Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

(Second Chamber)

8 October 2015 *

(Civil service — FRA staff — Member of the temporary staff — Career development report — Internal appeal — Accusations of discrimination — Accusations of victimisation within the meaning of Directive 2000/43 — Administrative enquiry — Disciplinary proceedings — Disciplinary penalty — Reprimand — Articles 2, 3, and 11 of Annex IX to the Staff Regulations — Termination of a contract of indefinite duration — Article 47(c)(i) of the CEOS — Right to be heard — Article 41(2)(a) of the Charter of Fundamental Rights of the European Union)

In Joined Cases F-106/13 and F-25/14,

TWO ACTIONS brought under Article 270 TFEU,

DD, a former member of the temporary staff of the European Union Agency for Fundamental Rights, residing in Vienna (Austria), represented by L. Levi and M. Vandenbussche, lawyers,

applicant,

v

European Union Agency for Fundamental Rights (FRA), represented by M. Kjærum, acting as Agent, and P. Jenkinson, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

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

Registrar: P. Cullen, Administrator,

having regard to the written procedure and further to the hearing on 9 March 2015,

gives the following

* Language of the case: English.

Judgment

1 By applications lodged on 25 October 2013 and 24 March 2014 respectively, and registered as Cases F-106/13 and F-25/14, DD has challenged the reprimand imposed on him by the Director of the European Union Agency for Fundamental Rights (FRA) and the decision adopted by that director to terminate his contract of indefinite duration as a member of the temporary staff, and has sought an order that the FRA compensate him for the harm he claims to have incurred as a result of those acts.

Legal context

2 Article 86 of the version of the Staff Regulations of Officials of the European Union applicable to the proceedings ('the Staff Regulations'), in Title VI thereof, entitled 'Disciplinary Measures', is worded as follows:

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

2. Where the Appointing Authority or [the European Anti-Fraud Office] becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred.

3. Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX [to the Staff Regulations].'

3 Under Article 1(1) of Annex IX to the Staff Regulations:

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

4 Article 2 of Annex IX to the Staff Regulations provides as follows:

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

2. The Appointing Authority shall inform the person concerned when the investigation ends, and shall communicate to him the conclusions of the investigation report and, on request and subject to the protection of the legitimate interests of third parties, all documents directly related to the allegations made against him.

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

5 Article 3 of Annex IX to the Staff Regulations is worded as follows:

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

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

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

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

(i) decide to initiate the disciplinary proceedings provided for in Section 4 of this Annex, or

(ii) decide to initiate disciplinary proceedings before the Disciplinary Board.'

6 Article 11 of Annex IX to the Staff Regulations provides as follows:

'The Appointing Authority may decide on the penalty of a written warning or reprimand without consulting the [Disciplinary] Board. The official concerned shall be heard before such action is taken by the Appointing Authority.'

7 Pursuant to Article 47 of the Conditions of Employment of Other Servants of the European Union, as applicable to the proceedings ('the CEOS'):

'Apart from cessation on death, the employment of temporary staff shall cease:

...

(c) where the contract is for an indefinite period:

(i) at the end of the period of notice stipulated in the contract; the length of the period of notice shall not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of 10 months. The period of notice shall not, however, commence to run during maternity leave or sick leave, provided such sick leave does not exceed three months. It shall, moreover, be suspended during maternity or sick leave subject to the limits aforesaid; or

(ii) where the servant no longer satisfies the conditions laid down in Article 12(2), point (a), [of the CEOS] subject to the possibility of authorising an exception under that provision. Should the exception not be authorised, the period of notice referred to in subpoint (i) of ... point (c) shall apply.'

8 Lastly, Article 50a of the CEOS provides that, '[w]ithout prejudice to Articles 49 and 50 [of the CEOS], any intentional or negligent failure by a member of the temporary staff or of a former member of the temporary staff to comply with his obligations under these conditions of employment shall render him liable to disciplinary action in accordance with Title VI of the Staff Regulations and where applicable Annex IX to the Staff Regulations, the provisions of which shall apply by analogy'.

Factual background to the dispute

9 The applicant was recruited as a Legal Affairs Officer by the European Monitoring Centre on Racism and Xenophobia (EUMC), under a contract as a member of the temporary staff within the meaning of Article 2(a) of the Conditions of Employment of Other Servants of the European Communities and for a renewable four-year term beginning on 1 August 2000.

10 The applicant's contract was renewed for another four-year term from 1 August 2004, and then converted into a contract of indefinite duration from 16 December 2006.

11 The FRA was established by Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (OJ 2007 L 53, p. 1), replacing the EUMC.

12 On 1 June 2008, Mr A was appointed Director of the FRA ('the Director').

13 By an e-mail of 18 May 2009, the applicant complained to the Director that he was the victim of 'ethnic discrimination', arguing that, in the context of the reorganisation of the FRA, he had been passed over for the position of Acting Head, and then Head, of the Freedoms and Justice Department as a result of his ethnicity.

14 On 4 and 8 May 2012, in the context of the appraisal exercise relating to 2011 and the compilation of the career development report (CDR) for that year ('the 2011 CDR'), the applicant carried out his self-assessment and forwarded this to his line manager and reporting officer, Ms B, Head of the Freedoms and Justice Department. In the 'Conduct in the service' part of his self-assessment, the applicant remarked that Ms B's management approach with regard to him '[was] not very motivating and quite discriminatory because [his colleagues] enjoy[ed] career perspectives and expectations of promotion which [he had] no access to'.

