



Reports of Cases

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

11 December 2012 *

(Civil service — Contract staff — 2010 appraisal procedure — Application for annulment of the appraisal report)

In Case F-107/11,

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

Ioannis Ntouvas, former member of the contract staff at the European Center for Disease Prevention and Control, residing in Sundbyberg (Sweden), represented by E. Mylonas, lawyer,

applicant,

v

European Center for Disease Prevention and Control (ECDC), represented by R. Trott, 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 5 July 2012,

gives the following

Judgment

- 1 By application lodged at the Registry of the Tribunal on 18 October 2011, Mr Ntouvas brought the present action seeking, essentially, the annulment of his appraisal report in respect of 2010.

* Language of the case: English.

Legal context

- 2 Article 29(1) of Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European centre for disease prevention and control (ECDC) (OJ 2004 L 142, p. 1) provides:

‘The staff of the [ECDC] shall be subject to the rules and the regulations applicable to officials and other staff of the [European Union].’

- 3 Article 43 of the Staff Regulations of Officials of the European Union (‘the Staff Regulations’) provides:

‘The ability, efficiency and conduct in the service of each official shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110. Each institution shall lay down provisions conferring the right to lodge an appeal within the reporting procedure, which has to be exercised before lodging a complaint as referred to in Article 90(2).

...

The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant.’

- 4 According to Article 15(2) of the Conditions of Employment of Other Servants of the European Communities (‘the CEOS’):

‘The provisions of Article 43 of the Staff Regulations, concerning reports, shall apply by analogy.’

- 5 In accordance with Article 87(1) of the CEOS:

‘The first paragraph of Article 43 of the Staff Regulations, concerning reports, shall apply by analogy to contract staff referred to in Article 3a engaged for a period of not less than one year.’

- 6 Article 1 of the Implementing rule No 20 on Appraisals (‘the Implementing rule’), adopted by the director of the ECDC on 17 April 2009 on the basis of Article 15(2) and Article 87(1) of the CEOS and of Article 43 of the Staff Regulations, reads as follows:

‘1. In accordance with Article 43 of the Staff Regulations ... and Articles 15(2) and 87(1) of the [CEOS]:

- An appraisal exercise shall be conducted at the beginning of each year. The reference period of the appraisal exercise runs from 1 January to 31 December of every year.
- All Temporary and Contract Agents who were in active service for a continuous period of at least one month in the year have to be appraised.
- To this end an annual report known as the appraisal report shall be drawn up for every staff member ... covering the reporting period.

...

2. The appraisal system shall be aimed in particular at evaluating the jobholder’s efficiency, competencies and conduct in the service.

...

4. A report does not have to be drafted for jobholders who left ECDC in the same year or who are going to leave in following year, unless they expressly request one.'

7 Article 2 of the Implementing rule provides as follows:

'1. The jobholder is the staff member who is subject of the appraisal.

2. The reporting officer shall conduct the appraisal. After a dialogue has taken place in accordance with Article 8(4) the reporting officer shall draw up a draft report.

3. The countersigning officer shall ensure that the appraisal standards defined by the [ECDC] are consistently applied. In cases of disagreement with the reporting officer, final responsibility for the [report] shall rest with the countersigning officer.

4. The appeal assessor shall decide on the follow-up to the opinion delivered by the Joint Committee for Appraisals.

...'

8 Article 8 of the Implementing rule, entitled 'Appraisal procedure', provides:

'...

2. Once they have been drawn up, the appraisal standards defined in the appraisals guide ([c]alendar/definition of the criteria of appraisal) shall be notified to the staff members of ECDC and shall be applied by the reporting officers and countersigning officers.

3. The jobholder shall, within 5 working days of receiving a request to that effect from the reporting officer, produce a self-assessment, which shall be included in the appraisal report.

4. Within ten working days of the jobholder submitting a self-assessment, the reporting officer and the jobholder shall engage in a formal dialogue. The dialogue shall constitute one of the reporting officer's basic management duties.

...

The dialogue shall cover three aspects: in the light of the self-assessment referred to in paragraph 3, appraising the jobholder's performance/efficiency during the reporting period, setting objectives for the year following the reporting period and drawing up a training map.

