Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)

17 July 2012*

(Civil service — Disciplinary proceedings — Disciplinary measure — Removal from post — Existence of a preliminary investigation before national criminal courts at the time the removal decision was adopted — Equal treatment for men and women — Prohibition on the dismissal of a pregnant worker during the period from the beginning of pregnancy to the end of her maternity leave)

In Case F-54/11,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

BG, a former official of the European Ombudsman, residing in Strasbourg (France), represented by L. Levi and A. Blot, lawyers,

applicant,

v

European Ombudsman, represented by J. Sant'Anna, acting as Agent, assisted by D. Waelbroeck and A. Duron, lawyers,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

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

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2012,

gives the following

Judgment

1 By application received at the Registry of the Tribunal on 4 May 2011, BG brought the present action seeking, first, annulment of the decision of the European Ombudsman to impose on her the penalty of dismissal without loss of pension rights and, secondly, compensation for the damage she claims to have suffered as a result of that decision.

* Language of the case: French.

Legal context

2 Article 47 of the Charter of Fundamental Rights of the European Union reads as follows:

‘…

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

…’

3 Article 23 of the Charter, entitled ‘Equality between men and women’, provides:

‘Equality between men and women must be ensured in all areas, including employment, work and pay.

…’

4 Article 1e(2) of the Staff Regulations of officials of the European Union (‘the Staff Regulations’) provides:

‘Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.’

5 Article 12 of the Staff Regulations provides:

‘An official shall refrain from any action or behaviour which might reflect adversely upon his position.’

6 Article 86(3) of the Staff Regulations reads:

‘Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX.’

7 Annex IX to the Staff Regulations concerns disciplinary proceedings. Article 5 of that annex reads as follows:

‘1. A Disciplinary Board, hereinafter referred to as “the Board”, shall be established in each institution. The Board shall include at least one member, who may be the chairman, chosen from outside the institution.

2. The Board shall consist of a chairman and four full members, who may be replaced by alternates, and, in cases involving an official in a grade up to AD 13, two additional members in the same function group and grade as the official subject to disciplinary proceedings.

3. The members and alternates of the Board shall be appointed from amongst the officials in grade AD 14 or above in active employment in respect of all cases other than those concerning officials in grades AD 16 or AD 15.

…’

8 According to Article 6 of Annex IX to the Staff Regulations:

‘1. The Appointing Authority and the Staff Committee shall each appoint two members and two alternates at the same time.

2. The chairman and alternate for the chairman shall be appointed by the Appointing Authority.

…

5. The official concerned shall be entitled to reject one of the Board members within five days of the Board’s establishment. The institution shall also be entitled to reject one of the Board members.

…’

9 Article 10 of Annex IX to the Staff Regulations provides:

‘The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account shall be taken in particular of:

(a) the nature of the misconduct and the circumstances in which it occurred,

(b) the extent to which the misconduct adversely affects the integrity, reputation or interests of the institutions,

(c) the extent to which the misconduct involves intentional actions or negligence,

(d) the motives for the official’s misconduct,

(e) the official’s grade and seniority,

(f) the degree of the official’s personal responsibility,

(g) the level of the official’s duties and responsibilities,

(h) whether the misconduct involves repeated action or behaviour,

(i) the conduct of the official throughout the course of his career.’

10 Article 18 of Annex IX to the Staff Regulations reads as follows:

‘After consideration of documents submitted and having regard to any statement made orally or in writing and to the results of any investigation undertaken, the [Disciplinary] Board shall, by majority vote, deliver a reasoned opinion as to whether the facts complained of are established and as to any penalty to which those facts should give rise. This opinion shall be signed by all the members of the Board. Each member may attach to the opinion a divergent view. The Board shall transmit the opinion to the Appointing Authority and to the official concerned within two months of the date of receipt of the report of the Appointing Authority, provided that this time limit is commensurate with the degree of complexity of the case. Where an investigation has been held at the Board’s initiative, the time limit shall be four months, provided that this period is commensurate with the degree of complexity of the case.’

11 Article 23 of Annex IX to the Staff Regulations provides that:

‘1. If the Appointing Authority accuses an official of serious misconduct, whether through a failure to honour his professional obligations or through an infringement of the law, it may immediately suspend the person accused of that misconduct for a specified or indefinite period.

2. The Appointing Authority shall take this decision after hearing the official concerned, save in exceptional circumstances.’

12 According to Article 25 of Annex IX to the Staff Regulations:

‘Where the official is prosecuted for those same acts, a final decision shall be taken only after a final judgment has been handed down by the court hearing the case.’

13 Article 2(3) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) provides:

‘This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.’

14 Directive 76/207 was repealed, with effect from 15 August 2009, by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23), Article 1 of that directive, entitled ‘Purpose’, provides:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.’

15 Article 2(2) of Directive 2006/54 provides:

‘For the purposes of this Directive, discrimination includes:

…

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.’

16 Article 10, entitled 'Prohibition of dismissal', of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), reads as follows:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

(1) Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

(2) if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

…'

Background to the dispute

17 After working for the European Ombudsman since 2002 as a member of the temporary staff and then as an official in the assistants' function group (AST), from 1 October 2008 until 3 July 2010 the applicant was employed in the administrators' function group (AD) as the person responsible within the Communication Unit of the Ombudsman's Office for communications, at grade AD 5.

18 At the hearing, the applicant stated that at the material time she owned a house in Kehl (Germany), which she and her husband had never used as their main residence, and that in 2006 she had purchased an apartment in Strasbourg (France) which had subsequently been put up for sale.

19 At the end of February 2008, the applicant submitted an application to a cooperative property development company ('the cooperative company') in order to obtain accommodation in Strasbourg under a public funding scheme available in France for households on modest incomes who are regarded as first-time property buyers. As part of the application process she sent to the cooperative company two income statements, for 2006 and 2007, dated 27 February 2008.

20 By letter of 24 March 2009, the cooperative company asked the applicant to confirm her interest in obtaining that accommodation and to send it certain information.

21 In July 2009, in order to be in a position to validate the applicant's application, the cooperative company asked her to send it her pay slips and those of her husband.

22 The applicant then sent it pay slips for April, May, June and July 2009 ('the pay slips') and information concerning her husband's income.

