Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 October 2021 *

(Appeal – Civil service – Disciplinary procedure – Staff Regulations of Officials of the European Union – Article 3 of Annex IX – Commission Decision C(2004) 1588 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary procedures – Article 4(4) – Administrative investigation – Hearing of the official concerned – Authorisation given to the Investigation and Disciplinary Office of the Commission (IDOC) to conduct that hearing – Rights of the defence – Right to be heard)

In Case C-583/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 July 2019,

Belén Bernaldo de Quirós, residing in Brussels (Belgium), represented by M. Casado García-Hirschfeld, avocate,

appellant,

the other party to the proceedings being:

European Commission, represented by B. Mongin and A.-C. Simon, acting as Agents,

defendant at first instance,

THE COURT (Second Chamber),

Composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb and A. Kumin (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the present

* Language of the case: French.

Judgment

1 By her appeal, Ms Belén Bernaldo de Quirós seeks to have set aside the judgment of the General Court of the European Union of 5 June 2019, *Bernaldo de Quirós* v *Commission* (T-273/18, not published, EU:T:2019:371; 'the judgment under appeal'), whereby the General Court dismissed her action for, first, annulment of the Commission decision of 6 July 2017 imposing on her the sanction of a reprimand ('the decision at issue') and, in so far as necessary, of the decision of 31 January 2018 rejecting her complaint against the decision at issue and, second, compensation for the harm allegedly sustained as a result of those decisions.

Legal framework

The Staff Regulations of Officials of the European Union

2 Article 12 of the Staff Regulations of Officials of the European Union, in the version applicable to the dispute ('the Staff Regulations'), provides:

'An official shall refrain from any action or behaviour which might reflect adversely upon his position.'

3 According to Article 86 of the Staff Regulations:

'1. Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.

2. Where the Appointing Authority or OLAF becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred.

3. Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX.'

4 Article 1(1) of Annex IX to the Staff Regulations provides:

'Whenever an investigation by OLAF reveals the possibility of the personal involvement of an official, or a former official, of an institution, that person shall rapidly be informed, provided this is not harmful to the investigation. In any event, conclusions referring by name to an official may not be drawn once the investigation has been completed without that official concerned having been given the opportunity to comment on facts concerning him. The conclusions shall make reference to these comments.'

5 In the words of Article 2 of that annex:

'1. The rules set out in Article 1 of this Annex shall apply, with any necessary changes, to other administrative enquiries carried out by the Appointing Authority.

2. The Appointing Authority shall inform the person concerned when the investigation ends, and shall communicate to him the conclusions of the investigation report and, on request and subject

to the protection of the legitimate interests of third parties, all documents directly related to the allegations made against him.

3. The appointing authority of each institution shall adopt implementing arrangements for this Article, in accordance with Article 110 of the Staff Regulations.'

6 Article 3 of that annex provides:

'On the basis of the investigation report, after having notified the official concerned of all evidence in the files and after hearing the official concerned, the Appointing Authority may:

(a) decide that no case can be made against the official, in which case the official shall be informed accordingly in writing; or

(b) decide, even if there is or appears to have been a failure to comply with obligations, that no disciplinary measure shall be taken and, if appropriate, address a warning to the official; or

(c) in the case of failure to comply with obligations within the meaning of Article 86 of the Staff Regulations:
(i) decide to initiate the disciplinary proceedings provided for in Section 4 of this Annex, or
(ii) decide to initiate disciplinary proceedings before the Disciplinary Board.'

7 Article 22(1) of Annex IX states:

'After hearing the official, the Appointing Authority shall take its decision as provided for in Articles 9 and 10 of this Annex within two months of receipt of the opinion of the Board. Reasons must be given for the decision.'

The 2004 Implementing rules

8 Pursuant to Article 2(3) of Annex IX to the Staff Regulations, the Commission adopted on 28 April 2004 Decision C(2004) 1588 fixing general implementing provisions on the conduct of administrative inquiries and disciplinary procedures, published in *Administrative notices* No 86-2004, of 30 June 2004 ('the 2004 Implementing rules').

