Reports of Cases

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

23 October 2013 *

(Civil service — Temporary staff — Appraisal — 2009 appraisal exercise — Career development report — Application for annulment of the career development report — Act adversely affecting an official — Action manifestly inadmissible)

In Case F-7/12,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

**Aristidis Psarras,** member of the temporary staff at the European Network and Information Security Agency, residing in Héraklion (Greece), represented by L. Levi and A. Tymen, lawyers,

applicant,

v

**European Network and Information Security Agency (ENISA),** represented by E. Maurage, acting as Agent, assisted by D. Waelbroeck and A. Duron, lawyers,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

composed of H. Kreppel, President, E. Perillo and R. Barents (Rapporteur), Judges,

Registrar: W. Hakenberg,

makes the following

**Order**

1 By application lodged at the Registry of the Tribunal on 16 January 2012, Mr Parras seeks the annulment of his career development report in respect of 2009 ('the 2009 CDR') and the annulment of the decision of the European Network and Information Security Agency (ENISA) of 16 November 2010 establishing the list of staff reclassified under the 2010 reclassification exercise.

* Language of the case: English.

## Legal context

2 The present case arises in the legal context of Article 43 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), concerning officials' staff reports, and Article 15 of the Conditions of Employment of Other Servants ('the CEOS'), under which the provisions of Article 43 of the Staff Regulations and the general provisions for implementing Article 43 of the Staff Regulations and Article 15 of the CEOS, adopted by ENISA by decision of 10 September 2008 ('the EDD 2008/18'), are applicable, by analogy, to such other servants.

3 Reference should also be made to ENISA's decision, based on Article 10 of the CEOS, of 19 September 2008, on the career of temporary agents and their reclassification to a higher grade ('the EDD 2008/19').

## Factual background to the dispute

4 On 16 February 2005, the applicant was recruited by ENISA under a temporary staff contract as accounting officer.

5 From 1 March 2009 to 28 February 2010, the applicant took leave on personal grounds in order to take up duties with the European Commission in Brussels (Belgium) as an official. ENISA's budget officer took up the duties of accounting officer *ad interim*.

6 On 1 March 2010, upon his return to ENISA, the applicant was reassigned to the post of awareness-raising officer and consequently reported to the Head of ENISA's Technical Competence Department. ENISA's budget officer retained the role of accounting officer.

7 On 25 October 2010, at a meeting of his new department, the applicant pointed out to his line manager that his 2009 CDR had not yet been drawn up.

8 On 29 October 2010, the list of staff members eligible for reclassification, and thus promotion from the grade held to the grade immediately above in the same function group in the 2010 exercise, was communicated to all members of staff. The applicant's name was included on that list.

9 By email of 30 October 2010, the applicant asked ENISA's Head of Administration ('the Head of Administration') whether all appraisals ought to be completed before members of staff were reclassified.

10 By email of 2 November 2010, the Head of Administration replied to the applicant, informing him that he could initiate his 2009 CDR himself on the intranet. He suggested to the applicant that he should initiate his CDR within the next day or two to benefit from an accelerated appraisal exercise. He also offered to perform the task of assessor and to finalise the applicant's 2009 CDR within a period of two days, since the person responsible for assessing the applicant in respect of January and February 2009 had left ENISA. In that way, according to the Head of Administration, it would be possible to submit the 2009 CDR to the countersigning officer within a very short period.

11 On 5 November 2010, after having prepared his self-assessment, the applicant tried to submit it but was not able to do so because of information technology problems. He informed the Head of Administration of this as well as ENISA's information technology department.

12 On 16 November 2010, the definitive list of members of staff reclassified under the 2010 exercise was published, without the applicant's name being included on that list.

13 On the same day, 16 November 2010, the applicant managed to submit his self-assessment.

14 On 24 November 2010, ENISA's Executive Director ('the Executive Director') signed the applicant's 2009 CDR as countersigning officer.

15 On 1 December 2010, the completed appraisal was communicated to the applicant.

16 On 2 December 2010, the applicant refused to accept the 2009 CDR and requested the withdrawal of negative comments made regarding the handover to the accounting officer *ad interim* prior to his departure to Brussels. Moreover, the applicant claimed that his 2009 CDR and the reclassification points relating to it were not available during the reclassification exercise and that he had not been asked in time to submit his self-assessment.