15 On 25 May 2012, Ms B drew up a first draft of the 2011 CDR, followed by a second draft of the 2011 CDR dated 7 June 2012.

16 On 13 June 2012, the applicant brought an internal appeal in accordance with the rules then in force at the FRA against the second draft of the 2011 CDR ('the internal appeal'). The internal appeal was reasoned as follows:

'I cannot agree to [the 2011 CDR]. [The 2011] CDR is biased, affected by a conflict of interests, discriminatory, factually inaccurate. It does not fully reflect the [appraisal interview] and the procedure applied does not correspond to the [rules in the] Staff Regulations and valid implementing rules of the FRA. The assessment of my [Head of Department] is punitive as a reaction to complaints of discrimination reflected in [the 2011 CDR] and earlier CDRs and constitutes [an] abuse of power[s]. For all these reasons I appeal.'

17 On 18 July 2012, the Director invited the applicant to 'substantiate [his] claims that the [2011] CDR [was] biased, discriminatory, and that it [did] not fully reflect the [appraisal interview]' and to explain in what way the 2011 CDR constituted an 'abuse of power[s]'.

18 By note of 14 September 2012, the applicant provided the requested explanations. So far as concerns, in particular, the complaint alleging that the 2011 CDR was discriminatory, that note contained the following passage:

‘B. The [2011] CDR is discriminatory

The reporting officer makes statements which are discriminatory. [His] key message during the CDR talk was discriminatory: [he] said that the jobholder should not expect any promotion for the foreseeable future [and that] if [he wanted] a promotion, he should apply for a job elsewhere … Illustrative examples: …

2. … The workload of the jobholder is not equivalent to others; rather the reporting officer pays attention, for no objective reason, only to the workload of some staff members, but not to the workload of the jobholder. … This difference in the level of attention and care by the reporting officer is discriminatory. …

3. The negative assessment of the reporting officer is also a reprisal for complaints of discrimination by the jobholder and amounts to victimisation under [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22)]. The jobholder complained about discrimination in his self-assessment and as a consequence negative statements were made by the reporting officer as a response and also to *ex post* justify [his] discriminatory treatment of the jobholder (the jobholder was passed over as team coordinator during a restructuring of the [FRA] and also [was] not allowed to participate in team coordinator meetings where important discussions take place and important decisions are taken and where the jobholder is forbidden to contribute). The reporting officer should explain why there were no similar negative statements made during the course of the year by the reporting officer, only after receiving the complaints contained in the self-assessment of the jobholder.’

19 By letter of 9 November 2012, the Director informed the applicant that, ‘in the light of the words … used and their tone in [his internal] appeal’, he had decided to launch an administrative enquiry pursuant to Articles 50a of the CEOS and 86(2) of the Staff Regulations and Articles 1 and 2 of Annex IX to those Staff Regulations (‘the administrative enquiry’). According to the Director, the way in which the applicant’s internal appeal was phrased ‘could amount to a breach of [his] obligation … to act with due respect, dignity and loyalty, as provided in [A]rticle 11 of the [CEOS] and [A]rticles 11, 12 and 21 of the Staff Regulations …’.

20 On 12 November 2012, the Director dismissed the internal appeal. In respect of, in particular, the complaint alleging that the 2011 CDR was discriminatory, the Director gave the following answer:

‘Here again the accusation is very grave, all the more since, after some examples of alleged “discrimination”, you qualify the negative assessments of your [Head of Department] as … “victimisation under [D]irective [2000/43]”. [That] directive [is aimed] concretely at prohibiting discrimination based on … race and/or ethnic origin, in other words [at fighting] racism.

This is one of the more serious accusations, if not the most serious, that one can make.

However, I found no evidence supporting this claim in your [internal] appeal.

…’

21 By decision of 13 November 2012, the Director transferred the applicant, with effect from 1 January 2013, to the Equality and Citizen’s Rights department, directed by Mr C.

22 On 27 November 2012, the applicant was informed that the Director had appointed Mr D to conduct the administrative enquiry ('the enquirer') and was invited to an interview with that enquirer on 5 December 2012.

23 By note of 30 November 2012 to the Director, the applicant requested the 'annulment' of the administrative enquiry on the ground that it was vitiated by irregularities. In particular, according to the applicant, the decision opening the administrative enquiry, by simply referring to the words and tone used in the internal appeal, 'could indeed appear vague considering the several pages of [the internal] appeal and … not enable [him] to properly prepare [his] defence'.

24 By note of 3 December 2012, the Director informed the applicant of his refusal to annul the administrative enquiry. While explaining that it was exclusively for the enquirer to identify the passages of the internal appeal which constituted misconduct, the Director added the following remarks:

'However, if you are interested in my own personal opinion, since it is on the basis of such [an] opinion that I decided to launch the [administrative] enquiry, I invite you to re-read my reply to your [internal] appeal. While I consider racism one of the major flaws of our society, I am also very sensitive to unfounded and unsubstantiated accusations of racism. And my position, apparently contrary to yours, is that Article 9 of … Directive 2000/43 may not be interpreted as [requiring] Member States to grant immunity for such accusations. But, here again, the issue will be addressed by the [e]nquirer.'