23 On 3 August 2009 the cooperative company contacted the Head of the Administration and Personnel Unit of the Ombudsman's Office to obtain clarification as regards the account to be taken of the salaries of European Union officials for the purposes of granting mortgages from public funds and also as regards the pay slips provided by the applicant. Following a request from the Ombudsman's Office, on 7 August 2009 the cooperative company sent it a copy of the pay slips.

24 When it examined the pay slips, the Administration and Personnel Unit noticed that they had been altered in such a way that the applicant's income appeared to be less than it really was. Thus the pay slips for April, May and June 2009 showed a net salary of EUR 2 410.36 instead of EUR 5 822.43, and the pay slip for July 2009 showed a net salary of EUR 5 711.32 instead of EUR 9 123.39.

25 On 10 August 2009, the Head of the Administration and Personnel Unit sent an e-mail to the cooperative company informing it, first, that he was not in a position to state what amounts should be taken into account under French law and, secondly, that he had discovered significant inaccuracies in the pay slips provided by the applicant.

26 On 11 August 2009, the Head of the Administration and Personnel Unit proposed commencing an administrative investigation into 'possible falsification of official documents of the Ombudsman … and [their] use vis-à-vis a third party in order to derive personal advantage therefrom'.

27 On 17 August 2009 the cooperative company informed the Head of the Administration and Personnel Unit of its intention to ask the applicant to send it a certificate concerning her qualifying taxable income for 2008.

28 On 25 August 2009 the applicant requested the Ombudsman's Office to provide her with the certificate required by the cooperative company and another certificate in German. The same day, the Head of the Administration and Personnel Unit informed the applicant that it was not possible for him to provide her immediately with the certificate for 2008, but sent her the certificate in German.

29 On 26 August 2009 the applicant submitted to the cooperative company a document entitled 'Certificate' concerning her taxable income for 2008, on headed paper of the Administration [and Personnel] Unit of the European Ombudsman.

30 The cooperative company sent that certificate to the Administration and Personnel Unit, which found that the document in question had not been prepared by that unit. The certificate bore, inter alia, the reference number of the certificate drawn up in German supplied to the applicant on 25 August 2009.

31 On 2 September 2009 the Ombudsman decided to commence an administrative investigation, to inform the French State Prosecutor of the facts in question and to suspend the applicant from her duties for an indefinite period without any reduction in salary. The applicant was informed accordingly the same day.

32 On 3 September 2009 the applicant was invited to an initial hearing as part of the administrative investigation. At that hearing she acknowledged that she had herself falsified the four pay slips and the income certificate for 2008. In addition, she informed the investigators that she was pregnant, answered the questions put to her and gave the investigators a handwritten letter in which she stated that she did not deny the facts complained of but wished to provide some explanation. Inter alia, she stated that she had acted 'foolishly' and had done so in order 'to put an end to a situation that was absolutely intolerable for her family', namely the difficulty in obtaining a mortgage due to her husband's serious illness.

33 On 18 September 2009 the investigators sent the applicant their findings with regard to the facts complained of. The applicant provided further comments on 22 September 2009, stating, in particular, that at the beginning of July 2009 she had realised that she was pregnant and had acted in a fit of panic, fearing that her application to the cooperative company would not be accepted.

34 By letter of 24 September 2009, the investigators sent the Ombudsman the report from the administrative investigation, in which they found that the applicant had falsified documents and had sent them to the cooperative company as documents in support of an application which, if it had been

successful, would have enabled her to receive a mortgage under conditions available under French law only for households on modest incomes. Consequently, the investigators recommended commencement of disciplinary proceedings.

35 On 23 October 2009 the applicant was heard by the Ombudsman at a preliminary hearing under Article 3 of Annex IX to the Staff Regulations.

36 On 20 November 2009 the Ombudsman decided to commence disciplinary proceedings. However, in view of the applicant's pregnancy and acting on the opinion of the institution's medical officer, a decision was taken on 18 January 2010 to postpone measures connected with the disciplinary proceedings to a date after the applicant's confinement.

37 On 19 May 2010 the Ombudsman referred the case to the disciplinary board, which heard the applicant on 8 July 2010.

38 On 9 July 2010, the disciplinary board delivered a reasoned opinion, in which it concluded that the facts complained of were established and were acknowledged by the applicant.

39 With regard to the penalty proposed, the disciplinary board explained its position as follows:

"– the facts complained of reflect adversely on [the applicant's] position, particularly in the context of the integrity of the institution which employs her, and constitute serious breaches of Article 12 of the Staff Regulations …,

– the intentional nature of the facts complained of and the responsibility of the official are unquestionable,

– the official's duties involve a high level of responsibility,

– the facts complained of involve no repeated action,

– the official has received good staff reports throughout her period of service.'

40 Taking that evidence into account, the disciplinary board, by a majority decision, proposed that the penalty should be 'classification of the official in a lower function group and downgrading (AST 1, step 1)'. A minority of the disciplinary board were, however, of the view that removal from post was the most appropriate penalty.

41 In its decision of 20 July 2010, of which the applicant was notified on 22 July 2010, the Ombudsman decided to impose the penalty of dismissal without loss of pension rights with effect from 31 July 2010 ('the contested decision').

42 On 21 October 2010 the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 20 July 2010.

43 By decision dated 18 January 2011, of which the applicant was notified on 24 January 2011, the Ombudsman dismissed the complaint.

Forms of order sought by the parties and procedure

44 The applicant claims that the Tribunal should:

— annul the decision of 20 July 2010;

— where appropriate, annul the decision dated 18 January 2011 and notified on 24 January 2011 expressly dismissing her complaint;

and consequently:

— declare that annulment of the contested decision entails her reinstatement, retrospectively to the date on which that decision was taken, in her post as administrator in Grade AD 5, step 2, and payment of the financial entitlements due to her throughout that period, together with interest for delayed payment at the European Central Bank rate plus 2 points;

— in the alternative, order the Ombudsman to pay a sum corresponding to the remuneration that the applicant would have received from the date on which her dismissal took effect until the month in which she will reach retirement age in July 2040, and the corresponding adjustment of the applicant's pension rights;

— in any event, order the Ombudsman to pay the sum of EUR 65 000 in respect of the non-material damage suffered by the applicant;

— order the Ombudsman to pay all the costs.