17 The refusal to accept the 2009 CDR was not followed by a formal dialogue with the countersigning officer, but the complaints were forwarded directly to ENISA's Joint Evaluation Committee ('the Committee'). On 10 December 2010, the Committee concluded that the applicant's refusal to accept his 2009 CDR related to the content of the report and not to the procedure by which it was drawn up and, consequently, the Committee was not able to give a decision on that issue. The Committee also stated that members of staff were required to keep themselves informed of the process and deadlines and were not requested on an individual basis to submit their career development report. That report was sent back to the applicant on 26 January 2011.

18 The next day, by a letter of 27 January 2011 sent to the members of the Committee, the applicant disputed its findings and asked to see his report again in order to check whether the comments which he had asked to have removed had been drawn up fairly and objectively in line with procedure.

19 By email of 28 January 2011, the applicant asked his line manager to remove the disputed comments from the final version of the 2009 CDR, a version which in his view should in any case be submitted to him after the Committee's report.

20 On 1 February 2011, the Head of Administration informed the applicant and his line manager by email that, following the Committee's decision, the next stage was the introduction of a complaint under Article 90(2) of the Staff Regulations, and that there was no obligation to re-examine the 2009 CDR.

21 Following several requests by the applicant for the finalised version of the 2009 CDR, the Head of Administration informed him, on 2 March 2011, that, following the findings of the Committee, he could not amend that report further and that the applicant's 2009 CDR would remain as it was and had been sent with the Committee's report to ENISA's Human Resources department.

22 On the same day, 2 March 2011, the applicant requested that the finalised 2009 CDR be sent to him, since the version in his possession was not correctly signed. He sent a reminder on 14 March 2011.

23 The Head of Administration informed him in reply that, since the computerisation of the 2009 appraisal exercise, career development reports were no longer signed.

24 On 16 March 2011, the 2009 CDR was nevertheless given to the applicant in person. That document, as a result of information technology problems during the self-assessment, had in fact been produced as a paper version.

25 On 14 June 2011, the applicant obtained his reclassification points.

26 On 16 June 2011, the applicant lodged a complaint under Article 90(2) of the Staff Regulations.

27 On 17 October 2011, the Executive Director replied to the applicant, informing him that the complaint would be rejected. He added that, as regards the re-examination procedure carried out by the Committee, he would convoke that committee to deliberate anew, annul its previous opinion and conduct a second review both as to the content and as to the procedure, in accordance with the case-law.

28 Following that decision, the applicant asked several times for information regarding his 2009 CDR. On 19 December 2011, the Executive Director replied, informing him that his 2009 CDR had been suspended because of procedural errors. He therefore invited the applicant to hold a dialogue, as required by the procedural rules, so that the applicant could put his arguments and submit any related documents, which might then lead to some amendments to his 2009 CDR.

## Forms of order sought

29 The applicant claims that the Tribunal should:

— annul his 2009 CDR;

— annul the decision of 16 November 2010 adopting the list of members of staff reclassified under the 2010 reclassification exercise;

— annul the decision of 17 October 2011 rejecting his complaint of 16 June 2011;

— order ENISA to pay all the costs of the proceedings.

30 ENISA contends that the Tribunal should:

— declare the application inadmissible;

— dismiss the application;

— order the applicant to pay the costs.

## Law

31 Under Article 76 of the Rules of Procedure, where an action is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, the Tribunal may, without taking further steps in the proceedings, give a decision on the action by reasoned order.

32 In the present case, the Tribunal considers that the information in the file is sufficient to enable it to rule on the admissibility of the action, and decides, pursuant to Article 76 of the Rules of Procedure, to give a decision without taking further steps in the proceedings.

### *The claim for annulment of the 2009 CDR*

#### Arguments of the parties

33 The applicant claims that the procedural requirements laid down by the EDD 2008/18 were not complied with, that the EDD 2008/19 was infringed and that his 2009 CDR is vitiated by manifest errors of assessment and infringes the obligation to state reasons.