9 Article 2(1) and (3) of the 2004 Implementing rules, on the tasks and functions of the Investigation and Disciplinary Office of the Commission (IDOC), provides:

'1. IDOC shall carry out administrative inquiries. For the purposes of these implementing provisions, "administrative inquiries" shall mean all actions taken by the authorised official to establish the facts and, where necessary, determine whether there has been a failure to comply with the obligations incumbent on Commission officials. …

3. IDOC shall carry out disciplinary procedures for the appointing authority.'

10 Article 3 of the 2004 Implementing rules, entitled 'The exercise of powers as regards administrative inquiries', provides:

'1. The Director and other members of IDOC shall exercise their powers of administrative inquiry independently. In the exercise of those powers, they shall neither seek nor receive

instructions. They shall have the power to obtain documents, summon any person subject to the Staff Regulations to provide information and carry out on-the-spot investigations.

2. Administrative inquiries shall be carried out thoroughly and include all aggravating and extenuating circumstances; they shall last for a period appropriate to the circumstances and complexity of the case.

3. IDOC may receive assistance from other officials or specialist departments.'

11 According to Article 4 of the 2004 Implementing rules, entitled 'Opening and conduct of administrative inquiries':

'1. An administrative inquiry shall be opened at the request of a Director-General or Head of Department, or on its own initiative, by the Director-General for Personnel and Administration in agreement with the Secretary-General.

…

3. The decision to open an administrative inquiry shall designate the Director of IDOC or another official as responsible for the inquiry, define the purpose and scope of the inquiry and require the officials responsible for it to determine responsibilities on the basis of the particular facts and circumstances, and, if appropriate, the individual responsibility of the officials concerned [by the inquiry].

4. As soon as an administrative inquiry suggests that an official may be personally involved in an affair, that official shall be kept informed provided that information does not hinder the inquiry. In any case, conclusions referring to an official by name may not be drawn at the end of the inquiry unless that official has had the opportunity to express an opinion on all the facts which relate to him or her. The conclusions shall record that opinion. …

5. IDOC shall submit a report on the inquiry to the Director-General for Personnel and Administration … That report shall set out the facts and circumstances in question; it shall establish whether the rules and procedures applicable to the situation were respected and shall determine any individual responsibility, having regard to aggravating or mitigating circumstances. Copies of all the relevant documents and records of interviews shall be attached to the report.

6. The Director-General for Personnel and Administration shall inform the official concerned of the conclusion of the inquiry together with the conclusions of the inquiry report and, on request, all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties.

7. After receiving an inquiry report from OLAF, the Director-General for Personnel and Administration may, if appropriate, either ask OLAF to supplement the report or decide to open an administrative inquiry himself or immediately open a disciplinary procedure or indeed close the file without any disciplinary consequences.'

12 Article 5 of the 2004 Implementing rules, entitled 'The hearing referred to in Article 3 of Annex IX to the Staff Regulations', states:

'1. An official heard pursuant to Article 3 of Annex IX to the Staff Regulations shall sign the record of the hearing or make comments and/or remarks within 15 calendar days from receipt of the record. Failure to do so within that period shall, except in cases of force majeure, result in the record being considered approved.

2. If the appointing authority or a person authorised to that effect has to conduct interviews with certain persons following the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the official concerned may, on request, receive a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him or her.'

Background to the dispute

13 The background to the dispute is set out in paragraphs 1 to 13 of the judgment under appeal and, for the purposes of the present proceedings, may be summarised as follows.

14 The appellant, Ms Bernaldo de Quirós, was engaged as an official at the Commission on 1 January 1987. After being Head of the 'Multilingualism' Unit, she became, on 1 January 2013, Head of the newly created 'Traineeship Office' Unit, attached to the 'Youth and Sport' Directorate of the Directorate-General (DG) for 'Education and Culture', now called 'Education, Youth, Sport and Culture'.

15 On 6 February 2014, five case managers working in the appellant's unit who were involved in trainee recruitment filed a complaint against her. They took issue, in particular, with her unacceptable conduct towards colleagues in the unit and irregularities in the selection procedure for trainees at the Commission.

16 On 26 March 2014, the appointing authority at the Commission instructed IDOC to conduct an administrative investigation in relation to the applicant. The terms of reference given to IDOC were worded as follows:

'The purpose of this investigation is to determine the extent to which [the appellant] adopted inappropriate behaviour towards certain members of her unit and failed to observe the procedures for the selection of trainees at the Commission.'

