Reports of Cases

JUDGMENT OF THE GENERAL COURT (Appeal Chamber)

3 June 2015 *

(Appeal — Civil service — Member of the contract staff — Staff of the European Union Agency for Fundamental Rights — Non-renewal of a fixed-term contract for an indefinite period — Right to be heard — Reassignment to another department until expiry of the contract — Assessment of the facts — Distortion of the clear sense of the evidence — Obligation to state reasons)

In Case T-658/13 P,

APPEAL against the judgment of the European Union Civil Service Tribunal (Second Chamber) of 30 September 2013 in *BP* v *FRA* (F-38/12, ECR-SC, EU:F:2013:138), seeking to have that judgment set aside,

BP, former member of the contract staff of the European Union Agency for Fundamental Rights (FRA), residing in Barcelona (Spain), represented by L. Levi and M. Vandenbussche, lawyers,

appellant,

the other party to the proceedings being

European Union Agency for Fundamental Rights (FRA), represented by M. Kjærum, acting as Agent, assisted by B. Wägenbaur, lawyer,

defendant at first instance,

THE GENERAL COURT (Appeal Chamber),

composed of M. Jaeger, President, M.E. Martins Ribeiro (Rapporteur) and M. van der Woude, Judges,

Registrar: E. Coulon,

gives the following

Judgment

1 By her appeal brought pursuant to Article 9 of Annex I to the Statute of the Court of Justice of the European Union, the appellant, BP, seeks the setting aside of the judgment of the European Union Civil Service Tribunal (Second Chamber) ('the Tribunal') of 30 September 2013 in *BP* v *FRA* (F-38/12, ECR-SC, EU:F:2013:138, 'the judgment under appeal') by which that court dismissed her action seeking, first, annulment of the decisions of the European Union Agency for Fundamental Rights

* Language of the case: English.

(FRA) not to renew her contract as a member of the contract staff for an indefinite period and to reassign her to another department for the last six months of her contract, and to order the FRA to pay compensation for her material and non-material loss.

Legal context

2 Article 41 of the Charter of Fundamental Rights of the European Union provides as follows:

‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

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

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

…’

3 Article 22a of the Staff Regulations of Officials of the European Union (‘the Staff Regulations’) provides:

‘1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.

Information mentioned in the first subparagraph shall be given in writing.

…

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

…’

4 Article 85 of the Conditions of Employment of Other Servants of the European Union (‘the CEOS’) provides as follows:

‘1. The contracts of contract staff referred to in Article 3a may be concluded for a fixed period of at least three months and not more than five years. They may be renewed not more than once for a fixed period of not more than five years. The initial contract and the first renewal must be of a total duration of not less than six months for function group I and not less than nine months for the other function groups. Any further renewal shall be for an indefinite period.

…’

5 Article 24(1) of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, (OJ 2007 L 53, p. 1), provides as follows:

'The Staff Regulations …, the [CEOS] and the rules adopted jointly by the [European Union] institutions for the purposes of applying [the] Staff Regulations and [the CEOS] shall apply to the staff of [the FRA] and its Director.'

6 On the basis of Article 110 of the Staff Regulations, Article 82(6) of the CEOS and Articles 15 and 24 of Regulation No 168/2007, the management board of the FRA adopted, on 4 June 2008, Decision 2008/04 on general implementing provisions on the procedures governing the engagement and the use of contract staff ('Decision 2008/04').

7 Article 1 of Decision 2008/04 states that that decision applies to contract staff within the meaning of Article 3a of the CEOS.

8 According to Article 6 of Decision 2008/04:

'…

2. The renewal of a contract in function groups II, III and IV shall be for another fixed period of at least three months and not more than five years. A second renewal without interruption leading to an indefinite-duration contract may only be granted if the first two contracts covered a total period of at least five years.'

9 On 29 May 2009, the Director of the FRA adopted Decision 2009/13 regarding the renewal of the contract of employment of contract agents ('Decision 2009/13') on the basis of, inter alia, Article 15(4)(c) of Regulation No 168/2007, according to which the Director is to be responsible for all staff matters and exercises, in respect of staff, the powers conferred by the CEOS on the authority authorised to conclude contracts of employment ('AACC').

10 In accordance with paragraphs 1.1 to 1.3 of Decision 2009/13, where a staff member wishes to renew his contract, following discussion with his head of department, that staff member must send a letter of motivation expressing his desire to continue working for the FRA to the Director of the FRA seven months before his contract expires. The head of department of the staff member is to provide a written statement to the Director of the FRA, a copy of which is provided to the staff member.

11 Paragraph 1.4 of Decision 2009/13 provides:

'[T]he decision of the Director shall be based on the future developments of the [FRA], the performance so far, the adequacy [sic] of the profile to the future needs of the [FRA] and the budgetary availability.'

12 It is stated in paragraph 1.5 of Decision 2009/13 that, six months before the expiry date of the contract, the staff member is to receive a letter informing him either that his contract will be renewed or reminding him of the date when the contract will come to an end and indicating the procedure to be followed.

