Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

8 November 2018 *

(Civil Service — Staff of the ECB — Appraisal — [2015] performance appraisal report — Opportunity to be accompanied by a trade union representative at the appraisal interview — Breach of the rules of objectivity and impartiality on the part of the appraiser — Remuneration — Decision not to award a salary increase — Admissibility of evidence — Email exchanged between a member of staff and her coach via an office email system — Liability)

In Case T-827/16,

QB, a member of staff of the European Central Bank, represented by L. Levi, lawyer,

applicant,

v

European Central Bank (ECB), represented by F. von Lindeiner and B. Ehlers, acting as Agents, and by B. Wägenbaur, lawyer,

defendant,

APPLICATION under Article 50a of the Statute of the Court of Justice of the European Union and Article 36.2 of the Protocol on the Statute of the European System of Central Banks and of the ECB, annexed to the EU Treaty and to the FEU Treaty, first, for annulment of the applicant's performance appraisal report for 2015 and of the ECB's decision of 15 December 2015 not to award her a salary increase and, in so far as necessary, annulment of the ECB's decisions of 2 May and 15 September 2016 rejecting the applicant's request for an administrative review and request for a grievance procedure, respectively, and, secondly, compensation for damage the applicant allegedly suffered,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, K. Kowalik-Bańczyk and C. Mac Eochaidh (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 The applicant, QB, joined the European Central Bank (ECB) on 1 March 2001. She has occupied a number of different posts at the ECB since the date of her recruitment.

2 Between 1 January 2014 and 31 January 2017, she was assigned as [*confidential*],[1] to the [*confidential*] Division ('DIV/[*confidential*]') of the [*confidential*] Directorate of General-Directorate (DG) [*confidential*].

3 It is apparent from the documents before the Court that the applicant took various steps in order not to be assigned to DIV/[*confidential*], or to be reassigned following her assignment to that division. Thus, the applicant's appraisal report for the appraisal period from 1 September 2013 to 31 August 2014 ('the 2014 appraisal report') states that she did not envisage remaining in DIV/[*confidential*] and that she and her managers were going to explore opportunities for internal mobility. Moreover, it appears from that report that the management of DIV/[*confidential*] agreed initially to reduce some of her workload in order to make the process towards mobility easier for her. When that process proved unsuccessful, new tasks were gradually assigned to her with a view to involving her fully in the work of DIV/[*confidential*]. On 5 February 2015, the applicant submitted a request for an administrative review of the 2014 appraisal report and challenged the decision concerning her annual salary and bonus review (ASBR) for 2014 through internal remedies (a request for an administrative review and subsequently a request for a grievance procedure).

4 The present action concerns the period during which the applicant was assigned to DIV/[*confidential*] and, in particular, the appraisal period from 1 September 2014 to 31 August 2015 ('the 2015 appraisal period') covered by the 2015 appraisal report ('the appraisal report at issue'). During the 2015 appraisal period, the applicant's managers in DIV/[*confidential*] were Mr [*confidential*], Assistant Head of Division ('Appraiser 1'), and Ms [*confidential*], Head of Division ('Appraiser 2'). The applicant worked under the supervision of those two persons until 15 April 2015. During the period from 15 April to 15 July 2015, the applicant was seconded to the DG for [*confidential*] ('DG-[*confidential*]'), in the [*confidential*] Division, working under the authority of Mr [*confidential*] and Ms [*confidential*], the Head of that division ('Appraiser 3'). She subsequently rejoined DIV/[*confidential*].

5 On 10 April 2015, the mid-term appraisal ('mid-term discussion') took place between Appraiser 1, as first appraiser, and the applicant. It is apparent from the record of that meeting that Appraiser 1 considered that the applicant did not devote the same amount of energy to all her various tasks, noting slowness and delays with regard to the portfolio concerning [*confidential*] and unsolicited extra time spent on an ad hoc task relating to [*confidential*]. For her part, the applicant reiterated her wish to leave DIV/[*confidential*] and considered that some of the tasks that had been assigned to her did not match her professional profile or did not help her career prospects, and added that she did not discriminate between preferred and less preferred tasks. That record does not report any tension. Appraiser 1 recalls that it was a harmonious conversation, but in November 2015 the applicant stated that the mid-term discussion had been a major source of stress for her.

6 On 28 September 2015, the applicant initially accepted the invitation to attend the appraisal interview in respect of the 2015 appraisal period, which Appraiser 1 had scheduled for 7 October 2015. She subsequently informed Appraiser 1 that she wished to be accompanied at the appraisal interview by Mr L., a representative and at that time president of a trade union, the International and European

1 Confidential data removed.

Public Services Organisation (IPSO). Appraiser 1's answer to that request was that, as there was no legal basis for a third person to be present, he was not in a position to authorise the presence of Mr L. at the appraisal interview.

7 On 6 October 2015, the applicant expressed her disagreement with Appraiser 1's answer. In her view, the grievance procedure that she had initiated a few months earlier provided evidence of a situation of conflict. According to the applicant, the provisions of the ECB Conditions of Employment and of the Memorandum of Understanding between the ECB and IPSO applied.

8 On 7 October 2015, notwithstanding Appraiser 1's instructions, the applicant went to her appraisal interview accompanied by Mr L., but in the end decided not to take part in that meeting, since Appraiser 1 objected to Mr L.'s involvement.

9 That evening, the applicant sent Appraiser 3 her observations on the latter's appraisal of her secondment, noting that, in her view, that appraisal was influenced by inappropriate exchanges that had taken place between Appraiser 3 and Appraiser 2 before the start of the secondment. In paragraph 3.3.1 of the appraisal report at issue Appraiser 3 noted that there had been differences in the understanding of the tasks assigned to the applicant during her secondment and that the secondment had not yielded the expected benefits.

10 A second interview was scheduled for 15 October 2015.

11 On 12 October 2015, the applicant reiterated her wish to be accompanied by Mr L. at her appraisal interview and stated that she considered that the management of DIV/[*confidential*] had clearly influenced Appraiser 3's assessment.

12 On 13 October 2015, Appraiser 1 repeated that the appraisal interview had been designed to take place on a one-to-one basis between the appraiser and the appraisee. He explained that Mr L. was going to find out whether his presence was compatible with the guidelines, and that it had been agreed that he would be informed if that was the case. If no such clarification was provided, Appraiser 1 expected that the appraisal interview on 15 October 2015 would take place on a strictly one-to-one basis.

13 On 15 October 2015, the date set for the appraisal interview, the applicant asked Appraiser 1 to postpone it until a reply was received from the member of the Executive Board of the ECB responsible for staff matters, Mr P., whom Mr L. had contacted concerning his involvement in the appraisal interview. The applicant stated that the mid-term discussion had been a major source of stress for her and that she could not go through such an experience again.

14 On 22 October 2015, Appraiser 1 wrote that he would wait for clarification, pointing out that the appraisal process provided for a deadline of 15 November 2015 by which all parties, including the second appraiser, must have uploaded their input.