45 The Ombudsman contends that the Tribunal should:

— dismiss the application as unfounded in its entirety;

— order the applicant to pay the costs.

46 In its preparatory report for the hearing, sent by letter of 15 December 2011, the Tribunal requested the parties to comply with measures of organisation of procedure, and the parties acted on that request within the prescribed period. However, the applicant informed the Tribunal that she was not in a position to produce a copy of the information sheet attached to the cooperative company's request of 24 March 2009.

Law

1. *Subject matter of the action*

47 Besides annulment of the decision of 20 July 2010, the applicant seeks annulment, where appropriate, of the decision of 18 January 2011 by which the appointing authority dismissed her complaint.

48 According to settled case-law, a claim for annulment formally directed against the decision rejecting a complaint, where that decision lacks any independent content, has the effect of bringing before the Tribunal the act against which the complaint was submitted (see, to that effect, judgment of 17 January 1989 in Case 293/87 *Vainker* v *Parliament*, paragraph 8). Since the decision rejecting the complaint brought against the contested decision lacks any independent content in the present case, the action must be regarded as being directed against the contested decision alone.

49 Moreover, the Tribunal notes that it is not for the Tribunal, in the context of an action brought under Article 91 of the Staff Regulations, to issue directions to the European Union institutions (see, for example, judgment of 24 February 2010 in Case F-89/08 *P* v *Parliament*, paragraph 120, and judgment of 14 September 2010 in Case F-52/09 *Da Silva Pinto Branco* v *Court of Justice*,

paragraph 31). The claim that the Tribunal should find that annulment of the contested decision entails the applicant's reinstatement, retrospectively to the date on which that decision was taken, in her post as administrator in Grade AD 5, step 2, must accordingly be rejected as inadmissible.

2. *The claim for annulment*

50 In support of her claim for annulment of the contested decision, the applicant puts forward five pleas: infringement of the disciplinary proceedings provided for in the Staff Regulations, breach of the obligation to state reasons, a manifest error of assessment, breach of the principle of equal treatment for men and women and of the right to maternity leave, and breach of the duty to have regard for the welfare of staff and of the principle of sound administration.

51 The applicant also raises in her written pleadings a question concerning the role of the Ombudsman in the context of disciplinary proceedings as regards the principles of equality of arms between the parties and of a fair hearing. However, even if the applicant intends by so doing to raise a plea in support of her claim for annulment, that plea, since it is not supported by any arguments, contrary to the rule laid down in Article 35(1)(e) of the Rules of Procedure, must be rejected as inadmissible.

The first plea: infringement of the disciplinary proceedings provided for in the Staff Regulations

52 The plea alleging infringement of the disciplinary proceedings provided for in the Staff Regulations can be divided into three parts: infringement of Article 25 of Annex IX to the Staff Regulations, infringement of Article 23 of Annex IX to the Staff Regulations and infringement of Articles 5 and 6 of Annex IX to the Staff Regulations.

The first part of the plea: the existence of a criminal prosecution based on the same facts

– Arguments of the parties

53 The applicant claims that the Ombudsman took a final decision without waiting for the outcome of the criminal prosecution brought against her, in breach of Article 25 of Annex IX to the Staff Regulations.

54 According to the Ombudsman, the meaning of 'criminal prosecution' used in Article 25 of Annex IX to the Staff Regulations must be assessed in the light of the national law applicable in the present case and hence in the light of French law. The Ombudsman contends in that regard that no 'criminal prosecution', within the meaning of French law, existed at the time the contested decision was adopted and requests the Tribunal to reject that part of the first plea.

55 At the hearing, the applicant argued that it was necessary to give Article 25 of Annex IX to the Staff Regulations an independent interpretation and that the reference to French law made by the Ombudsman in its defence was not relevant.

– Findings of the Tribunal

56 As a preliminary point, it must be stated that the submission alleging infringement of Article 25 of Annex IX to the Staff Regulations was not raised in the pre-litigation procedure.

57 The Ombudsman did not raise a plea of inadmissibility against the applicant. However, correspondence between the administrative complaint and the legal action, upon which the admissibility of that action depends, constitutes an issue of public policy which may be raised by the court of its own motion (see judgment of 11 July 2007 in Case F-7/06 *B* v *Commission*, paragraph 26 and the case-law cited).

58 That rule can apply only where the judicial action alters the relief sought in the complaint or its cause of action, and the concept of 'cause of action' must be given a broad interpretation. In particular, as regards claims for annulment, the 'cause of action of the dispute' must be understood as the applicant's challenge to the substantive legality of the contested decision or, in the alternative, the challenge to its procedural legality, a distinction which has been recognised in the case-law (see judgment of 1 July 2010 in Case F-40/09 *Časta* v *Commission*, paragraph 83 and the case-law cited).

59 In the present case, the applicant put forward several arguments at the complaint stage concerning both the procedural legality and the substantive legality of the contested decision, namely: the irregular nature of the procedure for the adoption of that decision, the material inaccuracy of the facts complained of, breach of the obligation to state reasons and breach of the principle of proportionality. It follows that, by raising in her application the plea alleging infringement of Article 25 of Annex IX to the Staff Regulations, the applicant did not fail to observe the rule of correspondence and, consequently, this plea is admissible.

60 As regards the substance, suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings, as provided for in Article 25 of Annex IX to the Staff Regulations, has a twofold rationale.

61 First, it is intended to ensure that the position of the official in question is not affected in any criminal prosecution brought against him on the basis of facts which are also the subject matter of disciplinary proceedings within his institution (judgment of 19 March 1998 in Case T-74/96 *Tzoanos* v *Commission*, paragraph 34).

62 Secondly, such suspension makes it possible to take into consideration, in the disciplinary proceedings, the findings of fact made by the criminal court when its verdict has become final. Indeed, Article 25 of Annex IX to the Staff Regulations establishes the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial, a rule which is justified in particular by the fact that the national criminal courts have greater investigative powers than the appointing authority. Consequently, where the same facts may constitute both a criminal offence and a breach of the official's obligations under the Staff Regulations, the administration is bound by the findings of fact made by the criminal court in the criminal proceedings. Once that court has established the existence of the facts in the case, the administration can then undertake their legal classification in the light of the concept of a disciplinary offence, ascertaining, in particular, whether they constitute breaches of obligations under the Staff Regulations (judgment of 10 June 2004 in Case T-307/01 *François* v *Commission*, paragraph 75, and judgment of 13 January 2010 in Joined Cases F-124/05 and F-96/06 *A and G* v *Commission*, paragraph 323).

