Reports of Cases

ORDER OF THE CIVIL SERVICE TRIBUNAL (Second Chamber)

15 October 2015*

(Civil service — EASO staff — Member of the contract staff — Probationary period — Dismissal for obviously inadequate work — Action for annulment — Correspondence between the application and the complaint — None — Manifest inadmissibility — Action for damages)

In Case F-113/13,

ACTION under Article 270 TFEU,

DI, former member of the contract staff of the European Asylum Support Office, residing in Bucharest (Romania), represented by I. Vlaic, lawyer,

applicant,

v

European Asylum Support Office (EASO), represented by L. Cerdán Ortiz-Quintana, acting as Agent, and by D. Waelbroeck and A. Duron, lawyers,

defendant

THE CIVIL SERVICE TRIBUNAL (Second Chamber),

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

Registrar: W. Hakenberg,

makes the following

Order

1 By application received at the Tribunal Registry on 23 January 2014, DI seeks, first, the annulment of the decision of the Executive Director of the European Asylum Support Office (EASO) of 28 February 2013 to dismiss him at the end of his probationary period and, secondly, damages for the material and non-material damage suffered by him and by his family.

* Language of the case: English.

Facts

2 On 1 March 2012, the applicant and EASO signed a contract of employment. According to that contract, the applicant was recruited by EASO on the basis of Article 3a of the Conditions of Employment of Other Servants of the European Union ('the CEOS'), as a member of the contract staff in function group III, grade 9, for a period of three years starting on 16 March 2012, as the EASO Security Officer.

3 Pursuant to Article 84 of the CEOS and Article 5 of the contract of employment, the applicant served a probationary period of nine months, from 16 March 2012, the date of his entry into service, until 15 December 2012.

4 The applicant's probationary period was extended by three months, from 16 December 2012 until 15 March 2013.

5 By decision of 28 February 2013, the Executive Director of EASO, in his capacity as the authority empowered to conclude contracts of employment ('the AECE'), decided, under Article 84 of the CEOS, to terminate the applicant's contract of employment ('the dismissal decision'). In view of the obligation, set out in Article 84(4) thereof, to give a notice period of one month, the AECE decided that the contract would end on 15 April 2013, that is, one month after the end of the extended probationary period.

6 By e-mail of 2 May 2013 to the Executive Director of EASO, the applicant indicated that he was lodging a 'formal complaint'. That e-mail is worded as follows:

'…

Taking into consideration the [dismissal decision] sent to me on [28 February 2013], please consider this e-mail a formal complaint against [the dismissal decision].

To my point a view, the evaluation has been done without taking into consideration the facts as they have been, without applying accordingly the [Staff Regulations of the European Union] and EC [Guides'] requirements, without taking into consideration my written comments on the [r]eport at the expiry of the probationary period drafted by [Mr X on 15 February 2013].

I would kindly request to re-analyse the above mentioned documents and to change the first decision regarding my employment contract.

…'

7 By a second e-mail of 2 July 2013, the applicant also stated that he wanted to lodge a complaint in the following terms:

'…

Please consider this e-mail a formal complaint against [the dismissal decision taken] after [thirteen] months of contract.

I kindly request the decision to be changed by [the AECE] and to allow me to be EASO's employe[e] until 15 [March] 2015, as the initial contract proposal mentioned.

…'

8 The e-mails of 2 May 2013 and 2 July 2013 were dealt with by EASO as a single complaint, which was rejected by a decision of the AECE of 28 August 2013, sent to the applicant on the same day by e-mail and on the following day by registered post.

9 By document received at the Tribunal Registry on 28 November 2013, the applicant applied for legal aid pursuant to Article 95 of the Rules of Procedure in the version then in force, with a view to bringing an action before the Tribunal. That application was dismissed by order of the President of the Tribunal of 13 January 2014.

Forms of order sought and procedure

10 The applicant claims that the Tribunal should:

— annul the dismissal decision;

— order EASO to pay the applicant EUR 90 000 for material damage, equivalent to income of 23 months, together with allowances (including annual travel allowance and installation allowance which the applicant had to pay back) and EUR 500 000 in compensation for the material and non-material damage suffered by the applicant and his family.

