Reports of Cases

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

4 April 2011 *

(Civil service — Officials — Disciplinary measure — Removal from post — Article 35(1)(d) and (2)(a) of the Rules of Procedure — Action, in part, clearly inadmissible and, in part, clearly unfounded)

In Case F-45/10,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty in accordance with Article 106a thereof,

AO, former official of the European Commission, residing in Brussels (Belgium), represented by M. Schober, lawyer,

applicant,

v

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

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

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

Registrar: W. Hakenberg,

makes the following

Order

1 By application received at the Registry of the Civil Service Tribunal on 11 June 2010 by fax (the original being lodged on 21 June 2010), the applicant seeks, inter alia, annulment of the decision of the Commission of the European Communities of 23 July 2009 ordering that he should, by way of disciplinary measure, be removed from his post without reduction to his entitlement to a retirement pension, with effect from 15 August 2009 ('the decision to remove').

* Language of the case: English.

Legal context

2 Article 47 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'Service shall be terminated by:

…

(e) removal from post;

…'

3 Article 3 of Annex IX to the Staff Regulations, relating to the disciplinary procedure, 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:

…

(c) in the case of failure to comply with obligations within the meaning of Article 86 of the Staff Regulations,

…

decide to initiate disciplinary proceedings before the Disciplinary Board.'

4 In Section 5 of Annex IX to the Staff Regulations, on the disciplinary procedure before the Disciplinary Board, Article 16(1) provides:

'The official concerned shall be heard by the Board; at the hearing, he may submit observations in writing or orally, whether in person or through a representative. …'

5 According to Article 22(1) of Section 5 of Annex IX to the Staff Regulations:

'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.'

Background to the dispute

6 The applicant entered the employment of the Commission as a temporary staff member on 1 October 1995. After sitting an internal competition, he was appointed as a probationary official on 16 March 2003. After two extensions of his probationary period following problems relating to his conduct in the service, the applicant was established in his post with effect from 16 June 2004.

7 From 16 March 2003 to 14 April 2009 ('the period at issue') the applicant was assigned to the Directorate-General for Research, within which he worked for a number of Units. At the time the decision to remove him from his post was adopted, he was classified at grade AD 10.

8 During the period at issue, and in particular from May 2007, several incidents occurred involving the applicant and his superiors.

9 On 5 October 2007 the appointing authority mandated the Investigation and Disciplinary Office of the Commission ('IDOC') to hear the applicant, in accordance with Article 3 of Annex IX to the Staff Regulations, in order to determine whether, by reason of his behaviour since May 2007, he had breached the provisions of the Staff Regulations.

10 On 19 December 2007 the applicant was heard by IDOC in accordance with Article 3 of Annex IX to the Staff Regulations. In light of the report on that hearing, and in order to find a constructive solution to the professional situation of the applicant, the appointing authority opted for the non-disciplinary internal procedure, called the 'COMPAS procedure', which provides for the application of an advisory structure of 'coordination of psychological, administrative and social assistance'. However, as the applicant refused to participate in that procedure, the appointing authority decided, on 6 March 2008, to commence a disciplinary procedure before the Disciplinary Board, pursuant to Article 3(c)(ii) of Annex IX to the Staff Regulations, for breach of Articles 12 and 21 of the Staff Regulations.

11 On 4 March 2008 the applicant submitted a request for transfer within the institution in accordance with Article 7(1) of the Staff Regulations, which request was rejected by memorandum of 4 June 2008. That refusal of requested transfer was not challenged and became final.

12 On 15 April 2008 the applicant submitted a request for assistance on the ground of psychological harassment pursuant to Article 24 of the Staff Regulations.

13 On 30 April 2008 the appointing authority decided to suspend the applicant for an indefinite period and to withhold EUR 1 000 of his salary for six months, in accordance with Articles 23 and 24 of Annex IX to the Staff Regulations.

14 The applicant was informed, by memorandum of 5 June 2008, that his request for assistance on the ground of harassment had been forwarded to the Disciplinary Board so that the Disciplinary Board could examine, in the context of the ongoing disciplinary procedure, the submissions set out in that request. The applicant did not challenge the memorandum of 5 June 2008, which therefore became final; and the Disciplinary Board considered the request for assistance on the ground of psychological harassment to be unfounded, as it found that the evidence submitted by the applicant did not establish the existence of such harassment.

15 By letter of 7 August 2008, the applicant brought a complaint against the decision to suspend of 30 April 2008, pursuant to Article 90(2) of the Staff Regulations, which was dismissed by decision of 5 November 2008. The decision of 5 November 2008 was not challenged.

16 On 2 December 2008 the applicant was heard by the Disciplinary Board pursuant to Article 16 of Annex IX to the Staff Regulations. On 23 June 2009 he was heard by the appointing authority under Article 22 of that annex. On 23 July 2009, on the conclusion of the disciplinary proceedings, the appointing authority adopted the decision to remove the applicant from his post.

17 On 29 October 2009 the applicant brought a complaint, pursuant to Article 90(2) of the Staff Regulations, against that decision.

