1b of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides, inter alia, that '[s]ave as otherwise provided in these Staff Regulations, … the European External Action Service … shall, for the purposes of these Staff Regulations, be treated as [an institution] of the Union.'

2 Article 10 of the Staff Regulations provides:

'A Staff Regulations Committee shall be set up consisting of representatives of the institutions of the Union and an equal number of representatives of their Staff Committees. The procedure for appointing members of the Staff Regulations Committee shall be decided by common accord of the institutions.'

3 Article 110(1) of the Staff Regulations states:

'The general provisions implementing these Staff Regulations shall be adopted by the appointing authority of each institution after consulting the Staff Committee and the Staff Regulations Committee.'

4 Annex X to the Staff Regulations establishes, under Article 1, the special exceptions applicable to EU officials posted to a third country.

5 Article 1 of Annex X to the Staff Regulations reads as follows:

'This Annex lays down the special and exceptional provisions applicable to officials of the European Union serving in a third country.

…

General implementing provisions shall be adopted in accordance with Article 110 of the Staff Regulations.'

6 The first paragraph of Article 8 of Annex X to the Staff Regulations provides:

'By way of exception, the appointing authority may, by special reasoned decision, grant an official rest leave on account of particularly difficult living conditions at his place of employment. For each such place, the appointing authority shall determine the town(s) where rest leave may be taken.'

7 Article 10(1) of Annex X to the Staff Regulations provides as follows:

'1. An allowance for living conditions shall be fixed, according to the official's place of employment, as a percentage of a reference amount. That reference amount shall comprise the total basic salary, plus the expatriation allowance, household allowance and dependent child allowance, less the compulsory deductions referred to in the Staff Regulations or in the regulations adopted to implement them.

…

The appointing authority may decide to grant a supplementary premium in addition to the allowance for living conditions in cases where an official has had more than one assignment to a place of employment considered difficult or very difficult. That supplementary premium shall not exceed 5% of the reference amount …'

8 By decision of 3 December 2014, the Director General for Budget and Administration of the European External Action Service (EEAS) adopted the guidelines establishing the method for setting the allowances for living conditions and the granting of rest leave ('the decision of 3 December 2014'). That decision, adopted on the basis of the decision of the High Representative of the Union for Foreign Affairs and Security Policy, of 17 December 2013, on the allowance for living conditions and the supplementary premium under Article 10 of Annex X to the Staff Regulations ('the decision of 17 December 2013'), came into force on 1 January 2015.

Background to the dispute

9 The applicants, Mr Ruben Alba Aguilera and the other persons whose names are listed in the annex, are officials or agents working in the EU delegation in Ethiopia.

10 On 19 April 2016, the EEAS Director General for Budget and Administration adopted, pursuant to Article 10 of Annex X to the Staff Regulations, a decision revising the amount of the allowance for living conditions ('the ALC') paid to agents posted to third countries ('the contested decision') By that decision, the ALC rate applicable to EU staff working in Ethiopia was reduced from 30% to 25% of the reference amount. Furthermore, it is apparent from the decision adopted on the same day by the EEAS Director General for Budget and Administration on the granting of rest leave to officials, temporary and contractual agents posted to third countries that rest leave is granted only if the place of employment is regarded as difficult or very difficult. Given that the rate of the ALC applicable to EU staff posted to Ethiopia had been reduced, the applicants also lost the benefit of rest leave.

11 Pursuant to Article 90(2) of the Staff Regulations, each of the applicants lodged, between 13 and 18 July 2016, a complaint against the contested decision with the appointing authority or the authority empowered to conclude contracts of employment.

12 By a decision of 9 November 2016, the appointing authority and the authority empowered to conclude contracts of employment rejected those complaints.

Procedure and forms of order sought

13 By application lodged at the Registry of the General Court on 20 February 2017, the applicants brought the present action.

14 On 15 May 2017, the EEAS lodged a statement of defence at the Court Registry.

15 By letter lodged at the Court Registry on 4 September 2017, the applicants' representatives informed the Court that Ms Tanja Haller was withdrawing her application.

16 By order of 25 September 2017 of the President of the Fifth Chamber of the General Court, Ms Haller's name was removed from the list of applicants.

17 The applicants claim that the Court should:

– annul the contested decision, inasmuch as it reduces, with effect from 1 January 2016, the ALC paid to staff posted to Ethiopia from 30% to 25% of the reference amount;

– order the EEAS to make a lump sum payment to the applicants, the amount of which is to be determined *ex aequo et bono* by the Court, in respect of the non-material damage suffered;

– order the EEAS to pay the costs.

18 The EEAS contends that the Court should:

– dismiss the action as unfounded;

– order the applicants to pay the costs.