17 On 22 June 2015, IDOC submitted its investigation report to the appointing authority, on the basis of Article 2 of Annex IX to the Staff Regulations. In that report, IDOC concluded that the appellant might have committed breaches of the obligations laid down in the Staff Regulations. In particular, IDOC considered, first, that '[the appellant's] behaviour towards Ms B.[, Deputy Head of Unit,] between 1 January 2013 and 31 May 2013 appear[ed] to display all the components of psychological harassment'; second, that 'the appellant's behaviour towards Ms C. at a meeting of the unit on 22 April 2013 [was] such as to constitute inappropriate behaviour within the meaning of Article 12 of the Staff Regulations'; and, third, that '[the appellant] h[ad] altered the system for the selection of candidates for traineeship in a way that did not guarantee equal and transparent

treatment of all candidates and [which] h[ad] been perceived as favouring some to the detriment of others. When [the appellant's] functions and responsibilities are taken into account, her initiative might be considered to be a breach of Article 21 of the Staff Regulations'.

18 In the light of IDOC's inquiry, the Director-General of DG 'Human Resources and Security' decided, also on 22 June 2015, to instruct IDOC to hear the appellant, on the basis of Article 3 of Annex IX to the Staff Regulations. By letter of 12 August 2015, counsel for the appellant objected to the appointing authority's decision to delegate powers to IDOC to conduct that hearing. On 9 September 2015, the appointing authority confirmed to the appellant that her hearing would be conducted by two members of IDOC and, in response to her objection, informed her that, according to consistent and settled practice, it could authorise IDOC to conduct the hearing referred to in Article 3 of Annex IX to the Staff Regulations in its place, provided that IDOC then submitted the record of the hearing to the appointing authority so that it might determine what action should be taken on the case. By letter of 16 September 2015, counsel for the appellant lodged with the appointing authority written observations for the hearing, in which they repeated their objection. On 23 September 2015, the appellant was heard by IDOC in the presence of her counsel.

19 On 6 October 2015, IDOC informed the appellant that it had decided to grant her request to hear further witnesses and heard four individuals who were members of the 'Traineeships Office' unit at the time. The minutes of those hearings were sent to the appellant for comment on 23 October 2015. Her counsel submitted comments by letter of 5 November 2015.

20 On 22 December 2015, the appointing authority decided to initiate the disciplinary procedure before the Disciplinary Board against the appellant, in the light of the record of her hearing under Article 3 of Annex IX to the Staff Regulations and the accompanying documents.

21 In the context of the disciplinary procedure before the Disciplinary Board, counsel for the appellant lodged written observations before that board and the appellant was heard by it on 5 October 2016. The reasoned opinion of the Disciplinary Board was delivered on 26 January 2017. In that opinion, the Disciplinary Board concluded that the appellant had acted in a way that might reflect adversely upon her position, within the meaning of Article 12 of the Staff Regulations. It considered, however, that it would be inappropriate to propose the imposition of a disciplinary measure on the sole basis of its finding, which it considered to be quite limited, that she had acted in a way that might adversely reflect upon her position and, in those circumstances, it proposed that no disciplinary measure should be imposed on the appellant.

22 Following the hearing of the appellant by the tripartite appointing authority, composed of three directors general of the Commission, that tripartite appointing authority decided on 6 July 2017 to adopt the decision at issue.

23 The appellant lodged a complaint against that decision, on the basis of Article 90(2) of the Staff Regulations, which was rejected by the appointing authority by decision of 31 January 2018.

The procedure before the General Court and the judgment under appeal

24 By application lodged at the Court Registry on 30 April 2018, the appellant brought an action for, first, annulment of the decision rejecting her complaint against the decision at issue and, second, compensation for the harm allegedly sustained as a result of those decisions.

25 In support of her claim for annulment, the applicant put forward four pleas in law, alleging, first, breach of the mandate given to IDOC; second, an application of Article 3 of Annex IX to the Staff Regulations that was contrary to the principle of respect for the rights of the defence; third, breach of the principle of equality of arms at the hearing referred to in Article 22 of Annex IX to the Staff Regulations; and, fourth, breach of the principle of proportionality, an error of fact and a manifest error of assessment as regards the disciplinary sanction of a reprimand.

