Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (First Chamber)

27 September 2011 *

(Civil service — Staff of the ECB — Annual salary and bonus review — 2008 review — Annual assessment — Criteria for assessment — Staff Committee consultation — Taking account of periods of sick leave — Setting of objectives)

In Case F-98/09,

ACTION brought under Article 36.2 of the Protocol on the Statute of the European System of Central Banks and the European Central Bank, annexed to the EC Treaty,

Sarah Whitehead, member of the staff of the European Central Bank, residing in Frankfurt am Main (Germany), represented by L. Levi and M. Vandenbussche, lawyers,

applicant,

v

European Central Bank (ECB), represented initially by F. Feyerbacher and G. Nuvoli, acting as Agents, and by B. Wägenbaur, lawyer, and subsequently by E. Carlini and G. Nuvoli, acting as Agents, and by B. Wägenbaur, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni, President, H. Kreppel (Rapporteur) and M.I. Rofes i Pujol, Judges,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2011,

gives the following

Judgment

1 By application received by fax at the Registry of the Tribunal on 20 November 2009 (the original being lodged on 26 November 2009), Ms Whitehead seeks, principally, annulment of the decision of the European Central Bank (ECB) of 8 January 2009 awarding her, under the Annual Salary and Bonus Review ('the ASBR'), a salary increase of two points (steps), and compensation for the non-material damage she suffered, evaluated *ex aequo et bono* at EUR 10 000.

* Language of the case: English.

Legal context

2 Article 36 of 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'), in the version in force at the material time, contains the following provisions:

'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 [of the European Union] 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 The Governing Council of the ECB first adopted the Conditions of Employment for Staff of the ECB on 9 June 1998, pursuant to Article 21 of the ESCB Statute (Decision of the ECB of 9 June 1998 on the adoption of the Conditions of Employment for Staff of the ECB, as amended on 31 March 1999, OJ 1999 L 125, p. 32, and on 5 July 2001, OJ 2001 L 201, p. 25 – 'the Conditions of Employment').

4 Further, pursuant to Article 12.3 of the ESCB Statute, the Governing Council adopted the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33) which, in the version in force at the material time, contain the following provisions:

'11.2 Without prejudice to Articles 36 and 47 of the Statute, the Executive Board shall enact organisational rules (hereinafter referred to as Administrative Circulars) which are binding on the staff of the ECB.

…

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

21.2. The Governing Council, upon a proposal from the Executive Board and following consultation of the General Council, shall adopt the Conditions of Employment.

21.3. The Executive Board shall adopt the Staff Rules, that shall implement the Conditions of Employment.

21.4. The Staff Committee shall be consulted before the adoption of new Conditions of Employment or Staff Rules. Its opinion shall be submitted to the Governing Council or the Executive Board respectively.'

1. *The ASBR procedure*

5 Articles 5 and 6 of Annex I to the Conditions of Employment, in their version in force at the material time, relating to the salary structure, provide:

'5. The Executive Board shall determine individual salary increases within the overall limits it adopts in the Annual Salary and Bonus Review exercise. Such individual salary increases shall be based on the assessment of the growth of a member of staff's contribution to the tasks of the ECB relative to that of other members of staff who perform their duties within the same business area.

6. The Executive Board may decide to delegate the authority to determine individual salary increases.'

6 On 6 August 2008 the Executive Board adopted the following decision ('the decision of 6 August 2008'):

'1. The powers established in Article 5 of Annex I – Salary Structure of the Conditions of Employment shall be delegated in directorates general to the Director General and to the Director in directorates that are not a subunit of a directorate general, of the business area in which the member of staff is employed as outlined in the Annex. For members of staff employed in the Counsel to the Executive Board, the Coordinator to the Counsel to the Executive Board shall be delegated those powers.

2. The powers under paragraph 1 shall be exercised within the budget established annually by the Executive Board for the [ASBR] and on the basis of criteria which have been established by the Executive Board for assessing the growth of a member of staff's contribution to the tasks of the ECB relative to that of other members of staff who perform their duties within the same business area.'

7 On the basis of Article 5 of Annex 1 to the Conditions of Employment an ASBR procedure has been introduced, the objective of which is to award, within the limits of the expenditure budget provided for that purpose by the Executive Board of the ECB, salary increases and/or bonuses to members of staff based on an assessment of their services.

8 The ASBR procedure was explained in a document entitled 'The Annual Salary & Bonus Review [ASBR]' ('the 2008 Guidelines'), accessible inter alia on the ECB intranet.

9 The 2008 Guidelines provide:

'…

1. Objective of [the ASBR]

The ECB's reward policy has been created with the objective of rewarding an individual's performance and achievements by linking their salary level to their contribution to the success of the ECB in achieving its objectives. Furthermore, the policy is based on the following principles:

— Individual salary awards should recognise increasing personal development and increasing contribution to the success of the business area and the ECB at large. In view of the hard budget constraint underlying the ASBR, the increasing personal development and increasing contribution must be regarded relative to others. The ECB depends on a variety of inter-dependent contributions from different groups and individuals. Therefore the reward system is based on an assessment of contribution both as an individual and in the qualities they bring to a team, within their own business area, as well as in the case of co-operation in cross-organisational initiatives. It can be expected that behavioural attitudes which support the ECB values will have a positive impact on individual and team performance, the success of individual business areas and the ECB at large. Such attitudes should therefore play a role as well in rewarding staff.

— The ECB endeavours to foster the flexibility of staff members, e.g. in showing willingness for mobility and involvement in cross-organisational initiatives. An important factor when considering awards is the extent to which staff members that have been mobile or involved in those initiatives have integrated within the new work environment and have brought in fresh ideas … . The flexibility shown by these staff members should therefore be properly reflected in their awards.

— Given its public exposure, the ECB remains committed to prudent management of its salary bill, and a budget of 1.5% for salary increases and 1.5% for bonuses has been decided.

The ASBR provides an important opportunity to support these principles, and they should be recognised in making the decisions on individual awards.

It is important to stress that the expected level of contributions and performance increases as staff members progress through their salary bands. Differences in the salaries of staff members that are not commensurate with differences in their individual contributions can be corrected by awarding salary increases of different sizes. …

2. Reward types

There are 2 types of funds available to reward staff: salary increases and bonus awards.

2.1 Salary increases

Salary increases are used to recognise an individual's personal development and added contribution over the past year, with an expectation that this would be sustained into the future. The decisions on individual salary increases should be based on the abovementioned principles and properly explained.

2.1.1 Award levels and distribution.

Salary awards are from 0 up to 14 points. Every point equals a salary raise of approximately 0.25%. Members of staff are awarded from 0 up to 14 points. …

…

2.2 Bonus awards

In contrast to salary increases, bonus awards are generally used to recognise and reward achievements of a short term nature or performance which is not specifically linked to an increase in personal development. …

3. Indirect relationship between the ASBR and the Appraisal

The ASBR and the Appraisal are two separate exercises with different objectives. As a result, there is no mechanistic link between them, nor consequently a requirement that the Appraisal is completed before the ASBR is undertaken. Nevertheless, conducting the individual appraisals in advance of ASBR decisions being made is in line with best practice and is the preferred approach.

The Appraisal exercise is directed at recognising areas of achievement and identifying areas of performance in which the individual, in his or her specific situation, can improve, irrespective of how the staff member has performed relative to other staff members. The Appraisal has thus the character of a "normative" exercise. It refers solely to the achievements of the individual against the individual objectives within the specific individual context, and does not carry a comparative notion.

The ASBR, on the other hand, must, in view of the budgetary constraints and bearing in mind the principle of reward based on merit, consider an individual's contribution relative to others within the same business area, taking into account the level of contribution that can be expected in view of the individual's position in the Salary Band. Consequently, a "good" appraisal of a staff member whose

salary is high in the relevant Band should generally result in a lower salary award than an equally "good" appraisal for a staff member in the lower part of the same Salary Band. The ASBR has thus the character of a "comparative" exercise.

