Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

2 October 2024*

(Civil service – Members of the contract staff – Disciplinary proceedings – Disciplinary penalty – Termination of the contract without notice – OLAF investigation – Reimbursement of medical expenses – Article 266 TFEU – Decision adopted to implement a judgment of the General Court – Measures necessary to implement a judgment delivered in an action for annulment – *Res judicata* – Procedural defect – Article 12 of Annex IX to the Staff Regulations – Consultation of the Disciplinary Board – Rights of the defence – Liability – Material and non-material damage)

In Case T-669/22,

IP, represented by J. Martins, lawyer,

applicant,

v

European Commission, represented by M. Brauhoff, acting as Agent,

defendant,

THE GENERAL COURT (Ninth Chamber),

composed of L. Truchot (Rapporteur), President, H. Kanninen and R. Frendo, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

* Language of the case: Portuguese.

Judgment [1]

1 By his action based on Article 270 TFEU, the applicant, IP, seeks, first, annulment of the decision of the European Commission of 18 January 2022 by which the Commission imposed on him the disciplinary penalty of termination of his contract of employment without notice ('the challenged decision') and, second, compensation for the damage which he claims to have suffered as a result of that decision.

I. Background to the dispute

…

C. The original judgment

13 By application lodged at the Registry of the General Court on 21 February 2020, the applicant brought an action for the annulment of the decision of 21 August 2019.

14 By judgment of 6 October 2021, *IP* v *Commission* (T-121/20, EU:T:2021:665; 'the original judgment'), the General Court annulled that decision after upholding the applicant's sixth plea in law, alleging infringement of Article 10(h) of Annex IX to the Staff Regulations, relating to the taking into account, in order to determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed on the applicant, of 'whether the misconduct involves repeated action or behaviour', without examining the other pleas in law.

15 To that end, the Court observed that Article 26 of the Staff Regulations provides for a series of safeguards intended to protect officials by preventing decisions taken by the administration and affecting their administrative status from being based on acts the existence of which is recorded in documents not included in their personal file. It thus held that in the light of the essential role of the personal file in protecting and informing officials, a decision imposing a penalty, even if it was previously inserted into an official's personal file, cannot be used against that official or relied on against him or her where all reference to that decision has since been deleted from that file.

16 The General Court added that affording the administration the right to base a finding of repeated misconduct for the purposes of Article 10 of Annex IX to the Staff Regulations on a decision imposing a penalty which had been removed from an official's personal file would render nugatory, in that respect, Article 27 of that annex.

17 The General Court inferred therefrom that the decision of 21 August 2019, by relying, vis-à-vis repeated misconduct, on a disciplinary penalty all reference to which had been deleted from the personal file of the official concerned, after a request for deletion of a decision imposing a penalty from that file brought by the applicant under the provisions of Article 27 of Annex IX to the Staff Regulations had been granted, failed to have regard to the rights which the Staff Regulations guarantees to officials.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

D. The resumption of the disciplinary proceedings following the original judgment and the pre-litigation procedure

18 For the purposes of implementing the original judgment, the tripartite AECE, composed of the Director-General of the Directorate-General for Human Resources and Security, the Director-General of the Directorate-General for Economic and Financial Affairs and the Deputy Director-General of the Directorate-General for Regional Policy ('the tripartite AECE'), summoned the applicant to a new hearing.

19 On 3 December 2021, the hearing took place by videoconference. The applicant was represented by his lawyer.

20 On 18 January 2022, the tripartite AECE adopted the challenged decision, by which it imposed on the applicant the disciplinary penalty of termination of his employment contract without notice.

21 In the challenged decision, the tripartite AECE stated that the applicant was accused of having submitted to PMO two requests for reimbursement of medical expenses that did not correspond to sums actually paid or treatment actually received (point 16 of the challenged decision). It classified those acts as 'attempted fraud against the EU budget', which, in its view, constituted particularly serious misconduct (point 41 of the challenged decision). Lastly, it set the penalty to be adopted having regard to the criteria set out in Article 10 of Annex IX to the Staff Regulations (paragraphs 39 to 52 of the challenged decision).