15 On 3 November 2015, in an email addressed to Appraiser 1 and copied to a representative of the DG for Human Resources ('DG-H') and to Mr L., the applicant repeated that the mid-term discussion had caused her stress. She made a number of observations on the criticisms that Appraiser 1 had made to her concerning her work. She repeated that she refuted those criticisms and accusations and stated that she felt harassed and the target of 'orchestrated victimisation', and that the management of DIV/[*confidential*] were trying to build a case against her in response to the complaints she had lodged in the past and following her request to be assisted by a staff representative at her appraisal interview.

16 On 4 November 2015, Appraiser 1 asked the representative of DG-H to consider the case from the human resources viewpoint.

17 On 6 November 2015, Appraiser 1 reminded the applicant that there was not much time left to meet the deadlines of the appraisal process. In the absence of the clarification sought and with no willingness on the part of the applicant to participate in the appraisal interview on a one-to-one basis, he informed her that he would upload his appraisal on the evening of 10 November 2015 without having the discussion with her and that she would have the opportunity to send him her observations on the factual aspects on 11 November 2015, after which he would send the draft appraisal report to Appraiser 2.

18 On 10 November 2015, in agreement with the applicant and her managers, DG-H opened an informal procedure to examine the attitudes and behaviour at issue ('the Dignity at Work procedure'). It is made clear in the email inviting Appraiser 1 and the applicant to take part in that procedure that the procedure would not have the effect of suspending the appraisal process. It should be pointed out that the conclusions of that procedure, dated 15 February 2016, do not disclose any objective evidence that Dignity at Work had been infringed.

19 On 11 November 2015, Appraiser 1 asked the applicant to send him her observations on the appraisal he had uploaded before he forwarded it to Appraiser 2; he intended to do that on the evening of 12 November 2015.

20 On 12 November 2015, the applicant sent her observations on Appraiser 1's appraisal to him, disputing a number of points. She reiterated that she felt harassed, repeated that she was the target of 'orchestrated victimisation', and stated again that she had the impression that her managers were trying to build a case against her.

21 On 13 November 2015, Appraiser 1 replied to the applicant, in an email, that he did not share the views she had expressed. The form was forwarded to Appraiser 2 for her to add her appraisal, which she did the same day, with a reminder to the applicant that she had until 15 December 2015 to add her final observations and close the 2015 appraisal process.

22 In essence, in paragraph 5.1 of the appraisal report at issue, Appraiser 1 noted that the quantity and quality of the work produced fell short of what was expected of a [*confidential*]. As regards the key competency 'analysis', he pointed to variations in the competencies demonstrated, depending on the applicant's different tasks, and stated that he would have hoped she would have demonstrated a higher level of autonomy and ownership. As regards the 'initiative/commitment' competency, Appraiser 1 noted a lack of ownership on the part of the applicant in the case of one of her main categories of tasks, which resulted in the shortfall in quantity, quality and timeliness of her work. As regards the 'teamwork' competency, Appraiser 1 found imbalances in terms of mutual support. His expectation, expressed during the 2014 appraisal exercise, that the applicant would become fully integrated into DIV/[*confidential*] had not been met. As regards the following appraisal exercise, Appraiser 1 noted that he expected the applicant to increase her efforts, embrace the full scope of the work of DIV/[*confidential*] and contribute to the work of the division at a level commensurate to her position. It was also made clear that the applicant's tasks and objectives would remain broadly unchanged.

23 Appraiser 2 added her appraisal in paragraph 5.2 of the appraisal report at issue. She stated that she shared Appraiser 1's appraisal. She considered that the applicant should have concentrated on the portfolio concerning [*confidential*] and not on a task relating to [*confidential*]. She noted that the applicant offered on her own initiative to contribute to a project concerning [*confidential*] whereas her managers had expressly told her that no further input on that topic was required. Appraiser 2 went on to point out shortcomings with regard to flexibility, initiative, integration into the team and quality of work. She stated that she expected the applicant to improve her performance, contribute to the work of the division at a level commensurate to her role and carry out her modelling work within

the boundaries of the tasks assigned to her. Lastly, Appraiser 2 stressed that the applicant should work on her effectiveness and efficiency and might develop her integrity, since the applicant frequently bypassed her line management in achieving her goals.

24 On 8 December 2015, the applicant, in paragraph 5.3, added her observations on the appraisal report at issue, rejecting the criticisms made of her.

25 The appraisal report at issue was finally adopted on 3 February 2016.

26 On 6 January 2016, the applicant made it known that she refused to meet her managers to receive the ECB's decision concerning her in respect of the ASBR procedure for 2015 ('the 2015 ASBR decision'). Because of that refusal, the 2015 ASBR decision was sent to her by post. The decision states that since the applicant's performance was judged to be unsatisfactory she was not being awarded any salary increase. Her management informed her by email of 7 January 2016 that, like the appraisal interview, communication of the 2015 ASBR decision was regarded as one of the regular interactions between staff members and managers in which the involvement of IPSO was not appropriate. The applicant's managers stated that they were available to meet her and explain the background of the decision to her.

27 On 4 March 2016, the applicant challenged the appraisal report at issue and the 2015 ASBR decision in a request for an administrative review, which was rejected by a decision of 2 May 2016.

28 On 28 June 2016, the applicant submitted a request for a grievance procedure in respect of the rejection of her request for an administrative review. The request for a grievance procedure was rejected by decision of the President of the ECB of 15 September 2016.

Procedure and forms of order sought

29 By application lodged at the Registry of the General Court on 24 November 2016, the applicant brought the present action.

30 Having received an application made by the applicant on the basis of Article 66 of the Rules of Procedure of the General Court, the latter, by decision of 17 January 2017, granted the application for anonymity and decided to omit the applicant's name from the public version of the present judgment.

31 Since the parties had not requested a hearing under Article 106(1) of the Rules of Procedure, the General Court (Ninth Chamber), considering that it had sufficient information available to it from the material in the file, decided to rule on the action without an oral part of the procedure, in accordance with Article 106(3) of the Rules of Procedure.

32 The applicant claims that the Court should:

– declare the present action admissible and well founded;

– consequently:

  – annul the appraisal report at issue and the 2015 ASBR decision;

  – in so far as necessary, annul the decisions of 2 May and 15 September 2016 rejecting the applicant's request for an administrative review and request for a grievance procedure, respectively;

– order the ECB to pay compensation for non-material damage valued *ex aequo et bono* at EUR 15 000;

– order the ECB to pay the entirety of the costs.

33 The ECB contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

34 In support of her claim for annulment of the appraisal report at issue, the applicant puts forward three pleas: the first alleging infringement of the Guide to the ECB appraisal, of the rights of the defence and of the duty of care, in so far as, in particular, the ECB did not give her the opportunity to be accompanied by a trade union representative at her appraisal interview; the second alleging infringement of the rules of objectivity and impartiality and of Article 41 of the Charter of Fundamental Rights of the European Union, in that, in particular, Appraiser 2 made comments about her that showed that the former was not capable of carrying out her role as appraiser objectively and impartially; and the third alleging manifest errors of assessment.