26 By the judgment under appeal, the General Court dismissed the action in its entirety as unfounded.

Forms of order sought

27 The appellant claims that the Court should:

– set aside the judgment under appeal;

– grant the form of order sought at first instance; and

– order the Commission to pay the costs, including those incurred before the General Court.

28 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

The appeal

29 In support of her appeal, the appellant relies on a single ground of appeal, alleging that the General Court made an error of law in holding that Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules, read in the light of the principle of respect for the rights of the defence, in particular the right to be heard guaranteed in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter'), do not preclude the appointing authority from instructing IDOC to conduct the hearing referred to in Article 3 of Annex IX. The ground of appeal consists of two parts.

30 By the first part, the appellant maintains that the General Court infringed Article 3 of Annex IX to the Staff Regulations and Articles 4 and 5 of the 2004 Implementing rules, read in the light of Article 41(2)(a) of the Charter. By the second part, she claims that the General Court distorted the facts.

First part

Arguments of the parties

31 In the first place, the appellant claims that the General Court, in paragraphs 81 and 82 of the judgment under appeal, misinterpreted Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules when it considered that those provisions do not require that the hearing referred to in Article 3 be held before the appointing authority. She maintains that it follows expressly from those provisions that the appointing authority in person must hear the official concerned before deciding, where appropriate, to open the disciplinary procedure.

32 In the appellant's submission, such a formality is an essential requirement, within the meaning of the second paragraph of Article 263 TFEU, in so far as the official concerned must be heard by the authority responsible, where appropriate, for opening a disciplinary inquiry. In that regard, the appellant observes that the report submitted by the appointing authority to the Disciplinary Board, adopted following that hearing, is intended only to establish the facts, in the light, in particular, of the results of the hearing.

33 In the second place, the appellant maintains that the reasoning of the General Court set out in paragraphs 81 and 82 of the judgment under appeal is vitiated by an error of law in so far as the General Court wrongly held that failure to comply with a condition of the Staff Regulations, namely Article 3 of Annex IX to the Staff Regulations, was justified by internal rules, namely the 2004 Implementing rules. The binding force of those rules is less than that of the Staff Regulations and, consequently, they cannot in law establish rules that derogate from higher-ranking provisions, such as the general principles of law or the provisions of the Staff Regulations.

34 In the third place, the appellant claims that the General Court's reasoning set out in paragraphs 81 and 82 of the judgment under appeal contains a contradiction. Whereas in paragraph 81 the General Court accepted that, in accordance with Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules, the obligation for the appointing authority to hear the official concerned means that it must receive the official's comments on all the facts at issue before, where appropriate, on the basis of the inquiry report, opening a disciplinary procedure, the General Court stated, in paragraph 82, that those provisions do not require that the hearing referred to in Article 3 take place before the appointing authority.

35 In the fourth place, the appellant maintains that, also in paragraphs 81 and 82 of the judgment under appeal, the General Court disregarded the judgment of 11 July 1968, *van Eick* v *Commission* (35/67, EU:C:1968:39). It follows from that judgment that, in the case of disciplinary proceedings, the mandatory hearing of the official concerned by the appointing authority, as referred to in Article 3 of Annex IX to the Staff Regulations, is a strict rule of law. Accordingly, in application of that judgment, Article 3 of Annex IX should be interpreted as imposing on the appointing authority the obligation to hear the official concerned before opening, where appropriate, the disciplinary procedure.

36 In the fifth place, the appellant maintains that in paragraph 84 of the judgment under appeal the General Court misinterpreted Article 5(2) of the 2004 Implementing rules when it held that that provision authorises the appointing authority to 'instruct a person, in this instance IDOC, to hear

certain persons, including [the appellant], as regards the hearing referred to in Article 3 of Annex IX to the Staff Regulations'. In fact, that provision allows such a delegation of powers only 'following the hearing' of the official concerned and only for the purpose of questioning witnesses.

37 In any event, IDOC is not a 'person', as the General Court incorrectly stated in that paragraph, but a body entrusted with conducting administrative investigations, on the instructions of the appointing authority and impartially and independently, and, following those investigations, making recommendations to the appointing authority.