34 As regards the admissibility of the claim for annulment of the 2009 CDR, the applicant asserts that the 2009 CDR is an act adversely affecting him, in so far as it contains assessments which he disputes and is thus liable to affect his legal situation directly.

35 ENISA contends that the claim for annulment of the 2009 CDR is inadmissible.

Findings of the Tribunal

36 The Tribunal considers that it is first necessary to consider the question whether, at the time the action was brought, namely 16 January 2012, the applicant's 2009 CDR had been drawn up. In this respect, the Tribunal notes that, under Article 77 of its Rules of Procedure it may at any time, of its own motion, examine whether there exists any absolute bar to proceeding. The existence of an act adversely affecting an official, against which the action for annulment is brought, in accordance with the provisions of Article 263 TFEU or of Article 91 of the Staff Regulations, is an essential condition for the admissibility of the action and the lack of such an act has been raised a number of times by the European Union judicature of its own motion (orders of 4 June 1986 in Case 78/85 *Group of the European Right* v *Parliament*, paragraph 11, and of 7 October 1987 in Case 248/86 *Brüggemann* v *ESC*, paragraph 6; judgments of 10 July 1990 in Case T-64/89 *Automec* v *Commission*, paragraph 41, and of 18 November 1992 in Case T-16/91 *Rendo and Others* v *Commission*, paragraph 39).

37 To that end, it is necessary to take account of the factual and legal context at the time the 2009 CDR was drawn up.

38 It is not disputed that the action is directed against the 2009 CDR as finalised and given to the applicant on 16 March 2011. It is also not disputed that in point 1.44 of his response to the complaint, the Executive Director declared that that complaint was rejected.

39 However, in his response to the complaint, in the second sentence of point 1.44, the Executive Director states that, as regards the review procedure conducted by the Committee, he would convoke that committee to deliberate anew, to annul its previous opinion and to conduct a second review both as to content and as to procedure, in line with the case-law. In point 1.22 of that response, the Executive Director conceded that, in breach of Article 5(9) of the EDD 2008/18, no formal dialogue had been held between the applicant and the countersigning officer in order to enable the applicant to submit his opinion and put his arguments, following his refusal to accept his 2009 CDR. In order to remedy this, the Executive Director stated that '[g]iven the absence of such dialogue with the [c]ountersigning [o]fficer, in the next few days [the applicant] would receive an invitation to this effect'.

40 In those circumstances, the Tribunal is of the opinion that it is apparent from the response to the complaint that that complaint was partially upheld, in so far as the applicant's objections concerning the absence of both a formal dialogue and a review procedure were accepted.

41 By email of 10 November 2011, the Executive Director, in his capacity as countersigning officer, invited the applicant to an interview, with the aim of organising the formal dialogue required by Article 5(9) of the EDD 2008/18.

42 In his email of 19 December 2011, the Executive Director declared that, as a result of his decision of 17 October 2011, the procedure for drawing up the applicant's 2009 CDR had been suspended because of breaches of procedure, in particular given the lack of a second dialogue with the countersigning officer, as required by Article 5(9) of the EDD 2008/18.

43 Consequently, the emails of 10 November and 19 December 2011 clearly show that, according to the Executive Director, the applicant's 2009 CDR had not yet been definitively drawn up.

44 That finding is borne out by the answer given to the measures of organisation of procedure ordered by the Tribunal. Whereas the Tribunal had asked for the version of the 2009 CDR amended or confirmed pursuant to Article 6(9) of the EDD 2008/18, ENISA supplied the same version as that sent to the applicant on 16 March 2011, without any explanation as to the stages which could have taken place following the response to the complaint and the suspension of the procedure for drawing up the 2009 CDR. ENISA therefore did not comply with the Tribunal's request.

45 Lastly, on 27 January 2012, a meeting between the Executive Director and the applicant took place. According to the minutes of that meeting, '[s]ince [the applicant] persisted in his refusal to recognise this meeting as a meeting with his countersigning officer, the [Executive Director] closed the meeting'. In his letter of 30 January 2012 sent to the Executive Director, the applicant confirmed that he did not accept that that meeting was the formal dialogue required by Article 5(9) of the EDD 2008/18.