…

II. Forms of order sought

24 The applicant claims that the Court should:

– annul the challenged decision and the decision rejecting the complaint;

– order the Commission to pay him compensation the amount of which is to be assessed by the Court;

– order the Commission to pay the costs.

25 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

III. Law

A. The claims for annulment

…

3. Substance

…

(a) The first plea, alleging failure to comply with the principle of res judicata***, the principles of sound administration, of protection of legitimate expectations and of*** ne bis in idem***, provided for in Article 50 of the Charter, and failure to comply with the duty to have regard for the welfare of staff and with the obligation to state reasons***

…

(2) Failure to comply with the principle of res judicata*, the principle of protection of legitimate expectations and the principle of* ne bis in idem

…

(i) Failure to comply with the principle of res judicata

53 It must be noted that the applicant claims that the consequence of the error of law that justified annulment of the decision of 21 August 2019 by the original judgment was the annulment of the disciplinary proceedings as a whole. He submits, in essence, that the tripartite AECE failed to comply with the *res judicata* of the original judgment on the ground that it resumed the disciplinary proceedings by relying on the same facts and reasons as the disciplinary proceedings that led to the adoption of the decision of 21 August 2019. He claims that the Commission erred in law, in implementing the original judgment, by interpreting the latter to the effect that the disciplinary proceedings could be resumed even though such resumption was impossible given the absence of any new facts.

54 The Commission disputes the applicant's line of argument.

55 As a preliminary point, it must be observed that the question of whether all or only part of the proceedings was affected by the illegality at the origin of the annulment of the decision of 21 August 2019 is independent of the question, on which the present part of the first plea in law is based, which consists in determining whether the disciplinary proceedings could be resumed. Inasmuch as the examination of the second plea, alleging the failure to consult the Disciplinary Board again, will mean determining, on the assumption that the disciplinary procedure could be resumed, at what stage that resumption could take place, that examination will enable the first of those questions to be answered. Thus, that question will be examined in connection with that plea.

56 It is settled case-law that annulment judgments given by the EU Courts have the force of *res judicata* as soon as they become final. That applies not only to the operative part of the judgment annulling a decision, but also to the grounds which are its essential basis and are inseparable from it (see judgments of 29 November 2018, *National Iranian Tanker Company* v *Council*, C-600/16 P, EU:C:2018:966, paragraph 42 and the case-law cited, and of 13 December 2018, *Kakol* v *Commission*, T-641/16 RENV and T-137/17, not published, EU:T:2018:958, paragraph 74).

57 The principle of *res judicata* of a judgment extends, however, only to the matters of fact and law actually or necessarily settled (see judgment of 13 December 2018, *Kakol* v *Commission*, T-641/16 RENV and T-137/17, not published, EU:T:2018:958, paragraph 74 and the case-law cited).

58 When the General Court annuls an act of an institution, that institution is required, under the first paragraph of Article 266 TFEU, to take the necessary measures to comply with the judgment of the General Court (see, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 56).

59 Article 266 TFEU does not, however, specify the nature of the measures to be taken by the institution concerned for the purposes of such compliance, meaning that it is for that institution to identify those measures (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 57 and the case-law cited).

60 In order to comply with the obligation laid down in Article 266 TFEU, it is for the institution which adopted the act annulled by the EU judicature to determine the measures required to implement the judgment annulling the act in the exercise of the discretion which it has for that purpose, complying with both the operative part and the grounds of the judgment which it is required to implement and with the provisions of EU law applicable. In particular, the institution is obliged to respect not only the operative part of the judgment, but also the grounds which led to it and which constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (see judgment of 10 November 2021, *Di Bernardo* v *Commission*, T-41/20, not published, EU:T:2021:778, paragraph 61 and the case-law cited).

61 Article 266 TFEU requires the institution which adopted the annulled act only to take the necessary measures to comply with the judgment annulling its act (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 57 and the case-law cited).

62 In the present case, in the original judgment, the General Court held that the tripartite AECE erred in law when it relied, in the decision of 21 August 2019, vis-à-vis repeated misconduct, on a reprimand imposed on the applicant prior to the facts which were the subject matter of that decision, even though the applicant's request seeking that all reference to that penalty be deleted in his personal file had been granted. The General Court held that that error of law had led the tripartite AECE unlawfully to take into account that penalty as an aggravating factor vis-a-vis the criterion of repeated misconduct, provided for in Article 10(h) of Annex IX to the Staff Regulations, a factor that played a decisive role in the choice of penalty imposed. Thus, the General Court held that the error of law in question was capable of entailing the annulment of the decision of 21 August 2019.