25 On 5 December 2012, the applicant's interview with the enquirer took place.

26 On 12 February 2013, the enquirer delivered the report he had drawn up of the administrative enquiry to the Director.

27 At a hearing on 20 February 2013 whose purpose was to hear the applicant in accordance with Articles 2 and 11 of Annex IX to the Staff Regulations, the Director verbally communicated the conclusions of the administrative enquiry to the applicant and informed him that, according to the enquirer, the allegations of discrimination on grounds of race, made by the applicant against Ms B, were unsubstantiated and that the internal appeal contained statements which, by the words used and their tone, were in breach of the provisions of the Staff Regulations.

28 In response, after requesting the disclosure of a certain number of documents, in particular the report drawn up by the enquirer at the end of the administrative enquiry, the applicant read out a statement which he had prepared before the hearing and delivered a written copy of that statement to the Director. According to the applicant, the Director, at the end of the hearing, imposed a reprimand on the applicant and informed him that a written version of that penalty would be sent to him subsequently. According to the FRA, the Director informed the applicant merely that he was contemplating imposing a reprimand.

29 On 22 February 2013, the Director sent the applicant a letter headed 'Investigation and disciplinary matters — Reply to your statement at the hearing held on February 20th, 2013'. In that letter, the Director again expressed his firm conviction that the applicant '[had] never been discriminated [against] on any basis by [Ms B], and in particular on the basis of [his] race and/or … ethnicity'.

30 The same day, the Director adopted in writing a decision imposing a reprimand on the applicant. That decision was sent to the applicant on 25 February 2013.

31 On 7 May 2013, the applicant filed a complaint under Article 90(2) of the Staff Regulations against the decision to open the administrative enquiry, the procedure followed in the administrative enquiry itself, the disciplinary proceedings and the oral and written decisions of 20 and 22 February 2013 imposing a

reprimand on him. That complaint was rejected by a decision of the Director, acting in his capacity as the authority authorised to conclude contracts of employment ('the AECE'), dated 17 July 2013, of which the applicant was notified the following day.

32 In the meantime, by letter of 13 June 2013, the Director informed the applicant of his decision to terminate his contract of indefinite duration ('the termination decision') and requested him not to provide services during his notice period 'beginning [that day] and finishing on 12 April 2014'.

33 As grounds for the termination decision, the Director stated that the applicant had breached 'numerous rules and principles of [the Staff Regulations], including Articles 11, 12, 17a and 21 [thereof]', leading to 'a breach of the bond of trust …, which is a prerequisite for a working relationship, concerning in particular an … agent [of grade AD 9]'. The Director referred to several incidents involving a conflict between the applicant and his management since 2009, in particular the attitude shown by the applicant towards his Head of Department at a meeting on 27 May 2013 and the terms used by the applicant in an e-mail to his Head of Department the following day.

34 On 13 June 2013, the applicant was also asked by e-mail to collect his personal belongings and effects by the end of office hours on the following day, 14 June 2013.

35 On 6 September 2013, the applicant filed a complaint against the termination decision. That complaint was rejected by a decision of the Director, acting in his capacity as the AECE, dated 20 December 2013, of which the applicant was notified on 30 December 2013, stating that the notice period would end on 14 April 2014 and not on 12 April 2014.

Procedure and forms of order sought

1. *Case F-106/13*

36 The applicant claims that the Tribunal should:

— annul the Director's decision of 20 February 2013 imposing a reprimand on him and, so far as necessary, the decision of 22 February 2013 confirming the reprimand in writing;

— so far as necessary, annul the Director's decision of 17 July 2013 rejecting the complaint brought against the reprimand;

— order the FRA to pay him EUR 15 000 by way of compensation for the non-material harm caused by 'the gross illegality and irregularity of the administrative enquiry and of the decision to impose a reprimand';

— order the FRA to pay the costs;

— as a measure of organisation of procedure, order the FRA to produce the full administrative enquiry report, or at least the conclusions of that report.

37 The FRA contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

2. *Case F-25/14*

38 The applicant claims that the Tribunal should:

— annul the termination decision;

— annul the Director's decision of 20 December 2013 rejecting the complaint brought against the termination decision;

— grant the applicant compensation in respect of the material harm incurred, consisting in the difference between, on the one hand, the unemployment allowance received since April 2014 plus any potential replacement income or lack thereof and, on the other hand, his full salary, including all allowances, of EUR 7850.33, until the date of his full reintegration within the FRA, plus default interest calculated at the rate set by the European Central Bank increased by three points;

— grant the applicant adequate compensation for the non-material harm caused by the termination decision, assessed on equitable principles at EUR 50 000;

— order the FRA to pay the costs.

39 The FRA contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

40 On 2 October 2014 and 6 March 2015 respectively, the FRA made two new offers of evidence in Case F-25/14, seeking to confirm the irreparable nature of the breakdown in the relationship of trust between the applicant and his management.

41 On 16 January 2015, the Tribunal, by way of measures of organisation of procedure in Case F-106/13, put questions to the parties and requested the FRA to produce a copy of the full administrative enquiry report delivered to the Director on 12 February 2013 by the enquirer. The parties duly complied with the Tribunal's requests and the applicant was able to comment on the administrative enquiry report at the hearing.

42 By decision of 22 January 2015 and pursuant to Article 44(1) of the Rules of Procedure, the President of the Second Chamber of the Tribunal, after hearing the parties, joined Cases F-106/13 and F-25/14 for the purposes of the oral part of the procedure and the decision closing the proceedings.