13 Paragraph 1.6 of Decision 2009/13 states that the Director will be available to provide a personal explanation.

Background to the dispute

14 The facts giving rise to the dispute are set out as follows in paragraphs 12 to 34 of the judgment under appeal:

'12 The applicant started working for [the FRA] on 1 September 2007. She was employed as a member of the contract staff under Article 3(a) of the CEOS to carry out tasks in function group III, at grade 10, on a two-year contract. Her contract was renewed for a period of three years, expiring on 31 August 2012. Therefore, under Article 85(1) of the CEOS and Article 6(2) of Decision 2008/04, any further renewal of the agreement could only be for an indefinite period.

13 The applicant was assigned to the "Procurement and Finance" team in the "Administration" department. She performed the duties of an assistant.

14 A career development report ("the CDR") was drawn up for each year of activity of the applicant.

15 In the CDR relating to the year 2008, out of a total of 20 points, namely 10 for efficiency, 6 for abilities and 4 for conduct in the service, the applicant was awarded a total of 13 points: 6.5 for efficiency, 3.5 for abilities and 3 for conduct in the service.

16 It is apparent from the CDR relating to the year 2009 that the applicant was awarded a total of 11.5 points: 6 for efficiency, 3.5 for abilities and 2 for conduct in the service.

17 It is apparent from paragraphs 3 to 7 of the application that, during the months of March 2010, November 2010, August 2011 and September 2011, and at an unspecified date in 2012, the applicant drew to the attention of the Director of the [FRA], under Article 22a of the Staff Regulations, various possible irregularities which she claimed had occurred in the [FRA]'s public procurement procedures and which she had come across in the course of her duties.

18 In the CDR relating to the year 2010, the applicant received the same assessment points as those in the 2009 CDR. The 2011 CDR has not been put before the Tribunal.

19 The appraisal of the applicant in respect of 2009 and 2010 was accompanied by negative comments made by the reporting officer. Thus, in the 2009 CDR, the reporting officer stated, inter alia, with regard to efficiency, that the applicant's poor personal relations with other staff members had had an impact on her efficiency during the period being assessed and recommended that she should strive continuously to overcome the situation. Regarding conduct in the service, the reporting officer also referred to the applicant's poor personal relations with colleagues.

20 In his response of 4 March 2011 to the complaint, brought by the applicant under Article 90(2) of the Staff Regulations, seeking a review of the mark awarded to her and the annulment of the reporting officer's comments in the three headings of the 2009 CDR, the Director [of the FRA], acting as AACC, first decided to increase by half a point the mark for efficiency, which was changed to 6.5 points and, secondly, amended the comments under the heading "conduct in the service" as follows: "During the reporting period the jobholder had good working relationships with the Agency's staff from other departments [of the FRA] but she had some difficulties to deal [sic] with some colleagues within her department. Efforts have been made by both the hierarchy and the jobholder to resolve the situation in a constructive way. A continuous effort should be dedicated [sic] to overcome this situation."

21 As regards the 2010 CDR, the reporting officer stated, in relation to efficiency, that the continuation of the applicant's poor personal relations with other staff members affected her efficiency during the appraisal period and recommended again that she strive continuously to overcome the situation. With regard to conduct in the service, the reporting officer wrote:

"[d]uring the reporting period the jobholder had some difficulties to deal [sic] with some of her colleagues. Efforts have been dedicated by the hierarchy to resolve her frictions with other members of the staff in a constructive way. The situation continued to impact on the performance of the jobholder during the appraisal period. A further effort should be dedicated [sic] to overcome this situation."

22 The applicant responded to the content of the 2010 CDR and made her disagreement known to the AACC by a letter of 18 April 2011, a letter of 4 May 2011 and an email of 15 May 2011, addressed to the Director, by which she also requested that the matter be referred to the Joint Evaluation Committee. In his response of 29 July 2011, the Director of the [FRA] rejected all the applicant's arguments.

23 The applicant did not challenge the 2009 and 2010 CDRs before the Courts of the European Union.

24 In the context of the procedure for renewing contracts for members of the contract staff, established by Decision 2009/13, the applicant met her head of department on 30 January 2012 and, the following day, the applicant's lawyers forwarded her letter of motivation to the Director of the [FRA], in which she expressed her desire to have her contract renewed.

25 On 21 February 2012, the applicant received by email an invitation to meet the Director of the [FRA] and the head of the "Human Resources and Planning" department ("the Human Resources department") on 27 February 2012, an invitation which she initially accepted but which she requested be postponed until 28 February because, inter alia, she wanted her lawyer to attend. The meeting that was postponed to 28 February did not take place because the applicant took sick leave.

26 By email of 24 February 2012, the applicant's head of department forwarded his opinion on the renewal of the applicant's contract ("the head of department's opinion") to the Director of the [FRA]. In that opinion, structured around ten points, the head of department highlights certain information relating to a recent reorganisation of the department, which transferred tasks to colleagues in other departments, and to the main features of the applicant's CDRs for the previous few years.

27 In that regard, the head of department states, inter alia, that the applicant's CDRs for 2009 and 2010 were below the average for staff members; that, in 2011, the situation was unchanged; that the applicant has had problems with her colleagues, which have had an impact on her performance, and that, despite efforts made by her line management, the Human Resources department and the Director of the [FRA], and despite also the training given to the applicant, the situation remained unchanged. The head of department also states that the [FRA] had twice offered the applicant, in her own interests as much as in the [FRA]'s interests, reassignment to another department, which she refused.

28 On Monday 27 February 2012, at 10 a.m., the Director of the [FRA] organised a general meeting of all staff, during which he addressed the issue of whistleblowing within the [FRA].