63 Furthermore, it is apparent from the relevant case-law that it is for the official concerned to provide the appointing authority with sufficient information to enable it to determine whether the matters of which he is accused in disciplinary proceedings are at the same time the subject of a criminal prosecution against him. In order to meet that obligation the official concerned has, as a rule, to show that a criminal prosecution was brought against him while he was the subject of disciplinary proceedings. It is only where such a criminal prosecution has been brought that the matters to which it relates can be identified and compared with the matters in respect of which the disciplinary proceedings have been instituted so that it can be determined whether they are the same (see judgment of 30 May 2002 in Case T-197/00 *Onidi* v *Commission*, paragraph 81).

64 It is therefore for the Tribunal to decide first of all whether, in the circumstances of the present case, the applicant has shown that 'a criminal prosecution on the basis of the same facts' had been brought at the time the contested decision was adopted.

65 The Tribunal notes from the outset that, according to settled case-law, the terms of a provision of European Union law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation which must take into account the context of the provision and the purpose of the relevant rules (judgment of 5 October 2009 in Case T-58/08 *Commission* v *Roodhuijzen*, paragraph 70, and judgment of 13 September 2011 in Case T-62/10 P *Zangerl-Posselt* v *Commission*, paragraph 41 and the case-law cited). It is only where it cannot identify in European Union law or in the general principles of European Union law criteria enabling it to define the meaning and scope of such a provision by an independent interpretation that the European Union Courts may, even in the absence of an express reference, find it necessary to refer to the laws of the Member States for the application of European Union law.

66 It is clear from that case-law that it is necessary first to consider the relevant provisions of the Staff Regulations (*Commission* v *Roodhuijzen*, paragraph 71). The only references to 'criminal prosecution' in the Staff Regulations are in Articles 24 and 25 of Annex IX, hence in the context of disciplinary proceedings, and so they do not provide any useful indication as to the meaning of that term. The Tribunal must therefore find that the Staff Regulations do not clarify the meaning of 'criminal prosecution', in contrast, for example, to the meaning of an official's 'stable non-marital partner' for the purposes of the household allowance in *Commission* v *Roodhuijzen*, a term used in Article 1(2)(c) of Annex VII to the Staff Regulations.

67 As regards European Union law, it should be pointed out that the legislature has adopted several measures which refer, expressly or implicitly, to national law for a definition of the term 'criminal proceedings' or more specifically 'criminal prosecution'. Thus, for example, Article 1(c) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1) provides that '"criminal proceedings" shall be understood in accordance with the national law applicable'. Similarly, Article 2 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1) gives rights to a 'suspect or accused person' without providing independent definitions of those terms.

68 The Tribunal concludes from this that it is not possible to identify in European Union law criteria enabling it to define the meaning and scope of the term 'criminal prosecution' used in Article 25 of Annex IX to the Staff Regulations by an independent interpretation. In those circumstances, the Tribunal can only refer, for the application of that provision, to the law of the Member States, in the present case, that of the French Republic, whose criminal authorities consider they have jurisdiction with regard to the facts complained of.

69 In that regard, it is apparent from the documents in the case that at the time the contested decision was taken a preliminary investigation was under way into facts classified as 'falsification of official documents of the Ombudsman … and use vis-à-vis a third party in order to derive personal advantage therefrom', but no judicial investigation had been commenced and assigned to an investigating magistrate.

70 Secondly, the Tribunal observes that in French law, the term 'criminal prosecution', because it involves the bringing of a public prosecution in order to impose penalties, cannot include the existence of a mere preliminary investigation. It follows that, under French law, a criminal prosecution had not been brought in the present case at the time the contested decision was adopted.

71 However, even in the absence of a criminal prosecution within the meaning of the national law, where an official is the subject, as in the present case, of an investigation liable to lead to a criminal prosecution, he must be allowed to demonstrate, specifically and in accordance with the twofold rationale of Article 25 of Annex IX to the Staff Regulations, both that the disciplinary decision was capable of affecting his position in any subsequent criminal prosecution to which the investigation

might lead (see *Tzoanos* v *Commission*, paragraph 38) and that, in the context of the disciplinary proceedings, the administration took into consideration facts contested by the applicant before the criminal court had reached a final decision on them.

72 That is not the case in this instance.

73 First, the applicant confined herself to stating in her application that the condition laid down in Article 25 of Annex IX to the Staff Regulations had not been met, without even attempting to show that a final decision on her case was capable of affecting her position in any subsequent criminal prosecution to which the investigation under way at the time of the disciplinary proceedings might lead, a criminal prosecution which would relate to the same acts.

74 Secondly, as regards the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial, the Tribunal notes that where that principle must be applied in the context of mere investigations before a criminal prosecution has been brought, it must be interpreted narrowly if it is not to deprive the disciplinary proceedings of all effectiveness. In particular, that principle cannot prevent the administration from adopting a disciplinary measure where it bases itself on facts which, at the time its decision was adopted, were not contested by the official concerned.

75 In the present case, it is clear from the documents in the case that all the facts on which the contested decision is based – the alteration of four pay slips and an income certificate, and the submission of those altered documents to third parties in connection with an application to obtain a bank loan at an advantageous rate – were admitted by the applicant and confirmed on several occasions throughout the procedure which gave rise to the contested decision. Moreover, the applicant does not seek to show that a French criminal court to which the matter might be referred at the end of the preliminary investigation of which she is the subject might make findings of fact capable of casting doubt in any way on the substantive accuracy of those facts.

76 When questioned on that point at the hearing, the applicant confined herself to stating that a potential criminal investigation might shed light on certain 'grey areas' such as the circumstances in which the 2008 income certificate was altered, the existence of an interest on her part in altering the pay slips and that certificate, and the existence of a personal advantage which the applicant would derive from the misconduct complained of.