38 In the sixth and last place, the appellant takes issue with the General Court for having, by confirming that the appointing authority was able to instruct IDOC to conduct the hearing referred to in Article 3 of Annex IX to the Staff Regulations, breached, in paragraphs 89 and 90 of the judgment under appeal, the principle of respect for the rights of the defence, of which the right to be heard and the *inter partes* principle, inter alia, form part. In particular, the General Court was wrong to hold that the official concerned may, via IDOC, validly make his or her comments on all the evidence in the files known to the appointing authority before it makes a ruling on the basis of Article 3 of Annex IX to the Staff Regulations. First, that hearing cannot be held by a body which has already drawn up an inquiry report proposing that that official be held liable and which, for that purpose, has received testimony, including that of the official. Second, the right to be heard means that it must be possible for the official concerned to have an influence on the decision-making process by submitting comments to the appointing authority.

39 The Commission contends that the appellant's arguments must be rejected as unfounded.

Findings of the Court

40 As regards, in the first place, the appellant's argument that the General Court, in paragraphs 81 and 82 of the judgment under appeal, infringed Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules, it should first be borne in mind that the first of those provisions states that, 'on the basis of the investigation report, after having notified the official concerned of all evidence in the files and after hearing the official concerned', the appointing authority may, in particular, decide to initiate the disciplinary proceedings. As for the second provision, it states that 'as soon as an administrative inquiry suggests that an official may be personally involved in an affair, that official shall be kept informed provided that information does not hinder the inquiry', that 'in any case, conclusions referring to an official by name may not be drawn at the end of the inquiry unless that official has had the opportunity to express an opinion on all the facts which relate to him or her' and that 'the conclusions shall record that opinion'.

41 Contrary to the applicant's contention, it does not follow from the wording of those provisions that the appointing authority 'in person' must hear the official concerned before deciding, where appropriate, to initiate the disciplinary proceedings.

42 It follows, second, from the context of which Article 3 of Annex IX to the Staff Regulations forms part that that provision implements the principle set out in Article 1(1) of that annex, which is made applicable to administrative enquiries carried out by the appointing authority by Article 2(1) of that annex and the terms of which are essentially reproduced in Article 4(4) of the 2004 Implementing rules, according to which the conclusions referring to an official by name may not be drawn at the end of the inquiry unless that official has had the opportunity to expression an opinion on all the facts which relate to him or her.

43 It follows that the purpose of the obligation to hear the official concerned laid down in Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules is to enable the official concerned to put forward his or her point of view on the establishment of the facts in the administrative inquiry before the appointing authority adopts a decision, on the basis of the inquiry report, on whether to open a disciplinary procedure.

44 That objective may also be achieved where the official concerned is heard by IDOC, instructed for that purpose by the appointing authority, and not directly by the appointing authority.

45 In that regard, it should be borne in mind that, as the General Court observed in paragraph 85 of the judgment under appeal, in accordance with Article 2(1) and (3) of the 2004 Implementing rules, IDOC is to carry out administrative inquiries in order to establish the facts and to carry out disciplinary procedures on behalf of the appointing authority. It is precisely in the context of that task of assisting the appointing authority which the 2004 Implementing rules entrusted to IDOC that the latter is in a position to be instructed by the appointing authority to conduct, on behalf of the appointing authority, the hearing provided for in Article 3 of Annex IX to the Staff Regulations.

46 Thus, although IDOC may conduct the hearing referred to in Article 3 of Annex IX to the Staff Regulations in the context of the investigation of the facts, the appointing authority is still required to take the comments made by the official concerned during that hearing into consideration in order to be in a position to adopt, on the basis of the inquiry report, an informed decision on whether to open a disciplinary procedure.

47 In fact, as the General Court observed in paragraph 85 of the judgment under appeal, even where IDOC is instructed by the appointing authority to conduct that hearing, it is not its place to decide on the action to be taken following the administrative inquiry which it has carried out, since the adoption of a decision on whether to open a disciplinary procedure following the hearing of the official concerned is solely a matter for the appointing authority.

48 It follows from the foregoing considerations that Article 3 of Annex IX to the Staff Regulations, read with Article 4(4) of the 2004 Implementing rules, must be interpreted as meaning that it does not preclude the official concerned by the administrative inquiry from being heard not directly by the appointing authority but by IDOC, instructed for that purpose. The argument whereby the appellant alleges that the hearing by the appointing authority is an essential procedural requirement, within the meaning of Article 263 TFEU, is therefore incorrect in law.