29 By a letter of 27 February 2012, communicated to the applicant on the same date, the Director of the [FRA] informed the applicant that, having studied her letter of motivation and the opinion of the head of department, he had taken a decision not to renew her contract on its expiry on 31 August 2012. The opinion of the head of department was annexed to that letter.

30 The reasons given by the Director of the [FRA] for the decision not to renew the applicant's contract were, first, the [FRA]'s limited availability of budgetary resources, which obliged him to reconsider the allocation of posts to members of the contract staff, as was apparent from the

opinion of the applicant's head of department of 24 February 2012 and, secondly, the applicant's efficiency and conduct in the service, both affected by her poor personal relations with colleagues, a situation which had not improved despite attempts by the hierarchy to resolve friction in a constructive way, in particular by reassignment to another department, which the applicant had refused.

31 The letter of 27 February 2012 contained a second decision by which the applicant was reassigned in the interests of the service, with immediate effect and for the last six months of her contract, to the "Communication and Awareness Raising" department.

32 On 5 March 2012, the applicant brought a complaint, under Article 90(2) of the Staff Regulations, in which she disputes the merits of the decisions of the Director of the [FRA] not to renew her contract and to reassign her.

33 The applicant was on sick leave from 8 March 2012 until the end of her contract.

34 By decision dated 5 July 2012, the Director of the [FRA], acting as AACC, rejected the complaint brought on 5 March 2012.'

Proceedings at first instance and judgment under appeal

15 By application lodged at the Tribunal Registry on 19 March 2012, the appellant brought an action seeking annulment of the decision not to renew her contract of service and of the decision to reassign her to another department of the FRA until expiry of her contract ('the reassignment decision'). The appellant also claimed that the FRA should be ordered to pay compensation for the material damage which she allegedly sustained, estimated at EUR 1 320 per month from the month of September 2012, plus default interest at the European Central Bank (ECB) reference rate plus two percentage points, and for non-material damage, estimated at EUR 50 000, and that the FRA be ordered to pay the costs.

16 The FRA contended, at first instance, that the Tribunal should dismiss the action and order the appellant to pay the costs.

17 In the context of the first head of claim, seeking annulment by the Tribunal of the decision not to renew the appellant's contract of employment, the appellant relied on five pleas in law.

18 In the context of her first plea and part of her fifth plea, which the Tribunal found it necessary to examine jointly, the appellant criticised the FRA, firstly, for having committed a manifest error of assessment and, secondly, for having breached the principle of good administration and the duty to have regard for the interests of staff. First, the appellant argued (i) that the reasons on which the decision not to renew her contract of service was based were not justified, since the FRA needed staff with her qualifications, (ii) that her qualifications were suitable for the future needs of the FRA and (iii) that the FRA budget was increasing. Secondly, the decision not to renew the appellant's contract of service was not taken in the interest of the service, since a single person could not manage the number of FRA calls for tender procedures.

19 The Tribunal noted, at paragraph 57 of the judgment under appeal, that the holder of a fixed-term contract does not, in principle, have any right to the renewal of his contract and, at paragraph 58 of that judgment, that the administration had, in that regard, a broad discretion. In the present case, after referring to the relevant case-law, the Tribunal noted, at paragraph 64 of the judgment under appeal, that the decision not to renew the appellant's contract of service was based on two grounds, namely (i) the limited budgetary resources of the FRA and (ii) the appellant's performance and conduct within the FRA, linked to the appellant's poor personal relations with colleagues.

20 As regards the first plea, the Tribunal found, in essence, in paragraph 66 of the judgment under appeal, that the increase in the FRA budget did not suffice, in itself, to show that it needed additional staff.

21 As regards the second plea, the Tribunal held, at paragraphs 67 to 72 of the judgment under appeal, that, notwithstanding the denials of the appellant, it was apparent from the career development reports ('the CDR or CDRs') for 2009 and 2010 that the decision not to renew her contract was not vitiated by manifest error of assessment.

22 As regards the principle of good administration and the duty to have regard for the interests of staff, the Tribunal noted, in paragraph 73 of the judgment under appeal, that the appellant's head of department and the Director of the FRA had shown benevolence towards her, in particular by drawing her attention to her poor personal relations within her team. The Tribunal thus rejected, at paragraph 77 of the judgment under appeal, the first and fifth pleas, in so far as the latter alleged breach of the principles of good administration and the duty to have regard for the interests of staff.

23 The Tribunal then rejected the second plea, only in so far as it alleged infringement of Article 22a of the Staff Regulations, other grounds invoked in support of that plea being declared inadmissible, and the fifth plea in so far as it alleged misuse of powers.

24 The Tribunal held, at paragraphs 90 to 97 of the judgment under appeal, that, although it was not disputed that the decision not to renew the appellant's contract of service had been adopted nearly two years after the appellant had begun, in March 2010, to report to the Director of the FRA possible irregularities in certain procurement procedures, it was not apparent from the documents in the file that this was one of the reasons for that decision. In the first place, on the one hand, the appellant was not present at the meeting of 27 February 2012 between the Director of the FRA and the staff and, on the other, the appellant's name did not appear in two e-mails, one of 27 February 2012, addressed to all of the staff, and the other of 21 February 2012, addressed to a part of the staff. In the second place, the 2009 CDR only related to that year and, when drawing it up, the reporting officer could not have taken into account the irregularities reported by the appellant, which occurred from the month of March 2010. In the third place, the appellant referred, in her comments of 27 October 2010 challenging the 2009 CDR, to a poor working environment. In the fourth place, even if certain assessments of the 2009 CDR had been amended, the fact remained that comments relating to the impact of the appellant's poor personal relations with other colleagues remained unchanged. In the fifth place, as regards the testimony given in support of a colleague which, it is claimed, may have played a role in the decision not to renew her contract, the appellant had not provided any other information in that regard.

