Reports of Cases

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

16 May 2012 *

(Civil service — Duty to provide assistance — Articles 12a and 24 of the Staff Regulations — Psychological harassment by a hierarchical superior)

In Case F-42/10,

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

Carina Skareby, official of the European Commission, residing in Louvain (Belgium), represented by S. Rodrigues and C. Bernard-Glanz, lawyers,

applicant,

v

European Commission, represented by J. Currall and J. Baquero Cruz, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

composed of S. Van Raepenbusch (Rapporteur), President, R. Barents and K. Bradley, Judges,

Registrar: W. Hakenberg,

having regard to the written procedure and further to the hearing on 30 November 2011,

gives the following

Judgment

1 By application received at the Registry of the Tribunal on 3 June 2010, Ms Skareby seeks annulment of the decision of the European Commission of 23 July 2009 rejecting her request for assistance in respect of a complaint of psychological harassment and, if necessary, annulment of the decision of the appointing authority of 19 February 2010 rejecting her complaint.

* Language of the case: English.

Legal context

2 Article 41(2) of the Charter of Fundamental Rights of the European Union, relating to the 'right to good administration' states:

'This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

…'

3 Article 12a of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'1. Officials shall refrain from any form of psychological or sexual harassment.

2. An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.

3. "Psychological harassment" means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.

…'

4 Under the terms of Article 24 of the Staff Regulations, in the version applicable at the material time:

'The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

They shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause the damage and has been unable to obtain compensation from the person who did cause it.'

Facts

5 The applicant has been an official of the European Union since 1 December 1996. On 18 April 2003 she was posted to the Commission Delegation in Almaty (Kazakhstan). After Kyrgyzstan was assigned a 'regionalised' delegation, the applicant was posted, on 19 April 2004, to Bichkek (Kyrgyzstan). In the verbal note of 8 June 2004 presenting her to the Minister for Foreign Affairs of Kyrgyzstan and to the diplomatic community working in that country, it was stated, first, that she would occupy the position of 'Head of Section with the rank of Chargé d'Affaires ad interim in the absence of the Head of Delegation', who would be accredited to Kyrgyzstan and, second, that 'the regionalised delegation in Bichkek [was] subject to the [regional] delegation of the Commission … in Almaty'. In August 2007 the applicant returned to the Commission Directorate-General (DG) for External Relations in Brussels (Belgium).

6 By letter of 10 November 2008, the applicant submitted a request for assistance ('the request for assistance') pursuant to Article 24 of the Staff Regulations, alleging she had suffered psychological harassment from her two successive hierarchical superiors, who, one after the other, had been Head of the Commission Delegation in Kazakhstan ('the first Head of Delegation' and 'the second Head of Delegation', respectively). She requested in that regard that an administrative inquiry be opened to establish the facts of the psychological harassment alleged. It is apparent from that letter that the allegations against the first Head of Delegation related to the period between April 2003 and September 2005, while those against the second Head of Delegation related to the period between October 2005 and August 2007, the date on which the applicant returned to the Commission headquarters in Brussels.

7 By letter dated 28 November 2008, the applicant submitted additional information in support of the request for assistance. She stated, in particular, that the first and second Heads of Delegation had systematically undermined and minimised her role within the Almaty and Bichkek delegations which, she claimed, had discredited and humiliated her vis-à-vis her counterparts in the Governments of Kazakhstan and Kyrgyzstan, the embassies of Member States of the European Union and international organisations and non-governmental organisations present in those countries.

8 Following the request for assistance, the Commission informed the applicant, by letter of 4 March 2009, that the Investigation and Disciplinary Office of the Commission (IDOC) had received a mandate to open an administrative inquiry into the allegations of psychological harassment made against the second Head of Delegation. In that letter, the Commission informed the applicant of its refusal to open such an inquiry against the first Head of Delegation, on the ground that the applicant had not presented the request for assistance within a reasonable period of time.

9 By letter of 28 May 2009, the applicant submitted a complaint, pursuant to Article 90(2) of the Staff Regulations, against the Commission decision of 4 March 2009 refusing to open an inquiry against the first Head of Delegation. The Commission rejected that complaint by decision of 31 July 2009. On 13 November 2009 the applicant brought an action against the abovementioned decision of 4 March 2009. That action was upheld and the refusal which had been challenged was annulled by the Tribunal (judgment of 8 February 2011 in Case F-95/09 *Skareby* v *Commission*, 'the *Skareby* judgment').

10 In the meantime, the Commission, by letter of 23 July 2009, informed the applicant of the conclusions reached by IDOC in its report concerning the administrative inquiry opened against the second Head of Delegation ('the inquiry report'). These conclusions state that the alleged harassment had not been established and the enquiry had therefore been closed, without any disciplinary follow-up. In that letter the Commission also informed the applicant that it had consequently decided not to grant the request for assistance and to close this file.

11 By letter of 26 October 2009, the applicant submitted a complaint pursuant to Article 90(2) of the Staff Regulations against the Commission's decision, of 23 July 2009, not to act on her request for assistance and on 19 February 2010 that complaint was rejected by the appointing authority.

Forms of order sought and procedure

12 The applicant claims that the Court should:

— declare the action admissible;

— ask the Commission to produce the inquiry report, with supporting evidence;

— annul the Commission's decision of 23 July 2009 rejecting her complaint alleging psychological harassment against the second Head of Delegation and, so far as necessary, annul the decision of the appointing authority of 19 February 2010 rejecting her complaint;

— order the Commission to pay the costs.