43 Following the hearing and after the close of the oral part of the procedure, the Tribunal proposed to the parties that it examine the possibility of seeking an amicable settlement of both cases. On 20 March 2015, the parties set out in writing their observations on an amicable settlement. On 6 May 2015, the Tribunal noted that the attempt at amicable settlement had failed.

Law

1. *The claims for annulment of the decisions rejecting the complaints*

44 It is settled case-law that claims for annulment formally directed against a decision rejecting a complaint have the effect, where that decision lacks any independent content, of bringing before the Tribunal the act against which the complaint was submitted (see, to that effect, judgment of 17 January 1989 in *Vainker* v *Parliament*, 293/87, EU:C:1989:8, paragraph 8).

45 Since the decisions rejecting the complaints brought on 7 May 2013 and 6 September 2013 respectively lack, in the present case, any independent content, the claims directed against those decisions must be considered to be directed against the decisions against which the complaints were brought and which are challenged in the present actions.

2. *The claim for annulment of the decisions of 20 and 22 February 2013 imposing a reprimand on the applicant*

Admissibility

46 According to case-law, a purely confirmatory measure cannot be described as an act adversely affecting the applicant (judgment of 17 March 2004 in *Lebedef* v *Commission*, T-175/02, EU:T:2004:78, paragraph 20). A decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the addressee of the earlier measure (judgment of 15 July 2004 in *Valenzuela Marzo* v *Commission*, T-384/02, EU:T:2004:239, paragraph 32).

47 In the present case, it is apparent from the documents in the file that, at the end of the hearing held on 20 February 2013, the Director informed the applicant that he was imposing on him the disciplinary penalty of a reprimand ('the reprimand decision') and added that a written version of that disciplinary penalty would subsequently be sent to him. Although the FRA contends that the Director merely informed the applicant that he was envisaging imposing such a penalty on him, that claim is contradicted by the minutes of the hearing, which show the adoption, at the end of the hearing, of the reprimand decision ('[the Director delivered his] decision orally after a short break').

48 Consequently, the written decision of 22 February 2013 imposing on the applicant the disciplinary penalty of a reprimand merely confirms the reprimand decision. The claim for its annulment must accordingly be dismissed as inadmissible.

The merits of the claim for annulment of the reprimand decision

49 In support of the claim directed against the reprimand decision, the applicant raises a set of pleas and arguments in which, by regrouping them, the Tribunal has identified six pleas, alleging, respectively, the irregular nature of the administrative enquiry, the irregular nature of the disciplinary proceedings, a manifest error of assessment, infringement of the principle of proportionality, infringement of Article 9 of Directive 2000/43 and a misuse of powers.

50 The Tribunal is of the opinion that the plea alleging the irregular nature of the disciplinary proceedings should be examined first.

Arguments of the parties

51 The applicant puts forward several complaints for the purposes of claiming that the disciplinary proceedings were of an irregular nature.

52 The applicant submits that the Director did not communicate to him the report, including the conclusions, of the administrative enquiry prior to the hearing of 20 February 2013, that disciplinary proceedings were not initiated prior to the penalty of a reprimand being imposed and that the reprimand decision was adopted without the hearing provided for in Article 11 of Annex IX to the Staff Regulations, in breach of his rights of the defence. In addition, according to the applicant, the Director did not take into account his comments at the hearing of 20 February 2013, since the reprimand decision was adopted at the end of that very hearing.

53 The FRA contends that the plea and all the complaints under it should be rejected. It maintains, in particular, that the conclusions of the administrative enquiry report were communicated verbally to the applicant at the hearing of 20 February 2013, then in writing by communication of the letter of 22 February 2013.

54 The FRA adds that, in any event, even if procedural irregularities were to have been committed, they did not have any effect on the decision that it had been led to adopt.

Findings of the Tribunal

55 It follows from Article 2(2) of Annex IX to the Staff Regulations that, following an administrative investigation, the Appointing Authority is required to inform the official concerned when the investigation ends and to communicate to him the conclusions of the investigation report.

56 It also follows from Article 3 of Annex IX to the Staff Regulations that, where, on the basis of the investigation report, the Appointing Authority decides, in the event of a failure by an official to comply with his obligations, to initiate the disciplinary proceedings, with or without the involvement of the Disciplinary Board, it may do so only 'after having notified the official concerned of all evidence in the files and after hearing the official concerned'.

57 Those provisions oblige the Appointing Authority, where it is envisaging the initiation of disciplinary proceedings on the basis of a report drawn up following an administrative enquiry, to communicate the conclusions of the enquiry report and all the evidence in the files to the official concerned beforehand to enable him, by having a reasonable period within which to prepare his defence, to make any relevant comments.

58 The Tribunal notes that, as is shown by the wording of the letter of 22 February 2013, which confirms the reprimand decision, the Director relied upon the administrative enquiry report to initiate the disciplinary proceedings and immediately adopt the reprimand decision, even though it is not disputed that the conclusions of the enquiry report had not been communicated to the applicant beforehand.

59 Although the FRA submits that the conclusions of the administrative enquiry report were brought to the applicant's knowledge verbally at the hearing of 20 February 2013, that step was not sufficient to comply with the provisions of the Staff Regulations.