25 The Tribunal therefore concluded, in paragraph 99 of the judgment under appeal, that the arguments and evidence submitted by the appellant had not established that the decision of the FRA not to renew her contract had been adopted in breach of Article 22a(3) of the Staff Regulations nor that it had the purpose of achieving an end other than that stated.

26 The Tribunal also rejected the third plea alleging infringement of the rights of defence and infringement of Article 41 of the Charter of Fundamental Rights. The Tribunal noted, in paragraph 104 of the judgment under appeal, that one of the two reasons for adopting the decision not to renew the appellant's contract of service concerned her efficiency and conduct in the service, which had been affected by her poor personal relations with her colleagues. The Tribunal noted, in paragraph 105 of the judgment under appeal, that the 2009 and 2010 CDRs had been accompanied by comments of the reporting officer relating to the appellant's poor personal relations which were, for the most part, confirmed by the Director of the FRA. The Tribunal added that it was not disputed that, in the context of drawing up those CDRs, the appellant had met with her reporting officer on 24 February 2010 and 4 March 2011, and that the Director of the FRA had responded to the complaints brought by the appellant against both of those CDRs which, however, had not been

challenged before the Tribunal. The Tribunal deduced from this that the appellant could not argue that her right to be heard had been infringed in respect of the assessments relating to her efficiency and conduct in the service during the years 2009 and 2010.

27 As regards the appellant's right to be heard before the adoption of the decision of the Director of the FRA not to renew her employment contract, the Tribunal found, in paragraphs 106 and 107 of the judgment under appeal, that, in accordance with Decision 2009/13, the appellant had been heard, first, during a meeting with her head of department, on 30 January 2012, and, secondly, by means of the letter of motivation that she had sent to the Director of the FRA seven months before the expiry of her contract. As regards the opinion of the head of department, a copy of which was received by the appellant and concerning which she wanted to express her point of view, the Tribunal held, in paragraph 108 of the judgment under appeal, that that act constituted a preparatory measure for the decision not to renew her contract of service. Thus, as it was not an act adversely affecting the appellant, the Tribunal held that she could not validly claim the right to make observations regarding its content. The Tribunal added that, in any event, in view of the 2009 and 2010 CDRs, the assessments set out in the opinion of the head of department could not have caught the appellant unprepared.

28 With regard to the possible infringement of Article 41 of the Charter of Fundamental Rights by the FRA, alleging the appellant's lack of access to the documents which would show that the distribution of posts allocated to contract staff had to change or that budgetary restrictions were necessary, the Tribunal found, in paragraph 110 of the judgment under appeal, that it was apparent from the Staff Management Plan 2012-2014 and the statement of revenue and expenditure of the FRA for the year 2012, which the appellant herself had placed in the case file, that, notwithstanding the difference between the appellant and the FRA as to how those two documents should be interpreted, the appellant did have access to the documents that formed the basis of the decision not to renew her contract of service.

29 The Tribunal rejected, moreover, the plea alleging infringement of the principle of equal treatment, finding, in paragraph 116 of the judgment under appeal, that, even assuming that the appellant's colleagues who had been offered a contract for an indefinite period were, in relation to the budgetary resources, in the same situation as the appellant, she had not submitted evidence that the 2009 and 2010 CDRs contained comments about their efficiency or their conduct in the service that were similar to those made about her.

30 In the context of the second head of claim, seeking annulment of the decision to reassign her, the appellant raised three pleas in law.

31 First of all, the Tribunal rejected the first plea alleging failure to state reasons and misuse of powers.

32 In that regard, the Tribunal found, at paragraph 123 of the judgment under appeal, that, although the decision referred to a 'transfer', it was in fact a 'reassignment' measure, as the appellant had been transferred with her post.

33 The Tribunal found, at paragraph 126 of the judgment under appeal, in the first place, that the reassignment decision had been adopted at the same time as the decision not to renew the appellant's contract of service, with regard to which the appellant did not allege a failure to state reasons. Secondly, the Tribunal noted that the decision not to renew the appellant's contract of service made reference, on the one hand, to the appellant's efficiency and to her conduct in the service, in particular her poor personal relations with some colleagues and, on the other, to the fact that the appellant had, in the past, twice refused a proposal by her superiors to reassign her to another service, issues which had been referred to in the appellant's 2009 and 2010 CDRs. Thirdly, the Tribunal noted that the appellant had received a copy of the opinion of the head of department.

34 The Tribunal concluded from this, at paragraph 127 of the judgment under appeal, that the decision of 27 February 2012, in so far as it had ordered the reassignment of the appellant to the 'Communication and Awareness Raising' department, stated sufficient reasons.