13 The Commission contends that the Court should:

— dismiss the action as inadmissible or in any event as unfounded;

— order the applicant to pay the costs.

14 In her application instituting the proceedings, the applicant asked the Court to request the Commission to produce the inquiry report, with supporting evidence, in order to determine whether an inquiry had actually been carried out.

15 In its defence, the Commission stated that it could not release the documents in question to the applicant because they contained personal data that must be protected which, if divulged, would affect the interests of third parties. The Commission stated, however, that it was willing to provide a confidential version of those documents to the Tribunal if the Tribunal addressed a reasoned order to it asking for it. The Commission nevertheless drew the Tribunal's attention to the difficulty it would have in producing a non-confidential version of those documents, as the alleged harassment took place in a small administrative unit, so that blanking the names of witnesses would not prevent them from being identified by other specific elements.

16 By reasoned order of 6 April 2011, made pursuant to Article 44 of the Rules of Procedure, the Tribunal invited the applicant to submit her observations on the Commission's statement that the inquiry report and the documents on which that report are based were confidential. By the same order, the Tribunal requested the Commission to produce the inquiry report and the abovementioned documents specifying that neither the applicant nor her lawyers would be authorised to consult them, at least until a decision had been taken regarding the relevance and confidentiality of those documents.

17 The Commission delivered the inquiry report and the documents requested by letter received at the Registry of the Tribunal on 18 April 2011 and the applicant submitted her observations on their possible confidentiality on 26 April 2011.

18 In the light of the inquiry report and the other documents forwarded by the Commission and in view of the submissions made in the application, the Tribunal held that only the inquiry report was relevant in resolving the dispute. The Tribunal found, moreover, that that report contained confidential information in so far as, having been drawn up following an inquiry into harassment, it contained personal data – that is, the surname, first name, post and grade of the persons heard – allowing them to be identified. Consequently, the Tribunal decided to invite the Commission to forward to it a non-confidential version of the inquiry report, omitting the abovementioned personal data, and to deliver that non-confidential version to the applicant. Finally, the Tribunal decided to return to the Commission the other documents that the Commission had delivered to it pursuant to the order of 6 April 2011. The Registry of the Tribunal informed the parties of those different decisions by letter of 31 May 2011.

19 The Commission presented a non-confidential version of the inquiry report on 7 June 2011 and the applicant submitted her observations on it by letter received at the Registry of the Tribunal on 15 July 2011, accompanied by three annexes. The observations of the applicant were served on the Commission, which submitted its remarks on those observations on 29 July 2011 and which were supplemented by a letter of 30 August 2011, accompanied by several documents.

20 By letter of 3 October 2011, the applicant lodged two documents, production of which she had announced in her observations of 15 July 2011.

21 The applicant was invited, in the preliminary report for the hearing to respond at the hearing to the plea of inadmissibility raised by the Commission in its defence and to submit her comments on the documents enclosed with the Commission's letter of 30 August 2011. The Commission, for its part, was invited to submit its observations, during the hearing, on the documents delivered to the Tribunal by the applicant on 28 September 2011.

Subject-matter of the dispute

22 In addition to annulment of the decision of the Commission of 23 July 2009 rejecting her request for assistance, the applicant requests annulment of the decision of 19 February 2010 rejecting her complaint against that decision.

23 According to established case-law, claims for annulment formally brought against a decision to reject a complaint have, where that decision lacks any independent content, the effect of bringing before the Tribunal the act against which the complaint was submitted (see, to this effect, judgment of 17 January 1989 in Case 293/87 *Vainker* v *Parliament*, paragraph 8). As the decision to reject the complaint brought against the decision of the Commission of 23 July 2009 lacks, in the present case, any independent content, the application must be regarded as being directed against that decision only ('the contested decision').

Admissibility

Arguments of the parties

24 The Commission submits that the application is inadmissible on the ground that the applicant has no interest in bringing the action. Even if the action were well-founded, annulment of the contested decision would not give her satisfaction. The psychological harassment, if any, ceased upon the return of the applicant, in 2007, to the Commission headquarters in Brussels, and the applicant did not seek compensation for any damage suffered.

25 The purpose of the application is, it is alleged, to bring about the initiation of a new administrative inquiry in order to lead to disciplinary proceedings against the second Head of Delegation or, should the facts be established, to obtain a simple ruling in law on the existence of harassment. With regard to the first hypothesis, the administration has a broad margin of discretion in deciding whether or not to open disciplinary proceedings against an official and other officials cannot, it is argued, compel it to bring such proceedings. With regard to the second hypothesis, it is contended that the applicant has no interest in bringing the action, as it is not for the Tribunal to complement the operative part of its judgments with declarations of law or findings.

26 During the hearing the applicant disputed the plea of inadmissibility raised by the Commission. She claimed, inter alia, that her action seeks to restore her dignity, which requires recognition of the fact that she has been the victim of psychological harassment. She considers that this justifies a personal interest in requesting annulment of the contested decision since, in the event of annulment, the administration will be led to re-examine, specifically, whether she suffered such harassment.

Findings of the Tribunal

27 It should be observed that, in the present case, the Commission maintained the plea of inadmissibility raised in its defence notwithstanding the fact that the Tribunal rejected a similar plea of inadmissibility in the *Skareby* judgment (paragraphs 22 to 31), a judgment that was issued before the hearing in the present case. In these circumstances, the following must be borne in mind.