77 However, it is clear from the documents in the case that the questions concerning, on the one hand, her potential interest in altering the pay slips and the certificate of income and, on the other hand, the personal advantage she may have derived from such alterations, were not decisive factors in the decision of the Ombudsman, which merely took into consideration, by way of an aggravating circumstance, the applicant's purpose in using those documents 'in connection with an application to obtain a bank loan at an advantageous rate intended for families on modest incomes' – which is not disputed by the applicant – and dismissed the applicant's alternative explanations.

78 It is clear from all the foregoing that, whilst no criminal prosecution had yet been brought against the applicant at the time the contested decision was adopted, the applicant did not provide specific evidence that, in the event that the investigation under way at the time the contested decision was adopted should lead to a criminal prosecution for the same acts, the disciplinary decision was capable of affecting her position in any criminal proceedings, nor that the administration took into consideration facts other than those which had been admitted by the applicant.

79 The first part of the first plea must therefore be dismissed as unfounded.

The second part of the first plea: a procedural defect in the adoption of the suspension decision

– Arguments of the parties

80 The applicant claims that the decision to suspend her was taken in breach of Article 23 of Annex IX to the Staff Regulations since she had not been heard before that decision was adopted.

81 The Ombudsman counters by contending, first, that the decision to suspend the applicant had been adopted without hearing her but in accordance with the provisions of Article 23 of Annex IX to the Staff Regulations, which provides for that possibility in exceptional circumstances. Secondly, the Ombudsman contends that even if there was a procedural defect in the adoption of the suspension decision it would have no effect on the contested decision.

– Findings of the Tribunal

82 It is settled case-law that a decision to suspend an official is an act adversely affecting him, which may form the subject matter of an action for annulment under the conditions laid down in Articles 90 and 91 of the Staff Regulations (judgment of 19 May 1999 in Case T-203/95 *Connolly* v *Commission*, paragraph 33).

83 However, such a decision constitutes not an essential procedural measure, preparatory to the final decision setting out the penalty to be imposed, but an autonomous decision which the appointing authority may adopt and the application of which is subject to an allegation of serious misconduct (see *Connolly* v *Commission*, paragraph 36, and judgment of 16 December 2004 in Joined Cases T-120/01 and T-300/01 *De Nicola* v *EIB*, paragraph 113). It follows that any defect in the suspension decision would have no effect on the validity of the contested decision.

84 Consequently, the second part of the first plea is ineffective and must therefore be rejected.

The third part of the first plea: the irregular composition of the disciplinary board

– Arguments of the parties

85 The applicant submits that a disciplinary board composed exclusively of members from outside the institution, such as the disciplinary board to which this case was referred by the Ombudsman, was constituted in breach of Articles 5 and 6 of Annex IX to the Staff Regulations.

86 The Ombudsman contends that the Tribunal should reject the third part of the first plea.

– Findings of the Tribunal

87 Article 5(1) of Annex IX to the Staff Regulations, by confining itself to providing that at least one member of the disciplinary board must be chosen from outside the institution concerned, does not in any way preclude the majority, or even all, of the members of the disciplinary board from being chosen from outside the institution.

88 Not only is there no textual basis for an interpretation of that provision which led to the exclusion of disciplinary boards composed exclusively of members from outside the institution concerned, but, as the Ombudsman rightly contended in its defence, it would mean that in the case of institutions or bodies which did not have a sufficient number of officials having the grade required by Articles 5 and 6 of Annex IX to the Staff Regulations to participate in a disciplinary board, it would be impossible validly to constitute such a board.

89 Consequently, the third part of the first plea must be rejected as unfounded.

90 It follows from the foregoing considerations that the first plea must be rejected in its entirety.

The second plea: breach of the obligation to state reasons

Arguments of the parties

91 The applicant contends that neither the opinion of the disciplinary board nor the decision to remove her from her post comply with the requirement to state reasons.

92 In the first place, the applicant cites the brevity of the opinion of the disciplinary board, which does not explain how or why the facts complained of reflect adversely on her position. Furthermore, the applicant challenges the disciplinary board's assertion that her duties involved a high level of responsibility, pointing out that she was an official in the lowest grade in function group AD.

93 Secondly, the applicant contends that the decision to remove her from her post does not comply with the requirement to state reasons where the opinion of the disciplinary board is not followed.

94 According to the applicant, in the contested decision the Ombudsman '[does not] determine whether the facts complained of are true', confines itself to drawing up a list of aggravating or mitigating factors, which appear to be merely rhetorical devices, and fails completely to explain how the penalty of removal from post is more appropriate than the downgrading advocated by the disciplinary board.

95 The Ombudsman argues that the disciplinary board and the appointing authority complied with the obligation to state reasons by setting out the relevant factors and contends that this plea should be rejected.

Findings of the Tribunal

96 According to settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (see judgment of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission*, paragraph 93 and the case-law cited).

97 The question whether the statement of reasons of the appointing authority's decision imposing a penalty meets those requirements must be assessed having regard not only to its wording, but also to its context and to all the legal rules governing the matter in question. In that regard, although the disciplinary board and the appointing authority are required to state the issues of fact and law which constitute the legal basis of their decisions and the considerations which led them to adopt them, they are not required to discuss all the issues of fact and law which have been raised by the interested party during the proceedings (judgment of 5 December 2002 in Case T-277/01 *Stevens* v *Commission*, paragraph 71 and the case-law cited).

98 Moreover, if, as in the present case, the penalty imposed by the appointing authority is more severe than that suggested by the disciplinary board, the decision must clearly state the reasons which led the appointing authority to depart from the opinion issued by disciplinary board (see, to that effect, judgment of 29 January 1985 in Case 228/83 *F.* v *Commission*, paragraph 35).

99 It is in the light of those principles that it is necessary to consider whether the opinion of the disciplinary board and the contested decision state adequate reasons.

100 First, with regard to the submission concerning the brevity of the disciplinary board's opinion, the Tribunal notes that that opinion is indeed rather short. However, the disciplinary board does state that the applicant has acknowledged the truth of the alleged facts and the opinion does cover the various aggravating and mitigating factors which support the proposal to downgrade the applicant, so that it allows the Tribunal to exercise its power of review and provides the person concerned with the information necessary to enable her to decide whether or not the decision is well founded. Accordingly, that submission must be rejected.