35 As regards the alleged misuse of powers, the Tribunal found, at paragraph 128 of the judgment under appeal that, having regard to the poor personal relations with some colleagues, the appellant had failed to submit prima facie evidence in support of her claims that the reassignment decision had been prompted by her testimony given in support of a colleague in August 2011.

36 Secondly, the Tribunal rejected the appellant's second plea, alleging irregular and unilateral amendment of an essential element of the contract of service and a discrepancy between post and grade.

37 In that regard, the Tribunal noted, at paragraph 134 of the judgment under appeal, that the FRA had not been plausibly contradicted by the appellant concerning the fact that she had been reassigned with her post, so that the principle that staff must be assigned to an equivalent post had been observed. Furthermore, the Tribunal found, at paragraph 137 of the judgment under appeal, that the appellant had failed to demonstrate that the tasks allocated to her after her reassignment did not correspond to the tasks of the function group in which she had been placed since 2007.

38 Finally, the Tribunal rejected the third plea, alleging non-observance of the interest of the service and manifest error of assessment, by holding, in paragraph 143 of the judgment under appeal, that it was apparent both from the 2009 and 2010 CDRs and from the opinion of the head of department that the appellant had poor personal relations with some members of her team and that her superiors had twice proposed to reassign her to another department, which she had opposed.

39 After dismissing the third plea, the Tribunal, at paragraphs 146 to 149 of the judgment under appeal, made the following observations:

'146 Finally, it should be pointed out that at paragraphs 108 and 109 of the application, the applicant states that she was never heard by the Director of the [FRA] before the reassignment decision and that she did not have, therefore, the opportunity to express her views on that decision which adversely affects her.

147 The Tribunal notes that this complaint is included in the arguments relating to the third plea, alleging infringement of the rights of defence and of Article 41 of the [Charter of Fundamental Rights], raised in support of the first head of claim, which seeks the annulment of the decision not to renew the contract.

148 However, to be considered by the Tribunal, that complaint, which emphasises a defect that may have vitiated the adoption of the reassignment decision, should have been raised in the second head of claim, seeking the annulment of that decision, and not only in the first head of claim. The Tribunal observes that, in its defence, the [FRA] addressed the pleas raised in each head of claim in turn, as they were raised in the application.

149 In those circumstances, since, on the one hand, it is not for the Tribunal to join together as it sees fit the arguments, complaints and pleas of an application under one or other head of claim and, on the other hand, the way in which that complaint was presented could affect the rights of defence of the [FRA], it is necessary to declare that complaint to be inadmissible.

150 It follows from the foregoing that the claim for annulment of the decision to reassign the applicant must be dismissed.'

40 In the light of the dismissal of the claims for annulment submitted by the appellant, the Tribunal dismissed the claims for damages and ordered the appellant to pay all the costs.

The appeal

Procedure and forms of order sought

41 By document lodged at the Registry of the General Court on 10 December 2013 the appellant brought the present appeal. On 24 March 2014, the FRA lodged a response.

42 The appellant claims that the Court should:

— set aside the judgment under appeal;

— consequently:

— annul the decision of 27 February 2012 not to renew the appellant's contract and to transfer her to the 'Communication and Awareness Raising' department;

— order the FRA to pay compensation for the material damage sustained by the appellant, estimated at EUR 1 320 per month from September 2012, together with default interest at the ECB reference rate plus two percentage points;

— order the FRA to pay compensation in respect of the non-material damage sustained by the appellant, assessed on equitable principles at EUR 50 000;

— order the FRA to pay the costs of the proceedings at first instance and on appeal.

43 The FRA claims that the Court should:

— dismiss the appeal;

— in the alternative, declare its pleas at first instance to be well founded;

— order the appellant to pay all the costs.

Law

44 In support of the appeal, the appellant raises four grounds of appeal against the judgment under appeal regarding the decision not to renew the appellant's contract of service. The first ground of appeal alleges infringement of the principle of observance of the rights of defence, of the right to be heard and of the right of access to relevant information, enshrined in Article 41 of the Charter of Fundamental Rights, and distortion of the evidence. The second ground of appeal alleges an infringement of the appellant's rights, a manifest error of assessment and denial of the right to a fair trial, following the refusal, first, to authorise a second exchange of pleadings and, secondly, to accept production of relevant evidence in response to the observations of the FRA. The third ground of appeal alleges a manifest error of assessment and distortion of the facts and evidence. The fourth ground of appeal alleges a manifest error in the assessment of the pleas on retaliation, misuse of powers and distortion of the facts and evidence.

45 Moreover, the appellant raises two grounds of appeal regarding the reassignment decision. The first ground of appeal alleges an illegal assessment by the Tribunal of the second plea, which alleged irregular and unilateral amendment of an essential element of the contract of service, a discrepancy between post and grade and distortion of the evidence. The second ground of appeal alleges infringement by the Tribunal of the rights of defence, as the appellant was not heard before the transfer decision.

46 Finally, the appellant alleges that the Tribunal infringed Article 87(2) and Article 88 of its Rules of Procedure concerning costs and breached the duty to state reasons.