18 By letter of 1 December 2009, the applicant provided further information in relation to his complaint of 29 October 2009.

19 By decision of 26 February 2010, the appointing authority rejected the applicant's complaint.

Forms of order sought and procedure

20 By a separate document, lodged at the Registry of the Tribunal on 8 July 2010, the Commission raised a plea of inadmissibility pursuant to Article 78(1) of the Rules of Procedure.

21 By a document lodged at the Registry of the Tribunal on 8 September 2010 the applicant submitted his observations on the plea of inadmissibility.

22 By letter of 27 October 2010, the applicant was invited to advise the Tribunal whether he wished his name to be omitted from publications in relation to the present case. By letter of 5 November 2010, the applicant responded that he wished to be granted anonymity. The Tribunal accordingly granted anonymity to the applicant.

23 The applicant claims that the Tribunal should:

— annul the decision to remove him from his post, on the grounds of harassment, mismanagement and breach of the fundamental right to be heard;

— annul all the decisions taken by the appointing authority against the applicant between the period from September 2003 until the termination of his employment on the grounds of harassment and mismanagement consisting in failure to respect his right to be heard;

— allow a hearing of the applicant in accordance with Article 7(1) and Article 24 of the Staff Regulations, as well as an examination of the requests submitted in February and March 2008;

— award symbolic damages in the amount of one euro to the applicant for psychological and professional harm suffered.

24 The Commission contends that the Tribunal should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

The Tribunal's decision to give its ruling by way of reasoned order

25 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, by reasoned order, give a decision on the action without taking further steps in the proceedings.

26 In this case, the Tribunal considers that there is sufficient information before it and has decided, pursuant to Article 76 of the Rules of Procedure, to give a decision on the action without taking further steps in the proceedings.

27 From the heads of claim submitted by the applicant, it is appropriate first to examine the second and the third heads of claim, then the first and, finally, the fourth head of claim.

The second and third heads of claim

28 As regards the second head of claim, seeking the annulment of all the decisions taken by the appointing authority against the applicant during the period from September 2003 until the termination of his employment, it must be noted that the applicant has not annexed to the application the decisions the annulment of which is sought and that those decisions are not even identified.

29 In that regard, the Tribunal notes that, under Article 35(2)(a) of the Rules of Procedure, the acts of which annulment is sought must be annexed to the application. While it is true that, when an application does not comply with this requirement, the Registrar may, pursuant to Article 36 of the Rules of Procedure, prescribe a reasonable period within which the applicant may put the application in order, nevertheless, no such process of putting the application in order is capable of being envisaged in the present case since the applicant has not identified the decisions of which annulment is sought.

30 According to Article 35(1)(d) of the Rules of Procedure, read in conjunction with Article 36 of the Rules of Procedure, the application referred to at Article 21 of the Statute of the Court must contain, inter alia, the subject-matter of the proceedings and may not be put in order when it breaches that requirement. Furthermore, it is settled case-law that the subject-matter of the proceedings must be sufficiently clear and precise to enable the defendant to prepare its defence and the Tribunal to give judgment in the action (see, inter alia, judgments of 14 May 2008 in Case F-95/06 *Taruffi* v *Commission*, paragraphs 121 to 125, and of 30 November 2009 in Case F-16/09 *de Britto Patrício-Dias* v *Commission*, paragraph 42).

31 In the present case, the Tribunal it not able to know which decisions it is called upon to examine and the Commission was not in a position to prepare its defence. It follows that the second head of claim must be rejected as being clearly inadmissible.

32 In relation to the third head of claim, by which the Tribunal is asked to order the Commission to hear the applicant and to examine certain requests made in February and March 2008, which, according to Annex A.17 to the application, are in fact the requests of 4 March and 15 April 2008, it must be noted that the European Union courts may not issue injunctions to the administration in the context of review of legality based on Article 91 of the Staff Regulations (judgments of 12 June 2002 in Case T-187/01 *Mellone* v *Commission*, paragraph 16, and of 2 March 2004 in Case T-14/03 *Di Marzio* v *Commission*, paragraph 63). It follows that the third head of claim must be rejected as clearly inadmissible.

The first head of claim

Admissibility

33 The Commission raised a plea of inadmissibility against the first head of claim by which the applicant seeks the annulment of the decision to remove him from his post. That plea of inadmissibility invokes a breach of Article 35(1)(e) of the Rules of Procedure on the ground that the application does not contain any real 'plea in law' in support of the claim made. The defendant submits that, accordingly, the action in its entirety should be rejected as inadmissible.

34 It is settled case-law that the Tribunal is entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on the merits without first ruling on the objection of inadmissibility (see, to that effect, judgments of 8 April 2008 in Case F-134/06 *Bordini* v *Commission*, paragraph 56, and of 28 October 2010 in Case F-113/05 *Kay* v *Commission*, paragraph 31 and case-law cited).