101 The applicant's challenge to the disciplinary board's assessment of the high level of responsibility of the tasks she engaged in is a question which goes to the merits rather than one concerning the adequacy of the statement of reasons. It will therefore be examined below in the context of the third plea concerning a manifest error of assessment.

102 As regards the statement of reasons for the contested decision, first, it refers to the applicant's employment status, the 'falsification of four pay slips' and a certificate, and the 'use of those falsified documents vis-à-vis third parties' in connection with an application for a bank loan at an advantageous rate. Secondly, the decision takes into consideration the fact that the applicant acknowledged the truth of those facts right from the stage of the initial hearing before the disciplinary board and did not deny them throughout the proceedings. Thirdly, the Ombudsman explains that the actions of which the applicant is accused and her subsequent conduct 'make it impossible to maintain, or even restore, the relationship of institutional, professional and personal trust between the Ombudsman and [the applicant]' and that, in view of the serious nature of her conduct and her actions, to keep her in the civil service would seriously tarnish the image of the service and would have very negative effects on the moral authority of the Ombudsman.

103 Such a statement of reasons, far from being mere rhetoric, sets out the specific facts of which the applicant is accused and the considerations which led the appointing authority to adopt the penalty of removing her from her post rather than downgrading her. That statement of reasons provides the person concerned with the information necessary to enable her to decide whether or not the contested decision is well founded and allows the Tribunal to exercise its power of review.

104 In the light of those factors, the statement of reasons of the disciplinary board's opinion and of the contested decision cannot be regarded as inadequate.

105 Consequently, the second plea must be rejected as unfounded.

The third plea: manifest error of assessment

106 The third plea comprises two parts, alleging, first, the substantive inaccuracy of the facts relied on and, secondly, a breach of the principle of proportionality.

The first part of the third plea: the substantive inaccuracy of the facts relied on

– Arguments of the parties

107 The applicant claims that the Ombudsman committed a manifest error of assessment in finding that she intended to derive from her misconduct 'personal advantage of a social nature', according to the wording of the contested decision. Moreover, she states that, according to French case-law, forgery is not a punishable offence under Article 441-1 of the French Criminal Code unless the item forged or altered is capable of causing another person actual or potential harm, and she contends that in the present case her action did not cause any harm.

108 The Ombudsman contends that the first part of the third plea should be rejected.

– Findings of the Tribunal

109 The Tribunal notes that the decision to impose the penalty of removal from post results from the fact, not disputed by the applicant, that she altered several official documents and that she used them vis-à-vis a third party. The substantive accuracy of those facts is therefore not called into question by the applicant.

110 Although the contested decision accuses the applicant of using 'falsified documents vis-à-vis a third party in order to derive personal advantage of a social nature therefrom', that decision is based on the fact that official documents had been altered and used vis-à-vis a third party. By way of an aggravating circumstance, the contested decision cites the applicant's intention to use those documents 'in connection with an application to obtain a bank loan at an advantageous rate intended for families on modest incomes'. That circumstance is not denied by the applicant, who merely contends that she did not derive any advantage of a social nature from her misconduct, without putting forward any argument capable of showing that the contested decision took that purpose as a basis. It should also be pointed out, for the sake of completeness, that the contested decision examines in detail, and rejects, the various explanations given by the applicant, and that the applicant did not provide any other satisfactory explanation for her actions.

111 Secondly, the legal classification of the applicant's actions under French criminal law is not relevant, since the contested facts were examined by the Ombudsman from the point of view of a disciplinary offence, not a criminal offence.

112 In those circumstances, the Tribunal finds that the applicant has not provided any argument capable of showing that the contested decision contained an error of assessment regarding the truth of the facts complained of. The first part of the third plea must therefore be rejected.

The second part of the third plea: manifest breach of the principle of proportionality

– Arguments of the parties

113 The applicant claims that the final and irreversible nature of the penalty imposed is disproportionate in the light of the misconduct in question and the circumstances of the case and that the Ombudsman wrongly assessed the aggravating and mitigating circumstances.

114 The Ombudsman contends that the Tribunal should reject the second part of the third plea.

– Findings of the Tribunal

115 According to Article 10 of Annex IX to the Staff Regulations, the disciplinary penalty imposed must be commensurate with the seriousness of the misconduct. That article also lays down some of the criteria which the appointing authority must take into account when deciding on a penalty.

116 The penalty to be imposed is to be determined on the basis of an overall assessment by the appointing authority of all the concrete facts and matters appertaining to each individual case, since the Staff Regulations do not specify any fixed relationship between the disciplinary measures listed by them and the various types of misconduct on the part of officials, and do not state the extent to which aggravating or mitigating circumstances are to be taken into account in the choice of penalty.

117 It should also be noted that observance of the principle of effective judicial protection laid down in Article 47 of the Charter does not mean that, in a procedure of an administrative nature, a penalty may not be imposed first by an administrative authority. This assumes, however, that the decision of an administrative authority which does not itself meet the conditions laid down in that article, like the appointing authority's decision in the present case, is subject to subsequent review by a 'judicial body that has full jurisdiction' (see, to that effect and by analogy, European Court of Human Rights, *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58; *Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria*, 23 October 1995, §§ 34, 37, 42, 39, 41 and 38, Series A no. 328 A-C and 329 A-C, respectively; and *Mérigaud v. France*, no. 32976/04, § 68, 24 September 2009). In order to be classified as a 'judicial body that has full jurisdiction', a judicial body must inter alia have jurisdiction to examine all questions of fact and law relevant to the dispute before it (European Court of Human Rights, *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III and the case-law cited, and *Silvester's Horeca Service v. Belgium*, no. 47650/99, § 27, 4 March 2004), which means, in the case of a disciplinary measure, that it should in particular have the power to determine the proportionality between the misconduct and the penalty, without confining itself to seeking out manifest errors of assessment or misuse of powers (judgment of 15 May 2012 in Case T-184/11 P *Nijs* v *Court of Auditors*, paragraphs 85 and 86).

118 It is within the legal framework described in paragraphs 115 to 117 above that the Tribunal must assess the arguments put forward by the applicant with regard to an alleged breach of the principle of proportionality by examining whether the appointing authority weighed up the aggravating and mitigating circumstances in a proportionate manner.