49 Consequently, in holding in paragraph 82 of the judgment under appeal that Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules do not require that the hearing referred to in Article 3 be held before the appointing authority, the General Court did not infringe those provisions.

50 In the second place, it cannot be considered that paragraphs 81 and 82 of that judgment are vitiated by contradictory reasoning. As is apparent from paragraph 46 of this judgment, although IDOC may conduct the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the appointing authority must in any event take the comments of the official concerned into account before adopting, on the basis of the inquiry report, a decision on whether to open a disciplinary procedure.

51 In the third place, the appellant's argument that the General Court was wrong to find that failure to comply with a provision of the Staff Regulations was justified by internal rules that derogate from that provision must be rejected as unfounded. It is sufficient to observe that it follows from the considerations set out in paragraphs 41 to 48 of this judgment that Article 4(4) of the 2004 Implementing rules does not derogate from Article 3 of Annex IX to the Staff Regulations.

52 As regards, in the fourth place, the appellant's argument that the General Court's interpretation in paragraphs 81 and 82 of the judgment under appeal of Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules disregards the case-law resulting from the judgment of 11 July 1968, *van Eick* v *Commission* (35/67, EU:C:1968:39), it should be borne in mind that in that judgment the Court considered that the obligation to hear the official in a disciplinary procedure, as laid down in the third paragraph of Article 7 of Annex IX to the Staff Regulations, in the version then in force ('the former Staff Regulations'), was a strict rule of law that had to be interpreted, in principle, as imposing on that entity a duty to hear the official itself.

53 The Court also made clear, in that judgment, that it was only by observing that principle and in conditions which ensured the protection of the rights of the officials concerned that the appointing authority might, for reasons connected with the efficient running of its departments, entrust to one or more of its members the task of hearing the official concerned.

54 In fact, it should be observed that the third paragraph of Article 7 of Annex IX to the former Staff Regulations corresponds to Article 22 of Annex IX to the Staff Regulations and not to Article 3 of that annex.

55 Furthermore, it follows from the judgment of 11 July 1968, *van Eick* v *Commission* (35/67, EU:C:1968:39), that the Court concluded that the third paragraph of Article 7 of Annex IX to the former Staff Regulations was a strict rule of law because, in particular, of the gravity of the penalties to which the disciplinary procedure referred to in that annex could lead.

56 In that regard, it should be borne in mind that a disciplinary procedure consists of two separate phases, the first being the administrative inquiry in which incriminating and exonerating evidence is investigated, initiated by a decision of the appointing authority and closed, after the official concerned has been heard concerning the alleged facts, by an inquiry report, and the second being the disciplinary procedure properly so-called, initiated by the appointing authority on the basis of the inquiry report, which assumes that the official was heard before a penalty applicable to him or her was adopted by the appointing authority (see, to that effect, order of 22 January 2019, *Kerstens* v *Commission*, C-577/18 P, not published, EU:C:2019:129, paragraph 26).

57 As the General Court stated in paragraph 81 of the judgment under appeal, the hearing referred to in Article 3 of Annex IX to the Staff Regulations forms part of the first of those phases, which aims to establish the facts with a view to the possible initiation of the second phase, namely the disciplinary phase properly so-called.

58 Unlike the disciplinary phase properly so-called, which includes, in particular, the hearing referred to in Article 22 of that annex, the first phase leads not to the adoption of a disciplinary penalty, but to the possible decision of the appointing authority to initiate the disciplinary phase. Nor does that decision prejudge the position which the appointing authority will adopt at the close of that second phase.

59 It follows from the foregoing that the case-law established in the judgment of 11 July 1968, *van Eick* v *Commission* (35/67, EU:C:1968:39), as referred to in paragraphs 52 and 53 of this judgment, cannot be transposed to the present case, which relates to the inquiry phase of the disciplinary procedure. The appellant's argument that the General Court disregarded that case-law must therefore be rejected as unfounded.

60 In the fifth place, as regards the appellant's argument that, in confirming that the appointing authority was entitled to instruct IDOC to conduct the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the General Court failed to have regard, in paragraphs 89 and 90 of the judgment under appeal, to the principle of respect for the rights of the defence, notably the right to be heard and the *inter partes* principle, it should be borne in mind that, as the General Court stated in paragraph 77 of the judgment under appeal, respect for the rights of the defence, in which the right to be heard is inherent, is a fundamental principle of EU law which applies to everyone and which must be guaranteed in all procedures which are liable to culminate in an act adversely affecting a person (see, to that effect, judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited).