Law

The claim for annulment

19 The applicants submit, in essence, that the contested decision must be annulled as it is unlawful.

20 The applicants rely on three pleas in law in support of their claim that the contested decision is unlawful. The first alleges breach of the obligation to adopt general implementing provisions ('GIPs'); the second, breach of Article 10 of Annex X to the Staff Regulations; and the third, a manifest error of assessment.

21 In support of their first plea, the applicants submit that the EEAS was bound, under the third paragraph of Article 1 of Annex X to the Staff Regulations and in accordance with Article 110 of the Staff Regulations, to adopt GIPs under Article 10 of Annex X to the Staff Regulations before adopting the contested decision.

22 In that regard, the applicants argue that the obligation to adopt GIPs before proceeding with the implementation of Article 10 of Annex X to the Staff Regulations derives from the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156) and that the EEAS has still not adopted such GIPs or taken any steps to that end.

23 Furthermore, the applicants maintain that the fact that the EEAS has set appropriate criteria to guide its assessment when revising the ALC applicable to agents posted to third countries, in internal guidelines, such as the decisions of 17 December 2013 and of 3 December 2014, is irrelevant inasmuch as those criteria are not enshrined in GIPs.

24 Lastly, the applicants argue that the EEAS cannot rely on the fact that the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156) was delivered only on 17 March 2016, that is to say, a little over a month prior to the adoption of the contested decision, given that, firstly, the obligation to adopt GIPs under Annex X to the Staff Regulations had already been affirmed in the judgment of 25 September 2014, *Osoria and Others* v *EEAS* (F-101/13, EU:F:2014:223); and secondly, and in any event, the obligation to adopt GIPs under Annex X to the Staff Regulations is set out in the third paragraph of Article 1 of that annex.

25 The EEAS does not dispute the fact that it is clear from the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), that it was under an obligation to adopt GIPs concerning Article 10 of Annex X to the Staff Regulations, given that the obligation under the third paragraph of Article 1 of that annex also covers the provisions governing the ALC.

26 However, the EEAS argues that the circumstances that led to the adoption of the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), differ materially from those in the present case. The EEAS maintains, in this regard, that in the case giving rise to the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), the only legal basis that it had at its disposal, prior to making the decision that led to the abolition of the ALC for officials or agents posted to the EU Delegation in Mauritius, was Article 10 of Annex X to the Staff Regulations. By contrast, in the present case, two framework measures, namely the decisions of 17 December 2013 and of

3 December 2014, were adopted prior to the adoption of the contested decision, the purpose of those decisions being to allow the EEAS to proceed to the annual ALC assessment exercise, as required by Article 10 of Annex X to the Staff Regulations.

27 Consequently, the EEAS considers that the decisions of 17 December 2013 and of 3 December 2014 constitute GIPs under Article 10 of Annex X to the Staff Regulations, or may at least be equated therewith, and this in accordance with the criteria set in the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156).

28 Firstly, it is apparent from the case-law that the GIPs within the meaning of Article 110 of the Staff Regulations refer to the GIPs expressly provided for by certain special rules in the Staff Regulations. In the absence of any express provision, the obligation to adopt GIPs subject to the formal requirements of Article 110 of the Staff Regulations can be recognised only in exceptional circumstances, that is, when the provisions of the Staff Regulations are so unclear and imprecise that any application of them must necessarily be arbitrary (see, to that effect, judgment of 9 July 1997, *Echauz Brigaldi and Others* v *Commission*, T-156/95, EU:T:1997:102, paragraph 53 and the case-law cited).

29 Consequently, the adoption of GIPs is mandatory in two situations: when the legislature expressly provides for it or where it is required by the very nature of the provision to be applied.

30 In the present case, while Article 10 of Annex X to the Staff Regulations, which is the legal basis for the contested decision, does not contain any express stipulation providing for the adoption of GIPs, by contrast the third paragraph of Article 1 of Annex X to the Staff Regulations, which pertains to Chapter 1 of that annex, on the 'General Provisions' of special and exceptional provisions applicable to officials posted to a third country, does expressly set out such an obligation.

31 In that regard, the provisions of the third paragraph of Article 1 of Annex X to the Staff Regulations are of general application and the GIPs, the adoption of which it provides for, concern the whole of Annex X to the Staff Regulations, including the provisions governing the grant of the ALC provided for in Article 10 of Annex X to the Staff Regulations. Consequently, an EU institution implementing those provisions is under the obligation to adopt GIPs under Article 10 of Annex X to the Staff Regulations, in accordance with the third paragraph of Article 1 of that annex.