…

The ASBR is therefore a separate assessment independent from the Appraisal. As a result, a direct read across from one exercise to another is not possible. Although there is no direct link, the overall messages from the Appraisal and the ASBR should be internally consistent.

4. Budget considerations and allocation

The Executive Board reviews the ASBR expenditure budget each year. The budget for salary increases is currently 1.5% of the salary bill, while a separate budget, also 1.5% of the salary bill, is available for bonus awards.

… The ASBR budgets are pro-rated in cases of part time work and unpaid leave. They are not pro-rated by maternity leave and sick leave, since these periods are considered as working time. Award decisions should be made based on an assessment of the staff member's relative development of performance during the year.

…'

10 A document titled 'Frequently Asked Questions' ('FAQ'), in the version available on the ECB intranet at the material time, contains the following:

'Applying the ASBR

— **What is needed to get a salary increase and/or bonus?** The general principles on which the ASBR is based are laid down in [the 2008 Guidelines]. These principles, together with individual objectives, are used by the management within each business area to decide on appropriate award levels. An important thing to remember is that the ASBR is a comparative exercise and, as such, each staff member's performance and development is assessed relative to that of their colleagues within the same business area. Meeting your individual objectives does not, on its own, guarantee a (certain level of) salary increase and/or bonus. Each staff member's position within their salary band and the respective achievements of other staff in the business area are also taken into consideration. In addition, decisions on the appropriate award levels are made while taking the budget constraints and the boundaries laid down in the ASBR policy into consideration.

…

— **What is done to ensure a fair ASBR exercise?** The fairness of decision making is supported by:

  — communicating the objectives and general principles for the ASBR in advance;

  — involving all managers/supervisors to whom staff members have reported and with whom staff members have co-operated for a substantial period of time during the year in the decision making process;

  — providing real time statistic information to management when entering the ASBR data to raise awareness on possible bias on gender and salary bands giving Area Heads the possibility to ensure a consistent approach across their entire business area;

— scrutinising the ASBR proposals by DG/H [Directorate General Human Resources, Budget and Organisation] against the ASBR policy;

— explaining ASBR decisions and the basis behind those decisions to individual staff members;

— providing statistical information on the distribution of awarded salary increases and bonuses once the exercise has been completed.

…

— **How does part time work and leave affect the ASBR budgets?** The ASBR budgets are pro-rated in cases of part time work and unpaid leave. They are not pro-rated by maternity leave and sick leave, since these periods are considered as working time. Award decisions should be made based on an assessment of the staff member's relative development of performance during the year.

The link between ASBR and other HR instruments

— **What is the difference between the ASBR and the appraisal?** The appraisal is a developmental tool. It provides an opportunity for a structured discussion of an individual's performance and development over the previous year and an assessment of training and development needs for the future. The performance of an individual staff member is only regarded against the requirements for the position and the individual's objectives. The ASBR is a comparative exercise and assesses the performance of the individual staff member against the performance of others.

In both cases, each staff member's performance is assessed but for different reasons and "against a different yard stick".'

2. *The annual appraisal*

11 Independently of the ASBR procedure, the contributions of ECB members of staff are assessed as part of an annual appraisal which is designed both as a tool for staff management and as a personal development tool for ECB employees and which takes the form of a dialogue between the member of staff and his or her line manager on the contributions made in the preceding period in the light of the objectives set for that period and of what is expected for the period to come. That appraisal leads each year to the production of an appraisal report.

3. *Provisions relating to the Staff Committee*

12 Articles 48 and 49 of the Conditions of Employment, in Part 9 headed 'Staff Representation', provide:

'48. A Staff Committee whose members are elected by secret ballot shall represent the general interests of all members of staff in relation to contracts of employment; staff regulations and remuneration; employment, working, health and safety conditions at the ECB; social security cover; and pension schemes.

49. The Staff Committee shall be consulted prior to changes in these Conditions of Employment, the Staff Rules and related matters as defined under paragraph 48 above.'

13 The Memorandum of Understanding on relations between the Executive Board and the Staff Committee signed on 17 June 2003, in Chapter II, headed 'Consultation procedure for Executive Board proposals', provides:

'5. **Obligation to consult**: In accordance with the procedure described below, the Executive Board shall consult the Staff Committee on proposals relating to the scope of the latter's tasks as defined in Articles 48 and 49 of the Conditions of Employment.

6. **Requirements for the consultation request**: When starting a consultation procedure, the President [of the ECB] or his/her representative shall submit to the Staff Committee a written consultation request together with complete information, i.e. information, which allows the Staff Committee to acquaint [itself] with and to examine the subject matter of the consultation, in so far as there are no overriding reasons for not doing so. The Staff Committee may ask for clarification of the contents of the documentation and/or the scope of the consultation.

…'

4. *Other relevant provisions*

14 Article 9(c) of the Conditions of Employment provides:

'… 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 Member States. Whenever necessary, these legal instruments will be implemented by the ECB. …'

15 On 14 October 1991 the Council of the European Communities adopted Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32), Articles 2 and 3 of which are worded as follows:

'Article 2

Reporting requirements

1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

…

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;

…

3. The information referred to in paragraph 2(f), (g), (h) and (i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points.

Article 3

1 Means of information

1. The information referred to in Article 2(2) may be given to the employee, not later than two months after the commencement of employment, in the form of:

(a) a written contract of employment

and/or

(b) a letter of engagement

and/or

(c) one or more other written documents, where one of these documents contains at least all the information referred to in Article 2(2)(a), (b), (c), (d), (h) and (i).

…'

16 The ECB newsletter of 20 October 2003, titled 'ECB in Motion' ('the newsletter'), in the section headed 'Measures to enable staff and reward performance', indicates that the Executive Board had decided to endorse a measure with reference B6 and headed 'Link performance and rewards', where the further information is given: 'B6 Quick win – Make the appraisal an effective tool for establishing performance as the basis for rewards[:] endorsed, but should be implemented in the appraisal 2004 exercise.'

Facts

17 The applicant has worked for the ECB since 15 June 2002 as a Management Assistant assigned to the Directorate-General Internal Audit ('DG Internal Audit'). In 2004 the applicant was temporarily transferred to the Fiscal Policy Division of the Directorate-General Economics.

18 Under the ASBR, the applicant was awarded three points in 2003 and 2004, six in 2005, and five in 2006 and 2007.

19 In late 2007 the applicant had to undergo extensive medical treatment. Consequently, she was continuously absent from 16 October 2007 until 29 August 2008, first on sick leave, from 16 October 2007 until 20 December 2007, then on annual leave, from 21 December 2007 until 3 January 2008, and again on sick leave from 4 January until 29 August 2008.

20 During that period, the temporary transfer of the applicant to the Fiscal Policy Division of the Directorate-General Economics ended on 31 December 2007, when she rejoined DG Internal Audit.

21 On 1 September 2008 the applicant, on her return from sick leave, resumed work within DG Internal Audit. In order to take account of her still fragile health and to facilitate her return, her working hours were adapted and her former tasks were replaced by new tasks. It was thus arranged that, until 15 October 2008, the applicant was to work part-time, in other words for four hours a day, and she was to concentrate on tasks other than those she had had before her sick leave.

22 From 15 September 2008 the applicant's working hours per day were increased to five, and then, from 29 September 2008, to six.

23 The applicant's return to full-time work, initially planned for 15 October 2008, was postponed until 27 October 2008 because of sick leave.

24 As part of the annual appraisal, the applicant and her Head of Division met on 9 October 2008 to discuss her performance since her return to work.

25 The applicant's annual appraisal report was completed on 19 December 2008. That report stated that the applicant had had the benefit of special working arrangements in order to facilitate her return and that she had shown willingness and enthusiasm to be involved in tasks other than her own.

26 By decision of 12 November 2008 the Director-General of DG Internal Audit awarded the applicant, as from January 2009, a salary increase of two points, or 0.50% of her salary, as part of the ASBR exercise for 2008 ('the 2008 ASBR'). By a letter dated 8 January 2009, of which the applicant became aware on 15 January, the DG Human Resources, Budget and Organisation ('DG Human Resources') informed her of the decision of the Director-General of DG Internal Audit to award her two points ('the contested decision').