11 EASO contends that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action in its entirety;

— order the applicant to pay the costs.

12 There were two exchanges of pleadings, the second limited to the pleas of inadmissibility raised by EASO.

13 By letter of 10 March 2015, the Tribunal asked the parties if they were prepared to enter into negotiations with a view to a possible amicable settlement of the dispute. As the parties could not come to an agreement, the Tribunal noted that the attempt to reach an amicable settlement had failed, of which the parties were informed by a letter from the Registry of 8 May 2015.

Law

The Tribunal's decision to give its ruling by way of reasoned order

14 Under Article 81 of the Rules of Procedure, where an action is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, the Tribunal may at any time decide to give a ruling by reasoned order without taking further steps in the proceedings.

15 In the present case, the Tribunal considers that it has sufficient information from the documents before it and has decided, pursuant to Article 81 of the Rules of Procedure, to give a decision on the action by reasoned order without taking further steps in the proceedings.

The claim for annulment

16 In its defence, EASO formally raises three pleas of inadmissibility, the first alleging that the action is out of time, the second alleging non-compliance with the rule that the application must correspond to the complaint and the third based on infringement of Article 35(1)(e) of the Rules of Procedure in the version in force when this action was brought.

17 It is appropriate to begin by examining the second plea of inadmissibility, alleging non-compliance with the rule that the application must correspond to the complaint.

18 EASO contends, first, that the applicant's original complaint, submitted by e-mail of 2 May 2013, contained unsubstantiated allegations and no real plea in law and that, in his subsequent e-mail of 2 July 2013, the applicant confirmed his original complaint, without providing any specific grounds. In those circumstances, EASO was not in a position to know in sufficient detail the criticisms made by the applicant of the dismissal decision. Secondly, EASO states that none of the pleas put forward in the application appeared in the complaint. For those reasons, the rule that the application must correspond to the complaint was not complied with and the action should be declared inadmissible.

19 In his reply, the applicant submits that the second plea of inadmissibility should be rejected.

20 With regard to the rule that the application must correspond to the complaint, it should be noted, in the first place, that the first indent of Article 91(2) of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), applicable to contract staff under Article 73 of the CEOS, provides that an action before the Tribunal is admissible only if the appointing authority or, where appropriate, the AECE, has previously had a complaint submitted to it (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 70).

21 It has been held on a number of occasions that the precise legal classification of a letter or a note is a matter for the Tribunal alone and not for the parties or for one of them. Thus, it has been held that an act by which an official or servant, without expressly requesting the withdrawal of the decision in question, which clearly manifests his intention intended to challenge the decision adversely affecting him, or an act by which an official or servant clearly intended to achieve an amicable settlement of his complaints, constitutes a complaint. It is necessary, in that regard, to give priority to the content of the act rather than its form or title (see judgments of 29 June 2000 in *Politi* v *ETF*, C-154/99 P, EU:C:2000:354, paragraphs 16 and 17, and of 13 March 2013 in *Mendes* v *Commission*, F-125/11, EU:F:2013:35, paragraphs 33 and 34). As regards the content of the act, in order to allow it to review its decision and thereby obtain an out-of-court settlement of the dispute with the official or servant, the administration must be in a position to know in sufficient detail the criticisms made by the person concerned of the contested decision (judgment of 1 July 2010 in *Mandt* v *Parliament*, F-45/07, EU:F:2010:72, paragraphs 109 and 110). Thus, even though a complaint need not adhere to standard formulations in order to be valid, it must nevertheless be sufficiently explicit to enable the institution to which it is addressed to respond appropriately (judgment of 22 June 1990 in *Marcopoulos* v *Court of Justice*, T-32/89 and T-39/89, EU:T:1990:39, paragraph 28).

22 In the present case, the applicant himself described his e-mails of 2 May 2013 and 2 July 2013 as a 'formal complaint' and in those two e-mails, he expressly requested that the dismissal decision 'be changed' by the AECE, that is, that the dismissal decision be withdrawn by the AECE.

23 As regards the e-mail of 2 July 2013, the Tribunal notes that it does not contain any plea in law and that it may be regarded as a confirmation of the e-mail of 2 May 2013 (collectively 'the complaint').