28 It is common ground that claims for annulment of an administrative act are inadmissible in the absence of a vested and present legitimate interest in bringing proceedings, where annulment of the contested measure would not give the person concerned satisfaction.

29 In the present case, it is true that the applicant is not seeking compensation for any damage resulting from the alleged harassment. It is also true that the Commission has a margin of discretion under Article 86(2) of the Staff Regulations to launch disciplinary proceedings. Finally, it is common ground that the alleged harassment ended in August 2007 when the applicant returned to the Commission headquarters in Brussels.

30 However, the circumstances referred to above have not rendered the present action devoid of purpose or removed the applicant's interest in seeking annulment of the contested decision.

31 Indeed, in so serious a matter as psychological harassment it must be accepted, notwithstanding the arguments relied upon by the Commission, that the supposed victim of such harassment, who brings an action against the institution's refusal to grant her request for assistance, retains the interest required by case-law as a condition for the admissibility of an application.

32 That approach is called for because of the very seriousness of psychological harassment, conduct which may have extremely destructive effects on a person's state of health. If the reputation of a retired official justifies his interest in challenging a decision suspending him, despite the fact that that suspension decision was necessarily rescinded on the day he retired (judgment of 30 November 2009 in Case F-80/08 *Wenig* v *Commission*, paragraph 35), the same must be true in respect of the staff member who allegedly suffers psychological harassment, irrespective of whether such harassment persists or whether the official or agent in question makes, intends to make or is merely entitled to make other claims, in particular for compensation, in respect of the psychological harassment allegedly suffered. It should be added in this context that a finding by the administration that psychological harassment has occurred is, in itself, likely to have a beneficial effect in the therapeutic process of recovery of an individual who has been harassed.

33 It follows from all the above considerations that the plea of inadmissibility raised by the Commission cannot be upheld.

Substance

34 In support of her claim for annulment of the contested decision, the applicant puts forward three pleas: (i) breach of the rights of defence and of the right to good administration, (ii) infringement of Article 12a(3) of the Staff Regulations, and (iii) manifest errors of assessment, breach of the duty to state reasons, breach of the duty to have regard for the welfare of officials and breach of the duty to provide assistance.

The first plea, alleging infringement of the rights of defence and of the right to good administration

35 It is apparent from the various pleadings of the applicant that the first plea contains two parts. In the first part, the applicant contests the effectiveness of the administrative inquiry carried out by IDOC, while in the second she criticises the insufficiency of her involvement in the proceedings, on the basis of the rights of defence and the principle of good administration.

The first part of the first plea, alleging the ineffectiveness of the administrative inquiry

36 In her initiating application, which was submitted at a time when she had not yet received the inquiry report or the accompanying evidence, the applicant first expressed doubts as to whether an inquiry had, in fact, been carried out.

37 In her observations on the inquiry report, sent by the Commission in a non-confidential version following the order of the Tribunal of 6 April 2011 (paragraph 16 et seq. above), the applicant claims that that report shows that the inquiry lacked thoroughness, objectivity and impartiality. In support of that assertion, the applicant argues that, of the thirty witnesses who had been suggested in the request for assistance, only four were heard. Moreover, the inquiry report did not, it is alleged, contain any reference to the specific examples of harassment described in the request for assistance and it does not follow that those examples are the subject of any investigation by IDOC. Furthermore, the account of the facts by IDOC is biased. The inquiry report, she alleges, also includes inconsistencies and contradictions. Finally, the fact that the statements of Witness C are quoted sometimes in French and sometimes in English raises suspicion with regard to the testimony in question and the presentation of the facts by Witnesses A and B includes errors that call their credibility into question.

38 In that regard it should be observed that IDOC has broad discretionary power with regard to the conduct of the administrative inquiries conferred on it (see, to that effect, the judgment of 13 January 2010 in Joined Cases F-124/05 and F-96/06 *A and G* v *Commission*, paragraph 173). In particular, as the resources of that service are limited, it is required to investigate the files that are submitted to it in a proportionate manner, that is, in particular, in a manner that allows it to allocate to each case a fair share of the time available. Furthermore, IDOC also has a wide margin of discretion to assess the quality and usefulness of the cooperation provided by the witnesses.

39 Consequently, in the present case, IDOC could decide to hear only some of the witnesses suggested by the applicant. Furthermore, nothing in the file submitted to the Tribunal suggests that IDOC's choice had been biased or had undermined the quality of the investigations. With regard to the applicant's criticism concerning the declarations of Witness C, the Tribunal does not see how the fact that the statements of that witness have been quoted sometimes in French and sometimes in English raises suspicion with regard to them. With regard to the absences of the applicant that the witnesses refer to, they are corroborated by documents submitted by the Commission, so that the credibility of those witnesses cannot be contested on the ground that their statements in this regard are inaccurate.

40 In addition, the issues addressed in the inquiry report show that IDOC did not fail to investigate the complaints of harassment alleged, in essence, by the applicant, even if, as she observes, that report does not address all the specific 'examples' that she had listed in the request for assistance. Accordingly, IDOC did in fact examine the issue of the instructions that the second Head of Delegation gave her through subordinates, whether or not he had prevented her from drafting reports on the political situation in Kyrgyzstan and the problem of her participation at the meetings of donor countries for Kyrgyzstan.