60 Besides the fact that Article 2(2) of Annex IX to the Staff Regulations expressly requires the administration to 'communicate' the conclusions of the enquiry report to the official or staff member concerned, the communication of the conclusions of the administrative enquiry report solely by verbal means at the meeting of 20 February 2013 was not such as to guarantee that the applicant was

adequately informed and to enable him to exercise his right to be heard in an effective manner. It is sufficient to note that the applicant, being ignorant of the conclusions reached by the enquirer and unable to answer the criticisms made against him at the hearing, simply read out a statement concerning the conduct of the enquiry. Furthermore, it is apparent from the note of 14 September 2012, drafted by the applicant at the Director's request to explain certain criticisms of the 2011 CDR made in the internal appeal (see paragraphs 17 and 18 above), that the applicant had put forward several grounds in support of his contention that he was treated differently from his colleagues by his Head of Department and the victimisation within the meaning of Directive 2000/43 to which he claimed to have been subject was only one of those grounds. However, the enquirer chose solely that last ground as a basis on which to conclude that the applicant had made a completely gratuitous accusation of racism and that the applicant's statements in the internal appeal were defamatory and offensive.

61 Given that the purpose of the hearing of 20 February 2013 was also to hear the applicant in accordance with Article 11 of Annex IX to the Staff Regulations, the Tribunal further observes that, where disciplinary proceedings without consultation of the Disciplinary Board have been initiated, Article 11 provides that the administration may decide on the penalty of a written warning or reprimand after the official concerned has been 'heard before[hand]'.

62 In order to give practical effect to the right to be heard guaranteed by Article 11 of Annex IX to the Staff Regulations, the administration is required, where it envisages imposing the penalty of a written warning or reprimand, to place the official or staff member concerned in a position enabling him to prepare his defence, which means that the person concerned must have access to all the information concerning him included in the files within the meaning of Article 3(1) of Annex IX to the Staff Regulations. Consequently, where, in a situation such as that in the present case, the administration decides to initiate disciplinary proceedings and then to impose a penalty at the end of a single specific hearing, the failure to comply with the requirements laid down in Articles 2 and 3 of Annex IX to the Staff Regulations constitutes a breach of the right to be heard, as guaranteed by Article 11 of Annex IX to the Staff Regulations.

63 The applicant is therefore justified in claiming that, by omitting to communicate the conclusions of the administrative enquiry to him before his hearing on 20 February 2013, a hearing intended in fact to allow the applicant to comment on those conclusions and at which the Director adopted the reprimand decision without enabling the applicant effectively to prepare his defence, the Director failed to comply with his obligations under Articles 2, 3 and 11 of Annex IX to the Staff Regulations.

64 In those circumstances, it must be found that the reprimand decision was taken following an irregular procedure, in breach of the applicant's right to be heard.

65 Admittedly, case-law provides that, in order for the infringement of the right to be heard to justify the annulment of the decision at issue, it is also necessary to examine whether, had it not been for such an irregularity, the outcome of the procedure might have been different (judgment of 3 July 2014 in *Kamino International Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 79). In this regard, it must be ascertained whether the FRA has adduced adequate evidence for the Tribunal to find that the reprimand decision would have been adopted in any event even if the applicant had been heard. Having regard to the fundamental nature of the right to be heard, as enshrined in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, it is for the FRA, which adopted the reprimand decision and which is therefore best informed as to the factors underlying the adoption of that decision, to prove that, even if the applicant had been properly heard, it could not have adopted a different decision.

66 It is sufficient, in the present case, to note that the FRA has not firmly established that the Director would have adopted the reprimand decision had the provisions of Annex IX to the Staff Regulations not been infringed. It is possible that, if the applicant's right to be heard had been respected, the latter

would have been able to prepare effectively for his hearing and to substantiate in more detail his criticisms in the internal appeal, so as to challenge the conclusions adopted unilaterally by the enquirer as to the gratuitous nature of the alleged accusations of racism.

67 On any view, to hold that, in the circumstances of the case, the Director would necessarily have adopted the same decision as that taken, even after hearing the applicant on the conclusions of the administrative enquiry report as properly communicated to him and the envisaged reprimand, would render meaningless the fundamental right to be heard, since the very content of that right implies that the person concerned have the possibility of influencing the decision-making process at issue (judgment of 14 May 2014 in *Delcroix* v *EEAS*, F-11/13, EU:F:2014:91, paragraph 44).

68 It follows that the reprimand decision must be annulled without there being any need to examine the other pleas raised, including the pleas calling into question the substantive legality of that decision.

The claims for damages in respect of the non-material harm caused by the illegality and irregularity of, first, the administrative enquiry and, secondly, the reprimand decision

Arguments of the parties

69 The applicant submits that the administrative enquiry and the reprimand decision caused him significant non-material harm for which the FRA should be required to pay compensation of EUR 15 000.

70 As regards the administrative enquiry and the hearing of 20 February 2013, the applicant asserts that the initiation of the administrative enquiry in the absence of adequately defined complaints and without the prior adoption of any procedural framework, as provided for in Article 2(3) of Annex IX to the Staff Regulations, together with his hearing under irregular conditions, placed him in a situation of great anxiety. That anxiety was exacerbated by the feeling of not having been heard and having been treated unfairly by the Director.

71 As regards the reprimand decision itself, the applicant states that, since he was not guilty of any misconduct, that decision adversely affected his integrity, dignity and reputation within the FRA.