27 On 15 February 2009 the applicant was transferred on the proposal of DG Human Resources to the Staff Committee as secretary to that committee.

28 On 12 March 2009 the applicant submitted a request for review of the contested decision.

29 By a decision of 8 May 2009, notified on 11 May 2009, the Deputy Director-General of DG Human Resources rejected the request for review of the contested decision.

30 By letter of 11 July 2009 the applicant filed a complaint against the contested decision.

31 By decision of 9 September 2009, notified on 11 September 2009, the President of the ECB rejected the applicant's complaint. The President of the ECB pointed out to the applicant among others that by her own admission her Head of Division was of the view that she had not yet mastered her newly allocated tasks and that was why, after comparing her performance with that of others employed in her division, he had decided to award her only a two-point increase in salary.

Forms of order sought by the parties

32 The applicant claims that the Tribunal should:

— annul the contested decision;

— annul the salary statement of 15 January 2009, implementing the contested decision;

— consequently, order the ECB to pay the amount of her salary representing the difference between the challenged salary increase and that which should have been granted to her under the 2008 ASBR, from 15 January 2009 until payment in full, plus default interest at the rate equal to the margin lending rate of the ECB during the default period increased by three percentage points;

— should the organisation of a new 2008 ASBR procedure be found to entail excessive difficulties, order the ECB to award her the equivalent of three salary points to compensate for the material prejudice;

— in any event, order the ECB to pay compensation for the non-material damage suffered assessed *ex aequo et bono* at EUR 10 000;

— order the ECB to pay the costs.

33 The ECB contends that the Tribunal should:

— dismiss the application as inadmissible, or, in the alternative, as unfounded; and

— order the applicant to pay the costs.

34 By various measures of organisation of procedure the Tribunal requested that the parties reply to certain questions and produce documents. The parties complied with those measures.

Law

35 First, it must be observed that although the ECB claims that the action should be held to be inadmissible, it offers no argument in support of that claim. In any event, the Tribunal considers that, in the context of the present case, it is appropriate to begin by considering the merits of the action. It must be recalled that the court is entitled to assess whether, in the circumstances of each case, the proper administration of justice justifies the dismissal of the action on the merits without first ruling on an objection of inadmissibility raised by the defendant (see judgment of 28 October 2010 in Case F-113/05 *Kay* v *Commission*, paragraph 31) or on bars to proceeding that might be considered of its own motion by the Tribunal.

1. *The claims for annulment and the claims for payment*

36 In support of her claims for annulment the applicant relies, in essence, on six pleas in law:

— first, infringement of the principle of legal certainty, the principle *patere legem quam ipse fecisti*, the principle of non-discrimination, the duty of transparency, Directive 91/533 and the decision with reference B6 described in the newsletter;

— second, infringement of the principle of non-discrimination and of Article 5 of Annex I to the Conditions of Employment, in that members of staff are treated differently according to their business area;

— third, infringement of the principle that the budgetary envelopes allocated to the ASBR should pursue a legitimate objective;

— fourth, infringement of the obligation to consult the Staff Committee, laid down in Articles 48 and 49 of the Conditions of Employment and by the Memorandum of Understanding on relations between the Executive Board and the Staff Committee;

— fifth, the lack of competence of the author of the contested decision and infringement of the ECB's Rules of Procedure;

— sixth, infringement of the principle of non-discrimination and infringement of the 2008 Guidelines.

The first plea

37 The first plea is divided into two parts. The argument in the first part is that there is no direct link between the annual appraisal and the ASBR procedure. The argument in the second part is that the ECB failed to adopt criteria on which staff could be assessed under the ASBR.

The first part of the first plea

– Arguments of the parties

38 The applicant asserts that, even though the annual appraisal is distinct from the ASBR procedure, the assessment carried out as part of the annual appraisal must be used, in order to establish the contribution of each staff member to the realisation of the ECB's tasks under the ASBR. In fact, the applicant states that, if the ECB is to be able to compare, within a business area, the respective contributions of members of staff to the realisation of the ECB's tasks, it must assess each staff member's individual merits. However, the ASBR procedure does not provide any tool for assessing the individual merits of each member of staff. In the absence of any specific tool, the applicant considers that the ECB should have taken into account the result of her annual appraisal to meet the requirements of the ASBR, which it did not do.

39 The applicant relies, first, on the measure, bearing reference B6 in the newsletter, according to which the ECB Executive Board had endorsed use of the annual appraisal for establishing performance as the basis for granting rewards; secondly, on Section 3 of the 2008 Guidelines according to which the overall messages from the appraisal and the ASBR should be internally consistent, and thirdly, by analogy, on the rules concerning promotion laid down by the Staff Regulations of officials of the European Union ('the Staff Regulations'), which provide that the report on an official in the context of the appraisal procedure is to be taken into account in the promotion procedure.

40 The applicant claims, moreover, that the failure to take into consideration the appraisal, as part of the ASBR, is contrary to the principle of legal certainty and the duty of transparency, respect for which would entail that the persons concerned are placed in a position to verify whether ASBR decisions affecting them are in line with the assessment made of their contributions within the annual appraisal and whether, comparatively, those decisions are consistent with the annual appraisals and ASBR decisions made in respect of their colleagues.

41 In its defence, the ECB contends that there is no rule and no legal principle which require the annual appraisal to be used as part of the ASBR. In particular, the ECB states that Article 5 of Annex I to the Conditions of Employment, the annex which is the legal basis for the ASBR, makes no reference to the annual appraisal exercise. Further, the ECB contends that the applicant's argument disregards the fact that the annual appraisal exercise and the ASBR are two procedures which pursue different objectives, as the Tribunal moreover explicitly recognised in its judgment of 9 July 2008 in Case F-89/07 *Kuchta* v *ECB*, paragraph 9 et seq.

42 As regards more specifically the decisions referred to in the newsletter, the ECB contends that those decisions stem from the 'ECB in Motion' Programme Office and that they are therefore not legally binding. Further, the ECB considers that the fact that that Programme Office endorsed the idea that financial rewards should be linked to performance does not mean that the annual appraisal should be the basis of the ASBR, particularly as, in a report dated 27 August 2004, the same 'ECB in Motion' Programme Office acknowledged that the annual appraisal exercise and the ASBR are two distinct exercises.

43 As regards the applicant's argument that Article 5 of Annex I to the Conditions of Employment must be interpreted in the light of provisions in the Staff Regulations, the ECB states that it enjoys autonomy as regards the arrangements applying to its staff. Consequently, only if it were assumed that the legislature had unintentionally created a legal lacuna might an argument based on analogy with the Staff Regulations possibly be used to interpret the internal provisions applicable to ECB staff. In the present case, the ECB emphasises that it deliberately chose to distinguish the annual appraisal exercise

and the ASBR procedure. In any event, the ECB contends that the extent to which the current rules applicable within the ECB differ from the rules in the Staff Regulations is such that they are not comparable.

– Findings of the Tribunal

44 It must be observed that the fact that the ASBR is based on a comparison, within a business area, of the contributions of each member of staff to the realisation of the ECB's tasks does not mean that, in the absence of any specific tool for assessing the individual merits of each member of staff under the ASBR procedure, the ECB is obliged to base its ASBR decisions on the annual appraisal. It is not apparent from the evidence in the case-file that there is any legal rule requiring the ECB to use the annual appraisal as part of the ASBR procedure. On the contrary, the 2008 Guidelines make it abundantly clear that those two procedures have clearly distinct objectives, since in the first paragraph of Section 3 the Guidelines state that 'the ASBR and the appraisal are two separate exercises, with different objectives'.

45 That finding is not called into question by the arguments put forward by the applicant in support of her plea.

46 As regards, first, the decision with reference B6 mentioned in the newsletter, it is clear that the newsletter is by itself not sufficiently complete to establish a rule of conduct which can be pleaded against its author on the basis of the principle *patere legem quam ipse fecisti*. As for the possibility that the newsletter reveals the existence of a decision establishing a rule of conduct, it must be observed that while it is clear from the content of the newsletter that the proposal, formulated by the 'ECB in Motion' Programme Office, to use the annual appraisal in order to measure the performance of each member of staff under the ASBR was endorsed by the ECB Executive Board, it has not been proved that, beyond a declaration of intent, the Executive Board adopted a binding decision to that effect.