24 As regards the e-mail of 2 May 2013, it is true that the applicant's allegation contained in it, namely that 'the evaluation [was] done without taking into consideration the facts as they have been [and] without applying accordingly the Staff [Regulations] and EC [Guides'] requirements', lacks detail and

did not allow EASO to understand the facts to which the applicant referred, which provisions of the Staff Regulations had been infringed and which provisions of which 'EC Guides' had not been complied with. However, the argument that the applicant's evaluation had been done 'without taking into consideration [his] written comments on the [r]eport at the expiry of [his] probationary period drafted by Mr [X] on [15 February 2013]' constitutes a real complaint, as it allowed EASO to know in sufficient detail the criticisms made by the applicant of the dismissal decision, in the present case, that his evaluation at the end of his probationary period had taken place without taking into consideration his written comments on his report at the end of the probationary period, and, therefore, without providing him with a detailed reply to those comments. In so far as the applicant's e-mail of 2 May 2013 identifies the contested decision, namely the dismissal decision which he seeks to have withdrawn, and contains a sufficiently detailed complaint against that decision, it must be concluded that that e-mail corresponds to the concept of a complaint, as developed in the case-law referred to in paragraph 21 of the present order.

25 Therefore, it must be held that, in accordance with the first indent of Article 91(2) of the Staff Regulations, the applicant lodged a complaint against the dismissal decision and that his complaint is based on the fact that his written comments on the report drawn up by Mr X at the end of his probationary period, on 15 February 2013, were not taken into consideration.

26 As regards the rule of correspondence, it must be noted, in the second place, that, according to settled case-law, the rule that there must be correspondence between the complaint, required by the first indent of Article 91(2) of the Staff Regulations, and the application which follows it requires a plea raised before the Courts of the European Union to have been raised during the pre-litigation procedure, so that the appointing authority or, where appropriate, the AECE, has already been made aware of the criticisms levelled by the person concerned against the contested decision, failing which the application will be inadmissible (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 71 and the case-law cited).

27 That rule is justified by the very purpose of the pre-litigation procedure, which is to allow for an amicable settlement of disputes arising between officials and the administration (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 72 and the case-law cited).

28 Therefore, as is apparent from consistent case-law, in actions brought by officials, claims for relief before the European Union judicature may contain only heads of claim based on the same matters as those raised in the complaint, although those heads of claim may be developed before the European Union judicature by the presentation of pleas in law and arguments which, whilst not necessarily appearing in the complaint, are closely linked to it (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 73 and the case-law cited).

29 Moreover, the Tribunal notes that, since the pre-litigation procedure is an informal procedure and those involved at that stage are generally acting without the assistance of a lawyer, the administration must not interpret complaints restrictively but should, on the contrary, examine them with an open mind. Furthermore, Article 91 of the Staff Regulations is not intended to be strictly and definitively binding for the purposes of a possible contentious stage of the procedure, provided that neither the heads of claim nor the relief sought in the complaint are changed in the action brought. However, in order for the pre-litigation procedure provided for under Article 91(2) of the Staff Regulations to achieve its objective, it is necessary that the appointing authority or, where appropriate, the AECE, be in a position to know with sufficient precision the criticisms formulated by the persons concerned against the contested decision (judgment of 25 October 2013 in *Commission* v *Moschonaki*, EU:T:2013:557, paragraphs 76 and 77 and the case-law cited).

30 In the present case, the Tribunal finds that the application contains neither real pleas in law nor consistent arguments of fact and law. It contains a statement of facts and a number of allegations, interspersed with references to case-law. While that statement of the facts, those allegations and those references to case-law do not appear to be related specifically to one or other of the two heads of claim in the application, a reading of them in the context of the present examination of the claim for annulment of the dismissal decision allows them to be interpreted as raising two pleas in support of annulment of the dismissal decision.