35 In support of her claim for annulment of the 2015 ASBR decision, the applicant puts forward two pleas: the first alleging that the appraisal report at issue, on which the 2015 ASBR decision is based, is unlawful, and the second alleging infringement of the ASBR Guidelines — contained in an ECB document entitled 'The Annual Salary and Bonus Review' — and of Article 41 of the Charter of Fundamental Rights, since the 2015 ASBR decision is not reasoned and she was not given a prior hearing.

36 The applicant does not put forward any specific pleas concerning the claim for annulment of the decisions of 2 May and of 15 September 2016 rejecting her request for an administrative review and her request for a grievance procedure, respectively.

The claim for annulment of the decisions of 2 May and of 15 September 2016 rejecting the request for an administrative review and the request for a grievance procedure, respectively

37 It should be noted that, according to settled case-law, a claim for annulment formally directed against the decision rejecting a complaint has the effect of bringing before the Court the act against which the complaint was submitted, where that claim, as such, lacks any independent content (see, to that effect, judgments of 17 January 1989, *Vainker* v *Parliament*, 293/87, EU:C:1989:8, paragraph 8, and of 6 April 2006, *Camós Grau* v *Commission*, T-309/03, EU:T:2006:110, paragraph 43).

38 In the present case, since the decisions of 2 May and of 15 September 2016 rejecting the request for an administrative review and the request for a grievance procedure, respectively, merely confirm the appraisal report at issue and the 2015 ASBR decision, the claim for annulment of the decisions of 2 May and of 15 September 2016 lacks any independent content and there is therefore no need to give a specific ruling on it, even though, in the examination of the lawfulness of the appraisal report at issue, it will be necessary to take into consideration the reasoning contained in those decisions (see, to that effect, judgment of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraphs 58 and 59 and the case-law cited).

The claim for annulment of the appraisal report at issue

First plea: infringement of the Guide to the ECB appraisal, of the rights of the defence and of the duty of care

39 The applicant claims that the Guide to the ECB appraisal was infringed on three counts: first, the alleged absence of a discussion as there was no appraisal interview, which constituted failure to respect her rights of defence; secondly, the alleged failure to identify ways of improvement and to set objectives in the appraisal report at issue, which breaches the duty of care; and, thirdly, the alleged absence of input by any other manager in the appraisal report at issue.

40 As regards the first part of the first plea: infringement of the Guide to the ECB appraisal, the absence of a discussion and infringement of her rights of defence, the applicant claims in essence that, under the Guide to the ECB appraisal, members of staff of the ECB can have assistance from a trade union representative at the appraisal discussion and that, by denying her the presence of such a person at that discussion, Appraiser 1 deprived her, de facto, of the appraisal interview provided for under that guide and infringed her rights of defence.

41 The ECB disputes those arguments.

42 In that regard, in the first place, it should be noted that, so far as the legal nature of the Guide to the ECB appraisal is concerned, it is clear from case-law that while guidelines cannot be regarded as rules of law which the administration is required to comply with, they lay down rules of conduct indicating the approach to be adopted from which the administration cannot depart, in an individual case, without giving reasons which are compatible with the principle of equal treatment. By adopting such rules and announcing by publishing them that it will apply them to the cases to which they relate, the institution in question imposes a limit on the exercise of its own discretion and cannot depart from those rules, without being found, in some circumstances, to be in breach of general principles of law, such as the principles of equal treatment or of the protection of legitimate expectations. It is not therefore inconceivable that, in certain circumstances and depending on their content, such rules of conduct of general application may produce legal effects (see, to that effect, judgments of 18 September 2015, *Wahlström* v *Frontex*, T-653/13 P, EU:T:2015:652, paragraph 61 and the case-law cited, and of 19 October 2017, *Possanzini* v *Frontex*, T-686/16 P, not published, EU:T:2017:734, paragraph 43).

43 In the present case, first, it should be noted that the applicant refused to take part in the appraisal interview although, according to the Guide to the ECB appraisal, she was required to do so. That guide states that 'appraisees are obliged to take part in the appraisal discussion and to receive management feedback'.

44 Secondly, it should be pointed out that it is clear from the wording of the Guide to the ECB appraisal that the appraisal discussion is supposed to involve only the appraisee and the appraiser. The Guide provides as follows:

'Appraisal discussions should, in principle, take place on a one-to-one basis between the first appraiser and the appraisee. When the organisation of work involves the appraisee reporting to more than one manager, the first appraiser will collect the input from the other managers and add it to the form. If deemed necessary, additional appraisal discussions between the appraisee and the other managers can take place.'

45 As the ECB points out, the expression 'in principle' allows the general rule to be distinguished from the exception. Thus, although as a general rule the appraisal interview is meant to take place on a one-to-one basis, it is not inconceivable that a third party might be involved. However, contrary to

what the applicant contends, that does not in any way mean that the presence of an IPSO representative is allowed. In that regard, as the ECB points out, the cases in which staff members can be assisted by a trade union representative are limited to certain specific provisions of the ECB's internal rules, all relating to situations of conflict (an individual dispute, an administrative review procedure, a grievance or a review procedure, or an administrative inquiry) or sensitive situations (informal resolution procedure under the Dignity at Work policy). Those provisions are summarised in paragraph 3(d) of the Memorandum of Understanding between the ECB and IPSO, entitled 'Assistance to staff members'. The cases provided for do not include the appraisal interview. In the present case, it is not disputed that the applicant could have been accompanied by Mr L. at meetings in connection with the Dignity at Work procedure, a procedure which is expressly mentioned in paragraph 3(d) of the Memorandum of Understanding between the ECB and IPSO. It is clear moreover from the documents in the case that the applicant and Appraiser 1 could actually have benefited from the opportunities provided for in the Guide to the ECB appraisal 'for serious concerns or problems', namely advice from DG-H and from a staff representative.

46 The applicant's argument that accompaniment by a trusted person is a practice followed in other institutions, although it is not provided for in any specific measure, by no means undermines that reasoning. First, the applicant does not provide any evidence to that effect. Secondly, it has not been established that that practice is followed in situations other than those of conflict, such as might arise during proceedings to deal with underperformance or disciplinary proceedings. Similarly, the fact that in January 2017 the ECB suggested to the applicant that she might be accompanied by an impartial observer — the medical adviser or a social counsellor — in view of her [*confidential*], by no means undermines that reasoning.

47 In the second place, it should be noted that, according to settled case-law, an appraisal report cannot be definitively adopted without the official in question being given the opportunity to be properly heard, and a procedural irregularity in the drawing up of the appraisal report whereby the official is not consulted also constitutes an infringement of the right to be heard (see judgment of 30 June 2015, *Z* v *Court of Justice*, F-64/13, EU:F:2015:72, paragraph 89 and the case-law cited).

48 According to case-law, direct contact between the official reported on and the appraiser is such as to encourage a frank and thorough dialogue, enabling them to ascertain exactly the nature of, the reasons for and the extent of any differences of opinion and to achieve better mutual understanding, particularly in a situation where it is necessary to remedy a very damaged personal relationship (see judgment of 30 June 2015, *Z* v *Court of Justice*, F-64/13, EU:F:2015:72, paragraph 93 and the case-law cited). Without a direct exchange between the reporting officer and the staff member under appraisal, the appraisal cannot entirely fulfil its function as a human resources management tool and as an instrument to accompany the professional development of the official concerned (see, to that effect, judgment of 18 September 2015, *Wahlström* v *Frontex*, T-653/13 P, EU:T:2015:652, paragraph 25 and the case-law cited).