63 It is apparent from the original judgment that the General Court annulled the decision of 21 August 2019 on account of an error of law characterised by the tripartite AECE having taken into account, vis-à-vis repeated misconduct, facts prior to the facts complained of, knowledge of which resulted from a document in the applicant's personal file, even though that should not have been the case. The taking into account of those facts influenced that authority's choice of

the penalty imposed on the applicant. On the other hand, the General Court did not rule on the accuracy of the facts complained of against the applicant that had been the subject of the two successive disciplinary penalties, or on the lawfulness of the other grounds of that decision.

64 Thus, the General Court found that the grounds of that decision were unlawful only in so far as the Commission had relied on the criterion of repeated misconduct.

65 It follows that the operative part of that judgment and the grounds which constitute the essential basis for it, which have the force of *res judicata*, do not preclude the disciplinary proceedings being resumed and a new penalty being imposed on the basis of facts complained of which have not been called into question by the same judgment.

66 However, in the event of the adoption of a new decision, the original judgment required the tripartite AECE not to base that new decision on the same grounds, recalled in paragraph 63 above, which accepted the criterion of repeated misconduct.

67 It does not follow from the challenged decision that the tripartite AECE relied on such grounds. As is apparent from paragraph 21 above, in the challenged decision, the latter stated that the applicant was accused of having submitted to PMO two requests for reimbursement of medical expenses that did not correspond to sums actually paid or treatment actually received. It classified those acts 'as attempted fraud against the EU budget', which, in its view, constituted particularly serious misconduct. Finally, it set the penalty to be adopted having regard to the criteria set in Article 10 of Annex IX to the Staff Regulations by explicitly ruling out taking into account the criterion of repeated misconduct and relying, in that respect, on the fact that the decision of 19 November 2010 was no longer in the applicant's personal file.

68 Thus, the tripartite AECE did not take into account the disciplinary penalty of a reprimand imposed on the applicant prior to the facts complained of.

69 Therefore, it may be found that the tripartite AECE did not fail to comply with the force of *res judicata* of the original judgment by resuming the disciplinary proceedings. The applicant's complaint alleging a failure by the tripartite AECE to implement the original judgment must thus be dismissed.

…

(b) The second plea, alleging a failure to carry out a fresh consultation of the Disciplinary Board

93 By his second plea, the applicant criticises the Commission for failing to refer the matter to the Disciplinary Board, by sending it a new report, following the delivery of the original judgment and the resumption of the disciplinary proceedings against him. By adopting the challenged decision on the basis of the opinion adopted by the Disciplinary Board on 27 April 2018, which took into consideration the decision of 19 November 2010 imposing a reprimand on him, which was void, the tripartite AECE incorrectly implemented the original judgment and infringed various provisions of the Charter and of the TEU.

94 In the alternative, the applicant claims in essence that, had the tripartite AECE decided to re-open the disciplinary proceedings in question on the basis of Article 11 of Annex IX to the Staff Regulations, which does not require consultation of that body, it was not open to it to impose on him the penalty of termination of his contract, but only to decide on a written penalty or a warning.

95 The Commission replies that a fresh consultation of the Disciplinary Board was not necessary. First, the Disciplinary Board had already ruled on the accuracy of the facts without those facts having been called into question by the original judgment. Next, no new facts had taken place following the adoption of the decision of 21 August 2019. Lastly, the only conclusion to be drawn from the original judgment with a view to the choice of the appropriate penalty was the requirement not to take into account the reprimand imposed on the applicant.

…

(2) The faulty implementation of the original judgment

99 As is apparent from paragraph 93 above, the applicant alleges that the Commission faultily implemented the original judgment because it failed to carry out a fresh consultation of the Disciplinary Board. It must be found that, by that complaint, he is essentially claiming infringement of Article 266 TFEU inasmuch as he alleges the tripartite AECE committed a procedural defect.