47 As regards, secondly, the argument that the 2008 Guidelines provide that the overall messages transmitted by the appraisal and the ASBR must be internally consistent, it must be observed that while the Guidelines state in Section 3 that 'the overall messages from the appraisal and the ASBR should be internally consistent', that requirement does not necessarily mean that the annual appraisal must form the basis for ASBR decisions, particularly when the Guidelines expressly provide that the ASBR and the annual appraisal are distinct procedures.

48 As regards, thirdly, the Staff Regulations, it may be observed that the ASBR procedure has no equivalent in those Regulations. Consequently, no analogy can be drawn between the principles governing the appraisal of officials of the European Union and those governing the ASBR procedure applicable to ECB members of staff.

49 As regards, fourth, the principle of legal certainty, it must be recalled that that principle requires administrative authorities to adopt rules that are sufficiently clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly (see, in particular, the judgment of 14 April 2005 in Case C-110/03 *Belgium* v *Commission*, paragraph 30). In the present case, it is evident from the 2008 Guidelines, accessible on the ECB intranet, that the ASBR and the annual appraisal are two distinct exercises. It follows that every member of staff knows, or could know, that the appraisal is not directly taken into account under the ASBR procedure. Consequently, the applicant cannot validly claim an infringement of the principle of legal certainty on the ground that the applicable rules were ambiguous.

50 As regards the duty of transparency, that duty does not constitute a principle of European Union law which an applicant can invoke in the absence of a written legal basis (judgment of 22 May 2007 in Case F-99/06 *López Teruel* v *OHIM*, paragraph 94). Consequently, not having indicated the legal provision which embodies the duty of transparency on which she relies, the applicant fails to put the Tribunal in a position to assess the scope of her argument.

51 Since none of the arguments raised has succeeded, the first part of the first plea must be rejected as unfounded.

The second part of the first plea

– Arguments of the parties

52 The applicant claims that the ECB is under an obligation to adopt, then communicate to its staff, criteria specifying what factors are taken into account when staff are assessed under the ASBR procedure. In support of that argument, the applicant states, first, that the decision of 6 August 2008 provides that decisions on individual salary increases are to be taken on the basis of criteria established by the Executive Board in order to assess the contribution made by a member of staff to the realisation of the ECB's tasks, as compared with the contributions of other members of staff performing their duties in the same business area. The applicant states, secondly, that Directive 91/533 requires the essential aspects of an employment relationship to be notified to the workers concerned. In her opinion, the assessment criteria used under the ASBR procedure constitute an essential aspect of every employment relationship at the ECB. Consequently, those criteria should be defined and published. Thirdly, since the ECB has a wide discretion to increase salaries under the ASBR, the principles of non-discrimination and legal certainty, and the duty of transparency and the obligation to state reasons compel the ECB to define assessment criteria which are clear and objective.

53 In the present case, the applicant considers that no documents issued by the ECB and notified to its staff define assessment criteria for the ASBR. The defining elements contained in Article 5 of Annex I to the Conditions of Employment are not sufficiently clear and precise to be described as criteria, because they refer in broad terms to the general principles of the ASBR and to individual objectives. As regards the 2008 Guidelines, the applicant does not accept that they contain such criteria. Further, taking account of the fact that those Guidelines were published at the end, and not the beginning, of the ASBR reference period, their publication did not enable staff to know with certainty, from the beginning of the reference period, on what basis their contributions would be assessed.

54 In its defence, the ECB questions whether it is under an obligation to adopt and communicate criteria specifying which factors are to be taken into account in order to assess its staff members under the ASBR procedure. Directive 91/533 refers to the essential aspects of every employment relationship. According to the ECB, the granting of an ASBR award, which, unlike a salary, is not guaranteed and which cannot exceed 3.5% of the salary, is not an essential aspect of the employment contract.

55 In any event, the ECB considers that Article 5 of Annex I to the Conditions of Employment and the 2008 Guidelines set out assessment criteria which are clear and objective and known to all members of staff. As regards the publication of the 2008 Guidelines at the end of the reference period, the ECB states that the assessment criteria are laid down in Article 5 of Annex I to the Conditions of Employment. Consequently, every member of staff, including the applicant, was fully aware of the criteria used from the beginning of 2008. Moreover, the ECB submits that the applicant has in no way proved that her level of performance would have been different if the 2008 Guidelines had been published at the beginning rather than at the end of the reference period.

– Findings of the Tribunal

56 None of the arguments put forward by the applicant is such as to establish that the ECB was under an obligation to enact assessment criteria in relation to the ASBR.

57 As regards the decision of 6 August 2008, it must be observed that while it provides that decisions on individual salary increases are to be taken 'on the basis of the criteria which have been established by the Executive Board for assessing the ... contribution', it can be inferred from the recitals in its preamble, which refer inter alia to Articles 5 and 6 of Annex I to the Conditions of Employment, and from the use of the past tense that the purpose of that decision was not to impose an obligation on the ECB to enact assessment criteria for ASBR decisions on salary increases to be awarded to members of staff, in which case the decision would have used the phrase 'to be established', but rather to refer back to the provisions of Annex I to the Conditions of Employment.

58 As regards Directive 91/533, it must be recalled that, under Article 9(c) of the Conditions of Employment, the ECB undertook to apply the directives addressed to Member States concerning social policy. While it is true that the ASBR rules relating to salary increases are related to the remuneration to which ECB members of staff are entitled and to that extent are 'essential aspects of an employment relationship' within the meaning of Directive 91/533, which is therefore applicable, the requirements of that directive are not so stringent as to compel the ECB to adopt and publish assessment criteria in respect of the contribution of each employee to the ECB's tasks.

59 As regards the principle of non-discrimination, the duty of transparency and the obligation to state reasons, it must be observed that while their effect is that when an administrative authority, in this case the ECB, exercises its powers it must comply with certain requirements, the effect cannot thereby be that the ECB is compelled to abandon the wide discretion which it has decided to maintain in conducting its policy on awarding individual salary increases and to define in a document the assessment criteria which it intends to use in order to exercise its discretion.

60 Likewise, as regards the principle of legal certainty, on the subject of which it was stated in paragraph 49 of this judgment that while that principle requires administrative authorities, when adopting rules, to draft them in such a way that they are sufficiently clear, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly, that principle does not oblige an administrative authority, in this case the ECB, to restrict the discretion which it means to exercise in relation to individual salary increases by adopting implementing measures designed to define how it intends to exercise that discretion in the future.

61 Lastly, in relation to the applicant's ground of complaint questioning the publication of the 2008 Guidelines at the end of the reference period, it is clear that the effect of those Guidelines is not to define the criteria governing how ASBR salary increases are to be decided. That finding is confirmed by the fact that the applicant was in that respect placed in the same situation as those of her colleagues who were performing their duties in her business area and with whom her contribution to the task of the ECB was compared. Consequently, although the Guidelines were published at the end of the reference period, they could have no effect on the lawfulness of the contested decision.

62 Since none of the arguments relied on in support of the second part of the first plea has succeeded, the second part and, consequently, the first plea in its entirety must be rejected.

The second plea in law

Arguments of the parties

63 The applicant asserts that, since the rules governing the ASBR are applicable to all employees of the ECB and since Article 5 of Annex I to the Conditions of Employment provides that the individual decision in the ASBR exercise is to be adopted on the basis of a comparison of the contributions of each member of staff to the tasks of the ECB as a whole and not solely to the work in his or her business area, all members of staff must be considered to be in the same situation for the purposes of the ASBR exercise. However, the applicant believes that members of staff are treated differently depending on their business area, because ASBR decisions are taken by each manager for his business area, after a comparison of the contributions solely of staff in that business area, and no mechanism ensuring homogeneity and consistency of decisions across all business areas has been implemented.