31 The first plea in law that the Tribunal identified in the applicant's pleadings alleges infringement of an internal EASO document entitled 'EASO Guide to the Assessment of Probationary Staff' ('the Guide'), in so far as the applicant's probationary period was not completed in accordance with the Guide. That plea is divided into seven grounds of complaint. In the first place, the applicant did not complete his probationary period under normal conditions in so far as he had three different tutors. In the second place, he was not continuously supervised for the duration of his probationary period. In the third place, the first probationary report, of 22 November 2012, was not followed by a discussion, contrary to the provision in section C(10) of the Guide. In the fourth place, the applicant received no advice or practical support during the period from 22 November 2012 to 15 February 2013, the date on which his second probationary report was delivered to him. In the fifth place, he was not provided with frequent feedback on how to carry out his duties, in breach of section D(1) of the Guide. In the sixth place, he did not obtain, in breach of section D(2) of the Guide and of his rights of defence, factual examples of complaints about his behaviour that had been addressed to his line management. Finally, in the seventh place, EASO did not deliver to the applicant the final probationary report of 15 February 2013, in breach of his rights of defence.

32 The second plea in law identified by the Tribunal in the applicant's pleadings concerns the incomplete communication of the decision rejecting the complaint.

33 As regards the second plea in law, alleging that EASO sent to the applicant, both by e-mail of 28 August 2013 and by registered post of 29 August 2013, only 4 of the 6 pages of the decision rejecting the complaint and in this way infringed his rights of defence, it suffices to note that this plea, even if well-founded, cannot invalidate the dismissal decision and must therefore be rejected as ineffective.

34 With regard to the first plea in law, the Tribunal notes that it was not explicitly invoked in the complaint.

35 In the complaint, the applicant simply criticised EASO for evaluating him without taking into consideration his written comments on the report drawn up by Mr X at the end of the probationary period, on 15 February 2013 (see paragraph 24 of the present order).

36 Moreover, the content of the complaint, as stated in paragraph 24 of the present order, even when interpreted with an open mind, does not establish that the first plea raised in the application, alleging infringement of the Guide, is closely linked to the only head of claim validly set out in the complaint, namely that the evaluation of the applicant had been carried out without taking into consideration his written comments on the report drawn up by Mr X at the end of the probationary period, on 15 February 2013.

37 It must therefore be held that the first plea in law is manifestly inadmissible for failure to comply with the rule of correspondence between the application and the complaint.

38 It follows from all of the foregoing, and without its being necessary to examine the other two pleas of inadmissibility raised by EASO, that the claim for annulment is manifestly inadmissible and must therefore be rejected.

The claim for damages

39 The applicant claims that he and his family have suffered material and non-material damage resulting from the dismissal decision. First, the applicant was deprived, in particular, of the remuneration to which he would have been entitled until the expiry of his contract of employment, scheduled for 15 March 2015. Secondly, the applicant and his family were put in a very stressful situation, to the extent that the life of his wife, who was pregnant at the time of the dismissal decision, and that of their unborn child were endangered.

40 It must be noted that, according to settled case-law, where a claim for compensation is closely related to a claim for annulment which has itself been rejected as inadmissible, the claim for compensation is also inadmissible (orders of 24 March 1993 in *Benzler* v *Commission*, T-72/92, EU:T:1993:27, paragraph 21, and of 24 May 2007 in *Lofaro* v *Commission*, F-27/06 and F-75/06, EU:F:2007:89, paragraph 73).

41 In so far as the claim for compensation is directly linked with the claim for annulment of the dismissal decision, which is manifestly inadmissible, the claim for compensation must also be rejected as manifestly inadmissible.

42 It follows from the above that this action must be dismissed as manifestly inadmissible.

Costs

43 Pursuant to Article 101 of the Rules of Procedure, subject to the other provisions of Chapter 8 of Title 2 of those Rules, the unsuccessful party is to bear his own costs and is to be ordered to pay the costs incurred by the other party if they have been applied for in the other party's pleadings. Under Article 102(1) of those Rules, if equity so requires, the Tribunal may decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.

44 It is apparent from the reasons set out in the present order that the applicant has been unsuccessful. Furthermore, in its claims EASO has expressly requested that the applicant be ordered to pay the costs. As the circumstances of the present case do not justify the application of the provisions of Article 102(1) of the Rules of Procedure, the applicant must bear his own costs and pay the costs incurred by EASO.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby orders:

1. The action is dismissed as manifestly inadmissible.

2. DI is to bear his own costs and is ordered to pay the costs incurred by the European Asylum Support Office.

Luxembourg, 15 October 2015.

W. Hakenberg
Registrar

K. Bradley
President