100 As a preliminary point, it must be observed that under Article 11 of Annex IX to the Staff Regulations, relating to disciplinary proceedings with no prior involvement of the Disciplinary Board:

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

101 Under Article 12(1) of Annex IX to the Staff Regulations, relating to the obligation on the competent authority to communicate a report to the Disciplinary Board, ‘the Appointing Authority shall submit a report to the [Disciplinary] Board, stating clearly the facts complained of and, where appropriate, the circumstances in which they arose, including any aggravating or extenuating circumstances’.

102 Under Article 49(1) of the CEOS, upon which the penalty imposed on the applicant is based in part, ‘after the disciplinary procedure provided for in Annex IX to the Staff Regulations, which shall apply by analogy, has been followed, employment may be terminated without notice on disciplinary grounds in serious cases of intentional or negligent failure of temporary staff to comply with their obligations.’

103 It must be observed that, in the challenged decision, the tripartite AECE decided to impose the penalty of termination of the applicant’s contract without notice, that penalty not being among those which, under Article 11 of Annex IX to the Staff Regulations, it may decide upon without consulting the Disciplinary Board. In addition, the opinion of the Disciplinary Board is included in the legal bases cited in the challenged decision.

104 It must therefore be held that, by adopting the challenged decision, the tripartite AECE relied on Article 12 of Annex IX to the Staff Regulations and not on Article 11 of that annex.

105 It is accordingly necessary to examine the plea alleging infringement of Article 266 TFEU, in so far as the tripartite AECE failed to consult the Disciplinary Board, under Article 12 of Annex IX to the Staff Regulations.

106 According to settled case-law, the procedure for replacing an annulled act must be resumed at the very point at which the illegality occurred, the annulment of an act not necessarily affecting the preparatory acts. The annulment of an act concluding an administrative procedure which comprises several stages does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment. The author of the act must, therefore, have reference to the date on which it had adopted the annulled act with a view to adopting the replacement act (see judgment of 10 November 2021, *Di Bernardo* v *Commission*, T-41/20, not published, EU:T:2021:778, paragraphs 89 and 90 and the case-law cited).

107 Since the applicant submits that the procedure seeking to replace the decision of 21 August 2019 was not resumed at the very point at which the illegality occurred, it is necessary to determine at what point the illegality occurred and to assess whether the procedure was resumed at that point. To that end, it is necessary to examine whether the opinion of the Disciplinary Board and the report submitted by the latter were affected by the illegality that justified annulment of that decision.

108 … on 25 July 2017, the AECE referred the matter to the Disciplinary Board by communicating to it a report, pursuant to Article 12 of Annex IX to the Staff Regulations. By its opinion, adopted on 16 April 2018, the Disciplinary Board recommended the penalty of termination of the applicant's employment without notice. On 21 May 2019, the applicant was summoned to a hearing before the tripartite AECE, before the first disciplinary penalty was decided upon on 21 August ….

109 Following the delivery, on 6 October 2021, of the original judgment and in order to implement it, as was recalled in paragraphs 18 to 20 above, the tripartite AECE summoned the applicant to a fresh hearing. The applicant submitted observations by letter on 24 November 2021, then, on 3 December 2021, the hearing of the applicant, represented by his lawyer, took place by videoconference. Lastly, on 18 January 2022, the AECE adopted the challenged decision.

110 In point 6 of that decision, the tripartite AECE refers to the opinion of the Disciplinary Board, adopted on 16 April 2018, erroneously dated 27 April in that point. However, in point 49 of the challenged decision, it discounts the criterion, accepted by the Disciplinary Board, of repeated misconduct, provided for in Annex IX to the Staff Regulations, on the ground that the 'reprimand decision of 19 November 2010 is no longer present in the [applicant's] personal file'.

111 It follows from the foregoing that, following the delivery of the original judgment, the tripartite AECE resumed the disciplinary proceedings at the stage of the applicant's hearing without carrying out a fresh consultation of the Disciplinary Board.

112 As is apparent from paragraph 62 above, in the original judgment, the General Court held that the tripartite AECE had erred in law when it relied, in the decision of 21 August 2019, vis-à-vis repeated misconduct, on a reprimand imposed on the applicant prior to the facts which were the

subject matter of that decision, even though the applicant's request seeking that all reference to that penalty be deleted in his personal file had been granted. That error of law had led the tripartite AECE unlawfully to take that penalty into account as an aggravating factor.