49 However, it should be noted that in the present case the applicant was invited on two occasions to attend the appraisal interview. She was subsequently reminded twice about the time limit laid down in the Guide to the ECB appraisal. DG-H informed her that the Dignity at Work procedure did not suspend the appraisal process. It is not apparent from the documents in the case that the applicant took any steps to speed up a possible response from the member of the ECB Executive Board responsible for staff matters concerning the presence of a trade union representative at the appraisal interview. Nor is it apparent from the documents in the case that the applicant suggested a compromise that did not involve a representative of IPSO in order to facilitate a direct exchange with Appraiser 1 within the time limit required by the Guide to the ECB appraisal.

50 It must therefore be held that the applicant was given the opportunity to have a proper hearing before the appraisal report at issue was finalised and that she did not take it.

51 In those circumstances, the applicant cannot rely on the fact that she withdrew from that interview on the pretext that she was apprehensive about it because of her strained relations with the appraiser, or on a situation created by herself, in order to challenge thereby the legality of the appraisal report at issue or of the appraisal process (see, to that effect, judgment of 9 February 1988, *Picciolo* v *Commission*, 1/87, EU:C:1988:67, paragraph 24).

52 In the light of the circumstances of the present case and of all the considerations set out in paragraphs 42 to 51 above, the view must be taken that the ECB did not deprive the applicant of the appraisal interview provided for under the Guide to the ECB appraisal by not allowing her to have a trade union representative present at her appraisal interview and, hence, did not infringe her rights of defence.

53 It follows that the first part of the first plea must be rejected as unfounded.

54 The Court considers it appropriate to examine next the second plea, alleging infringement of the rules of objectivity and impartiality and of Article 41 of the Charter of Fundamental Rights.

Second plea: infringement of the rules of objectivity and impartiality and of Article 41 of the Charter of Fundamental Rights

55 The applicant contends, in essence, that the appraisal report at issue is unlawful due to Appraiser 2's alleged lack of impartiality. In that regard, she cites comments made by that appraiser in four emails appearing in documents XVII, XXV and XXXVI in Annex A.12 and in Annex A.19 to the application ('the documents at issue'), which demonstrate that Appraiser 2 was no longer able to perform her duties objectively and impartially.

56 The applicant also contends, more briefly, that, in view of the statements made by Appraiser 3, her line manager during her secondment, as reported by Appraiser 2, Appraiser 3 — who also gave her a negative appraisal — was not able to appraise her objectively.

57 Lastly, the applicant mentions the tensions with Appraiser 1 and also the Dignity at Work procedure, and states that the appraisal report at issue would have been different if Appraiser 1's impartiality had been assured.

58 The ECB disputes the admissibility of the documents at issue and the merits of the second plea.

– *The admissibility of the documents at issue*

59 The ECB questions the admissibility of the documents at issue and the means by which the applicant appropriated them. However, it does not make an express request for those documents to be removed from the file.

60 So far as the ECB is concerned, the emails contained in documents XVII and XXV in Annex A.12 form part of routine exchanges of correspondence between managers relating to performance of their management duties and are not public documents. The email in document XXXVI in Annex A.12 is part of a confidential exchange of correspondence between Appraiser 2 and her husband in the context of correspondence relating to their private life. Lastly, the email in Annex A.19 is part of a personal and confidential exchange between Appraiser 2 and her coach within a relationship of trust necessary for the proper functioning of that service; the applicant should not have had knowledge of it and she was not entitled to make use of it. According to the ECB, the fact that the email in Annex A.19 was placed anonymously on the applicant's desk — which the ECB finds difficult to believe — is irrelevant as regards the intrinsically confidential nature of that document and does not justify the applicant's use of it before the Court.

61 The applicant notes that, with the exception of Annex A.19, she had submitted the other documents to the ECB during the pre-litigation procedure and the latter had not raised any questions. She states that she 'did not use any means and did not appropriate … those emails', which were simply placed anonymously on her desk or in her personal pigeonhole. She considers that the documents at issue are essential in order to show that Appraiser 2 lacked the impartiality and objectivity needed in order to perform her role in respect of the applicant and that they are decisive, since they are necessary in order to demonstrate that her complaint is well founded.

62 The ECB's questioning of the admissibility of the documents at issue is based on three points, namely, first of all, the internal nature of the emails in documents XVII and XXV in Annex A.12, next, the confidential and personal nature of the emails in document XXXVI of Annex A.12 and in Annex A.19 and, lastly, the fact that those four documents were obtained unlawfully.

63 In that regard, it must be observed that neither the fact that the documents in question may be confidential nor the fact that they may have been obtained unlawfully precludes in principle their remaining in the case file. There is no provision that expressly prohibits evidence obtained unlawfully from being taken into account (see, to that effect, judgment of 12 May 2015, *Dalli* v *Commission*, T-562/12, EU:T:2015:270, paragraph 47; see also, in the context of competition law, judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraphs 44 and 76).

64 Thus, in certain situations, it has not been necessary for an applicant to show that it had obtained by lawful means the confidential document relied on in support of its action. The Court has held, on the balance of the interests to be protected, that it was necessary to consider whether particular circumstances, such as the decisive nature of the production of the document for the purposes of reviewing the lawfulness of the procedure leading to the adoption of the contested measure (see, to that effect, judgment of 6 March 2001, *Dunnett and Others* v *EIB*, T-192/99, EU:T:2001:72, paragraphs 33 and 34) or of establishing the existence of a misuse of powers (see, to that effect, judgment of 29 February 1996, *Lopes* v *Court of Justice*, T-280/94, EU:T:1996:28, paragraph 59), constituted grounds for not withdrawing a document (judgments of 8 July 2008, *Franchet and Byk* v *Commission*, T-48/05, EU:T:2008:257, paragraph 79; of 2 October 2009, *Estonia* v *Commission*, T-324/05, EU:T:2009:381, paragraph 54; and of 12 May 2015, *Dalli* v *Commission*, T-562/12, EU:T:2015:270, paragraph 48).

65 Furthermore, the Court of Justice has not ruled out the possibility that even internal documents may, in certain cases, be lawfully placed in a case file (judgments of 2 October 2009, *Estonia* v *Commission*, T-324/05, EU:T:2009:381, paragraph 55, and of 12 May 2015, *Dalli* v *Commission*, T-562/12, EU:T:2015:270, paragraph 47).

66 Lastly, it is clear from case-law, that the circumstances which permit internal documents to remain in the file are, in particular, those that may be taken into account for keeping in the case file documents that may have been obtained unlawfully and which are referred to in paragraph 64 above (see, to that effect, judgments of 6 March 2001, *Dunnett and Others* v *EIB*, T-192/99, EU:T:2001:72, paragraph 33, and of 2 October 2009, *Estonia* v *Commission*, T-324/05, EU:T:2009:381, paragraph 56).