32 The obligation deriving from the third paragraph of Article 1 of Annex X to the Staff Regulations to adopt GIPs prior to adopting a decision revising the amount of the ALC applicable to agents posted to third countries is explained by the fact that Article 10 of Annex X to the Staff Regulations confers a particularly broad margin of appreciation on the appointing authority with respect to the determination of the living conditions in third countries. Thus, in providing for such an obligation, the legislature intended, firstly, that the criteria to be applied in that determination should be established according to the procedure for adopting GIPs described in Article 110(1) of the Staff Regulations, a procedure which allows the appointing authority to seek clarification about the relevant parameters by consulting its staff committee and seeking the opinion of the Staff Regulations committee. Secondly, the legislature intended the criteria to be established in the abstract, independently of any procedure designed to revise, in a specific case, the amount of the ALC applicable to agents posted to a third country, in order to avoid the risk that the choice of criteria might be influenced by the outcome which the administration hoped to obtain (see, to that effect, judgment of 17 March 2016, *Vanhalewyn* v *EEAS*, T-792/14 P, EU:T:2016:156, paragraph 32).

33 That being so, the third paragraph of Article 1 of Annex X to the Staff Regulations cannot be regarded as merely setting down a formal requirement to be met by a decision revising the amount of the ALC applicable to agents posted to third countries, such as the contested decision. Instead, it provides that the prior adoption of GIPs in accordance with the procedure described in Article 110(1) of the Staff

Regulations is a mandatory requirement which must be fulfilled in order for a decision, such as the contested decision, to be legally adopted (see, to that effect, judgment of 17 March 2016, *Vanhalewyn* v *EEAS*, T-792/14 P, EU:T:2016:156, paragraph 33).

34 Firstly, it should be noted that the EEAS, acting with regard to its staff as an institution within the meaning of the Staff Regulations, has still not adopted GIPs for the implementation of Article 10 of Annex X to the Staff Regulations, in accordance with Article 110 of those regulations.

35 In the present case, first and foremost, the decisions of 17 December 2013 and of 3 December 2014 cannot be regarded as constituting GIPs within the meaning of the third paragraph of Article 1 of Annex X to the Staff Regulations. For the purposes of adopting merely internal guidelines, such as those decisions, the institutions are not bound to meet the requirements set by Article 110 of the Staff Regulations and, in particular, to seek the opinion of the Staff Regulations Committee or consult the staff committee of the institution concerned by the measure. By contrast, Article 110 of the Staff Regulations provides that GIPs cannot be adopted by an institution without the twofold requirement of consulting its staff committee and seeking the opinion of the Staff Regulations committee.

36 Next, at the hearing, the EEAS put forward the argument that the decision of 17 December 2013 and the decision of 3 December 2014 did not require the opinion of the Staff Regulations committee in order to constitute GIPs, given that those decisions were intended to apply solely to staff members serving in EU delegations in third countries. According to the EEAS, inasmuch as the staff posted to third countries consists of officials or agents of the EEAS or the Commission, consultation of the EEAS and Commission staff committees alone would be required.

37 It must be noted, in this regard, that such an interpretation cannot be accepted since the EU legislature has expressly laid down, in Article 110 of the Staff Regulations, a mandatory provision which distinguishes clearly between the obligation on the part of the appointing authority or authority empowered to conclude contracts of employment to consult the staff committee of the institution concerned and the obligation on the part of the appointing authority or authority empowered to conclude contracts of employment to seek the opinion of a body which brings together representatives of the administrations and staff of all institutions, that is to say, the Staff Regulations committee. Article 110 of the Staff Regulations confers competence on the Staff Regulations committee to issue opinions on all GIPs, which necessarily implies that such an opinion is such as to influence the decision of the appointing authority or the authority empowered to conclude contracts. To presume that the decisions of 17 December 2013 and of 3 December 2014 would necessarily have been the same had they been made further to the opinion of the Staff Regulations committee has the effect of rendering meaningless the obligation to seek the opinion of that committee, which must be able to set out its own views on the criteria guiding the exercise by the administration of its broad discretionary power to revise the amount of the ALC. The opinion of the Staff Regulations committee is therefore necessary in order to ensure that the implementing measures of the Staff Regulations, taken by the different institutions, are consistent and respect the principle of the integrity of the Staff Regulations.

38 Lastly, it should be noted that the opinion of an external inter-institutional body, such as the Staff Regulations committee, is required to ensure that the criteria, according to which the living conditions in third countries are determined, are established abstractly and independently of any procedure the purpose of which is to revise the amount of the ALC, in order to avoid the risk that the criteria chosen might be influenced by the outcome which the administration hoped to obtain. This is all the more so given that some of the criteria contained in Article 3 of the decision of 3 December 2014, such as the ‘general policy objectives’, ‘issues regarding recruitment’ or the ‘estimated budgetary impact’, which may be taken into account at the final stage in determining the ALC, are criteria which affect all of the institutions and not solely the EEAS.