The decision not to renew the appellant's contract of service

– The first plea, alleging infringement of the principle of observance of the rights of defence, of the right to be heard and of the right of access to relevant information, enshrined in Article 41 of the Charter of Fundamental Rights, and distortion of the evidence

47 The appellant criticises paragraphs 106 to 109 of the judgment under appeal, in so far as the Tribunal found, at paragraphs 106 and 107 of that judgment, that Decision 2009/13 provided for the appellant's hearing at two stages: first, during a meeting with the head of department and, secondly, by means of the letter of motivation which she had sent to the FRA seven months before the expiry of her contract through her lawyers and which was dated 31 January 2012. The Tribunal considered, on the other hand, at paragraph 108 of the judgment under appeal, that the opinion of the head of department, a copy of which was received by the appellant and concerning which she wanted to express her point of view, constituted a preparatory measure for the decision not to renew her contract of service which, as it did not adversely affect the appellant, did not entitle her to make observations regarding its content. The Tribunal added that, in any event, in view of the 2009 and 2010 CDRs, the assessments set out in the opinion of the head of department could not have caught the appellant unprepared.

48 As regards the possible infringement of Article 41 of the Charter of Fundamental Rights, the Tribunal held, at paragraph 110 of the judgment under appeal, that, in so far as the appellant claimed not to have had access to the documents that would show that the distribution of posts allocated to contract staff had to change or that budgetary restrictions were necessary, she herself had placed in the case file the Staff Management Plan 2012-2014 and the statement of revenue and expenditure of the FRA for the year 2012. The Tribunal added that the fact that there was a difference between the parties as to how those two documents should be interpreted did not mean that the appellant had not had access to the documents that formed the basis of the decision not to renew her contract of service.

49 It must be noted that Decision 2009/13 provides, at paragraphs 1.1 to 1.5, that a staff member who wishes to renew his contract must, following discussion with his head of department, send a letter of motivation to the Director of the FRA seven months before his contract expires. The head of department is to provide a written statement to the Director of the FRA, a copy of which should be received by the staff member. Six months before the expiry date of the contract, the staff member is to receive a letter informing him either that his contract will be renewed or reminding him of the date when it will come to an end.

50 In so far as the appellant claims, in essence, that her right to be heard was infringed, it is necessary to recall the relevant case-law on the matter.

51 According to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the procedure in question (see judgments of 24 October 1996 in *Commission* v *Lisrestal and Others*, C-32/95 P, ECR, EU:C:1996:402, paragraph 21, and 9 November 2006 in *Commission* v *De Bry*,

C-344/05 P, ECR, EU:C:2006:710, paragraph 37 and the case-law cited; see also, to that effect, judgment of 6 December 2007 in *Marcuccio* v *Commission*, C-59/06 P, ECR-SC, EU:C:2007:756, paragraph 46). That principle of observance of the rights of the defence is particularly important where, as in the present case, the decision not to renew the appellant's contract of service was adopted against a background of poor personal relations, as the Tribunal itself noted in paragraph 70 of the judgment under appeal (see, to that effect, judgment in *Marcuccio* v *Commission*, EU:C:2007:756, paragraph 46).

52 That principle requires that the person concerned must have been afforded the opportunity effectively to make known his views on any information against him which might have been taken into account in the measure to be adopted (see judgment in *Commission* v *De Bry*, cited in paragraph 51 above, EU:C:2006:710, paragraph 38 and the case-law cited).

53 It is apparent from the case-law that rights of the defence occupy a prominent position in the organisation and conduct of a fair trial and include the rule that both parties should be heard. That rule applies to any procedure which may result in a decision by an institution perceptibly affecting a person's interests. As a general rule, it means that the parties in a case must be given an opportunity to state their views on the facts and documents on which a judicial decision will be based, and to discuss the evidence and observations submitted to the court and the pleas in law which the court has raised of its own motion and on which it intends to base its decision (see judgment of 16 October 2014 in *Schönberger* v *Court of Auditors*, T-26/14 P, ECR-SC, EU:T:2014:887, paragraph 23 and the case-law cited).

54 Accordingly, such a decision not to renew a contract of service can be taken only after the person concerned has been given the opportunity to put forward his view concerning the draft decision, in the context of an oral and/or written exchange of views initiated by the appointing authority, proof of which must be adduced by the latter (see, to that effect, judgment in *Marcuccio* v *Commission*, cited in paragraph 51 above, EU:C:2007:756, paragraph 47).

55 It should be noted that the appellant does not dispute the observance by the FRA of the procedure laid down in Decision 2009/13, but argues more specifically that, according to settled case-law, observance of the rights of the defence, which is binding even in the absence of any rules, would have required that she could express her view on all the factors taken into consideration by the appointing authority for the purposes of adopting the decision not to renew her contract of service. Thus, by considering that the rights of the defence were adequately protected even though she was not heard by the appointing authority on the opinion of the head of the department, the appellant submits that the Tribunal committed an error of law.

56 In that regard, it is indisputable that the decision not to renew the appellant's contract of service affected her administrative status and that such a decision could only be taken after she had been given the opportunity to put forward her view concerning the draft decision, in the context of an oral and/or written exchange of views initiated by the appointing authority, proof of which must be adduced by the latter (see, to that effect, judgment in *Marcuccio* v *Commission*, cited in paragraph 51 above, EU:C:2007:756, paragraph 47).

57 Moreover, it has been held that the rights of the defence are observed most effectively when the person concerned is able to express his view in full knowledge of all the elements that are available to the appointing authority, and in particular on the content of an opinion (judgment of 9 July 2002 in *Aimone* v *Court of Justice*, T-70/01, ECR-SC, EU:T:2002:178, paragraph 36).