61 As the General Court observed in paragraph 78 of the judgment under appeal, Article 41 of the Charter, which guarantees the right to good administration, states in the first indent of paragraph 2(a) that that right includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

62 Thus, more specifically, the right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of a decision likely to affect his or her interests adversely (judgment of 25 June 2020, *HF* v *Parliament*, C-570/18 P, EU:C:2020:490, paragraph 58 and the case-law cited).

63 In addition, it must be considered that, as the General Court observed in paragraph 79 of the judgment under appeal, respect for the rights of the defence, of which the *inter partes* principle is a corollary, requires that an official against whom an EU institution has opened an administrative procedure has been put in a position during that procedure to make known his or her views on the reality and the relevance of the facts, the alleged circumstances and the documents which that institution intends to use against him or her in support of its allegation that there has been an infringement of the provisions of the Staff Regulations.

64 It follows from the foregoing that the right to be heard pursues a dual objective. First, it serves to enable the case to be examined and the facts to be established in as precise and correct a manner as possible and, second, it ensures that the person concerned is in fact protected (judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraph 69).

65 It is in the light of the foregoing considerations that the Court of Justice must ascertain whether the General Court failed to observe the right to be heard and the *inter partes* principle when it considered, first, in paragraph 89 of the judgment under appeal, that the fact that the hearing in question was conducted by IDOC does not mean that the appellant was not in a position to put forward her point of view effectively to the appointing authority on the reality and the relevance of the facts, of the alleged circumstances and of the documents forming the subject matter of the disciplinary case against her and on which the appointing authority was required to take a decision on the basis of Article 3 of Annex IX to the Staff Regulations and, second, in paragraph 90 of that judgment, that the appellant had the opportunity to express her views before the decision to open the disciplinary procedure was adopted, in accordance with Article 3.

66 In that regard, first, it is not disputed that, as the General Court stated in paragraph 89 of the judgment under appeal, the appellant, accompanied by her counsel, not only had the opportunity to comment and to ensure that her comments were correctly transcribed in the record of the interview in question, in accordance with Article 5 of the 2004 Implementing rules, but was also able to comment on the record of her interview in order to apprise the appointing authority of her position on the matter. Likewise, the records of the interviews with the witnesses who were heard after the appellant were sent to her in order to put her in a position to communicate any comments she might have, which she specifically did by letter of 5 November 2015.

67 In addition, it is also common ground that, as the General Court stated in paragraph 90 of the judgment under appeal, that, by letters of 12 August and 16 September 2015, the appellant sent the appointing authority her written comments in preparation for her hearing on 23 September 2015, in which she disputed, in particular, the instructions given by the appointing authority to IDOC to conduct that hearing and also alleged irregularities committed by IDOC in the course of the inquiry.

68 In those circumstances, it must be stated that the appellant was able, in accordance with Article 3 of Annex IX to the Staff Regulations, to make her point of view known effectively before the appointing authority adopted its decision to open the disciplinary procedure.

69 Therefore, as the General Court observed in paragraph 90 of the judgment under appeal, the appellant cannot claim that she was unable to raise certain matters before IDOC, relating in particular to alleged irregularities vitiating the administrative inquiry, which she would have been able to raise before the appointing authority.

70 Consequently, the General Court cannot be accused of having failed to observe, in paragraphs 89 and 90 of the judgment under appeal, the applicant's rights of defence, in particular her right to be heard during the investigative phase of the disciplinary procedure.

71 In the sixth place, as regards the appellant's argument that the General Court, in paragraph 84 of the judgment under appeal, misinterpreted Article 5(2) of the 2004 Implementing rules, in that it held that it followed from that provision that the appointing authority was 'entitled to instruct a person, in this instance IDOC, to conduct the hearing of certain persons, including [the appellant], concerning the hearing referred to in Article 3 of Annex IX to the Staff Regulations', it must be borne in mind that, in the words of Article 5(2), 'if the appointing authority or a person authorised to that effect has to conduct interviews with certain persons following the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the official concerned may, on request, receive a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him or her'.