39 Consequently, in view of the obligation for the EEAS to adopt GIPs under Article 10 of Annex X to the Staff Regulations, the fact that the appointing authority or authority empowered to conclude contracts of employment had, in the decisions of 17 December 2013 and of 3 December 2014, set appropriate criteria to guide its assessment when revising the ALC applicable to agents posted to third countries, is irrelevant inasmuch as those decisions cannot constitute GIPs within the meaning of Article 110 of the Staff Regulations, since they were not adopted in accordance with the procedure set out in that article.

40 Secondly, concerning the argument put forward by the EEAS that the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), was delivered only one month prior to the adoption of the contested decision, it should be noted that the obligation to adopt GIPs is set out in the third paragraph of Article 1 of Annex X to the Staff Regulations. Furthermore, in paragraph 33 of the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), the Court gave an interpretation of the rules, set out in Article 110(1) of the Staff Regulations and in the third paragraph of Article 1 of Annex X to the Staff Regulations, which clarifies and defines, where appropriate, their meaning and scope, setting out inter alia the manner in which they must or ought to have been understood and applied from the time of their enforcement (see, to that effect, judgment of 12 July 2011, *Commission* v *Q*, T-80/09 P, EU:T:2011:347, paragraph 164 and the case-law cited).

41 Moreover, the EEAS has not referred to any particular circumstance of such a nature as to prevent it from drawing all the consequences of the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156), prior to the adoption of the contested decision, if appropriate, by deferring the adoption of that decision.

42 In those circumstances, nothing can justify the EEAS' delay in meeting its obligation to adopt GIPs under Annex X to the Staff Regulations as a whole.

43 It follows from all of the foregoing considerations that the EEAS failed to have regard to its obligation to adopt GIPs under Article 10 of Annex X to the Staff Regulations.

44 Consequently, the contested decision must be set aside, without it being necessary to examine the other pleas in law raised by the applicants, in so far as that decision entailed a reduction, as of 1 January 2016, of the ALC paid to EU staff posted to Ethiopia.

The claim for damages

45 The applicants claim to have suffered non-material damage as a result of the failure, on the part of the EEAS, to give effect to the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156) on the obligation to adopt GIPs. In that regard, they request that the EEAS be ordered to pay them a lump sum, appraised *ex æquo et bono* by the Court, in respect of the non-material damage suffered.

46 The EEAS contends that the claims for damages should be rejected.

47 In that regard, firstly, concerning the *erga omnes* effects of a judgment annulling a measure, it is settled case-law that the failure to give effect to a judgment requiring the annulment of a measure constitutes a breach of the confidence that litigants must have in the EU judicial system, which is based, in particular, on respect for the decisions made by the EU Courts and itself entails non-material damage for the successful party, irrespective of any material harm that may result from that failure (judgments of 12 December 2000, *Hautem* v *EIB*, T-11/00, EU:T:2000:295, paragraph 51; and of 15 October 2008, *Camar* v *Commission*, T-457/04 and T-223/05, not published, EU:T:2008:439, paragraph 60).

48 However, it is also settled case-law that, although the *erga omnes* authority of an annulling judgment of a Court of the European Union attaches to both the operative part and the *ratio decidendi* of the judgment, it cannot entail annulment of an act not challenged before the EU Courts but alleged to be vitiated by the same illegality. The only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the EU Court is to determine the exact meaning of the ruling made in the operative part of the judgment. The authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever. In those circumstances, although the first paragraph of Article 266 TFEU requires the institution concerned to ensure that any act intended to replace the annulled act is not vitiated by the same irregularities as those identified in the judgment annulling the original act, that provision does not mean that it must, at the request of interested parties, re-examine identical or similar decisions allegedly affected by the same irregularity, addressed to addressees other than the applicant (see judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraphs 54 to 56 and the case-law cited).

49 In the present case, the applicants were not parties to the case which gave rise to the judgment of 17 March 2016, *Vanhalewyn* v *EEAS* (T-792/14 P, EU:T:2016:156). Consequently, they cannot rely on the case-law cited in paragraph 47 above in order to claim the existence of non-material damage linked to the failure to give effect to that judgment.

50 Furthermore, as regards the parties' non-material damage linked to the illegality of the annulled act, according to settled case-law, the annulment ordered by the Court is, in itself, adequate and, in principle, sufficient compensation for any non-material damage that an applicant may have suffered (see judgment of 18 September 2015, *Wahlström* v *Frontex*, T-653/13 P, EU:T:2015:652, paragraph 82 and the case-law cited).

51 Therefore, the applicants' claim for damages must be rejected.

Costs

52 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EEAS has been largely unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls the decision of the European External Action Service (EEAS) of 19 April 2016 reducing, as of 1 January 2016, the allowance for living conditions paid to European Union staff posted to Ethiopia from 30% to 25% of the reference amount;**

2. **Dismisses the action as to the remainder;**

3. **Orders the EEAS to pay the costs.**

Gratsias Labucka Ulloa Rubio

Delivered in open court in Luxembourg on 13 April 2018.

[Signatures]