64 In its defence, the ECB considers that neither the internal rules applicable to staff nor the general principles of EU law impose on it the obligation to conduct the ASBR on the basis of a comparison of the contributions of members of staff across all business areas. Further, the ECB asserts that the ASBR procedure is neither directly nor indirectly discriminatory, because the same criteria are applied by all business areas. Admittedly, the comparison of the contributions of members of staff takes place within each business area and not at the level of the ECB, but that is justified, first, by the fact that the assessment of the contributions of members of staff requires knowledge of the individual contribution of each member of staff to the tasks of the ECB and, second, by the fact that each ECB business area has its own specific features in such matters as size, spectrum of tasks, number of staff, and structure. Lastly, the ECB contends that, if the ASBR were conducted, as claimed by the applicant, on the basis of a comparison at ECB level of all members of staff, irrespective of their business area, the result would be a comparison of situations which are not comparable, which would be the very antithesis of the principle of equal treatment.

Findings of the Tribunal

65 It must be observed that this plea seeks to establish the existence not of discrimination rendering the contested decision unlawful, but of a risk of inconsistency between individual ASBR decisions, a risk which is said to be the consequence of the lack of any mechanism to ensure the homogeneity and consistency of ASBR decisions across business areas. However, it must be borne in mind that, generally, before an individual decision by an administrative authority can be regarded as being in breach of a legal principle or legal rule, it is necessary that the alleged infringement of such legal principle or legal rule by the administrative decision at issue be established rather than merely a possibility.

66 Further, in accordance with settled case-law, an applicant is not entitled to act in the interests of the law and may put forward, in support of an action for the annulment of a particular measure, only such claims as relate to him or her personally (judgment of 21 January 1987 in Case 204/85 *Stroghili* v *Court of Auditors*, paragraph 9; judgment of 23 January 2007 in Case F-43/05 *Chassagne* v *Commission*, paragraph 100, and case-law cited). However, in the present case, the applicant does not explain how the lack of a mechanism ensuring homogeneity and consistency of ASBR decisions across all business areas affected the contested decision.

67 In any event, it can be recalled that the principle of equal treatment and the principle of non-discrimination require institutions to ensure that the same situations should not be treated differently and different situations should not be treated in the same way unless that is objectively justified (see, for example, the judgment 16 October 1980 in Case 147/79 *Hochstrass* v *Court of Justice*, paragraph 7, and judgment of 25 October 2005 in Case T-368/03 *De Bustamante Tello* v *Council*, paragraph 69, and case-law cited).

68 In the present case, it is apparent from Article 5 of Annex I to the Conditions of Employment, the decision of 6 August 2008 and the 2008 Guidelines that the ASBR is based on a comparison of the individual contribution of each employee to the tasks of the ECB with those of his or her colleagues in the same business area. Admittedly, because of the way in which they are worded, the provisions relating to the ASBR applicable to ECB staff may cause a difference in treatment of ECB members of staff, but that difference in treatment must be regarded as justified by an objective factor, namely the fact that each business area is responsible for the performance of different tasks. The 2008 Guidelines are therefore not in breach of the principle of equal treatment. Further, since the entire staff of the ECB are not considered by the provisions governing the ASBR to form one and the same legal category, the applicant cannot claim that the ECB erred by comparing her contribution to the tasks of the ECB with the contributions of colleagues in her business area.

69 It follows from the foregoing that the second plea must be rejected as unfounded.

The third plea in law

Arguments of the parties

70 The applicant raises an objection of illegality in respect of the budgetary envelope allocated to salary increases and bonuses in connection with the 2008 ASBR, on the ground that the envelope was reduced without fulfilment of the three essential conditions governing such a reduction: namely, that the method used to reduce a budgetary envelope should be objective, stable and foreseeable, that there must be a real need for it and, in accordance with the case-law of the Administrative Tribunal of the International Labour Organisation ('ILO'), that the objective of that reduction must not be to make savings at the expense of staff.

71 In its defence, the ECB considers that the plea is inadmissible on the grounds, first, that since the determination of the annual budget is a decision which is legislative and not administrative, it cannot be challenged by means of an objection of illegality; second, the decision to reduce the budgetary envelope allocated to ASBR salary increases was adopted in 2005 and, as it has remained unchanged since, it cannot be challenged years later, and, third, the applicant offers no specific legal basis to support her plea.

72 In any event, as to the merits, the ECB asserts that the Governing Council has a discretion as regards the adoption of the ECB budget and, consequently, it is open to the Governing Council to reduce the proportion of it allocated to the ASBR. Further, the ECB observes that the applicant refers to case-law of the Administrative Tribunal of the ILO although the ECB does not come under the jurisdiction of that Tribunal. Lastly, the ECB considers that the applicant's argument is based on political conjecture.

Findings of the Tribunal

– The first two pleas of inadmissibility raised by the ECB

73 As regards the first objection of inadmissibility in relation to the types of measures the lawfulness of which may be contested by objection of illegality, it must be recalled that the objection of illegality is intended to enable applicants to contest, by means of objection, the lawfulness of the applicability of a measure of general application to the issue with which the action is concerned and that that measure may have the character of an implementing measure or legislative act, provided that there is a direct connection between the contested decision and the general measure in question (see, to that effect, inter alia, the judgment of 15 September 1998 in Case T-23/96 *De Persio* v *Commission*,

paragraph 54). Consequently, the mere fact that the applicant pleads, in her plea in law, that an act of a legislative character, namely the ECB budget allocated to the 2008 ASBR, is unlawful, does not mean that plea is inadmissible. The ECB's first objection of inadmissibility must therefore be rejected.

74 As regards the ECB's second objection of inadmissibility, based on the argument that the plea is out of time, because the decision to reduce the budgetary envelope allocated annually to the ASBR was made in 2005, it must be observed that the possibility of raising an objection of illegality in relation to a measure of general application is not restricted to a particular period of time. Article 241 EC provides that the possibility of raising an objection of illegality in an action based on Article 230 EC holds '[n]otwithstanding the expiry of the period [for instituting proceedings] laid down …'. There is no reason not to apply the same rule to actions based on Article 236 EC, Article 152 EA or Article 36.2 of the Statute of the European System of Central Banks. Consequently, the ECB's second objection of inadmissibility must be rejected.

– The ECB's third objection of inadmissibility and the applicant's objection of illegality

75 In support of her objection that the budget allocated to the ASBR since 2005 has been illegal, the applicant asserts that reduction of the budgetary envelope allocated to salary increases and bonuses in connection with the 2008 ASBR is possible only if three conditions are satisfied, namely that the method used to reduce a budgetary envelope must be objective, stable and foreseeable, that there must be a real need for it, and that the objective of the reduction of that budgetary envelope is not to effect budget savings at the expense of staff. However, as rightly contended by the ECB, the applicant offers no legal argument capable of establishing the existence of the first two conditions which, in her opinion, should be satisfied before the budgetary envelope allocated to the ASBR may be reduced. Article 35(e) of the Tribunal's Rules of Procedure provides that an application must contain the arguments of law relied on in support of each plea in law. The applicant's objection of illegality is therefore partly inadmissible.

76 As regards the third condition which should, according to the applicant, be satisfied before the budgetary envelope allocated to the ASBR may be reduced, a condition which she claims to exist on the basis of case-law of the Administrative Tribunal of the ILO, it must be observed that that case-law does not, as such, constitute a source of European Union law. Consequently, given the applicant's failure to call in aid any recognised rule or principle of European Union law, she has not shown that third condition to be fulfilled.

77 It follows that the applicant's objection of illegality must be rejected as being in part inadmissible and in part as lacking any legal basis.

The fourth plea in law

Arguments of the parties

78 The applicant asserts that, contrary to the provisions of Articles 48 and 49 of the Conditions of Employment and the Memorandum of Understanding on relations between the Executive Board and the Staff Committee, the ECB did not properly consult the Staff Committee on the adoption of several decisions which were the basis for the ASBR procedure. In support of her plea, the applicant puts forward four grounds of complaint.