113 It is apparent from the original judgment that the error of law affecting the decision of 21 August 2019 and justifying its annulment was committed by the tripartite AECE.

114 However, it cannot be inferred therefrom that the illegality at issue occurred solely at the final stage of the procedure in which the tripartite AECE is involved, namely at the point of adoption of the decision of 21 August 2019 (see, by analogy, judgment of 22 October 2008, *Tzirani* v *Commission*, F-46/07, EU:F:2008:129, paragraph 68).

115 In that regard, first, it must be observed that the report communicated by the AECE to the Disciplinary Board for the purposes of bringing the matter before that board referred to the reprimand imposed on the applicant by the decision of 19 November 2010. That decision was annexed to that report, in which the AECE devoted five paragraphs to that issue inasmuch as, in its view, it constituted the applicant's disciplinary history. It stated in that report that the fact that, in the circumstances of the present case, the applicant had acted in a similar manner demonstrated that he had not learnt any lessons from that previous penalty and continued to give preference to his personal interests over those of the institution. The tripartite AECE inferred therefrom that such a circumstance constituted an aggravating factor.

116 The conclusion to that report stated that the applicant, by making two requests for reimbursement which did not correspond to treatment he had actually received, had gravely infringed Articles 11 and 12 of the Staff Regulations, so that that conduct, assessed in the light of a disciplinary infringement of which he had previously been accused, had definitely broken the personal relationship of trust which should exist between him and his institution. Thus, the report's conclusion was based not only on the seriousness of the acts, but also on a finding of repeated misconduct.

117 Secondly, it is apparent from the opinion of the Disciplinary Board that that body took account of the penalty imposed on the applicant by the decision of 19 November 2010. In points 94 and 95 of that opinion, the Disciplinary Board observed that that decision had imposed a reprimand on the applicant on account of fraud similar to the facts of the case before it and classified those facts as constituting repeated misconduct. As follows from points 97 and 98 of the Disciplinary Board's opinion, that board held that the applicant had broken the relationship of trust that bound him to the Commission and concluded that the appropriate penalty in the present case consisted in the termination, without notice, of his contract of employment.

118 The report submitted to the Disciplinary Board and the opinion of the latter are thus affected by the illegality that justified the annulment of the decision of 21 August 2019.

119 Consequently, the illegality occurred at the stage of the communication of the AECE's report to the Disciplinary Board.

120 The Commission nevertheless submits that the opinion of the Disciplinary Board is not binding on the tripartite AECE. Thus, it claims, in essence, that the fact that the opinion concerned takes account of the criterion of repeated misconduct has no impact on the lawfulness of the challenged decision. In addition, it claims that the tripartite AECE has a discretion as to whether it is appropriate to carry out a fresh consultation of the Disciplinary Board in circumstances such as

those of the present case, where no new facts have occurred since the adoption of the decision of 21 August 2019 and where the only consequence of the annulment of that decision is that it is impossible to take into account the criterion of repeated misconduct. It is open to the tripartite AECE, in that context, alone to determine the appropriate sanction.

121 As follows from a systematic interpretation of the Staff Regulations, and in particular Articles 18, 22 and 25 of Annex IX thereto, the opinion of the Disciplinary Board, which is a body of a consultative nature, does not bind the disciplinary authority as to the accuracy of the facts alleged (judgments of 3 June 2015, *Bedin* v *Commission*, F-128/14, EU:F:2015:51, paragraphs 23 to 29, and of 10 June 2016, *HI* v *Commission*, F-133/15, EU:F:2016:127, paragraphs 147 and 148; see, also, judgment of 29 January 1985, *F.* v *Commission*, 228/83, EU:C:1985:28, paragraph 16).

122 Moreover, it must be observed that the AECE has the power to proceed to an assessment of the official's responsibility which is different from that of the Disciplinary Board and to choose, as a consequence, the disciplinary penalty which it considers to be adequate to sanction the misconduct found (see, to that effect, judgment of 10 September 2019, *DK* v *EEAS*, T-217/18, not published, EU:T:2019:571, paragraph 71 and the case-law cited).