41 Furthermore, the presentation of the facts in the inquiry report does not appear to be biased. Accordingly, with regard to the fact that, after she complained, in 2005, to a person of trust that the first Head of Delegation harassed her, the applicant did not pursue her action after that person had

expressed the view that the attitude of her hierarchical superior was within the normal course of events, the inquiry report is confined to setting out, in essence, the statements of the applicant herself that appear in the supplement to the request for assistance of 28 November 2008.

42 The inquiry report also does not appear contradictory. Accordingly, whereas Witness B stated that the normal working method of the second Head of Delegation was to transmit instructions through subordinates, IDOC was entitled to conclude that, although the latter proceeded in this way with all the staff under his direction, that behaviour was, none the less, only occasional, since it was apparent from the various statements taken that the second Head of Delegation only acted in this way in urgent cases, in relation to minor issues and when the interested party was absent. Furthermore, there is no contradiction between, on the one hand, the assertion contained in the applicant's assessment report for 2006, according to which she frequently and regularly produced reports on the political situation in Kyrgyzstan and, on the other hand, the fact that the inquiry report notes that those reports intended for the services of the Commission in Brussels were drafted in Almaty on the basis of the contributions of the applicant. Moreover, the limited role of the latter in drafting those reports is confirmed by Witness C and by the applicant herself.

43 Finally, the fact that statements submitted by the applicant confirm that she adequately represented the Commission in the meetings of the donor countries for Kyrgyzstan does not point to a lack of seriousness of the inquiry carried out by IDOC. Those various statements clearly indicate the competence of the applicant as Chargé d'Affaires ad interim, as well as her credibility as representative of the Commission and contradict the statement of the second Head of Delegation according to which 'all the other donors for Kyrgyzstan had the [opposite] feeling'. However, IDOC did not confine itself to noting the statements of the second Head of Delegation. It collected other evidence emphasising the 'general context', namely that it was impossible for the applicant to attend all the official events and to carry out all her tasks as a result, in particular, of her absences at the time when the institution had to prepare its strategy in the abovementioned meetings of the donor countries.

44 In the light of the above and of the documents submitted by the parties, the Tribunal, taking the view that it has sufficient information, finds, in the first place, that the complaint alleging the ineffective nature of the IDOC inquiry is unfounded and, secondly, that it is not necessary to comply with the applicant's requests, set out in her observations on the inquiry report, first, that the Tribunal should collect evidence from representatives of international organisations, non-governmental organisations or from Member States or, at least, that it should question the Commission on the reasons that led IDOC to select witnesses from those she had suggested for hearing and, second, that it should order the Commission to produce the questions that had been put to the witnesses and, third, that it should collect evidence from the persons whose statements she had appended to those observations.

The second part of the first plea, alleging breach of the rights of defence and of the right to good administration

45 Relying on a breach of the rights of defence and the 'requirements of good administration' that she infers from Article 41(2)(a) of the Charter of Fundamental Rights, the applicant alleges that she should have had access to the inquiry report and to the evidence submitted in support of that report, and that she should have been heard on the content of those documents before the appointing authority adopted the contested decision.

46 It should be noted, however, that the applicant may not rely on the Commission's obligation to observe the rights of the defence which, according to settled case-law, constitutes a general principle of European Union law in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person (Case C-344/05 P *Commission* v *De Bry* [2006] ECR I-10915, paragraph 37; judgment of 17 October 2006 in Case T-406/04 *Bonnet* v *Court of Justice*, paragraph 76;

Wenig v *Commission*, paragraph 48). An IDOC inquiry procedure initiated following a request for assistance from an official with a complaint of harassment cannot, in any event, be compared to an inquiry procedure opened against that official.

47 Furthermore, and without there being any need to examine the question of its applicability over time, it is sufficient to note that Article 41 of the Charter of Fundamental Rights reflects the existing case law establishing the general principle of sound administration (see, to this effect, the judgment of 14 October 2004, in Case T-257/02 *K* v *Court of Justice*, paragraph 104), as pointed out in the explanation to Article 41 in the explanations relating to the Charter (OJ 2007, C 303, p. 17).

48 In this respect, it should be accepted that the applicant may claim procedural rights that are separate from the rights of defence and which are not as extensive as those rights (on that distinction, see Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5945, paragraph 91 and Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 108).

49 In the present case, it is not disputed that the applicant had three opportunities to put forward her arguments, in the context of the request for assistance, by means of the additional information that she supplied in writing on 28 November 2008 and during her hearing by IDOC in the context of the administrative inquiry.

50 As the procedural rights that the applicant can claim in the present case do not entail that she should have had access to the inquiry report and to the evidence obtained by IDOC, nor that she should have been heard on the content of those documents before the contested decision was made, the second part of the first plea, alleging breach of the rights of defence and of the right to good administration must, therefore, be rejected.

51 Since both parts of the first plea have been rejected, that plea must be rejected.

The second plea, alleging infringement of Article 12a(3) of the Staff Regulations

52 The applicant denies, first, that the appointing authority was able to endorse the conclusions of IDOC that there was no harassment on the ground that, by summoning to Almaty staff members placed under her direct authority in order to discuss their work in her absence, and to send instructions to her through them, the second Head of Delegation had not treated her differently from the other middle managers of the Almaty Delegation. Article 12a(3) of the Staff Regulations does not make the classification as psychological harassment conditional upon the existence of discrimination.

