Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

26 April 2017 *

(Civil service — Contract staff — Disciplinary proceedings — Suspension — Sums withheld from remuneration — Reprimand — Repayment — Article 24(4) of Annex IX to the Staff Regulations)

In Case T-569/16,

OU, residing in Brussels (Belgium), represented by J.-N. Louis and N. de Montigny, lawyers,

applicant,

v

European Commission, represented by C. Ehrbar and F. Simonetti, acting as Agents,

defendant,

ACTION pursuant to Article 270 TFEU for annulment of the decision of the Commission of 13 March 2015 rejecting the applicant's claims for repayment of sums withheld from his remuneration during a period of six months as from 15 January 2007, and for repayment of those sums together with interest payable on them,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, V. Valančius (Rapporteur) and U. Öberg, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

1 The applicant, Mr OU, was employed as a member of the local staff by the delegation of the Commission of the European Communities to Ukraine from 1 July 2003 to 30 April 2006, then as a member of the contract staff under Article 3a of the Conditions of Employment of Other Servants of the European Union ('CEOS') for three years as from 1 May 2006.

2 In December 2005, the European Anti-Fraud Office (OLAF) opened an internal investigation owing to suspicions of passive corruption on the part of the applicant.

* Language of the case: French.

3 Following the communication of information by OLAF to the Belgian judicial authorities, a warrant was issued for the arrest of the applicant, who was detained in custody pending trial from 30 May to 30 November 2006.

4 By decision of 12 December 2006, the authority empowered to conclude contracts of employment (the 'AECE') opened disciplinary proceedings against the applicant and immediately suspended him pending a definitive criminal judgment by the Belgian judicial authorities.

5 By decision of the AECE of 14 December 2006 (the 'decision of 14 December 2006'), the applicant was suspended for an indefinite period. That decision also stated that, pursuant to Article 24(1) of Annex IX to the Staff Regulations of Officials of the European Union (the 'Staff Regulations'), a sum of EUR 800 per month would be withheld from his remuneration for a period of six months, with effect from 15 January 2007.

6 By decision of the AECE of 24 May 2007, the applicant was dismissed, with effect from 1 July 2007.

7 By judgment of the tribunal de première instance de Bruxelles (Court of First Instance, Brussels (Belgium)) of 6 November 2011, the applicant was sentenced to a term of imprisonment of 18 months and a fine of EUR 5 000 for passive corruption. By judgment of 12 March 2014, the cour d'appel de Bruxelles (Court of Appeal, Brussels (Belgium)) annulled that judgment and sentenced the applicant to a suspended term of imprisonment of 12 months and a fine of EUR 3 000. The appeal on a point of law against that judgment was dismissed by the Cour de cassation (Court of Cassation (Belgium)) by judgment of 17 September 2014.

8 Following the judgment of the Cour de cassation (Court of Cassation) on 17 September 2014, disciplinary proceedings were resumed and, by decision of 18 February 2015, the AECE issued a reprimand to the applicant within the meaning of Article 9(1)(b) of Annex IX to the Staff Regulations (the 'penalty decision of 18 February 2015'). In that connection, it stated that the gravity of the applicant's misconduct, as established by the Belgian criminal courts, would have led it to terminate the applicant's contract without notice on disciplinary grounds if he had still been a member of staff. However, it considered that, given that the applicant's contract ended on 1 July 2007, a reprimand was the most severe penalty that could be imposed on him.

9 By emails of 18 and 26 February 2015, the applicant claimed the repayment of the sums withheld from his remuneration following the decision of 14 December 2006.

10 By decision of 13 March 2015 (the 'contested decision'), the AECE rejected the claim for repayment submitted by the applicant. Referring to the penalty decision of 18 February 2015, it asserted that the gravity of the applicant's misconduct would have led it to terminate the applicant's contract without notice on disciplinary grounds if he had still been a member of staff, and that a reprimand was the most severe penalty that could be imposed on him. It explained that, given that the penalty was imposed on him only because he no longer had any employment relationship with the institution, the application of Article 24(4) of Annex IX to the Staff Regulations was not warranted.