58 It must be held that, by holding, in paragraph 109 of the judgment under appeal, that the appellant's right to be heard had not been infringed, the Tribunal committed an error of law, since the appellant, first, was never heard by the appointing authority before the adoption of the decision not to renew her

contract of service, but only by the head of department, so that she could not state her views, before the adoption of that decision, on all the factors taken into consideration by the appointing authority in the context of that adoption, including, in particular, the opinion of the head of department.

59 It is true that, after sending her letter of motivation with a view to renewal of her contract, the appellant was heard by the head of department.

60 However, it must be found, first, that the head of department is not the appointing authority. Secondly, the head of department sent an opinion concerning the renewal of the appellant's contract to the appointing authority and the appellant only became aware of that opinion after the adoption of the decision not to renew her contract of service, without having had the opportunity to express her views in that regard, even though that opinion contained several reasons why the appellant's contract should not be renewed.

61 The fact that, as the Tribunal held in paragraph 108 of the judgment under appeal, the opinion in question constitutes a preparatory measure, so that it did not have an adverse effect, does not preclude the conclusion that, precisely because it is a preparatory measure, it forms part of the acts on the basis of which the appointing authority adopted its decision not to renew the appellant's contract of service, so that the appellant should have been heard by the appointing authority on the observations set out in the opinion before the appointing authority adopted its position.

62 It follows that, contrary to the finding of the Tribunal, the appellant's right to be heard was not observed, since she was not heard by the appointing authority before the adoption of the decision not to renew her contract of service, but only by the head of department.

63 It follows from all the foregoing that the first ground of appeal raised by the appellant against the judgment under appeal is well founded. Without it being necessary to examine the other grounds of appeal raised by the appellant, the judgment under appeal must be set aside in part, in so far as it includes a rejection of the form of order sought by the appellant seeking annulment of the decision not to renew her contract of service.

The reassignment decision

– The first ground of appeal, alleging an illegal assessment by the Tribunal of the second plea raised before it, alleging irregular and unilateral amendment of an essential element of the contract of service and a discrepancy between post and grade and distortion of the evidence

64 The appellant criticises paragraph 137 of the judgment under appeal in which the Tribunal held that she had failed to demonstrate that the tasks that had been allocated to her after her reassignment, on 27 February 2012, did not correspond to the tasks of the function group in which she had been placed since 2007. The appellant claims that the Tribunal did not take into consideration the document which she had appended to her application and which set out the list of tasks that had been assigned to her, namely her Career Development Plan for 2010.

65 According to the appellant, the tasks that she performed until her reassignment were very different from the new tasks that had been assigned to her in the 'Communication and Awareness Raising' department and thus did not correspond to the tasks of the function group in which she had been placed.

66 In that regard, it should be noted that, according to settled case-law, it follows from Article 11(1) of Annex I to the Statute of the Court of Justice and Article 138(1)(c) of the Rules of Procedure of the General Court that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of

the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, confines itself to reproducing the pleas in law and arguments previously submitted to the Tribunal. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Tribunal, which the General Court does not have jurisdiction to undertake (judgments of 19 September 2008 in *Chassagne* v *Commission*, T-253/06 P, ECR-SC, EU:T:2008:386, paragraph 54, and 8 September 2009 in *ETF* v *Landgren*, T-404/06 P, ECR, EU:T:2009:313, paragraph 140; see also, by analogy, judgment of 4 July 2000 in *Bergaderm and Goupil* v *Commission*, C-352/98 P, ECR, EU:C:2000:361, paragraph 34).

67 The argument put forward by the appellant does not meet those requirements. In fact, it does not contain any legal argument to demonstrate the manner in which the Tribunal allegedly erred in law. The appellant does no more than reproduce the plea which she raised before the Tribunal, without furnishing any further clarification and without identifying clearly the elements of the judgment under appeal that she wishes to challenge (see, to that effect, judgment of 13 September 2007 in *Il Ponte Finanziaria* v *OHIM*, C-234/06 P, ECR, EU:C:2007:514, paragraph 45).

68 Thus, that plea merely constitutes a request to have the action brought at first instance re-examined, in breach of the rules imposed both by the Statute of the Court of Justice and by the Rules of Procedure (see, to that effect, judgment in *Il Ponte Finanziaria* v *OHIM*, cited in paragraph 67 above, EU:C:2007:514, paragraph 46).

69 It follows from the foregoing that the first ground of appeal must be rejected.

– The second ground of appeal, alleging infringement of the rights of defence by the Tribunal

70 The appellant criticises paragraphs 146 to 149 of the judgment under appeal, which are recalled in paragraph 39 above.

71 According to the appellant, the statement of reasons set out in paragraphs 146 to 149 of the judgment under appeal infringes her rights of defence, as the complaint was clear enough for the Tribunal to identify and understand it, regardless of where it appeared in the application. Furthermore, the admissibility of the complaint could not affect the rights of the FRA. Moreover, it was understandable or at least excusable that the appellant should put forward this complaint in support of the first head of claim. Finally, according to the appellant, in so far as observance of the rights of the defence is an essential procedural requirement, breach of which a court can raise of its own motion, the Tribunal should have raised that complaint of its own motion.