53 First, it should be noted that, if an express decision rejecting a complaint has made significant clarifications concerning the reasons given by the administration in the initial decision, the specific identification of the reasons of the administration must result from a combined reading of those two decisions (see, to that effect, judgment of 10 June 2004 in Case T-258/01 *Eveillard* v *Commission*, paragraph 31).

54 That said, it is apparent from the decision rejecting the complaint that the Commission did not make the existence of discrimination a condition on which recognition of harassment would depend. In response to the applicant's complaint alleging that the second Head of Delegation directly gave instructions to her subordinates, the appointing authority merely noted that IDOC had observed, first, that the second Head of Delegation did not adopt this mode of behaviour only with regard to the complainant, but that this approach corresponded to his general style of staff management and, second, that the simple fact that the applicant does not agree with that style was not sufficient for it to be possible to classify it as harassment.

55 The applicant considers, secondly, that the contested decision infringes Article 12a(3) of the Staff Regulations because that article does not make the reality of harassment conditional upon there being several victims, whereas the contested decision, like the decision rejecting the complaint, made much of the fact that no other person working at the Almaty regional delegation or in a regionalised delegation had brought a complaint for psychological harassment against the second Head of Delegation.

56 It should be noted, however, that in observing that no other complaint for harassment had been lodged against the second Head of Delegation, the Commission was merely responding to the assertion of the applicant that other members of staff had been victims of psychological harassment by the second Head of Delegation.

57 The applicant complains, third, that the contested decision, like the decision rejecting her complaint, is based on the conclusions of IDOC which, it is alleged, makes the intention to harass a necessary element of the classification of psychological harassment, whereas that condition is not required by Article 12a(3) of the Staff Regulations, as interpreted by the Tribunal in its judgment of 9 December 2008 in Case F-52/05 *Q* v *Commission* (partially annulled by the judgment of 12 July 2011 in Case T-80/09 P *Commission* v *Q*, but only insofar as, at paragraph 2 of the operative part, that judgment ('*Q* v *Commission*') ordered the Commission to pay Q damages). The applicant points out that in the decision rejecting her complaint, the appointing authority explained that IDOC had only wanted to stress the fact that harassment complaints have to be examined without taking the subjective impression of the complainant into account, but she considers that, in so doing, the appointing authority made no mention of the fact that IDOC had also concluded that she '[had] not been the subject of a behaviour objectively aiming to discredit her or to degrade on purpose her working conditions.'

58 The Commission replies that the *Q* v *Commission* judgment introduces excessive subjectivity in that, contrary to earlier case-law, it no longer makes the existence of harassment conditional upon demonstrating that the harasser had intended, by his reprehensible conduct, to discredit the victim or deliberately impair the latter's working conditions. With that judgment of the Tribunal, the institutions run the risk of being instrumentalised by excessively sensitive officials or agents. According to the Commission, the definition of harassment should take into account the stated or presumed intention of the alleged harasser, the perception of the alleged victim, the objective nature of the facts and the context in which they took place. The Tribunal stated, at paragraph 135 of the *Q* v *Commission* judgment, that to be classified as harassment, the reprehensible conduct in question must have led 'objectively' to discrediting the victim or impairing the latter's working conditions. However, that qualification would remain insufficient, as it would not prevent bringing within the scope of Article 12a(3) of the Staff Regulations non-abusive conduct that may 'objectively' lead to an impairment of working conditions or to a feeling of being discredited among persons suffering from psychological problems.

59 The Commission considers, therefore, that if the Tribunal fails to revert to the case law prior to *Q* v *Commission*, it would be appropriate, in any event, to make the classification of harassment conditional upon the conduct in question having sufficient objective reality, in the sense that an impartial and reasonable observer, of normal sensitivity, would consider it to be improper.

60 In the present case the Commission contends that the conduct of the second Head of Delegation was objectively not such as to discredit the applicant or to impair her working conditions and could not, therefore, be classified as improper in the sense referred to above, but that it was, on the contrary, quite normal in a working relationship. The fact that no other staff member of the Almaty Delegation, placed in similar conditions, considered himself a victim of harassment by the second Head of Delegation would, it is contended, indicate that the applicant's feeling of harassment arose solely from her personal perception of the facts.

61 Furthermore, IDOC and the appointing authority considered that the facts did not constitute acts of harassment by reason of their nature, so that the contested decision is only partially based on the absence of intentionality in the conduct of the second Head of Delegation.

62 Finally, the conduct of the second Head of Delegation was not repetitive and systematic, as required by the definition of psychological harassment.

63 In that regard, it should be recalled that the Tribunal held, at paragraphs 133 et seq. of *Q* v *Commission*, that Article 12a(3) of the Staff Regulations does not in any way make the malicious intent of the alleged harasser a necessary criterion for classification as psychological harassment. In that judgment (see also the judgment of 9 March 2010 in Case F-26/09 *N* v *Parlement*, paragraph 72) the Tribunal held as follows:

> '134 Article 12a(3) of the Staff Regulations defines psychological harassment as "improper conduct" which, in order to be established, requires that two cumulative conditions be satisfied. The first condition relates to the existence of physical behaviour, spoken or written language, gestures or other acts which take place "over a period" and are "repetitive or systematic" and which are "intentional". The second condition, separated from the first by the preposition "and", requires that such physical behaviour, spoken or written language, gestures or other acts have the effect of "undermin[ing] the personality, dignity or physical or psychological integrity of any person"'.
>
> 135 By virtue of the fact that the adjective "intentional" applies to the first condition, and not to the second, it is possible to draw a twofold conclusion. Firstly, the physical behaviour, spoken or written language, gestures or other acts referred to by Article 12a(3) of the Staff Regulations must be intentional in character, which excludes from the scope of that provision reprehensible conduct which arises accidentally. Secondly, it is not, on the other hand, a requirement that such physical behaviour, spoken or written language, gestures or other acts were committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person. In other words, there can be psychological harassment within the meaning of Article 12a(3) of the Staff Regulations without the harasser's having intended, by his reprehensible conduct, to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such reprehensible conduct, provided that it was committed intentionally, led objectively to such consequences.'