72 The FRA contends that the claims for damages should be dismissed.

Findings of the Tribunal

– As to the non-material harm caused by the administrative enquiry and the irregularity of the hearing of 20 February 2013

73 It is settled case-law that in order for the Union to incur non-contractual liability, a number of conditions must be satisfied as regards the illegality of the allegedly wrongful conduct of the institutions, actual harm and the existence of a causal link between the conduct and the harm alleged to have been suffered (see judgment of 14 May 1998 in *Lucaccioni* v *Commission*, T-165/95, EU:T:1998:105, paragraph 56). It follows that, even on the assumption that wrongful conduct on the part of the administration is established, it is still for the applicant to demonstrate that he has incurred actual harm and that there is a causal link between the administration's wrongful conduct and that harm.

74 First, as regards the initiation of the administrative enquiry, it is apparent from the file that the internal appeal contained several accusations, including accusations of discrimination, against Ms B. Although the letter of 9 November 2012, in which the Director informed the applicant of his decision to initiate

an administrative enquiry, referred only to 'the words … used and their tone' in the internal appeal, the Director dismissed that internal appeal on 12 November 2012 by refuting each of the five complaints raised in it by the applicant. Furthermore, as the applicant himself has observed in the application, the Director, in a note to the applicant of 3 December 2012, stated that he was 'very sensitive to unfounded and unsubstantiated accusations of racism'. Likewise, the enquirer explained at the interview with the applicant on 5 December 2012 that the administrative enquiry had been initiated because of the applicant's allegations of discrimination on Ms B's part. The applicant consequently cannot reasonably claim that the complaints made against him were not adequately defined.

75 Secondly, the fact that the administrative enquiry was conducted without the FRA having first adopted the implementing arrangements for Article 2 of Annex IX to the Staff Regulations and thereby defined the procedural framework of the enquiry is not such as to vitiate that enquiry on grounds of irregularity. Admittedly, Article 2(3) of Annex IX to the Staff Regulations requires the appointing authority of every institution to adopt implementing arrangements for that article, in accordance with Article 110 of the Staff Regulations. However, contrary to what the applicant claims, the fact that such arrangements have not been adopted does not in itself preclude the initiation and conduct of an administrative enquiry, since that enquiry must in any event be carried out in accordance with the provisions of Annex IX to the Staff Regulations and general principles of law such as respect for the rights of the defence.

76 Thirdly, the Tribunal has found that the reprimand decision was adopted following disciplinary proceedings which were conducted irregularly. As stated in paragraph 63 above, the Director failed to comply with his obligations under Articles 2, 3 and 11 of Annex IX to the Staff Regulations and did not allow the applicant to effectively prepare his defence. Having thus established the irregular nature of the applicant's hearing on 20 February 2013, it is still necessary to ascertain whether the applicant has proved that he incurred actual harm. The fact remains, however, that the applicant merely refers in his application to stress and anxiety during the administrative enquiry without substantiating his claims in more detail.

77 It follows that the claim seeking that the FRA be ordered to compensate the applicant in respect of the non-material harm he allegedly incurred on account of the administrative enquiry and irregularity of the hearing of 20 February 2013 must be dismissed as unfounded.

– As to the non-material harm caused by the illegality of the reprimand decision

78 It is settled case-law that the annulment of an illegal act in itself constitutes appropriate and, in principle, sufficient compensation for any non-material harm which that act may have caused (judgment of 9 July 1987 in *Hochbaum and Rawes* v *Commission*, 44/85, 77/85, 294/85 and 295/85, EU:C:1987:348, paragraph 22).

79 In the present case, the applicant submits that the annulment of the reprimand decision could not adequately and sufficiently compensate him for the harm caused by that decision since the disciplinary penalty which was imposed on him, in the absence of any misconduct on his part, has unfairly affected his integrity, dignity and reputation within the FRA.

80 It must be pointed out that the Tribunal has upheld the plea alleging the irregularity of the disciplinary proceedings and the breach of the applicant's right to be heard, the applicant having been denied the opportunity to state his views effectively on the criticism against him. In the Tribunal's opinion, it is not excluded that the Director, had he heard the applicant, would have adopted a different decision.

81 Thus, if it is not to prejudge the FRA's execution of the present judgment, the Tribunal takes the view that it is premature to rule on the present claim seeking damages in respect of the non-material harm caused by the reprimand decision itself.

82 The claim for damages stemming from the illegality of the reprimand decision must accordingly be dismissed as premature.

83 It follows from the foregoing that the claims for damages in respect of the non-material harm caused by the illegality and irregularity of, first, the administrative enquiry and, secondly, the reprimand decision must be dismissed as unfounded and premature respectively.

3. *The claim for annulment of the termination decision*

Preliminary observations

84 The applicant essentially raises five pleas in support of the claim for annulment of the termination decision, alleging, respectively, infringement of the principle of respect for the rights of the defence, a manifest error of assessment, infringement of the *ne bis in idem* principle, infringement of the duty of care and of the principle of sound administration, and misuse of powers together with victimisation within the meaning of Article 9 of Directive 2000/43.

85 The Tribunal takes the view that it is appropriate to examine first the plea alleging infringement of the applicant's rights of the defence.

The plea alleging infringement of the applicant's rights of the defence

Arguments of the parties

86 The applicant complains that the Director adopted the termination decision without hearing the applicant beforehand and alleges that such an omission constitutes an infringement of the principle of respect for the rights of the defence and of Article 41(2) of the Charter. He adds that he was heard neither as regards any of the facts on which the termination decision was based nor as regards the claim of a breakdown in the relationship of trust. Lastly, the applicant claims that, had he been heard on the potential termination of his contract on the basis of a breakdown in the relationship of trust, his observations might have altered the Director's analysis and persuaded him not to decide to terminate the applicant's contract.