67 With regard to balancing the interests to be protected, it is necessary to take into account the probative value of the documents at issue, whose authenticity has not been called into question, the conditions under which they were obtained and the internal, confidential or personal nature of those documents.

68 First of all, it should be noted that, in the present case, the applicant states that she 'did not use any means and did not appropriate' the documents at issue, which were simply placed anonymously 'on her desk or in her personal pigeonhole'. Although the ECB finds that difficult to believe, it is not established that the applicant herself unlawfully obtained the emails (see, to that effect, judgment of 12 May 2015, *Dalli* v *Commission*, T-562/12, EU:T:2015:270, paragraph 49).

69 Moreover, the Court finds that the ECB has not submitted any argument or evidence to demonstrate that those documents were obtained unlawfully or that the applicant was aware of the way in which the documents at issue were obtained. It is not clear from the case file that the ECB undertook, either at the stage of the pre-litigation procedure or following the lodging of the present action, any investigation to establish how the documents at issue came into the applicant's possession. The circumstances of the present case are therefore different from those of the case giving rise to the judgment of 8 May 2008, *Suvikas* v *Council* (F-6/07, EU:F:2008:55). In that case, concerning a selection procedure, a security investigation had been opened within two days of the applicant sending to the Council of the European Union documents that were in part covered by the secrecy of selection boards' proceedings, in addition to his request for review. It emerged that a colleague of the applicant had entered the office of one of the members of the selection board in his absence, had photocopied without permission the documents lying on that member's desk and had sent them to the applicant, and that, on the date on which the application and its annexes were lodged, the applicant was aware of the way in which that colleague had obtained the documents in question (judgment of 8 May 2008, *Suvikas* v *Council*, F-6/07, EU:F:2008:55, paragraphs 25 and 67).

70 The Court notes that the applicant, like any reasonable person in circumstances such as those in the present case, might think that the documents at issue had been obtained unlawfully and doubt whether the professional conduct of the person who had appropriated them was acceptable (see, to that effect and by analogy, judgment of 8 May 2008, *Suvikas* v *Council*, F-6/07, EU:F:2008:55, paragraph 67).

71 However, the fact remains that the circumstances in which the documents at issue were obtained have not been established.

72 Next, it should be noted that the documents at issue have been relied upon specifically as evidence to prove that Appraiser 2 was not capable of carrying out her role objectively and impartially and are, according to the applicant, decisive and necessary in order to demonstrate that her complaint is well founded.

73 In that regard, first, it should be noted that the internal nature of the emails in documents XVII and XXV in Annex A.12 does not preclude the admissibility of those documents (see paragraphs 63, 65 and 66 above). As for the emails in document XXXVI in Annex A.12 and in Annex A.19, although those documents may be considered to be of a personal and confidential nature for Appraiser 2, they deal only with professional concerns, they were sent by the latter from the office email system provided for members of staff of the ECB by the ECB, and their 'subject' field gives no indication that they are personal or private.

74 It should be noted that, since the entry into force of the Treaty of Lisbon, it is necessary to take into account the Charter of Fundamental Rights, which, under the first subparagraph of Article 6(1) TEU, are to have 'the same legal value as the Treaties'. Furthermore, Article 6(3) TEU confirms that fundamental rights, as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR') constitute general principles of EU law.

75 Article 52(3) of the Charter of Fundamental Rights states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, the meaning and the

scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, inter alia, by reference to the case-law of the European Court of Human Rights (judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 35).

76 The European Court of Human Rights recently had occasion to recall that emails sent from the workplace could attract the protection of Article 8 ECHR (ECtHR, 22 February 2018, *Libert v. France*, CE:ECHR:2018:0222JUD000058813, § 24) and could thus fall within the concepts of 'private life' and 'correspondence'. However, it is apparent from the same judgment that any interference in private life will not be regarded as being an infringement of Article 8 ECHR (see, to that effect, ECtHR, 22 February 2018, *Libert v. France*, CE:ECHR:2018:0222JUD000058813, §§ 37, 46 and 53).

77 In the present case, as regards the emails in document XXXVI in Annex A.12 and in Annex A.19, it should be noted that the ECB has not put forward any argument regarding the right to respect for private and family life and communications guaranteed by Article 7 of the Charter of Fundamental Rights, that article corresponding to Article 8(1) ECHR. So far as the first of those emails is concerned, the ECB merely stated that it constituted a confidential exchange of correspondence between Appraiser 2 and her husband in the context of correspondence relating to their private life. So far as the second of those emails is concerned, the ECB merely stated, equally succinctly, first, that it constituted an exchange of personal and confidential correspondence between Appraiser 2 and her coach within a relationship of trust necessary for the proper functioning of the service; the applicant should not have been aware of it and she was not entitled to use it. Secondly, the fact that it was placed on the applicant's desk anonymously does not justify the applicant's use of it before the Court.

78 Moreover, as noted in paragraph 63 above, there is no provision in EU law that expressly prohibits evidence obtained unlawfully from being taken into account in judicial proceedings (see, to that effect, judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraph 76).

79 Lastly, the confidential nature of the emails in document XXXVI in Annex A.12 and in Annex A.19 does not preclude their admissibility in the context of the present action (see paragraphs 63, 65 and 66 above).

80 Secondly, it should be noted that the ECB rejects the allegation regarding Appraiser 2's lack of impartiality. The documents at issue are, therefore, capable of demonstrating the facts complained of by the applicant and needed in order to examine the lawfulness of the appraisal report at issue. The circumstances of the present case thus differ from those in the case that gave rise to the judgment of 8 May 2008, *Suvikas* v *Council* (F-6/07, EU:F:2008:55) in that regard also. In that case, the facts relied upon by the applicant in support of his line of argument that the selection procedure was unlawful had been expressly acknowledged by the Council. The Court had therefore found that certain documents were not necessary for examining the lawfulness of the selection procedure at issue (judgment of 8 May 2008, *Suvikas* v *Council*, F-6/07, EU:F:2008:55, paragraph 68).

81 Lastly, the applicant contends, without be contradicted, that with the exception of Annex A.19, she had already communicated the other documents at issue to the ECB during the pre-litigation procedure and the latter had not raised any questions. In that regard, it should be noted that the decision of 2 May 2016 rejecting the request for an administrative review does not refer expressly to those documents. The decision of 15 September 2016 rejecting the request for a grievance procedure notes that the applicant asserts that the appraisal report at issue is flawed by a manifest lack of objectivity, neutrality and impartiality and that she had produced documents that in her view attested to her management's intention to dismiss her out of 'retaliation'. The decision states that the assessments provided in the appraisal report at issue do not point to any retaliatory intent or misuse of powers and that the evidence provided does not, in itself, permit the conclusion that there was a misuse of powers.

82 In the light of those considerations and of the particular circumstances of the present dispute, the nature of the documents at issue and the case-law referred to in paragraphs 63 to 66 and 78 above, the documents at issue must be declared admissible.

– The merits of the second plea: infringement of the rules of objectivity and impartiality and of Article 41 of the Charter of Fundamental Rights

83 In the first place, the applicant claims that on several occasions Appraiser 2 made comments about her which went beyond what a Head of Division and second appraiser should make, exhibiting bias and prejudice against her. Hence, the requirement of subjective impartiality was not met.