64 In essence, the Commission considers that that case law puts too much emphasis on the perception of the alleged victim and that it is a source of uncertainty.

65 The Tribunal stated, however, at paragraph 135 of *Q* v *Commission*, that, to be classified as harassment, the reprehensible conduct must have 'led objectively to … consequences' that discredit the victim or impair the latter's working conditions. As the conduct in question must, under Article 12a(3) of the Staff Regulations, be improper, it follows that the classification of harassment is subject to the condition of its being objectively sufficiently real, in the sense that an impartial and reasonable observer, of normal sensitivity and in the same situation, would consider it to be excessive and open to criticism.

66 In the present case, IDOC noted in its report that 'the enquiry team concludes that [the complainant] has not been the subject of a behaviour objectively aiming to discredit her or to degrade on purpose her working conditions; it seems that, regardless of her subjective impressions, none of the evoked episodes and behaviours, considered separately or as a whole, can be considered as psychological harassment.'

67 However, the question before the Tribunal is whether the Commission, in the contested decision and in the rejection of the complaint, assessed the situation of the applicant on the basis of an incorrect interpretation of Article 12a of the Staff Regulations, according to which harassment is conditional upon the intention of the perpetrator of the acts complained of to discredit or deliberately impair the working conditions of the applicant.

68 As the applicant herself points out, in the decision rejecting the complaint, the appointing authority considered that the allegations of harassment had to be examined 'regardless of the subjective impression of the victim'. Furthermore, the contested decision and the decision to reject the complaint are based on grounds which tend to establish that the applicant's allegations of harassment were not objective. Accordingly, the contested decision observes that the fact that the second Head of Delegation gave instructions directly to the applicant's subordinates corresponded to his usual style of staff management, without demonstrating specific circumstances that could indicate, through such conduct, a negative attitude towards the applicant. Moreover, in response to the applicant's request for verification contained in the supplement to the request for assistance of 28 November 2008, the Commission, in the contested decision, observed that no other official or agent had complained about the conduct of the second Head of Delegation. Finally, the decision to reject the complaint is based on an objective analysis of the duties of the applicant from which the Commission infers that she belonged to the middle management staff and that that position did not prevent the second Head of Delegation from replacing her with another official to attend meetings of donor countries for Kyrgyzstan.

69 Since the recognition of the existence of harassment, within the meaning of the statutory provisions as interpreted by the Tribunal, is subject to:

— the intentional nature of the physical behaviour, spoken or written language, gestures or other acts in question,

— but does not require that such physical behaviour, spoken or written language, gestures or other acts be committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person,

— provided that they lead objectively to consequences that discredit the victim or impair the latter's working conditions,

the ground advanced by the Commission, that the acts in question did not objectively discredit the applicant, is, of itself, sufficient to justify legally the contested decision under Article 12a of the Staff Regulations, irrespective of the interpretation adopted by IDOC.

70 Moreover, it should be noted that the applicant's assessment of the conduct of the second Head of Delegation is very subjective. Whereas she complains that the attitude of the latter discredited her with embassies and representations of international organisations present at the headquarters of the regionalised delegation of Bichkek, the documents that she submitted annexed to her observations on the inquiry report reveal, on the contrary, the respect that she enjoyed in those circles.

71 It follows from the above that second plea is unfounded.

The third plea, alleging manifest errors of assessment, breach of the duty to state reasons, breach of the duty to have regard for the welfare of officials and breach of the duty to provide assistance

72 With regard to the arguments advanced by the applicant in support of her third plea, it is appropriate to make a distinction between a first part alleging, exclusively, a breach of the duty to state reasons, and a second part alleging, in essence, several manifest errors of assessment, from which the applicant also infers a breach of the duty to state reasons and breach of the duty to have regard for the welfare of officials and to provide assistance.

The first part of the third plea, alleging breach of the duty to state reasons

73 The applicant claims that the contested decision and the decision rejecting the complaint fail to state adequate reasons, insofar as the Commission did not respond to her assertion that the second Head of Delegation had continued the practice of his predecessor, consisting in sending to Kyrgyzstan the staff serving at the regional delegation of Kazakhstan without consulting her or, at least, without informing her and thereby embarrassing her with respect to the authorities of the host State and the diplomatic community.

74 In this respect, it should be recalled that, according to settled case-law, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second subparagraph of Article 25 of the Staff Regulations must be assessed having regard not only to its wording, but also to its context and to all the legal rules governing the matter in question (see, to that effect, the judgment of 11 December 2007 in Case T-66/05 *Sack* v *Commission*, paragraph 65, and the judgment of 13 September 2011 in Case F-4/10 *Nastvogel* v *Conseil*, paragraph 66).