72 Thus, it follows from the wording of Article 5(2) that that provision relates only to the interviews which took place, where appropriate, with persons other than the official involved in the disciplinary procedure, following the hearing referred to in Article 3 of Annex IX to the Staff Regulations.

73 It follows that the General Court made an error of law when it held, in paragraph 84 of the judgment under appeal, that it was clear from Article 5(2) of the 2004 Implementing rules that the appointing authority was able to authorise IDOC 'to interview certain persons, including [the appellant], concerning the hearing referred to in Article 3 of Annex IX to the Staff Regulations'.

74 However, it is clear from the case-law of the Court of Justice that an error of law made by the General Court does not invalidate a judgment under appeal if its operative part is well founded on other legal grounds (judgment of 17 December 2020, *BP* v *FRA*, C-601/19 P, not published, EU:C:2020:1048, paragraph 49 and the case-law cited).

75 In so far as it dismisses the appellant's action, the operative part of the judgment under appeal is well founded. It is apparent, first, from paragraph 48 of this judgment that the General Court was correct to hold that Article 3 of Annex IX to the Staff Regulations and Article 4(4) of the 2004 Implementing rules do not require that the hearing referred to in Article 3 be conducted before the appointing authority. Second, as is apparent from paragraphs 65 to 70 of this judgment, the Commission did not err in law when it held that the fact that the hearing referred to in Article 3 was conducted not by the appointing authority itself but by IDOC, authorised for that purpose, was not such as to constitute a breach of the appellant's rights of defence, in particular her right to be heard.

76 It follows from the foregoing that the error on the part of the General Court, as established in paragraph 73 of this judgment, does not invalidate the judgment under appeal, as the operative part of that judgment, in that it dismisses the appellant's action, was based on other legal grounds. Accordingly, the appellant's argument that the General Court failed to have regard to Article 5(2) of the 2004 Implementing rules must be rejected as ineffective.

77 Consequently, the first part of the single ground of appeal must be rejected as unfounded.

The second part

Arguments of the parties

78 The appellant claims that the General Court distorted the facts when it considered, in paragraph 91 of the judgment under appeal, that in any event her assertion that the decision adopted under Article 3 of Annex IX to the Staff Regulations would have been different if she had been heard directly by the appointing authority was purely hypothetical. In the appellant's submission, a hearing by the appointing authority might have influenced the decision-making procedure.

79 The Commission contends that this argument must be rejected as unfounded.

Findings of the Court

80 As regards the second part of the single ground of appeal, alleging that the General Court distorted the facts in paragraph 91 of the judgment under appeal, it should be borne in mind that arguments directed against a ground of a decision of the General Court that is included only for the sake of completeness cannot lead to that decision being set aside and are therefore ineffective (judgment of 25 June 2020, *Schneider* v *EUIPO*, C-116/19 P, not published, EU:C:2020:501, paragraph 76 and the case-law cited).

81 As is apparent from the use, in paragraph 91, of the words 'in any event', this second part of the ground of appeal is aimed at a ground expounded only for the sake of completeness by the General Court. In paragraph 91, the General Court held that, in order for a breach of the rights of the

defence to entail the annulment of the decision adopted by the appointing authority under Article 3 of Annex IX to the Staff Regulations, that breach must have been capable of having an impact on the content of that decision, then going on to consider that the appellant had not shown that if she had been heard directly by the appointing authority she would have been able to adduce evidence other than that already brought to the appointing authority's knowledge and that, accordingly, the content of the appointing authority's decision might have been different.

82 Thus, in paragraph 91 of the judgment under appeal, the General Court ruled on the consequences of a possible breach of the rights of the defence. However, the General Court was correct, as is clear from paragraph 75 of the present judgment, to hold that such a breach had not occurred in the present case. In those circumstances, the second part must be rejected as ineffective.

83 It follows from all of the foregoing considerations that the single ground of appeal must be dismissed as unfounded in part and ineffective in part. Consequently, the appeal must be dismissed in its entirety.

Costs

84 Under Article 138(1) of the Rules of Procedure of the Court, applicable to the proceedings on appeal pursuant to Article 184(1) of those 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. As the appellant has been unsuccessful, she must be ordered to pay the costs relating to the appeal, in accordance with the form of order sought by the Commission.

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

1. Dismisses the appeal;

2. Orders Ms Belén Bernaldo de Quirós to pay the costs.

[Signatures]