84 The applicant relies, in particular, on:

– the fact that, in the email which Appraiser 2 sent to her husband, dated 16 July 2015 (document XXXVI in Annex A.12), she:

  – expressed her intention to ask a member of the ECB Executive Board 'to dismiss [her]' describing her case as exemplary in terms of underperformance;

  – mentioned the fact that the applicant had challenged previous decisions that she had taken and decisions of Appraiser 1, and she took a negative view of this;

  – claimed that the applicant's reputation was so bad that no other service wanted her, including DG-[*confidential*], to which she had been seconded, because of the 'mess' she had made there;

– the fact that Appraiser 2 made the following comments to her coach on 11 June 2015, in the email in Annex A.19 in the case file: 'the sheer thought of her coming back [to DIV/[*confidential*] after the secondment] makes me angry'; 'it just makes me very angry'; 'I have to think of ways to limit her impact on us and myself, in particular';

– the fact that, in the email of 20 March 2015 (document XVII in Annex A.12), Appraiser 2 made negative comments about her and that she stated in it that Appraiser 3 did not want her secondment;

– the fact that Appraiser 2 wrote, on 9 February 2015, in the email in document XXV in Annex A.12, to three members of the senior management of DG [*confidential*] expressing surprise that the applicant appeared on the lists of staff assigned to the [*confidential*] project 'given that you know about [the applicant's] performance here in the Bank', and the fact that Appraiser 2, not as part of any organised or transparent procedure, thus informed the senior management of the ECB that her performance was poor, that her presence on that project was questionable, that she was incapable of taking part in that project and that she was not entitled to take part in it due to her allegedly unsatisfactory performance;

– the fact that, in an email of 14 April 2015 concerning the record of her mid-term appraisal, Appraiser 2 said she would prefer not to have a meeting with her, adding the following: 'In the spirit of economising, why should I insist on talking to her when we know that her position and our position are orthogonal?'

85 According to the applicant, it is in the light of that breach of the impartiality requirement laid down in Article 41 of the Charter of Fundamental Rights that the comments made in the appraisal report at issue should be read, and they might have been different if the impartiality of both Appraiser 2 and Appraiser 1 had been assured. In that regard, the applicant highlights certain comments made by Appraiser 2, in paragraph 5.2 of the appraisal report at issue, in particular regarding:

– her alleged lack of integrity, in that she bypassed her managers;

– the fact that she challenged her 2014 appraisal report and the 2014 ASBR decision, which Appraiser 2 regarded as blocking secondment to DG-[*confidential*];

– the fact that she tried to shift responsibility on to her managers;

– the fact that she 'made a mess' of her secondment;

– the fact that she did not perform satisfactorily, her performance falling below that expected of a [*confidential*].

86 In the applicant's view, Appraiser 2, by her communications — and the content of her communications to third parties — not only spread information that damaged her reputation, but did so in a manner that was defamatory.

87 Secondly, the applicant contends that Appraiser 3 was not able to appraise her objectively, since, according to one of the documents at issue, the email of 20 March 2015 (document XVII in Annex A.12), Appraiser 3 stated that she did not want the secondment, referring to a 'case' that she was involved in when she worked in DG-[*confidential*], that is to say, the applicant's complaint of harassment that did not ultimately succeed.

88 Thirdly, the applicant contends that the appraisal report at issue would have been different if Appraiser 1's impartiality had been assured.

89 The ECB contends that the second plea is unfounded. First of all, the applicant provided no evidence that Appraiser 2 lacked objectivity and impartiality. While it is apparent from a number of documents in the file that the applicant may have been a source of frustration for Appraiser 2 and perhaps for Appraiser 3 also, that frustration was not the result of personal feelings, but of strain and weariness in a professional context as regards the applicant's output and performance, which does not demonstrate a lack of impartiality and objectivity. According to the ECB, Appraiser 2 did not go beyond the limits of her duties as Head of Division, responsible for a team and concerned for the proper functioning of her institution. In fully performing her duties as a line manager, she expressed both her views and her concern regarding a difficult situation within her service. The ECB goes on to say that, although Appraiser 2's attitude may have been a problem, *quod non*, her intervention did not have any impact on the applicant's appraisal overall, since Appraiser 2, as the second appraiser, merely confirmed the criticisms expressed by Appraiser 1, whose alleged lack of impartiality has not been established. Lastly, the applicant's assertion that the appraisal report at issue would have been different if she had been able to have an objective and impartial second appraiser is, according to the ECB, based on the presumption of a lack of impartiality and remains purely speculative.

90 As a preliminary point, first, it must be observed that the complaint alleging that the email of 16 July 2015, sent by Appraiser 2 to her husband (document XXXVI in Annex A.12), spread a defamatory rumour about the applicant cannot be accepted. It does not contain any details enabling an assessment to be made of whether it is well founded. Nor does the email in question refer to the applicant by name. In addition, it is not clear from the documents in the case that Appraiser 2 circulated it to anyone other than the addressee, her husband, and it was the applicant herself who placed it in the case file at the pre-litigation stage and in the present action.

91 Secondly, regarding the alleged lack of impartiality on the part of Appraiser 1 and Appraiser 3, the applicant provides no prima facie evidence to support any such lack of impartiality or any substantiated arguments in support of those complaints. In the case of Appraiser 1, the applicant merely mentions possible tensions, disagreements and the Dignity at Work procedure. In the case of Appraiser 3, she merely draws a general conclusion from reported comments contained in a document in the file. Those factual claims are not accompanied by any sufficiently precise, objective and consistent indicia of their truth or probability, nor of any detail or arguments enabling an assessment of their merits (see, to that effect, judgment of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 113). Both of the applicant's complaints must therefore be rejected as unfounded.

92 Furthermore, it should be observed that it is inherent in any performance appraisal that in some cases conclusions may be reached that do not meet the expectations of the person concerned. It is also inherent in any activity involving the management of a team or department that there will be exchanges, by word of mouth or in writing, of an informal or a formal nature, within management and with the human resources department, about the operation of the team or department and about the results obtained and difficulties encountered. Such conclusions and exchanges cannot therefore, in themselves, be defamatory.

93 With regard to the complaint alleging lack of impartiality and objectivity on the part of Appraiser 2, it should be noted that, under Article 41(1) of the Charter of Fundamental Rights, every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the Union. That requirement of impartiality includes inter alia subjective impartiality, which means that members of a pre-selection panel must not show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary (judgment of 5 December 2017, *Spadafora* v *Commission*, T-250/16 P, not published, EU:T:2017:866, paragraphs 74 and 75; see also, by analogy, judgment of 13 December 2012, *Commission* v *Strack*, T-197/11 P and T-198/11 P, EU:T:2012:690, paragraph 113).

94 Furthermore, as the parties noted, according to settled case-law, even though the possibility cannot be excluded that differences between an official and his immediate superior may cause a degree of irritation on the part of that immediate superior, that possibility does not, as such, imply that the immediate superior is no longer in a position to assess objectively the merits of the person concerned. It has moreover been held that, even the fact that a staff member has lodged a complaint of harassment against the official who is to assess his professional performance cannot of itself, without more, call into question the impartiality of the person against whom the complaint has been lodged (see judgment of 30 June 2015, *Z* v *Court of Justice*, F-64/13, EU:F:2015:72, paragraph 71 and the case-law cited).