119 In the circumstances of the present case, it does not appear that the contested penalty is disproportionate since, by altering official documents, the applicant acted in a manner which reflected adversely upon her position and breached once and for all the relationship of trust with the Ombudsman. Furthermore, the applicant has put forward no argument to show that the penalty imposed is disproportionate in relation to the conduct alleged against her.

120 In particular, the applicant complains that the Ombudsman, in the first place, was wrong to regard as aggravating circumstances the important duties she performed as the administrator responsible for communications, the seriously culpable nature of the facts complained of, the applicant's inability and refusal to acknowledge the facts, the significant harm caused to the reputation of the Ombudsman and the fact that her actions were premeditated.

121 So far as the applicant's responsibilities are concerned, as the Ombudsman rightly notes in its written pleadings, the applicant was the only administrator in the Communication Unit. Moreover, it is clear from the staff reports annexed to the application that she was indeed responsible for performing important duties in connection with public procurement and the management of public funds. The applicant's experience in the Ombudsman's Office and the important duties assigned to her show the Ombudsman's trust in the applicant and justify the fact that he took those factors into consideration as aggravating circumstances (see, to that effect, *Onidi* v *Commission*, paragraph 146).

122 As regards the description of the facts and the seriousness of the misconduct, the applicant merely states that the latter is not such that it constituted the negation of her position as an official, but she does not put forward any argument capable of casting doubt on the Ombudsman's assessment that the fact of altering official documents and using them vis-à-vis a third party is very serious misconduct.

123 With regard to the submission concerning the applicant's 'inability and refusal to acknowledge the facts' and the fact that she did not make any apologies for her conduct, the Tribunal notes that the Ombudsman did not deny that the applicant acknowledged the facts and that in the contested decision he did consider the applicant's 'inability and refusal to acknowledge the seriousness of the facts' to be an aggravating circumstance. Moreover, although during the interview with the

investigators the applicant had stated straightaway that she was 'aware of the seriousness of the facts', it is apparent from the documents in the case that on several occasions she did attempt to minimise it. For instance, at the hearing with the Ombudsman, she pointed out that the cooperative company and the State Prosecutor did not attach much importance to the case; similarly, in the additional comments of 3 November 2009 she complained of the Ombudsman's 'wish to make too much of them so that ultimately he breached the principle of proportionality'. Lastly, the applicant merely apologised to the investigators 'for the horrible and distressing time caused them by that situation and her actions', but did not at any point apologise for her misconduct. Consequently, the Ombudsman cannot be criticised for finding that the fact the applicant had not understood the seriousness of the facts complained of was an aggravating circumstance.

124 The applicant contends that the Ombudsman was wrong to regard the harm which her actions caused to the Ombudsman's reputation as an aggravating circumstance, since the case remained confidential. However, the Tribunal notes that the applicant herself complains of the publicity given to the case and that, as the Ombudsman points out, the case is certainly known to the cooperative company and the French public authorities to which, in pursuance of Article 4(2) of Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113, p. 15), the Ombudsman reported the facts complained of, so that this submission cannot be upheld.

125 Lastly, the applicant disputes the claim of premeditation put forward by the Ombudsman. However, it suffices to say that it is not disputed that the applicant's misconduct extended over a period of approximately two months, from the beginning of July 2009 until 26 August 2009, the date on which the applicant sent to the cooperative company the income certificate which she had prepared herself. Moreover, the actions which the applicant acknowledges she committed clearly involve a level of preparation which rules out any 'impetuous action', which the applicant alleges. The applicant's argument must therefore be rejected.

126 Secondly, with regard to the assessment of the mitigating circumstances, the applicant complains that the Ombudsman did not take into account her personal distress and that of her family. However, the fact that the Ombudsman dismissed those arguments does not indicate that he failed to take them into consideration.

127 Furthermore, the applicant complains that the Ombudsman failed to draw the appropriate conclusions from the fact that there had been no repeated action on her part. In that regard, Article 10(h) of Annex IX to the Staff Regulations states that, to determine the seriousness of the misconduct the appointing authority must take into account whether the misconduct involves repeated action or behaviour, so that any repeated action might justify an increase in the penalty. However, the fact that there has been no repeated action is not in itself a mitigating circumstance, since in principle an official is required to refrain from any action or behaviour which might reflect adversely upon his position (see, to that effect, judgment of 30 November 2011 in Case T-208/06 *Quinn Barlo and Others* v *Commission*, paragraphs 255 and 264, which state that in competition matters the fact that there has been no repeated infringement is not in itself a mitigating circumstance; that judgment is the subject of an appeal pending before the Court of Justice, Case C-70/12 P).

128 The applicant complains that the Ombudsman confused her private misconduct and her professional activities, her misconduct being totally independent of her professional duties. However, that submission must be rejected, since the respect which an official owes to his position is not confined to the particular time at which he carries out a specific task but is expected from him under all circumstances (judgment of 6 March 2001 in Case C-274/99 P *Connolly* v *Commission*, paragraphs 79 to 93 and 130, and judgment of 7 March 1996 in Case T-146/94 *Williams* v *Court of Auditors*, paragraph 68).

129 Lastly, the applicant complains that the Ombudsman did not regard as a mitigating circumstance her staff reports, in which the Ombudsman stated that her standard of efficiency was excellent. However, irrespective of the assessment given in the applicant's staff reports and even though the Ombudsman stated in the contested decision that the applicant's effectiveness and ability were undeniable, the appointing authority was nevertheless fully entitled to find that, having regard to the gravity of the facts established and the applicant's grade and responsibilities, such a factor was not capable of mitigating the penalty to be imposed (see Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission*, paragraph 167).

130 It follows from the foregoing considerations that the third plea must be rejected in its entirety as unfounded.

The fourth plea: equal treatment for men and women and the right to maternity leave

Arguments of the parties

131 The applicant contends that since the contested decision took effect whilst she was on maternity leave it infringes Article 2(3) of Directive 76/207 and Article 10 of Directive 92/85.

132 Whilst accepting that Directive 92/85 may apply in principle, the Ombudsman contends that Article 10 of that directive does not prohibit the dismissal of a pregnant worker except where such dismissal is connected with her condition, and contends that this plea should be rejected.