72 In that regard, it should be noted that in the context of the appellant's application before the Tribunal, three pleas were raised in support of the form of order seeking annulment of the reassignment decision, namely (i) failure to state reasons and misuse of powers, (ii) unilateral amendment of an essential element of the contract of service and a discrepancy between post and grade, and (iii) non-observance of the interest of the service and manifest error of assessment.

73 It should be noted that the appellant raised no plea alleging breach of her right to be heard by the Director of the FRA before the reassignment decision, so that it was not for the Tribunal to reinterpret the application on that point, which would, moreover, have involved a breach of the FRA's procedural rights (see, to that effect, judgment of 13 December 2005 in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, ECR, EU:C:2005:761, paragraphs 44 to 50).

74 Furthermore, as regards the appellant's argument that, in any event, the Tribunal should have ruled of its own motion on the failure to hold an interview before the reassignment decision, it is sufficient to state that the appellant has not proved that such a plea raises a matter of public policy (see, to that effect, order of 3 October 2013 in *Marcuccio* v *Commission*, C-617/11 P, EU:C:2013:657, paragraph 22).

75 It is therefore appropriate to reject that ground of appeal and, accordingly, the appellant's head of claim seeking the setting aside of the judgment under appeal in so far as the Tribunal dismissed the application for annulment of the reassignment decision, as well as the head of claim brought directly before the General Court seeking annulment of that decision.

The ground of appeal alleging, first, infringement of Article 87(2) and Article 88 of the Rules of Procedure of the Civil Service Tribunal concerning costs and, secondly, breach of the duty to state reasons

76 The appellant criticises paragraph 157 of the judgment under appeal, which states as follows:

'It is apparent from the reasons set out in the present judgment that the applicant has been unsuccessful. Furthermore, in its pleadings the [FRA] has expressly requested that the applicant be ordered to pay the costs. Since the circumstances of the present case do not warrant the application of Article 87(2) of the Rules of Procedure, the applicant should bear her own costs, including those incurred in the proceedings for interim relief, and pay those incurred by the [FRA], including those incurred by the [FRA] in the proceedings for interim relief.'

77 According to the appellant, the Tribunal should have stated reasons for that order as to costs and examined the possibility afforded it under Article 88 of its Rules of Procedure to order the FRA, even though it had been successful in all its claims, to pay the costs, since the appellant had expressly applied for the FRA to pay the costs and had stated reasons for seeking that form of order.

78 It is sufficient to note that, as a result of the annulment of the judgment under appeal, reference is made to paragraphs 85 to 87 below regarding the determination of the costs.

The heads of claim seeking a ruling on the dispute

79 Under Article 13(1) of Annex I to the Statute of the Court, if the appeal is well founded, the General Court may, where the decision of the Civil Service Tribunal is set aside, itself give judgment on the matter where the state of the proceedings permits a decision by the General Court. That is so in the present case.

The claim for annulment

80 It is apparent from paragraphs 55 to 63 above that the appellant's head of claim regarding the request for annulment of the decision not to renew her contract must be upheld and that the decision of the FRA in that regard must be annulled.

81 The appeal must, however, be dismissed as regards the head of claim relating to the application for annulment of the decision to reassign the appellant, given that, as was stated in paragraphs 66 to 69 and 73 to 75 above, the Tribunal did not commit any error of law by dismissing at first instance the application for annulment of that decision.

The claim for damages

82 The appellant claims, by way of compensation for material damage, the sum of EUR 1 320 per month from the month of September 2012, plus default interest at the ECB reference rate plus two percentage points and, for non-material damage, the sum of EUR 50 000.

83 It should be recalled, in that regard, that the appellant's claim for compensation is based on the illegality of the decision not to renew her contract of service and on the illegality of the reassignment decision.

84 It is sufficient, in that regard, to note that the annulment ordered by the General Court of the decision not to renew the appellant's contract of service is in itself adequate compensation for the damage suffered by the appellant in the present case (see, to that effect, judgment of 28 February 2008 in *Neirinck* v *Commission*, C-17/07 P, ECR-SC, EU:C:2008:134, paragraph 98 and the case-law cited).

Costs

85 In accordance with the first paragraph of Article 148 of the Rules of Procedure, where the appeal is well founded and the General Court itself gives final judgment in the case, it is required to make a decision as to costs.

86 Under the first subparagraph of Article 87(3) of the Rules of Procedure, which applies to appeals by virtue of Article 144 of those rules, the General Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that the parties bear their own costs.

87 Accordingly, BP and the FRA must bear their own costs both in the proceedings before the Civil Service Tribunal and on appeal.

On those grounds,

THE GENERAL COURT (Appeal Chamber)

hereby:

1. **Sets aside the judgment of the European Union Civil Service Tribunal (Second Chamber) of 30 September 2013 in *BP* v *FRA* (F-38/12, ECR-SC, EU:F:2013:138) in so far as it dismissed the application brought against the decision of the European Union Agency for Fundamental Rights (FRA), contained in a letter of 27 February 2012, not to renew BP's contract of service as a member of the contract staff;**

2. **Annuls the decision of the FRA, contained in a letter of 27 February 2012, not to renew BP's contract of service as a member of the contract staff;**

3. **Dismisses the appeal as to the remainder;**

4. **Orders BP and the FRA to bear their own costs relating to the proceedings before the Civil Service Tribunal and on appeal.**

Jaeger Martins Ribeiro Van der Woude

Delivered in open court in Luxembourg on 3 June 2015.

[Signatures]