11 By letter of 8 May 2015, the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations against the contested decision, in support of which he alleged infringement by the AECE of Article 24(4) of Annex IX to those regulations, concerning the right to repayment of the sums withheld from the remuneration of a member of the contract staff when the decision concluding disciplinary proceedings imposes a penalty consisting of a reprimand.

12 By decision of 2 September 2015, the AECE rejected the complaint.

Procedure and forms of order sought

13 By application lodged at the Registry of the Civil Service Tribunal on 13 November 2015, the applicant submitted an application for legal aid. By order of 25 February 2016, the President of the Civil Service Tribunal granted the applicant's application for legal aid.

14 By application lodged at the Registry of the Civil Service Tribunal on 23 March 2016, the applicant brought the present action. The case was registered as Case F-141/15.

15 Pursuant to Article 3 of Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137), the present case was transferred to the General Court in the state in which it was found as at 31 August 2016. It was registered as Case T-569/16 and assigned to the First Chamber.

16 The General Court (First Chamber) decided, pursuant to Article 106(3) of the Rules of Procedure of the General Court, to rule on the action without an oral part of the procedure.

17 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to repay the sums withheld from his remuneration pursuant to the decision of 14 December 2006, together with compound interest at the rate specified in Article 12 of Annex XII to the Staff Regulations;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

19 In support of his action, the applicant raises a single plea in law, alleging infringement of Article 24(4) of Annex IX to the Staff Regulations.

20 The applicant claims that the AECE concluded disciplinary proceedings against him by issuing a penalty decision on 18 February 2015 imposing a reprimand on him, and that he is entitled, therefore, by virtue of that provision, to obtain the repayment of the sums withheld from his remuneration in accordance with the decision of 14 December 2006, together with compound interest at the rate specified in Article 12 of Annex XII to the Staff Regulations.

21 The Commission disputes that the AECE is required to repay the applicant the sums withheld from his remuneration. It notes that it was not possible to impose a more severe penalty than a reprimand on the applicant, and adds that the penalty does not reflect the gravity of his misconduct. Consequently, according to the Commission, the repayment of sums withheld, as a result of a literal interpretation of Article 24(4) of Annex IX to the Staff Regulations, would be incompatible with the objective of that provision, which is to remedy the effects of deductions considered, on the conclusion of disciplinary proceedings, to be excessive in the light of the insignificance of the misconduct established. A literal interpretation of this provision would also give rise to the unjust enrichment of the member of staff,

who would receive the repayment of the sums withheld from his remuneration despite the gravity of his misconduct, and would result in discrimination between members of staff who engaged in misconduct of the same nature during their employment, according to whether or not a continuing and permanent legal relationship had been retained with those staff after their duties had ceased. Therefore, members of staff such as the applicant, who no longer had any relationship with the Commission, could, since it would be impossible to have more serious penalties than a reprimand imposed on them, obtain repayment of deductions from their remuneration which were wholly justified when the decision to withhold was made. The Commission adds, in the alternative, that interest is payable on sums to be repaid only where no penalty has been imposed following disciplinary proceedings.

22 Pursuant to Article 24(1) and (4) of Annex IX to the Staff Regulations, applicable by analogy to contract staff and former contract staff pursuant to Articles 50a and 119 of the CEOS:

'1. The decision suspending an official shall state whether the official is to continue to receive his full remuneration during the period of suspension or what part thereof is to be withheld. ...

4. Sums withheld under paragraph 1 shall be repaid to the official if the final decision imposes a disciplinary penalty no more severe than a written warning, reprimand or deferment of advancement to a higher step, or if no disciplinary penalty is imposed; in the latter case, the repayment shall be made with compound interest at the rate defined in Article 12 of Annex XII [to the Staff Regulations].'

23 In the present case, by the decision of 14 December 2006, the AECE suspended the applicant for an indefinite period and withheld the sum of EUR 800 per month from his remuneration for a period of six months, with effect from 15 January 2007.

24 By the penalty decision of 18 February 2015, the AECE issued a reprimand to the applicant within the meaning of Article 9(1)(b) of Annex IX to the Staff Regulations.