123 Consequently, the opinion of the Disciplinary Board does not bind the tripartite AECE.

124 However, consultation of the Disciplinary Board is still a procedural obligation for the AECE.

125 In the first place, it must be recalled that, where the disciplinary proceedings include the involvement of the Disciplinary Board, that is to say, in the light of Article 3 and 11 of Annex IX to the Staff Regulations, where the AECE initiates disciplinary proceedings envisaging that they may lead to the imposition of a penalty more severe than a written warning or reprimand, that involvement constitutes an essential element of the procedure, since, first, it is the occasion for an in-depth, adversarial debate accompanied, potentially, by the conduct of a supplementary investigation and, secondly, the AECE thereafter gives its decision taking into account the work of the Disciplinary Board, that is to say, taking account of its reasoned opinion adopted by majority vote and any divergent views expressed by certain of its members, as follows from Articles 12 to 18 of that annex. Thus, where the AECE departs from the opinion of the Disciplinary Board, it must give a detailed statement of reasons for doing so (see, to that effect, judgment of 15 December 2021, *HG* v *Commission*, T-693/16 P RENV-RX, EU:T:2021:895, paragraph 170 and the case-law cited). It must be added that the Court has held that the opinion itself of the Disciplinary Board could be the subject of an admissible action for annulment (judgment of 29 January 1985, *F.* v *Commission*, 228/83, EU:C:1985:28, paragraph 16).

126 Consequently, the involvement of the Disciplinary Board constitutes, where the matter must be referred to that board, as in the present case, an essential procedural requirement the opinion of which an official subject to a penalty on conclusion of those proceedings must in principle be able to contest where the appointing authority endorses the assessment of the facts by the Disciplinary Board (judgment of 15 December 2021, *HG* v *Commission*, T-693/16 P RENV-RX, EU:T:2021:895, paragraph 170).

127 In the second place, it must be recalled that the right for every member of staff to consult his or her disciplinary file examined by the Disciplinary Board and to see the latter take cognizance of all the facts alleged and circumstances in which they were committed constitutes an essential guarantee that the rights of the defence have been observed (see, by analogy, judgment of 26 January 1995, *D* v *Commission*, T-549/93, EU:T:1995:15, paragraph 48).

128 The existence of such a right is borne out by various guarantees, provided for under the Staff Regulations, enjoyed by a member of staff in connection with disciplinary proceedings.

129 First, under Article 6(1) of Annex IX to the Staff Regulations, the Disciplinary Board is a body composed of equal numbers (judgment of 26 January 1995, *D* v *Commission*, T-549/93, EU:T:1995:15, paragraph 48). In addition, under Article 6(5) of Annex IX to the Staff Regulations, 'the official concerned shall be entitled to reject one of the Board members'.

130 Secondly, the Disciplinary Board is a body before which the member of staff may defend him or herself (see, by analogy, judgment of 26 January 1995, *D* v *Commission*, T-549/93, EU:T:1995:15, paragraph 48). That member of staff enjoys procedural guarantees to that effect. Pursuant to Article 16(1) of Annex IX to the Staff Regulations, the member of staff concerned 'shall be heard by the Board; at the hearing, he may submit observations in writing or orally, whether in person of through a representative' and 'he may call witnesses'.

131 Moreover, under Article 13(2) of Annex IX to the Staff Regulations, the member of staff has a period of 15 days from the date of receipt of the report initiating the disciplinary proceedings, provided for in Article 12(2) of Annex IX to the Staff Regulations, to prepare his or her defence. In that context, that staff member has the right to obtain his or her complete personal file (Article 13(1) of Annex IX to the Staff Regulations) and to be assisted by a person of his or her choice (Article 13(3) of Annex IX to the Staff Regulations).

132 In the present case, the tripartite AECE did not carry out a fresh consultation of the Disciplinary Board, even though it had initially referred the matter to it by communicating to it a report affected by the illegality found by the General Court in the original judgment. By merely discounting the contents of that opinion, even though it could infer from that judgment that that opinion was also affected by the illegality which justified the annulment of the decision of 21 August 2019, the tripartite AECE did not allow the Disciplinary Board to take into account, for the purposes of drafting its opinion, the deletion from the applicant's individual file of the decision of 19 November 2010. By that conduct, the tripartite AECE thus deprived the Disciplinary Board of the possibility of taking account only of the circumstances in which the facts of which the applicant had been accused had been committed and of assessing the seriousness of those facts.