79 First, the Staff Committee did not have available to it the necessary supporting information and documents to enable it to validly exercise its right to give its opinion when the first ASBR procedure was launched in 1999.

80 Secondly, the Staff Committee was not properly consulted in the 2008 ASBR procedure and, in particular, on the 2008 Guidelines. The consultation which was organised was restricted to certain matters only, and further, it was carried out solely *pro forma*. Taking into account the period necessary to alter the ECB's IT systems and to integrate the 2008 Guidelines within them before the start of the 2008 ASBR procedure, the consultation of the Staff Committee would have had to be carried out earlier than it was, which shows that the ECB must have already taken its decision when it commenced the consultation.

81 Thirdly, the applicant states that the Staff Committee was not properly consulted on the amendment of Article 5 of Annex I to the Conditions of Employment, given that it lacked the relevant information, in particular a comparative study made by DG Human Resources.

82 Fourthly, the Staff Committee was never consulted on the determination of the 2008 ASBR budgetary envelope.

83 In its defence, the ECB states that pursuant to Article 49 of the Conditions of Employment, the Staff Committee must be consulted solely in cases of changes to the Conditions of Employment or the Staff Rules or when a measure relating to those two documents is adopted. In the light of the scope of that article, the ECB considers that it properly consulted the Staff Committee.

Findings of the Tribunal

84 As regards the first ground of complaint, on the failure to consult the Staff Committee when the first ASBR procedure was launched in 1999, it must be recalled that under Article 35(1)(e) of the Rules of Procedure, the application must set out the arguments of fact and law relied on. Accordingly, it is not for the Courts of the European Union to search for and identify in annexes within the case-file which measure is specifically the intended subject of an applicant's complaint. In the present case, the applicant does not specify which measure is, on the basis of an objection of illegality, unlawful on the ground that the Staff Committee was not properly consulted in 1999. Consequently, the first ground of complaint, on the failure to consult the Staff Committee when the first ASBR procedure was launched in 1999, must be rejected.

85 In any event, on the assumption that the decision allegedly taken without consulting the Staff Committee is the decision establishing the first ASBR Guidelines, adopted in 1999, this ground of complaint must none the less be rejected as ineffective, since those Guidelines were no longer applicable at the date of the contested decision.

86 As regards the second ground of complaint, on the failure properly to consult the Staff Committee on the appraisal system introduced for the purposes of the 2008 ASBR, it is apparent from the documents annexed by the ECB to its written pleadings that the two measures determining how the 2008 ASBR would operate, namely the 2008 Guidelines and the FAQ, were sent to the Staff Committee for its opinion by letter of 12 September 2008. Admittedly, in its request for that opinion, DG Human Resources limited the scope of the consultation to certain changes to the ASBR proposed for the 2008 exercise, but it must be observed that the Staff Committee submitted its observations on the proposed 2008 Guidelines and on the FAQ by letter of 24 September 2008, and that those observations are not limited to the matters restrictively defined in the request of DG Human Resources for an opinion. By letter of 29 September 2008 the International and European Public Services Organisation subsequently endorsed the observations made by the ECB Staff Committee on the draft 2008 Guidelines and on the FAQ. By letter of 6 October 2008 addressed to the Staff Committee and to the International and European Public Services Organisation, DG Human Resources gave further clarification on some specific points in the two drafts. Lastly, in its letter of 9 October 2008, the Staff Committee confirmed that it had no other observations on the two drafts sent by DG Human Resources.

87 The Tribunal considers, taking account of the exchange of correspondence described above between the ECB and the Staff Committee, that the Staff Committee was properly consulted when the 2008 Guidelines and the FAQ were adopted and, consequently, that the applicant's second ground of complaint, on the failure to consult the Staff Committee in the 2008 ASBR procedure, must be rejected as unfounded.

88 In relation to the third ground of complaint, on the failure to consult the Staff Committee on the changes to Article 5 of Annex I to the Conditions of Employment, it must be recalled that the scope of an objection of illegality is limited to what is essential for the determination of the dispute. In the present case, the applicant does not explain what effect the change to Article 5 of Annex I to the Conditions of Employment had on the contested decision. Consequently, the applicant's third ground of complaint, on the failure to consult the Staff Committee on the changes to Article 5 of Annex I to the Conditions of Employment, must be rejected as being inadmissible.

89 Lastly, as regards the fourth ground of complaint, on the failure to consult the Staff Committee when the budgetary envelope allocated to the ASBR in 2008 was decided, it must be observed that the budget is not one of the measures whose adoption or amendment is subject to the provisions of Article 49 of the Conditions of Employment, in conjunction with Article 48 of those Conditions of Employment, imposing on the ECB the obligation to consult the Staff Committee. Indeed, the budget is adopted on the basis of Article 15 of the ECB's Rules of Procedure and not on the basis of the Conditions of Employment or the Staff Rules or a measure related to one of those documents, nor does it relate to a matter covered by Article 48 of the Conditions of Employment, in respect of which only the consultation of the Staff Committee is required. Consequently, the applicant's fourth ground of complaint, on the failure to consult the Staff Committee when the budgetary envelope allocated to the ASBR in 2008 was decided, must be rejected.

90 It follows from the foregoing that the fourth plea must be rejected in its entirety.

The fifth plea in law

Arguments of the parties

91 The applicant asserts that the 2008 Guidelines were adopted by an authority which lacked competence, namely DG Human Resources, and that lack of competence vitiates the contested decision taken on the basis of those Guidelines. Further, the applicant complains that the Executive Board erred by entrusting the drafting of the 2008 Guidelines to DG Human Resources and doing no more than approving them a posteriori. Lastly, the applicant claims that the 2008 Guidelines, since they are not merely informative, ought to have been adopted in the form of an administrative circular, in accordance with Article 11(2) of the ECB's Rules of Procedure, which they were not.

92 In its defence, the ECB observes that the Executive Board approved the 2008 Guidelines at its meeting on 14 October 2008. As regards the choice of the legal form of the Guidelines, the ECB asserts that its discretion in that area gave it the power to decide on the form of the measure.

Findings of the Tribunal

93 Under Article 11(2) of the ECB's Rules of Procedure, the Executive Board has the power to enact the internal organisational rules of the ECB and, in that respect, to adopt the 2008 Guidelines. However, in the present case, it is apparent from the extract from the minutes of the 601st meeting of the Executive Board on 14 October 2008, a document annexed by the ECB to its defence, that the Executive Board approved the 2008 Guidelines. Admittedly, it is regrettable that the 2008 Guidelines bore the name of DG Human Resources and not of the Executive Board, but that error in the formal

presentation of the text of the 2008 Guidelines, which cannot have had any effect on the content of the measure or, in particular, on the competence of its author, namely the Executive Board, cannot have the consequence that the contested decision is unlawful.

94 As regards the ground of complaint that the ECB, in the person of its Executive Board, delegated the drafting of the 2008 Guidelines to DG Human Resources, and did no more than approve them a posteriori, it must be observed that the fact that a specific authority alone is competent to adopt a decision does not preclude that authority from being able to instruct another body to give written form to the content of the decision it plans to adopt, provided however that it has the opportunity to amend the text and that the text returns to it for its ratification of the final version.

95 As regards the form which the 2008 Guidelines should have taken according to Article 11(2) of the ECB's Rules of Procedure, it must be observed that the expression 'administrative circular' in that provision is a term chosen in order to designate the organisational rules covered by that provision, a term intended to facilitate subsequent reading of the text. It is therefore apparent from the very wording of Article 11(2) of the ECB's Rules of Procedure that no obligation is imposed by that provision on the Executive Board to ensure that the organisational rules referred to take the form of administrative circulars.

96 In any event, on the assumption that there is a rule requiring specific types of measures to be called 'administrative circulars', disregard of such a rule cannot be considered to be a substantial infringement since it is not of such a kind as to have an effect on the content of the measures concerned (see, to that effect, inter alia, the judgment of 15 December 2008 in Case F-34/07 *Skareby* v *Commission*, paragraph 40, and case-law cited).