25 By the contested decision, the AECE rejected the applicant's claim for repayment of the sums withheld from his remuneration following the decision of 14 December 2006. Referring to the penalty decision of 18 February 2015, it asserted that the gravity of the applicant's misconduct would have led it to terminate the applicant's contract without notice on disciplinary grounds if he had still been a member of staff and that a reprimand was the most severe penalty that could be imposed on him. It added that that penalty had been imposed on him only owing to the purely fortuitous circumstance that he no longer had any employment relationship with the Commission, and not owing to the insignificance of the misconduct established. It therefore concluded that the application of Article 24(4) of Annex IX to the Staff Regulations was not warranted in the present case.

26 Lastly, by decision of 2 September 2015, the AECE rejected the applicant's complaint against the contested decision. It asserted that the penalty of a reprimand was not proportionate to the gravity of the applicant's misconduct, and that it had only been imposed since it was in practice impossible to impose a heavier penalty on the applicant, given that there was no employment relationship between the applicant and the Commission and that he was not receiving a pension or allowance from the Commission. It added that repaying the applicant the sums withheld from his remuneration would be incompatible with the spirit of Article 24(4) of Annex IX to the Staff Regulations, and the principle that a disciplinary penalty must reflect the gravity of the misconduct established. Lastly, it took the view that repaying the applicant the sums withheld from his remuneration would only worsen the imbalance, to the Commission's detriment, between the damage it suffered and the penalty it finally imposed.

27 In the present case, it should be examined in turn whether, contrary to the AECE's findings, the applicant was right to claim, first, the repayment of the sums withheld from his remuneration following the decision of 14 December 2006 and, second, the interest payable on these sums specified in Article 12 of Annex XII to the Staff Regulations.

28 First, on the question of whether the AECE was right to consider that the applicant had no right to repayment of the sums withheld from his remuneration, it must be noted that, as the Commission itself acknowledges, Article 24(4) of Annex IX to the Staff Regulations provides for the repayment of sums withheld from the remuneration of a suspended official subject only to the condition that no penalty has been imposed or that a written warning, a reprimand or a temporary deferment of advancement to a higher step has been imposed in the decision concluding the disciplinary proceedings, with no other condition or restriction.

29 As the Commission states, it is necessary, in interpreting a provision of EU law, to take into account not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgments of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 73 and the case-law cited, and of 7 March 1996, *de Rijk* v *Commission*, T-362/94, EU:T:1996:35, paragraph 32 and the case-law cited).

30 Nonetheless, in the present case, the AECE interpreted Article 24(4) of Annex IX to the Staff Regulations in a manner manifestly contrary to its clear and precise wording.

31 The AECE based its refusal to grant the application for the sums withheld from the applicant's remuneration on the fact that the applicant's misconduct was grave enough to justify immediate termination of his contract for disciplinary reasons, if his contract had not already been terminated and that he had, therefore, been issued with a reprimand owing to the purely fortuitous absence of an employment relationship with the Commission and not to the insignificance of that misconduct.

32 Article 24(4) of Annex IX to the Staff Regulations provides that it is on the basis only of the penalty imposed in the decision closing disciplinary proceedings that it may be determined whether sums withheld from remuneration must be repaid, and the assessment of the gravity of the misconduct of the person concerned has no relevance in that regard.

33 It should also be noted that, under Article 10 of Annex IX to the Staff Regulations, the disciplinary penalty imposed is to be commensurate with the seriousness of the misconduct. Nonetheless, sums withheld from remuneration do not constitute a disciplinary penalty, but only a temporary measure taken pending the conclusion of disciplinary proceedings and, as the case may be, adoption of a disciplinary penalty (judgment of 16 July 1998, *Y* v *Parliament*, T-219/96, EU:T:1998:178, paragraph 29). Sums withheld from remuneration can therefore not be used by the administration to redress possible discrepancies between the gravity of a member of staff's misconduct and the penalty imposed on him on conclusion of disciplinary proceedings.