46 Accordingly and without it being necessary to make a decision on the legality of the procedure which should have culminated in the 2009 CDR, the applicant cannot validly claim that, at the time of bringing his action, the 2009 CDR was definitively drawn up.

47 It follows that the action, in so far as it seeks the annulment of the 2009 CDR, is directed against an act which, at the time of bringing the action, did not exist and, consequently, it must be declared manifestly inadmissible.

48 Therefore, there is no longer any need to adjudicate on the claim for annulment of the Committee's decision, or on the claim for annulment of the decision of 17 October 2011 rejecting the complaint.

*The claim for annulment of the decision of 16 November 2010*

Arguments of the parties

49 The applicant claims that the decision of 16 November 2010 is an act adversely affecting him, in so far as his name is not included in it. In his opinion, he has an interest in challenging that definitive list even if the reclassification points which were finally attributed to him on 14 June 2011 would not have sufficed for him to be reclassified. He also submits that that reclassification exercise is a result of the examination of the comparative merits of the members of the temporary staff and, in particular, is based on the career development reports.

50 ENISA contends that the action brought against the decision of 16 November 2010 is inadmissible.

Findings of the Tribunal

51 Under Article 1(2) of the EDD 2008/19 '[t]he reclassification is an upgrading from the grade held to the grade immediately higher within the same function group'. In accordance with Article 10(10) of that decision, the list of temporary staff reclassified to a higher grade is decided on by the authority authorised to conclude contracts ('the AACC').

52 It follows that the decision of the AACC determining the list of members of the temporary staff to be reclassified constitutes a final decision in so far as it identifies the members of the temporary staff to be reclassified during the reclassification exercise in question. Therefore, it is on publication of that list that the members of the temporary staff who consider themselves eligible for reclassification learn, in a manner which is final and not open to doubt, of the assessment of their respective merits and are able to tell whether their legal position is affected. Consequently, such a decision constitutes, in principle, an act adversely affecting an official, against which an action may be brought by a member

of the temporary staff who feels himself to have been prejudiced by that act in so far as he was not reclassified (judgments of 21 November 1996 in Case T-144/95 *Michaël* v *Commission*, paragraphs 30 and 31, and of 28 September 2004 in Case T-216/03 *Tenreiro* v *Commission*, paragraphs 47 and 48).

53 It is not disputed that, in the present case, the list of members of the temporary staff who were reclassified was determined by decision of 16 November 2010, that the applicant learned of it the same day by an internal email and that the applicant's name was not included on it. Nor is it disputed that on that date the applicant's 2009 CDR had not yet been drawn up, so that the applicant was fully aware that the decision of 16 November 2010 had been adopted without taking account of his 2009 CDR.

54 However, it is apparent from the file that the applicant did not, within the time-limits provided for by Articles 90 and 91 of the Staff Regulations, challenge the appointing authority's decision not to include his name on the list of reclassified members of the temporary staff. To the extent that, as the applicant claims, the complaint of 16 June 2011 was also directed against the decision of 16 November 2010, it must be held that that complaint was brought out of time.

55 It follows that the claim for annulment of the decision of 16 November 2011 is manifestly inadmissible.

**Costs**

56 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title II 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. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.

57 It follows from the grounds of the present order that the applicant is the unsuccessful party. Furthermore, in its claims ENISA has expressly requested that the applicant be ordered to pay the costs.

58 However, following the measure of organisation of procedure ordered by the Tribunal on 25 January 2013, ENISA merely supplied, on 7 February 2013, a copy of the 2009 CDR which was identical to that sent in the annexes to the application and did not give the Tribunal the necessary information which it had at its disposal. That would have enabled the question whether a definitive version of the 2009 CDR had been drawn up to be resolved. Since the facts of the case therefore justify the application of the provisions of Article 87(2) of the Rules of Procedure, it should be held that ENISA should bear its own costs and be ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby orders:

1. **The action is dismissed as manifestly inadmissible;**

2. **The European Network and Information Security Agency is to bear its own costs and is ordered to pay the costs incurred by Mr Psarras.**

Luxembourg, 23 October 2013.

W. Hakenberg
Registrar

H. Kreppel
President