97 It follows from the foregoing that since none of the grounds of complaint relied on in support of the fifth plea in law is well founded, that plea must be rejected.

The sixth plea in law

Arguments of the parties

98 The applicant asserts that she was penalised in several respects because of her sick leave and that the contested decision therefore was in breach of the principle of non-discrimination.

99 First, the applicant complains that the ECB did not take into account, in the ASBR, the fact that she had less time, because of her sick leave, to contribute to the tasks of her business area although the 2008 Guidelines provided that periods of sick leave should be neutral in effect and the Court of First Instance of the European Communities recognised the existence of that requirement of a neutral effect in its judgment of 6 October 2009 in Case T-102/08 P *Sundholm* v *Commission*.

100 Secondly, the applicant asserts that, although it was necessary to set the objectives of every member of staff in order thereafter to be able to compare their respective contributions under the ASBR procedure, she was not given any objective for 2008 because of her sick leave.

101 Thirdly, the applicant asserts that the tasks allocated to her on her return from sick leave did not correspond to her job profile and were fewer and less important than those she had performed before her sick leave, which prevented her from making a full contribution to the tasks of the ECB. The applicant observes in particular that, although the ECB was informed of her return to part-time work from September 2008, and to full-time work from the middle of October 2008, the ECB decided to award a contract with a duration of six months, from 1 September 2008, to the management assistant who had replaced her during her absence, thereby hindering her from fully resuming her former duties. The applicant emphasises that the fact that she accepted the tasks proposed by her managers cannot

be used against her, because that situation was not intended to last. However, when she proposed to her Head of Division that additional tasks be allocated to her, he refused, thereby purposefully keeping her in a situation where she was under-employed.

102 Fourthly, the applicant asserts that her sick leave was wrongly taken into account under the ASBR. To support that argument, the applicant claims that she accomplished in full the few tasks which were assigned to her and that the explanation given by the President of the ECB in reply to her complaint that 'by [her] own admission, [her] Head of Division was of the view that [she] had not yet mastered [her] newly allocated tasks' is not substantiated, nor is there any evidence for the statement that she had not been able to master certain tasks. Further, the applicant notes that the number of points awarded to her in 2008 is clearly lower than the number she obtained in the ASBR exercises for the years 2005, 2006 and 2007.

103 In its defence, the ECB contends, at the outset, that, in general, the applicant produces no evidence of the existence of discrimination.

104 In reply then to each of the grounds of complaint submitted by the applicant, the ECB states, first, that the 2008 Guidelines do not provide that the assessment under the ASBR procedure of persons who have been absent on sick leave should be proportional (pro rata) to the time of their presence.

105 Secondly, the ECB observes that under the ASBR procedure there is no rule creating an obligation to set objectives to be attained by each member of staff.

106 Thirdly, the ECB states that the tasks allocated to the applicant, on her return in September 2008, were chosen with her agreement, in order to take into account her adapted working hours, the advice of her doctor, her still fragile state of health, and changes which had occurred in the interim in the area of IT at the ECB. It was accordingly inevitable that those tasks did not correspond to those she performed previously.

107 Fourthly, the ECB observes that the applicant's assessment of her own contribution is not a material basis on which to challenge the assessment made by her line manager and, further, that the comparison between the number of points obtained in the years 2005 to 2007 and the number obtained in 2008 is inconclusive, since, between those two periods, the applicant changed business area, and consequently the factors taken into account in the ASBR are not comparable. On the other hand, the ECB observes that in 2003 and 2004, years when the applicant was also often absent on sick leave, she obtained only three points in the ASBR.

Findings of the Tribunal

108 As a preliminary point, as stated in paragraph 67 of this judgment, the principle of equal treatment and the principle of non-discrimination as recognised in the European Union oblige administrative authorities not to treat the same situations differently and not to apply the same treatment to different situations, unless that is objectively justified. Given that the question whether or not a situation is identical must be assessed in the light of the conditions governing the applicability of the rule the implementation of which is allegedly the source of unequal treatment or discrimination, it is clear that, as a matter of fact, a person on sick leave is not in the same situation as a person in active service and that, consequently, in terms of European Union law, no general principle requires administrative authorities to consider persons on sick leave as being in the same situation as persons actively at work (see, to that effect, the judgment of 11 July 2006 in Case C-13/05 *Chacón Navas*, paragraph 54; and the judgment of 20 January 2009 in Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others*, paragraph 27). Quite to the contrary, there is settled case-law both that the administrative authority is entitled to take into account, as a secondary factor, an official's periods of sick leave in order to decide between candidates for promotion (see, to that effect, the judgment of

31 May 2005 in Case T-284/02 *Dionyssopoulou* v *Council*, paragraphs 50 to 52, and case-law cited) and that where an official is entitled to sick leave, he is, by definition, excused from performing his duties and is therefore not in the same situation as an official in active service (see, to that effect, the judgment of 9 June 2005 in Case T-80/04 *Castets* v *Commission*, paragraph 30, and the judgment of 29 March 2007 in Case T-368/04 *Verheyden* v *Commission*, paragraph 61). Consequently, only when a legal provision requires the administrative authority to treat the situation of a person on sick leave as comparable to that of a person in active service is a person on sick leave justified in claiming the same treatment as a person in active service.

109 In the present case, it is not apparent from the case-file that the internal rules applicable to the ECB required it, at least for the purposes of the ASBR, to treat the situation of persons on sick leave as comparable to the situation of persons in active service. In particular, and contrary to what is asserted by the applicant, the 2008 Guidelines do not provide that a member of staff's periods of sick leave must be neutral in effect in the ASBR procedure, but only that the amount of the budgetary envelopes allocated to salary increases and bonuses must be calculated taking into account employees on sick leave. Admittedly, it is apparent from the case-file that the ECB used that text in order to answer criticism advanced by the Staff Committee when the latter was surprised by the removal of the statement, which appeared in earlier guidelines, that ASBR decisions must not be affected by periods of sick leave, but that fact cannot give to the 2008 Guidelines a meaning which they do not have.

110 It is in the light of those preliminary considerations that the Tribunal must examine each of the arguments put forward by the applicant.

111 As regards, first, the argument that the ECB should have taken into account her periods of sick leave and that, consequently, she had less time to carry out the tasks assigned to her than if she had been actively at work over the whole of the reference period, it has been noted that the 2008 Guidelines do not provide that periods of sick leave should be neutral in effect under the ASBR procedure. Further, the case to which the applicant refers, *Sundholm* v *Commission*, cannot be applied by analogy to the present case. First, that case concerned the appraisal of an official of the European Commission, an appraisal which, under Article 43 of the Staff Regulations, is carried out inter alia on the basis of performance. However, in order to compare performance, rather than, as in the present case, contributions to one or more tasks, it is necessary, in order that all officials are treated in the same way, that there be a comparison of the average work performed by each of them during the same period of time. Secondly, contrary to the internal rules in force at the ECB, in *Sundholm* v *Commission* the internal provisions in force at the Commission expressly provided that the reporting officer should not take account of periods of sick leave of the official being appraised. Consequently, the Court of First Instance held that the Commission was under an obligation not only not to penalise an official because of her periods of sick leave but also to examine whether the marks given for her performance could not be increased so as to take account of the conditions under which she had performed her duties faced with the fact that, because of her absence, she had less actual time at work (*Sundholm* v *Commission*, paragraph 29).

112 However, unlike the appraisal procedure in force at the Commission, the ASBR procedure at the ECB is not based on a comparison of the performance of different employees within the same business area taking into account their actual time at work, but on a comparison of their respective individual contributions to the work of the ECB. The Director-General in charge of the unit to which the applicant was assigned was therefore not obliged to investigate whether the assessment of the applicant's performance in the ASBR procedure ought to be revised upwards in order to take account of the fact that, because of her sick leave, she had less time to carry out the tasks which had been assigned to her.