34 The AECE, which has circumscribed powers in the present case, therefore, in essence, made the application of Article 24(4) of Annex IX to the Staff Regulations subject to a condition not laid down by that provision, deriving from its assessment of the gravity of the misconduct for which a penalty was imposed.

35 Furthermore, contrary to what the Commission contends, the Court cannot find that Article 24(4) of Annex IX to the Staff Regulations has a lacuna that must be supplied as regards former officials or other staff who do not receive a pension or allowance, or who receive a pension or allowance that is too low to be able to impose on them disciplinary penalties with financial consequences. Even if this allegation were well founded, it could nonetheless not lead the Court to interpret that provision in a manner contrary to its clear and precise wording, thereby unduly restricting its scope.

36 The same reasoning applies to the Commission's allegations relating to the alleged unjust enrichment of the member of staff, who would receive the repayment of the sums withheld from his remuneration despite the gravity of his misconduct, and relating to the alleged discrimination between members of staff who engaged in misconduct of the same nature during their employment, according to whether or not a continuing and permanent legal relationship had been retained with those staff after their duties had ceased.

37 These allegations stem from the alleged lacuna in Article 24(4) of Annex IX to the Staff Regulations. Consequently, they must be dismissed for the reasons set out in paragraph 35 above. Moreover, it should be noted that former staff retaining a permanent relationship with the Commission, as in the case of receipt of an allowance or a pension, are not in the same situation as former staff who do not receive a pension or allowance, in respect of the disciplinary penalties which may be imposed on them. That state of affairs is a result, specifically, of the application of the regulations themselves, particularly of Article 9 of Annex IX to the Staff Regulations and Article 49 of the CEOS, which list the disciplinary penalties which may be imposed on a member or former member of staff.

38 Lastly, the Commission cannot maintain that a literal interpretation of Article 24(4) of Annex IX to the Staff Regulations would deprive of any practical effect the right to withhold sums from the remuneration of a suspended member of the contract or temporary staff. As set out in paragraph 28 above, the right to repayment of sums withheld is only available, under this provision, to staff on whom no penalty has been imposed, or on whom a written warning, a reprimand or a temporary deferment of advancement to a higher step has been imposed, on conclusion of disciplinary proceedings. Moreover, it should be noted that the interpretation upheld by the AECE in the contested decision and defended by the Commission resulted in that provision being deprived of any practical effect in the present case.

39 It follows from the foregoing that the AECE infringed Article 24(4) of Annex IX to the Staff Regulations by refusing to repay the applicant sums withheld from his remuneration by virtue of the decision of 14 December 2006.

40 Secondly, on the question of whether the applicant was entitled to claim from the AECE interest pursuant to Article 12 of Annex XII to the Staff Regulations on the sums withheld from his remuneration when they are repaid, Article 24(4) of Annex IX to the Staff Regulations provides that such interest is payable on those sums only when no penalty has been imposed on conclusion of the disciplinary proceedings.

41 Given that a reprimand had been issued to the applicant by the penalty decision of 18 February 2015, the applicant cannot claim interest on the sums of which he is entitled to claim repayment.

42 Given that the present dispute is of a financial character, the Court has unlimited jurisdiction, pursuant to Article 91(1), second sentence, of the Staff Regulations. Consequently, the order sought by the applicant that the Commission repay him the sums withheld from his remuneration under the decision of 14 December 2006 must be granted.

43 It follows from the foregoing that the contested decision should be annulled and the Commission ordered to repay the applicant the sums withheld from his remuneration pursuant to the decision of 14 December 2006, without the interest payable under Article 12 of Annex XII to the Staff Regulations.

Costs

44 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, as the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (First Chamber),

hereby:

1. **Annuls the decision of 13 March 2015 by which the European Commission rejected the application of Mr OU for repayment of sums withheld from his remuneration pursuant to the decision of the Commission of 14 December 2006;**

2. **Orders the Commission to repay Mr OU the sums withheld from his remuneration pursuant to the decision of 14 December 2006;**

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

Pelikánová Valančius Öberg

Delivered in open court in Luxembourg on 26 April 2017.

[Signatures]