75 Moreover, an inadequate statement of grounds may be remedied by additional information provided, even during the proceedings if the official concerned already had at his disposal before bringing his action information constituting the beginnings of a statement of grounds (judgment of 15 September 2005 in Case T-132/03 *Casini* v *Commission*, paragraph 36; and judgment of 1 December 2010 in Case F-89/09 *Gagalis* v *Conseil*, paragraph 67).

76 In the present case, it is true that the contested decision and the decision to reject the complaint do not specifically refer to the grievance that the second Head of Delegation had caused the applicant embarrassment by sending to Kyrgyzstan the staff serving at the regional delegation of Kazakhstan without consulting, or even informing, her. However, it should be noted that those decisions state the reasons on which they are based and their reasoning mentions, at the very least, that it was within the normal hierarchical prerogatives of the second Head of Delegation to decide who would replace him in meetings and to delegate officials other than the applicant to do so.

77 Moreover, the Commission supplemented its reasoning in its written submissions. It stated in those submissions that the practice at issue should be seen in the specific context of relations between a regionalised delegation and a regional delegation which retains a certain number of responsibilities and that, in that context, that practice may be accepted. It added that the first Head of Delegation had given instructions, which had remained in force, specifying that the applicant should be informed at all times of the missions to Kyrgyzstan, that she should be invited to attend the meetings which took place there and that copies of the mission reports should be sent to her. Furthermore, in a context characterised by many projects and frequent meetings, the Commission concluded that the fact that the applicant had not always been duly informed could be due to accidental omissions rather than an attempt to discredit her.

78 In view of the foregoing, the first part of the third plea must be rejected.

The second part of the third plea alleging, primarily, manifest errors of assessment

79 The applicant claims, first, that the contested decision is vitiated by a manifest error of assessment insofar as the Commission considered, wrongly, that the fact that the second Head of Delegation called members of staff, over whom the applicant had authority, to discuss their duties in her absence and to send instructions for her through them, was the expression of the second Head of Delegation's right to give instructions to his subordinates.

80 However, to make an assertion without supporting this with any argument, as the applicant does, is insufficient to establish a manifest error of assessment. That is particularly so given that, in the present case, the Commission plausibly states that, in the specific context of relations between a regional delegation and a regionalised delegation, the Head of the regional delegation can directly address the members of staff of the regionalised delegation and send instructions through them to the Chargé d'Affaires heading the regionalised delegation, as that staff remains under his authority. Such a manner of exercising hierarchical authority does not, as such, discredit the Chargé d'Affaires heading the regionalised delegation or impair her working conditions, in the absence of any other circumstances to that effect. The verbal note of 8 June 2004 presenting the applicant as Chargé d'Affaires ad interim in Bichkek corroborates the above by stating that 'the regionalised delegation in Bichkek is subject to the delegation of the Commission … in Almaty'.

81 The applicant claims, second, that the contested decision, and the decision rejecting the complaint, is vitiated by a manifest error of assessment insofar as she is referred to in it as forming part of the 'middle management', whereas she was the 'Resident Official in Charge – Chargé d'Affaires [ad interim]', vested, as such, with a greater level of responsibility than that of the middle management, as indicated in the Vienna Convention on Diplomatic Relations, signed on 18 April 1961 ('the Vienna Convention').

82 However, it should be recalled, first, that the abovementioned verbal note of 8 June 2004 highlighted the subordination of the regionalised delegation of Bichkek to the regional delegation of Almaty and, second, it should be observed that that note announced the appointment of the applicant as 'Kyrgyzstan Head of Section'. It is significant, moreover, that the applicant was, at the material time, holder of the grade A*9, renamed AD 9, and that, further to the abovementioned verbal note, she worked, even as Chargé d'Affaires ad interim in Bichkek, under the authority and responsibility of the Head of the regional delegation of Almaty, as is apparent, moreover, from the extracts of the assessment reports that she submitted in the file relating to the present case. Furthermore, in response to a question from the Tribunal, during the hearing the applicant only claimed to have eight years of experience as a security policy analyst within the Swedish security services, stating that, before her assignment to Bichkek, she had no experience within the DG External Relations of the Commission, in any event as Chargé d'Affaires.

83 In these circumstances, and without there being any need to examine the status of Chargés d'Affaires ad interim with regard to the Vienna Convention, which only governs the relations of diplomatic missions with the receiving States, it does not appear that the Commission committed a manifest error of assessment in taking the view, when assessing the employment relationship between the second Head of Delegation and the applicant, that she belonged to the middle management staff within the Commission.

84 Even if the Commission has misinterpreted the importance of Chargés d'Affaires ad interim with regard to the Vienna Convention, the applicant does not explain how that error of interpretation could have led the appointing authority to commit a manifest error of assessment by refusing to recognise the existence of harassment. It is true that the applicant indicates that, by so doing, the appointing authority had 'persist[ed] in prejudicing her position'. However, if the applicant means by

this that the appointing authority itself contributed to her harassment, it must be stated that an error of law cannot in itself constitute an act as serious as harassment. The applicant does not provide any explanation in that regard.

85 The applicant claims, third, that the contested decision is vitiated by a manifest error of assessment insofar as the Commission considered that her complaint was that the decision to confer the task of drafting reports on the political situation in Kyrgyzstan on another staff member had prevented her from performing that task, whereas in reality she was criticising the fact that she had received misleading instructions on this subject and had thus been manipulated.