87 The FRA, in its statement in defence, contends that the applicant was heard as regards each of the incidents on which the adoption of the termination decision was based and adds that, even though the applicant had not been expressly informed at those various hearings that the Director was envisaging the termination of his contract, he was nevertheless fully aware that those incidents were incompatible with the status of a member of staff of the FRA and that they could no longer be tolerated.

88 In the event that the Tribunal should find that the principle of respect for the rights of the defence was infringed, the FRA submits, as a subsidiary plea, that the termination decision was also based on a breakdown in the relationship of trust. Even if the applicant had been heard on the potential termination of his contract, the Director's decision would have been the same, having regard specifically to that breakdown of trust.

Findings of the Tribunal

89 It follows from the general principle of EU law of respect for the rights of the defence, and in particular for the right to be heard enshrined in Article 41(2)(a) of the Charter, that the person concerned must be given the opportunity, before the drawing up of a decision adversely affecting him, to make known

his views effectively as to the truth and relevance of the facts and circumstances on which that decision was based. Furthermore, respect for the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (judgment of 3 July 2014 in *Kamino International Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 39).

90 In the present case, the documents in the file show that the Director relied, in order to adopt the termination decision, on a series of incidents of which the applicant was accused which constituted, in his view, a breach of 'numerous rules and principles of [the Staff Regulations]'. However, it is not disputed that the termination decision was adopted without the Director, beforehand, having expressly informed the applicant that he was envisaging the termination of the latter's contract on the basis of those incidents and invited the applicant to express any comments he might have on that matter. Moreover, even assuming that, as the FRA contends, the Director had drawn to the applicant's attention the seriousness of the incidents at issue after each of them had taken place, that approach does not mean that the applicant was put in a position to understand the measure envisaged with regard to him.

91 The FRA's argument that the applicant was properly heard because he was already aware of the facts of which he was accused and had been given the opportunity to make known his views effectively as to the incidents resulting in the adoption of the termination decision must be rejected, since the right to be heard must in fact allow the applicant not only to provide explanations as to his conduct and the reasons for it, but also to put forward arguments in relation to the measure envisaged with regard to him, which was clearly not the case in the situation under consideration.

92 In those circumstances, the applicant is justified in claiming that the Director infringed the principle of respect for the rights of the defence, in particular the right to be heard before the adoption of the termination decision.

93 Although the FRA also submits that the plea alleging infringement of the right to be heard cannot result in the annulment of the termination decision since the procedure could not have led to a different result in the absence of that irregularity, such an argument must be rejected. The onus is on the FRA to prove that, even if the applicant's right to be heard had been respected, the termination decision would still have been adopted. The argument simply alleging a breakdown in the relationship of trust with the applicant, put forward by the FRA 'on a subsidiary basis' in its statement in defence, in no way rules out the possibility that, had the applicant's right to be heard not been infringed by the Director, the explanations which the applicant might have provided could have persuaded the Director to refrain from terminating his contract.

94 Admittedly, as the FRA points out in defence, in the judgment of 5 December 2012 in *Z* v *Court of Justice* (F-88/09 and F-48/10, EU:F:2012:171) the Tribunal refused to annul a decision to re-assign an official notwithstanding the infringement of the right of every official to be heard, particular before the adoption of an act liable to have appreciable consequences for his career development. However, the Tribunal justified its refusal to annul the contested re-assignment decision by holding, in particular, that it had been adopted 'in order to end a situation of interpersonal tension which, considered objectively, had become unsustainable, and not on account of the conduct [of the official concerned]' (judgment of 5 December 2012 in *Z* v *Court of Justice*, F-88/09 and F-48/10, EU:F:2012:171, paragraph 149, not set aside on this point by the judgment of 19 June 2015 in *Z* v *Court of Justice*, T-88/13 P, EU:T:2015:393). In the present case, the Director first imposed a reprimand on the applicant because of accusations of 'racism' made against his line manager, before terminating his contract following two incidents which occurred on 27 and 28 May 2013, taking the view that such behaviour constituted insubordinate conduct on the part of the applicant in breach of his obligations under the Staff Regulations. Those circumstances cannot on any view be described as 'a situation of interpersonal tension which, considered objectively, had become unsustainable'.

95 Moreover, the termination decision constitutes an act of extreme seriousness for the applicant, who has suddenly found himself to be unemployed and whose career might be negatively affected for many years. Besides the fact that it is a fundamental right of the applicant to be heard before the adoption of an individual measure which would affect him adversely, the exercise by the latter of the right to state his views effectively on the termination decision envisaged falls within the AECE's responsibility, a responsibility which it must scrupulously comply with.

96 On any view, as stated in paragraph 67 above, to hold that the Director would necessarily have adopted the same decision as that taken, even after hearing the applicant, would render meaningless the fundamental right to be heard, as enshrined in Article 41(2)(a) of the Charter, since the very content of that right implies that the person concerned must have the possibility of influencing the decision-making process at issue.

97 Lastly, although the FRA submits that the applicant's rights of the defence were nevertheless observed on an *ex post* basis on the ground that the applicant was able to submit his arguments against the termination decision in the framework of the complaints procedure under Article 90(2) of the Staff Regulations, the Tribunal must reject such a line of argument.