95 Furthermore, it is clear from case-law that only the involvement of managers in the professional activities of the staff members reporting to them enables the former to make the most appropriate assessment possible of the activities of the persons under them (see, to that effect, judgment of 30 June 2015, *Z* v *Court of Justice*, F-64/13, EU:F:2015:72, paragraph 72 and the case-law cited). Acceptance of an argument whereby neither the head of unit nor any member of the management of the department to which a staff member is assigned should take part in the appraisal procedure would lead to a situation in which a proper assessment of the performance of the staff member and of his conduct in the service would not be ensured (see, to that effect, judgment of 30 June 2015, *Z* v *Court of Justice*, F-64/13, EU:F:2015:72, paragraph 72).

96 Lastly, according to settled case-law, the appraisal report contains the appraisers' freely expressed opinion. It follows that a certain amount of subjectivity is inherent in the assessments in that report, as in any personal opinion (see, to that effect, judgment of 5 December 2006, *Angelidis* v *Parliament*, T-416/03, EU:T:2006:375, paragraph 107 and the case-law cited).

97 In the present case, the applicant asserts that, in the light of the documents at issue, the impartiality of Appraiser 2's assessments contained in the appraisal report at issue was compromised. It should be noted that the documents at issue cover the period from February to July 2015, the last email, dated 16 July 2015, having been written four months before Appraiser 2 added her appraisal to the appraisal report at issue.

98 It is true that it follows from the case-law cited in paragraph 94 above that the existence of differences between the appraisee and the appraiser, and of a certain amount of irritation on the part of the latter, does not, as such, mean that the appraiser is no longer able to assess the merits of the person concerned objectively. It is also relevant that the comments, even the negative comments, contained in the appraisal report at issue cannot, as such, be regarded as evidence that that report was drawn up with a lack of impartiality and objectivity.

99 However, the Court finds that the documents at issue, which have been declared admissible (see paragraph 82 above), constitute sufficiently precise, objective and consistent indicia of the truth or probability of the applicant's allegation regarding Appraiser 2's lack of subjective impartiality (see, to that effect, judgment of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 113). That finding is not invalidated by the ECB's argument that, although Appraiser 2's attitude may have been a problem, *quod non*, her intervention did not have any impact on the applicant's appraisal overall, since Appraiser 2 merely confirmed the criticisms made by Appraiser 1. In that regard, it should be pointed out that Appraiser 1's impartiality does not preclude the possibility that the second appraisal is unlawful due to Appraiser 2's lack of impartiality. The conduct of just one appraiser is such as to render unlawful the appraisal report as a whole (see, by analogy, judgment of 8 May 2008, *Suvikas* v *Council*, F-6/07, EU:F:2008:55, paragraph 97). Under the appraisal process introduced at the ECB, the appraisal carried out by a second appraiser, the first appraiser's line manager, constitutes a guarantee for the staff member concerned, who must be able to rely on the experience and impartiality of that manager.

100 In the present case, although the comments about the applicant contained in the appraisal report at issue, however negative they may be, still come within the limits of the appraiser's wide discretion and, in particular, do not cross the boundary into derogatory or harmful criticism of the person herself, the fact remains that the applicant has provided evidence to show that Appraiser 2 expressed very strong negative views about her on several occasions during the 2015 appraisal exercise.

101 Thus, in her email of 9 February 2015 addressed to three members of the ECB's senior management concerning the [*confidential*] project (document XXV in Annex A.12), Appraiser 2 asks them whether they are aware of the applicant's participation in that project given that they knew about her performance at the ECB, expresses doubts about that participation, stating that she '[doesn't] see the rationale behind this nomination' and seems to wish to become involved, asking them to 'let [her] know whom to approach in this matter'.

102 Furthermore, the email of 20 March 2015, sent by Appraiser 2 to Ms O. and copied to Appraiser 1, concerning a project on [*confidential*] (document XVII in Annex A.12), contains remarks made in a rather ironic tone by Appraiser 2: '[Appraiser 3] unfortunately knows more about [the applicant] than we do because she has been involved in the case not only when she was in DG-[*confidential*] but also in DG-[*confidential*]'; 'de facto, [Appraiser 3] does not really want to have [the applicant] in her team (surprise, surprise)'.

103 The observations contained in the email dated 11 June 2015 which Appraiser 2 sent to her coach (Annex A.19) are even more negative, Appraiser 2 referring to her horror at the idea of the applicant returning to DIV/[*confidential*] after her secondment, the time and energy that the applicant would 'steal' from her and the temporary relief that the period of secondment had given her ('she is on

secondment and this has given us so much more additional time and energy that the sheer thought of her coming back makes me angry not scared ... it just makes me very angry and frustrated how much time and energy she "steals" from us').

104 Lastly, it should be noted that the email dated 16 July 2015 'on a personnel matter', which Appraiser 2 sent to her husband and which lists five reasons why she wanted a meeting with a member of the Executive Board of the ECB (document XXXVI in Annex A.12), refers to an exemplary case of underperformance in her division which might help to pin down and eventually solve the pitfalls of the current underperformance procedure. Appraiser 2 states that the person in question had launched a grievance procedure against her and against Appraiser 1, and she had been involved in other conflicts besides a case that had been brought before the European Union Civil Service Tribunal and administrative reviews. Appraiser 2 notes that, given the various conflict cases in which the person had been involved in the past, she had been placed in a number of other DGs, which unfortunately did not want to keep her, and the reputation of that person was so bad that she could not be placed elsewhere. Lastly, Appraiser 2 states that she spends a disproportionate amount of time and energy (20% of her time) on the person in question, that one of the reasons why DIV/[*confidential*] ran so smoothly in the last three months was that that person was on secondment and that, since she 'made a mess' of her secondment, she was back in DIV/[*confidential*].

105 It is clear from the comments set out in paragraphs 100 to 104 above that the documents at issue demonstrate not only strain and weariness in a professional context, as expressed by the ECB, but also very strong negative personal feelings towards the applicant on the part of Appraiser 2.

106 In those circumstances, the comments made by Appraiser 2 in the documents at issue demonstrate a lack of subjective impartiality or, at least, the likelihood of such a lack. This is all the more so since, according to the Guide to the ECB appraisal, the role of Appraiser 2, as a second appraiser, is to complement the appraisal by the first appraiser, to review the appraisals by the first appraisers, ensuring fair and equal treatment across the division, and to arbitrate in the event of serious disagreement between the first appraiser and the appraisee.

107 The second plea in this action must therefore be accepted.

108 That finding alone justifies annulment of the appraisal report at issue, without the need to examine the other arguments put forward by the applicant in respect of the second and third parts of the first plea and the third plea.

The claim for annulment of the 2015 ASBR decision

109 In essence, the applicant bases her claim for annulment of the 2015 ASBR decision on the unlawfulness of the appraisal report at issue and on the fact that she was not able to have a meeting with her appraiser in order to receive the 2015 ASBR decision so that she could be given an explanation of the background to that decision, in accordance with the ASBR Guidelines.