Findings of the Tribunal

133 With regard to the alleged breach of the principle of equal treatment for men and women, it must be stated from the outset that Article 23 of the Charter requires observance of the principle of equality between men and women in all areas, including employment, and that the principle of non-discrimination in respect of pregnant workers is laid down in Article 2(2)(c) of Directive 2006/54 and Article 10 of Directive 92/85. The applicant's written pleadings must therefore be understood as referring to those provisions.

134 The Tribunal notes that case-law has recognised that it is necessary to ensure equality as between female and male workers employed by the European Union institutions (judgment of 28 January 1992 in Case T-45/90 *Speybrouck* v *Parliament*, paragraph 48).

135 In the present case, the applicant has not established any fact that shows the existence of direct or indirect discrimination, and such discrimination cannot be presumed merely from the fact that the Ombudsman was aware of the applicant's pregnancy.

136 In the absence of any fact that would allow the presumption that the applicant has established the existence of direct or indirect discrimination, it is not for the Ombudsman to prove that there was no breach of the principle of equal treatment for men and women.

137 As regards the alleged infringement of Article 10 of Directive 92/85, Article 1e(2) of the Staff Regulations provides that officials in active employment are to be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.

138 The purpose of Directive 92/85 is to improve the working environment by increasing the health and safety of pregnant workers. Therefore, that directive is binding on institutions where the latter, within the scope of their organisational autonomy and within the limits of the Staff Regulations, must provide pregnant workers with protection equivalent to the minimum protection offered by the directive (see judgment of 30 April 2009 in Case F-65/07 *Aayhan and Others* v *Parliament*, paragraph 116).

139 However, Article 10 of Directive 92/85 cannot be interpreted to mean that it prohibits any dismissal of a pregnant worker. A dismissal decision taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with the pregnancy is not contrary to Article 10 of Directive 92/85, provided that the employer gives substantiated grounds for dismissal in writing and that the dismissal of the person concerned is permitted under the relevant national legislation and/or practice, in accordance with Article 10(1) and (2) of that directive (see judgment of 11 November 2010 in Case C-232/09 *Danosa*, paragraph 63).

140 In the first place, it is clear from the documents in the case that the removal of the applicant from her post is in no way connected with her pregnancy. Furthermore, the applicant did not claim, either in her written pleadings or in her oral arguments at the hearing, that the decision to remove her from her post was due to the fact that she was pregnant.

141 Secondly, the Ombudsman gave the reasons for the dismissal in writing in the contested decision.

142 Thirdly, although the Staff Regulations contain no specific provision laying down an express exception to the prohibition laid down in Article 10 of the directive, they must be interpreted as allowing such an exception in Article 47(e), which provides for the possibility, purely by way of an exception, that an official's service may be terminated where a removal decision is adopted following disciplinary proceedings.

143 It follows from the foregoing considerations that the fourth plea must be rejected as unfounded.

The fifth plea: breach of the duty to have regard for the welfare of staff and of the principle of sound administration

Arguments of the parties

144 The applicant complains that the Ombudsman decided to wait until 19 May 2010 to commence disciplinary proceedings despite the fact that she had requested in writing, producing a medical certificate from her regular doctor, that the proceedings be concluded as soon as possible, in view of the effects of the stress thus caused on her pregnancy. Moreover, the applicant points out that the proceedings were conducted whilst she was pregnant, then a new mother, which demonstrates a lack of regard for her welfare on the part of the Ombudsman.

145 The Ombudsman contends that the Tribunal should reject this plea.

Findings of the Tribunal

146 It is clear from the documents in the case that on 25 November 2009 the applicant contacted the Ombudsman to inform him that she was experiencing stress in connection with the proceedings and that that stress could have negative effects on the progress of her pregnancy. By letter of 27 November 2009, the Ombudsman informed the applicant of its intention to ask his medical officer to examine the applicant's medical situation in order to suggest to her possible measures to minimise the impact of the disciplinary proceedings on her own health and on that of her unborn baby. Acting on the opinion of the institution's medical officer, which was that the applicant's state of health was

fragile and could be negatively affected by disciplinary proceedings, on 18 January 2010 the Ombudsman took the decision to postpone measures in connection with the disciplinary proceedings to a date after the applicant's confinement.

147 It must be concluded that it was indeed out of concern for the applicant's welfare that the Ombudsman postponed the commencement of the disciplinary proceedings.

148 Consequently, the fifth plea must be rejected as unfounded.

3. *The claims for damages*

Arguments of the parties

149 The applicant asks, as her main claim, that the Tribunal should find that annulment of the contested decision entails payment of the financial entitlements owing to her in respect of the period between the date on which the dismissal took effect and the Tribunal's decision declaring that annulment, together with default interest dating from that decision.

150 In the alternative, she claims that the Tribunal should order the Ombudsman to compensate for the material and non-material damage she alleges she suffered as a result of the contested decision.

151 In any event, she claims that the Ombudsman should be ordered to pay the sum of EUR 65 000 in respect of the non-material damage she suffered.

152 The Ombudsman contends that those claims should be rejected.

Findings of the Tribunal

153 According to consistent case-law relating to the civil service, a claim for compensation for damage must be dismissed where there is a close connection between it and a claim for annulment which has been rejected as unfounded (judgment of 8 November 2007 in Case F-40/05 *Andreasen* v *Commission*, paragraph 277).

154 In the present case, there is a close connection between all the claims for damages and the claim for annulment which has been rejected as unfounded. Since examination of the claim for annulment has not established any unlawful action such as to give rise to non-contractual liability on the part of the Ombudsman, the claims for damages must be rejected.

155 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

156 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Title 2, Chapter 8 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.

157 It follows from the grounds set out above that the applicant is the unsuccessful party. Furthermore, in its pleadings the Ombudsman expressly contended that the applicant should be ordered to pay the costs. Since the circumstances of this case do not warrant application of the provisions of Article 87(2) of the Rules of Procedure, the applicant must pay her own costs and be ordered to pay the costs incurred by the Ombudsman.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. Dismisses BG's action;

2. Declares that BG shall pay her own costs and orders her to pay those incurred by the European Ombudsman.

Rofes i Pujol Boruta Bradley

Delivered in open court in Luxembourg on 17 July 2012.

W. Hakenberg
Registrar

H. Kreppel
President