98 A complaint brought under Article 90(2) of the Staff Regulations does not have the effect of suspending the execution of the contested decision (see, to that effect, order of 22 November 2006 in *Milbert and Others* v *Commission*, T-434/04, EU:T:2006:359, paragraph 42) so that, despite the complaint brought by the applicant against the termination decision, that decision, which moreover was accompanied by an order to the applicant to desist from providing services as of the following day, had an immediate negative impact on the situation of the applicant, who was not in a position to influence it. Thus, it is apparent that adopting the termination decision without hearing the applicant beforehand clearly might have affected the essence of the applicant's rights of the defence.

99 In those circumstances, the termination decision, taken in breach of the principle of respect for the rights of the defence and, in particular, of the applicant's right to be heard, must be annulled, without it being necessary to examine the other pleas raised, to rule on the requests for the adoption of measures of inquiry or, lastly, to rule on the new offers of evidence made by the FRA during the proceedings.

4. *The claims for damages in respect of the material and non-material harm caused by the illegality of the termination decision*

Arguments of the parties

100 The applicant first requests that the FRA be ordered to compensate him for the material harm resulting from the illegality of the termination decision, that loss being equivalent, in his view, to the difference between all the allowances and income which he would have received from the FRA had the termination decision not been adopted and the allowances and income which he has actually received since April 2014.

101 Secondly, the applicant requests that the FRA be ordered to compensate him for the non-material harm he has incurred, assessed on equitable principles at EUR 50 000, stating in particular that the termination decision caused him 'a deep psychological trauma' in so far as, in particular, it 'affected his reputation, dignity and self-esteem'. The applicant adds that those feelings were exacerbated by the decision not to let him work through his notice period and by the extremely short notice which was given to him to 'clear … his office space'.

102 The FRA contends that the claims for damages should be dismissed.

Findings of the Tribunal

As to the material harm

103 The annulment of a measure by the courts has the effect of retroactively eliminating that measure from the legal system and, where the measure annulled has already been carried out, the abolition of its effects means that the applicant must be restored to the legal position he was in before it was adopted (see judgment of 26 October 2006 in *Landgren* v *ETF*, F-1/05, EU:F:2006:112, paragraph 92 and the case-law cited therein). Moreover, pursuant to Article 266 TFEU, it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment addressed to it.

104 In the present case, the termination decision must be annulled due to the infringement by the Director of the applicant's right to be heard before the adoption of an act adversely affecting him. In that regard, as the Tribunal has stated, it is possible that, had the applicant been given an opportunity to state his views on the envisaged termination decision, he might have persuaded the Director not to adopt that decision. In that context, the Tribunal cannot prejudge the decision which the FRA will be required to adopt in the light of this judgment. Consequently, the claim seeking that the FRA be ordered to compensate the applicant for the material harm which he claims to have suffered on account of the illegality of the termination decision must be dismissed as premature.

As to the non-material harm

105 As observed in paragraph 78 above, the annulment of an unlawful act in itself constitutes appropriate and, in principle, sufficient compensation for any non-material harm that act may have caused. That is, however, not the case where the applicant demonstrates that he has suffered non-material harm which, without being separable from the act itself, is separable from the illegality of the act justifying its annulment and not capable of being entirely remedied by that annulment (see judgment of 14 July 2011 in *Petrilli* v *Commission*, F-98/07, EU:F:2011:119, paragraph 28 and the case-law cited therein).

106 In the present case, the termination decision, which was accompanied by the order to the applicant not to continue providing services during his notice period and to collect his personal belongings by 14 June 2013 at the latest, that is to say, the day after the termination decision was adopted, was taken in breach of the applicant's right to be heard.

107 Nevertheless, the applicant has merely stated that the termination decision caused him 'deep psychological trauma' and affected his reputation and dignity, yet not demonstrated that such harm could not be entirely remedied by the annulment of that decision by the present judgment.

108 Thus, the claim for damages in respect of the non-material harm caused by the termination decision must be dismissed as unfounded.

109 Consequently, the claims for damages in respect of the material and non-material harm caused by the illegality of the termination decision must be dismissed as premature and unfounded respectively.

Costs

110 Under Article 101 of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to bear his own costs and is to be ordered to pay the costs incurred by the other party if they have been applied for in the other party's pleadings. Under Article 102(1) of those Rules, if equity so requires, the Tribunal may decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.

111 It follows from the grounds of the present judgment that in Cases F-106/13 and F-25/14 the FRA is the unsuccessful party. Furthermore, in both of those cases the applicant has expressly applied for the FRA to pay the costs. Since the circumstances before the Tribunal do not, in either of those cases, warrant the application of Article 102(1) of the Rules of Procedure, the FRA must bear its own costs and be ordered to pay the costs incurred by the applicant in both of those cases.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. **Annuls the decision of 20 February 2013 by which the Director of the European Union Agency for Fundamental Rights imposed a reprimand on DD;**

2. **Annuls the decision of 13 June 2013 by which the Director of the European Union Agency for Fundamental Rights terminated DD's contract of indefinite duration as a member of the temporary staff;**

3. **Dismisses the actions in Joined Cases F-106/13 and F-25/14 as to the remainder;**

4. **Declares that the European Union Agency for Fundamental Rights is to bear its own costs and orders it to bear the costs incurred by DD.**

Bradley Kreppel Rofes i Pujol

Delivered in open court in Luxembourg on 8 October 2015.

W. Hakenberg
Registrar

K. Bradley
President