110 The ECB contends that the claim for annulment of the 2015 ASBR decision is manifestly unfounded.

111 It is clear from paragraphs 106 to 108 above that the comments made by Appraiser 2 in the documents at issue are such that they establish a lack of subjective impartiality or, at least, the likelihood of such a lack, so the appraisal report at issue must be annulled.

112 In view of the 'indirect relationship' established in paragraph 3 of the ASBR Guidelines between the appraisal exercise and the ASBR exercise, which although they have different objectives must be internally consistent, the 2015 ASBR decision must also be annulled.

The claim for damages

113 First, the applicant asserts that, following the annulment of the appraisal report at issue and of the 2015 ASBR decision, the ECB should resume her appraisal and adopt a new ASBR decision and, accordingly, restore her financial entitlements with effect from 1 January 2016, plus interest for late payment at the key rate of the ECB, increased by two percentage points.

114 Secondly, the applicant claims that the ECB should be ordered to pay a sum of EUR 15 000 by way of compensation for the non-material damage she suffered. For the applicant, mere annulment of the appraisal report at issue and of the 2015 ASBR decision will not fully compensate for the non-material damage she suffered, which is separable from the unlawfulness forming the grounds for the annulment sought. The way in which Appraiser 1 and Appraiser 2 behaved towards her, as reflected in the appraisal report at issue, calling in question her integrity and her loyalty towards the ECB, making inappropriate and defamatory comments to a third party without respect for her privacy and spreading rumours about her, caused her serious damage, publicly undermining her reputation and her dignity.

115 The ECB contends that, in the absence of any unlawfulness, there is no basis for any claim for damages. Furthermore, the ECB contends that it is for the applicant to demonstrate the actual occurrence of the material and non-material damage she allegedly suffer as a result of behaviour outside the context of the adoption of the appraisal report at issue and of the 2015 ASBR decision, which has not been done in the present case.

116 Under the first paragraph of Article 266 TFEU, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. It is therefore incumbent on the ECB to determine what measures are necessary in order to comply with the present judgment and to establish the consequences thereby arising with regard to the 2015 appraisal exercise and the 2015 ASBR procedure.

117 As regards the claim for compensation for the non-material damage allegedly suffered by the applicant, it must be recalled that, according to settled case-law regarding civil service matters, the European Union can be held liable for damages only if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institution, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered (judgment of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 42; see, also, judgment of 16 December 2010, *Commission* v *Petrilli*, T-143/09 P, EU:T:2010:531, paragraph 45 and the case-law cited). Those conditions are cumulative, which means that if one of them is not satisfied the European Union cannot be held non-contractually liable (see judgments of 17 May 2017, *PG* v *Frontex*, T-583/16, not published, EU:T:2017:344, paragraph 97 and the case-law cited, and of 26 October 2017, *Paraskevaidis* v *Cedefop*, T-601/16, EU:T:2017:757, paragraph 78 and the case-law cited).

118 It follows that, even if fault on the part of the institution, body, office or agency of the European Union is established, liability can actually arise only once the applicant manages to establish the fact and nature of the loss (see, to that effect, judgment of 26 October 2017, *Paraskevaidis* v *Cedefop*, T-601/16, EU:T:2017:757, paragraph 79 and the case-law cited).

119 It must also be recalled that, according to settled case-law, the annulment of an act vitiated by unlawfulness may itself constitute adequate and, in principle, sufficient compensation for any non-material damage which that act may have caused (judgment of 9 November 2004, *Montalto* v *Council*, T-116/03, EU:T:2004:325, paragraph 127; see also, to that effect, judgment of 9 July 1987, *Hochbaum and Rawes* v *Commission*, 44/85, 77/85, 294/85 and 295/85, EU:C:1987:348, paragraph 22).

120 Nonetheless, the annulment of an act vitiated by unlawfulness cannot itself constitute adequate compensation where, either the contested act involves an explicitly negative and potentially damaging assessment of the applicant's abilities (see, to that effect, judgments of 7 February 1990, *Culin* v *Commission*, C-343/87, EU:C:1990:49, paragraphs 27 to 29; of 23 March 2000, *Rudolph* v *Commission*, T-197/98, EU:T:2000:86, paragraph 98, and of 13 December 2005, *Cwik* v *Commission*, T-155/03, T-157/03 and T-331/03, EU:T:2005:447, paragraphs 205 and 206), or the applicant demonstrates that he has suffered non-material damage which is separable from the unlawfulness giving rise to the annulment and which cannot be fully compensated for by the annulment (judgments of 6 June 2006, *Girardot* v *Commission*, T-10/02, EU:T:2006:148, paragraph 131; and of 19 November 2009, *Michail* v *Commission*, T-49/08 P, EU:T:2009:456, paragraph 88).

121 In the present case, it should be noted that it has by no means been established that Appraiser 1's assessment contained in the appraisal report at issue is vitiated by any error. In addition, the applicant has not produced any prima facie evidence in support of any lack of impartiality on the part of Appraiser 1.

122 Furthermore, any non-material damage that the applicant may have suffered on account of the appraisal report at issue and of the 2015 ASBR decision stems directly from the absence of subjective impartiality on the part of Appraiser 2 and, thus, from the unlawfulness established. Also, as stated in paragraph 100 above, the comments made about the applicant in the appraisal report at issue, although negative, are not harmful.

123 Lastly, in so far as the applicant seeks the award of compensation for possible non-material damage based on the documents at issue, it should be noted that it is clear from the judgments delivered in actions based on Articles 90 and 91 of the Staff Regulations of Officials of the European Union that, where the alleged harm results not from the measure whose annulment is sought but from faults and omissions allegedly committed, it is mandatory for the pre-litigation procedure to begin with a request calling on the administration to make good that harm (see, to that effect, judgment of 22 September 2015, *Gioria* v *Commission*, F-82/14, EU:F:2015:108, paragraph 74 and the case-law cited). It is appropriate, by analogy, to apply that case-law to actions based on Article 50a of the Statute of the Court of Justice of the European Union, on Article 36.2 of the Statute of the European System of Central Banks and of the ECB and on Article 42 of the ECB Conditions of Employment. It follows that such a claim for damages is inadmissible since no claim for compensation for any non-material damage based on the documents at issue was made to the ECB prior to the judicial proceedings (see, to that effect and by analogy, judgment of 22 September 2015, *Gioria* v *Commission*, F-82/14, EU:F:2015:108, paragraph 76).

124 It follows that the annulment of the appraisal report at issue and of the 2015 ASBR decision on the grounds stated is sufficient to compensate for any non-material damage suffered by the applicant.

125 The claim for damages must therefore be rejected.

Costs

126 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

127 Since the ECB has for the most part been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls QB's appraisal report for the 2015 appraisal exercise and the decision of the European Central Bank (ECB) of 15 December 2015 not to award QB a salary increase;**

2. **Dismisses the action as to the remainder;**

3. **Orders the ECB to bear its own costs and to pay those incurred by QB.**

Gervasoni Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 8 November 2018.

[Signatures]