35 In the circumstances of the present case and in the interests of procedural economy, the pleas on the merits raised by the applicant in support of his claim for the annulment of the decision to remove must be examined at the outset, without first ruling on the inadmissibility raised by the Commission, the pleas put forward in support of that claim being, in any event and for the reasons set out below, unfounded.

Merits

36 In the first place, the applicant seeks annulment of the decision to remove him from his post by reason of harassment said to have been suffered. Thus, he claims to have been the victim on several occasions of offensive conduct towards him by certain colleagues, even persons that he does not know, without, however, explaining how that alleged harassment makes the impugned decision unlawful. Similarly, he states that he has been affected by conflicts with his superiors and with several colleagues.

37 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', which suggests that psychological harassment must be a process that occurs over time and presumes the existence of repetitive or continual reprehensible conduct, which is 'intentional'. The second condition, separated from the first by the conjunction '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'. 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 (see, to that effect, judgment of 9 December 2008 in Case F-52/05 *Q* v *Commission*, paragraph 135, which is the subject of an appeal pending before the General Court of the European Union in Case T-80/09 P).

38 It is in light of those considerations that the ruling is to be given on the complaint alleging the existence of psychological harassment, which requires an examination whether the conduct at the root of the conflicts of which the applicant considers he is victim actually occurred and a determination as to whether that conduct had the effect of objectively undermining the personality, dignity or physical or psychological integrity of the applicant.

39 However, the applicant has adduced no evidence at all, nor even the beginnings of any evidence, permitting the Tribunal to rule whether he was actually the victim of harassment.

40 In the second place, the applicant seeks the annulment of the decision to remove him from his post on the ground that the Commission mismanaged his career.

41 The Tribunal notes that the applicant does not specify in what way his career was mismanaged. Even assuming that such mismanagement occurred, given that the applicant has established no link with the decision taken at the close of the disciplinary proceedings to remove him from his post, that mismanagement is not susceptible of entailing annulment of the impugned decision.

42 Finally, in the third place, the applicant seeks the annulment of the decision to remove him from his post as, in his submission, his right to be heard had been violated.

43 However, the applicant did not provide information in support of his claim that his right to be heard during the disciplinary proceedings had been breached. This being so, the Tribunal may review only the lawfulness of the decision to remove him from his post, from which decision it would appear that during the course of the disciplinary proceedings the hearings prescribed by Annex IX to the Staff Regulations did take place. In that connection, the case-file discloses that the applicant was heard on 19 December 2007 by IDOC, that is before the appointing authority decided to commence disciplinary proceedings in accordance with Article 3 of Annex IX to the Staff Regulations, on 2 December 2008 by the Disciplinary Board pursuant to Article 16 of Annex IX to the Staff Regulations, and on 23 June 2009 by the appointing authority pursuant to Article 22 of Annex IX to the Staff Regulations.

44 In the event that the applicant were to be objecting that the Commission did not hear him before adopting, on 30 April 2008, the decision to suspend him, it must be noted that, by letter of 7 August 2008, the applicant lodged an administrative complaint against that decision claiming, inter alia, that he had never been invited to a hearing pursuant to Article 23(2) of Annex IX to the Staff Regulations. That complaint was rejected by decision of 5 November 2008. If the applicant considered that his right to be heard had been breached, he should have brought an action within the period provided by Article 91 of the Staff Regulations against the decision to dismiss his administrative complaint, which he did not do. Further, and in any event, any such objection raised against the decision to suspend him is ineffective in support of the claim in respect of the decision to remove him from his post.

45 In light of the above, the claim for the annulment of the decision to remove him from his post must be dismissed as clearly unfounded.

Fourth head of claim

46 The applicant seeks compensation, in the amount of one euro, for psychological and professional damage that he has suffered.

47 It must be pointed out that the claim for compensation is directly linked to the claim for the annulment of the decision to remove the applicant from his post. In that regard, it is sufficient to note that, according to settled case-law, claims for compensation must be dismissed insofar as they are directly linked to claims for annulment which have themselves been dismissed as inadmissible or unfounded (order of 26 June 2008 in Case F-1/08 *Nijs* v *Court of Auditors*, paragraph 51 and case-law cited).

48 In the present case, the claim for annulment has been dismissed as clearly unfounded. Accordingly, the claim for compensation must also be dismissed as clearly unfounded.

49 It follows from the foregoing that the entire action must be dismissed as, in part, clearly inadmissible and, in part, clearly unfounded.

Costs

50 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), if equity so requires, the Tribunal may 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.

51 It follows from the reasoning set out above that the applicant has failed in his action. Furthermore, in its pleadings the Commission expressly requested that the applicant be ordered to pay the costs. As the circumstances of the present case do not justify the application of Article 87(2) of the Rules of Procedure, the applicant must therefore be ordered to pay all the costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby orders:

1. **The action is dismissed as being, in part, clearly inadmissible and, in part, clearly unfounded.**

2. **The applicant shall pay all the costs.**

Luxembourg, 4 April 2011.

W. Hakenberg
Registrar

S. Gervasoni
President