113 It follows that the applicant's first argument must be rejected as unfounded.

114 As regards, secondly, the argument that objectives to be achieved were not set in advance, it is clear that the applicant's argument to that effect lacks any legal basis. It can be observed that while some staff appraisal procedures may provide for the prior setting of objectives to be achieved, that is not true of the ASBR procedure. Consequently, the fact that a member of staff of the ECB has or has not achieved the objectives assigned to him in the appraisal procedure has no effect on the ASBR exercise. Further, contrary to what is claimed by the applicant, the exercise of comparing the respective individual contributions to the work of ECB members of staff working in the same business area does not necessarily require that individual objectives have been set in advance. It follows that, in the absence of any provision requiring the setting of individual objectives under the ASBR procedure, the applicant's second argument must be rejected.

115 As regards, third, the argument that the tasks allocated to the applicant were fewer and less important than those for which she had been responsible before her sick leave and did not correspond to her job profile, it must be stated that that circumstance is the result of the adapted working hours of which she had the benefit on her return from sick leave specifically in order to facilitate that return. Moreover, the applicant does not dispute that she agreed to the introduction of those adapted working hours. Consequently, the applicant cannot complain that the ECB assigned to her, within those adapted working hours, tasks of less importance which did not correspond to her job profile.

116 Further, it must be observed that the applicant had been informed that the tasks for which she was responsible before her sick leave had had to be allocated to another person and that she could not therefore expect to resume all of the tasks assigned to her whenever she was capable of again working full-time. Since only two months elapsed between the date when the applicant resumed full-time work, 27 October 2008, and the end of the 2008 ASBR reference period, the applicant cannot complain that the ECB did not restore her to her former duties. Moreover, since the number of tasks corresponding to a given job profile cannot exceed the requirements of the business area, the applicant cannot claim that her Head of Division was wrong not to have withdrawn certain tasks from her colleagues in order to allocate them to her. Since the applicant has not adduced any evidence of the existence of tasks to be performed which correspond to her job profile and which had not previously been assigned to one of her colleagues, the applicant's third argument must be rejected as unfounded.

117 As regards, fourth, the argument that her sick leave was wrongly taken into account in the 2008 ASBR, suffice it to say, in order to reject that ground of complaint, that the provisions in force at the ECB at the material time did not oblige the ECB to ensure that the applicant's periods of sick leave were neutral in effect.

118 As to the argument that several statements made by the applicant's line managers on her work were not supported by evidence, it must be observed that the texts applicable to the ASBR do not provide that there is any obligation to support by factual evidence the assessments which may be made on the contribution of members of staff to the ECB's work. On the contrary, the fact that the ECB accords to the competent authorities a wide discretion in relation to the ASBR presupposes that the authorities are under no obligation to disclose in their decisions all the elements of fact and law taken into account for each assessment.

119 Lastly, on the supposition that, by her claim, the applicant intends in fact to raise a ground of complaint that reasons for the contested decision were not stated, it must be borne in mind that, in relation to a procedure which, like the ASBR, leads to the adoption of a multiplicity of individual decisions, reasons for a decision may be stated only at the pre-litigation stage (see, by analogy, inter alia, the judgment of 10 September 2009 in Case F-47/07 *Behmer* v *Parliament*, paragraph 94). However, in the present case, while the contested decision contains only a statement of the principles governing the ASBR, and not, as required by the case-law, the reasoning which led the ECB to award only two points of salary increase to the applicant, it is clear that the reasons for the contested decision have been stated since the President of the ECB said, when rejecting the complaint, that,

according to the applicant's Head of Division, she had not yet mastered her newly allocated tasks and that was why, after comparing her performance with that of others employed in her division, he had decided to award her solely a two-point increase in salary.

120 In any event, the fourth argument must therefore be rejected as unfounded.

121 Consequently, the sixth plea in law must be rejected.

122 Since all of the pleas in law are unfounded, the Tribunal must reject the claims for annulment and, consequently, the claims for payment of the difference between the challenged salary increase and that which should have been granted to the applicant under the 2008 ASBR, from 15 January 2009 until payment in full, plus default interest at the rate equal to the marginal lending rate of the European Central Bank during the default period increased by three percentage points.

2. *The claims for compensation*

Arguments of the parties

123 The applicant considers that if the contested decision were annulled and if the organisation of a new ASBR for 2008, duly and appropriately carried out, were to entail excessive difficulties, the ECB should compensate her for the material damage she suffered, which she estimates as the difference between the two points which were awarded to her and the number of points which she could reasonably expect taking into account the number obtained in the previous year, that is to say, five points, or the average of the three preceding years.

124 In any event, the applicant considers that she has suffered non-material damage, which she assesses *ex aequo et bono* at the sum of EUR 10 000, arguing that the ECB has, by the contested decision, deeply affected her dignity and confidence in that institution. The nature of the damage is that, first, when she had undergone an extended period of sick leave she discovered that her absence had been used against her in order to refuse her a well-deserved promotion and, secondly, that the ECB assigned to her only a limited number of tasks which were not commensurate with her abilities and qualifications as a management assistant in DG Internal Audit.

125 In its defence, the ECB states that, since the applicant bases her loss on the illegality of the contested decision and since her claims for annulment must be rejected, the claims for compensation must be rejected.

Findings of the Tribunal

126 It must be recalled that, in accordance with settled case-law, claims for compensation, submitted jointly with claims for annulment which have no foundation in law, are themselves without any foundation in law if they are closely linked to the claims for annulment (see, inter alia, judgment of 18 June 2009 in Case F-43/08 *Spee* v *Europol*, paragraph 55, and judgment of 10 September 2009 in Case F-139/07 *van Arum* v *Parliament*, paragraph 141, under appeal to the General Court of the European Union, Case T-454/09 P).

127 The applicant's claims for compensation, submitted jointly with the claims for annulment, are based on the illegality of the contested decision and are therefore closely linked to the claims for annulment. The claims for annulment in the application have been held to be without any foundation in law (see paragraph 122 of this judgment) and have for that reason been rejected. The claims for compensation must consequently be rejected.

128 There is no need to rule on the claims by the ECB that the action should be dismissed as being inadmissible, since all the claims in the application have been rejected on the merits and the action must be dismissed in its entirety.

Costs

129 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Title 2, Chapter 8 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.

130 However, under Article 88 of the Rules of Procedure, the Tribunal may order a party, even if successful, to pay to the other party costs which the successful party has caused the other party to incur and which the Tribunal holds to be unreasonable or vexatious.

131 In the present case, the Tribunal notes that, although the applicant had queried the competence of the author of the 2008 Guidelines at the pre-litigation stage in view of the heading they bore, the ECB waited for the applicant to bring the present action before it sent to her the relevant extract of the minutes of the 601st meeting of the Executive Board, which sufficed alone to prove that the competent authority, namely the Executive Board and not DG Human Resources, had indeed adopted the 2008 Guidelines.

132 Accordingly, if the applicant had received notice in good time of the document mentioned in the preceding paragraph, she could possibly be considered to have abandoned her fifth plea in law or at least some of the ground of complaints raised in support of that fifth plea in law. In that event, it would be open to the Tribunal to contemplate imposing on the ECB, pursuant to Article 88 of the Rules of Procedure, liability for the part of the costs linked to the provision to the applicant of legal advice in relation to grounds of complaint which, in the light of the document in question, were obviously bound to fail.

133 However, it is apparent that, even after the notification to her, when the defence was lodged, of the abovementioned document, the applicant did not alter her arguments and, in particular, did not withdraw the grounds of complaint which, in the light of the document in question, were thenceforth obviously without any foundation in law. It follows that the exception laid down in Article 88 of the Rules of Procedure cannot apply and consequently that the applicant, who has been unsuccessful in these proceedings, must be ordered to bear the entire costs (judgment of 8 July 2010 in Case F-17/08 *Wybranowski* v *Commission*, paragraph 114 et seq.).

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Ms Whitehead to bear her own costs and to pay those of the European Central Bank.

Gervasoni Kreppel Rofes i Pujol

Delivered in open court in Luxembourg on 27 September 2011.

Registrar
W. Hakenberg

President
S. Gervasoni