86 It should be observed, in that regard, that in the request for assistance, the applicant alleged that the fact that the second Head of Delegation had asked her to draw up 'contributions' on the situation in Kyrgyzstan in the form of 'daily five line reports' and that he had conferred on another official of the Almaty Delegation the task of following the disturbances that took place in Bichkek in November 2006, because she did not provide a proper political analysis, gave the impression to her hierarchy at the headquarters of the Commission that she was not capable of drafting adequate political reports.

87 In the contested decision, the Commission responded, in the light of the inquiry report, that the main responsibility for drafting reports on the political situation in Kyrgyzstan rested with the Almaty Delegation, but that the applicant had been allowed, and even encouraged, to participate in that task, thus implicitly, but assuredly, ruling out any question of manipulation.

88 Furthermore, the Tribunal does not see how the Commission, by taking the view that the applicant complained of having been prevented from drafting reports on the political situation in Kyrgyzstan, had misrepresented the complaint she made which emphasised that the second Head of Delegation had, by limiting her role in drafting such reports, attempted to demonstrate her incompetence in that regard.

89 In any event, the alleged misrepresentation of the terms of the applicant's harassment complaint lacks sufficient substance to vitiate the contested decision with a manifest error of assessment.

90 The applicant alleges, fourth, that the Commission committed a manifest error in the assessment of her prerogatives by considering that, when the second Head of Delegation did not himself travel to Kyrgyzstan, it was within his power to decide who would replace him during meetings with the donor countries for Kyrgyzstan or with other intermediaries. As the 'Resident Official in Charge – Chargé d'Affaires [ad interim]', she alone was empowered, under the Vienna Convention, to represent the Commission in the absence of the Head of Delegation.

91 The Tribunal does not consider it necessary in the present case, however, to rule on the question of whether the appointment of a Chargé d'Affaires ad interim at the head of a regionalised delegation prevents the Head of the regional delegation exercising jurisdiction over that regionalised delegation from appointing another official to represent the Commission during meetings organised in the country where that Chargé d'Affaires has been accredited.

92 Even assuming that the Commission had, in the present case, misinterpreted the prerogatives of Chargés d'Affaires ad interim under the Vienna Convention, that possible error of law would not support the conclusion that the appointing authority had committed a manifest error of assessment by refusing to recognise the existence of harassment. It is true that the applicant emphasises that the second Head of Delegation asked another official to chair a meeting of the donor countries for Kyrgyzstan specifying: 'not [the applicant]'. However, although this approach may have displeased her, it cannot establish the existence of a manifest error of assessment with regard to the existence of psychological harassment, which requires sustained, repetitive or systematic conduct and regarding which priority cannot be given to the subjective interpretation of the alleged victim. As the Commission noted, the applicant claimed, in her assessment report for 2007, that she regularly

participated in coordination meetings with the donor countries for Kyrgyzstan. Likewise, the applicant indicated in her assessment report for 2006 that she had played an active role in the diplomatic scene that year. Furthermore, the conduct for which she criticises the second Head of Delegation cannot, in any event, be classified as sustained, repetitive or systematic within the meaning of Article 12a of the Staff Regulations.

93 Ultimately, although, as IDOC pointed out, several witnesses have highlighted the lack of clarity in the definition of the respective tasks of the regional delegations and of the regionalised delegations, and that lack of clarity could be the cause of the difficulties experienced by the applicant, the absence of a clear organisation of the tasks within a Commission Directorate-General cannot, as such, give rise to harassment.

94 Insofar as the applicant infers, moreover, from the alleged manifest errors of assessment reviewed above, an infringement of the duty to state reasons, it is sufficient to note that, as she has not established the existence of such errors, she has likewise not demonstrated that the appointing authority has failed to observe its duty to state reasons. Furthermore, an inadequate statement of reasons, which is a procedural grievance, cannot be confused with a defect of substantive legality (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 72).

95 Finally, the applicant also infers from the alleged manifest errors of assessment, which she has failed to establish, breaches of the duty to have regard for the welfare of officials and of the duty to provide assistance under Article 24 of the Staff Regulations. Since the complaints alleging manifest errors of assessment have been rejected, it follows that the latter complaints must also be rejected.

96 As the third plea must also be rejected, the action must be dismissed in its entirety.

Costs

97 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. 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 or she is not to be ordered to pay any.

98 It is apparent from the reasons set out above that the applicant has been unsuccessful. Furthermore, in its pleadings the Commission has expressly requested that the applicant be ordered to pay the costs. However, given that the plea of inadmissibility raised by the Commission was rejected, it is appropriate to apply the provisions of Article 87(2) of the Rules of Procedure and to decide that the applicant shall pay, in addition to her own costs, three quarters only of the costs incurred by the Commission.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Ms Skareby to pay, in addition to her own costs, three quarters of the costs of the European Commission;**

3. Orders the European Commission to pay one quarter of its own costs.

Van Raepenbusch Barents Bradley

Delivered in open court in Luxembourg on 16 May 2012.

W. Hakenberg
Registrar

S. Van Raepenbusch
President

The text of the present decision and the texts of the decisions of the Courts of the European Union cited in it are available on the internet site www.curia.europa.eu and are generally published in chronological order in the *Reports of cases before the Court of Justice and the General Court*, or the *Reports of European Union Staff cases*, as the case may be.