133 Consequently, first, the tripartite AECE did not allow the in-depth, adversarial debate to which entitlement is given under the procedure before the Disciplinary Board to take place in full cognizance of the evidence held by the latter and deprived the applicant of enjoyment of the guarantees enabling him to ensure observance of his rights of the defence.

134 Secondly, the tripartite AECE deprived the Disciplinary Board of the possibility of recommending a penalty on the basis of an assessment of the exact facts warranting the matter being referred to it. The tripartite AECE could not therefore receive a recommendation from the Disciplinary Board as to a penalty that took account of the grounds of the original judgment and of those facts.

135 Having regard to the fact that respect for the rights of the defence is a fundamental principle of EU law which applies to everyone and which must be guaranteed in all procedures which are liable to culminate in an act adversely affecting a person (see judgment of 14 October 2021, *Bernaldo de Quirós* v *Commission*, C-583/19 P, EU:C:2021:844, paragraph 60 and the case-law cited) and to consultation of the Disciplinary Board being in the nature of an essential procedural requirement, the fact that the opinion was not binding on the tripartite AECE, as noted in

paragraph 123 above, has no impact on the obligation on the tripartite AECE, with a view to ensuring the implementation of the original judgment under the provisions of Annex IX to the Staff Regulations, to submit a new report to that board whose content took account of the grounds of the original judgment. The tripartite AECE had no discretion in that regard.

136 It follows from the foregoing that, in the implementation of the original judgment, the AECE was required to resume the procedure at the stage of referral of the matter to the Disciplinary Board. Therefore, it was not open to it to resume that procedure at a later stage, as it did in the present case.

137 It thus follows that the tripartite AECE infringed an essential procedural requirement in the light of Article 12 of Annex IX to the Staff Regulations by failing to refer the matter afresh to the Disciplinary Board. Thus, by that infringement, it failed to ensure the implementation of the original judgment as it was obliged to under Article 266 TFEU and, consequently, infringed the latter provision.

138 The Commission nevertheless submits that, pursuant to case-law, a procedural irregularity cannot justify the annulment of a decision unless the administrative procedure at issue could have led to a different result had that irregularity not been committed. In its view, the applicant has not demonstrated that a fresh consultation of the Disciplinary Board could have changed the outcome of the disciplinary proceedings at issue.

139 However, as is apparent from paragraph 126 above, the involvement of the Disciplinary Board in the disciplinary proceedings is in the nature of an essential procedural requirement.

140 It is apparent from case-law that infringement of an essential procedural requirement entails the annulment of the vitiated act, irrespective of whether that infringement caused damage to the person invoking it or whether the administrative procedure could have led to a different result (see, to that effect, judgments of 22 December 2008, *Gordon* v *Commission*, C-198/07 P, EU:C:2008:761, paragraphs 73 and 74; of 23 March 2000, *Gogos* v *Commission*, T-95/98, EU:T:2000:85, paragraphs 53 and 54; and of 11 November 2014, *De Nicola* v *EIB*, F-52/11, EU:F:2014:243, paragraph 145; see also, by analogy, judgment of 6 April 2022, *Mead Johnson Nutrition (Asia Pacific) and Others* v *Commission*, T-508/19, EU:T:2022:217, paragraph 290).

141 Therefore, the applicant was not required to demonstrate that a fresh consultation of the Disciplinary Board could have altered the outcome of the disciplinary proceedings at issue.

142 As a result, the tripartite AECE infringed Article 266 TFEU and Article 12 of Annex IX to the Staff Regulations. The second plea in law must be upheld and the challenged decision annulled, without it being necessary to examine the third plea in law.

…

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls the decision of the European Commission of 18 January 2022 imposing on IP the disciplinary penalty of termination without notice of his contract of employment;**

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

3. **Declares that the parties are to bear their own costs.**

Truchot Kanninen Frendo

Delivered in open court in Luxembourg on 2 October 2024.

[Signatures]