(a) Taking the self-assessment into account, the reporting officer shall, jointly with the jobholder, consider the latter's efficiency, the competencies he or she has demonstrated and his or her conduct in the service during the reporting period.

...

5. Immediately after the formal dialogue has been held, the reporting officer shall draw up a draft appraisal report, which shall include appraisals of efficiency, competencies and conduct in the service [and] which is consistent with the indications given during the formal dialogue.

6. The [d]irector shall, in concertation with the countersigning officers, seek to ensure that, across ECDC and within each function group and grade, the merits of the jobholders concerned have been appraised consistently.

7. After the concertation referred to in paragraph 6, the reporting officer and the countersigning officer shall finalise each appraisal report and transmit it to the jobholder.

...

8. The jobholder shall have up to five working days to accept the report without adding any comments, accept it after adding some comments in the appropriate section, or refuse to accept the report, stating in the appropriate section the reasons for requesting that it be reconsidered.

If he or she accepts it, the appraisal report shall be closed. If the jobholder fails to react within the time limit set, he or she shall be deemed to have accepted the report.

9. If the jobholder refuses to accept the appraisal report, the countersigning officer shall hold a dialogue with him or her within ten working days. If the jobholder, reporting officer or countersigning officer so requests, the reporting officer shall also take part in the dialogue.

...

No later than five working days after this dialogue the countersigning officer shall either confirm or amend the report. He or she shall transmit the report to the jobholder.

The jobholder shall have up to 10 working days to accept the report without adding any comments, accept it after adding some comments in the appropriate section, or refuse to accept it, stating the reasons in the appropriate section. If he or she accepts it the appraisal report shall be closed. ...

10. The jobholder's reasoned refusal to accept the report shall automatically mean referral of the matter to the "Joint Committee" referred to in Article 9.

...

12. The time limits referred to in this Article shall be calculated only from the time when the relevant decision has been notified to the person concerned. ...

13. The jobholder shall be notified, by e-mail or other means, that the decision rendering the report final has been adopted ... Such notification shall constitute communication within the meaning of Article 11 and Article 92 of [the] CEOS and Article 25 of the Staff Regulations.'

9 Under Article 9 of the Implementing rule, entitled 'Joint Committee for Appraisals':

'1. A Joint Committee for Appraisals ... shall be set up in ECDC

... the Joint Committee shall be composed as follows:

— a [c]hair ...;

— four members: a [h]ead of [u]nit, hereinafter referred to as an "external member"; the [h]ead of [s]ection for human resources, ...; two staff representatives ...

3. The Joint Committee shall meet by invitation of the [c]hair. Opinions shall be adopted by a simple majority of the members present who are entitled to vote. For the Committee's decisions to be valid, the [c]hair or external member must be present, together with two members who are entitled to vote. If the number of participants present at a meeting is not sufficient to enable decisions to be taken, the [c]hair shall immediately convene a fresh meeting which may be held within two working days. If the third meeting is inquorate the Joint Committee shall record its failure to deliver an opinion.

Rules of procedure shall be adopted by the [h]ead of [s]ection [for h]uman [r]esources in accordance with the provisions of this Article. The rules of procedure shall apply to every Joint Committee.

4. The Joint Committee may not take the place of the reporting officer or the countersigning officer as regards appraising the jobholder's performance. It shall verify that [reports] have been drawn up fairly and objectively, i.e. where possible on a factual basis and in accordance with these general implementing provisions and the appraisals guide. It shall verify in particular that the procedure laid down in Article 8 has been followed. To this end it shall carry out the necessary consultations and shall have at its disposal any working documents which may assist it in carrying out its work.

...

5. The Joint Committee shall, when appealed to under Article 8(10), deliver an opinion within ten working days of the matter being referred to it.

6. If the [c]hair or a member of the Committee has a personal interest in a matter such as to impair his or her independence in the handling of that matter, he or she shall be replaced by the appropriate alternate member and refrain from participating in the work of the Committee. A conflict of interest[s] is deemed to arise in particular where the [c]hair or member is also the reporting officer, countersigning officer or appeal assessor for the jobholder who has appealed to the Committee or where the jobholder, acting on the authority of the Staff Committee or as a representative of a trade union or staff association, has been in contact with the [c]hair or one of the members on matters of personnel management.

7. The opinion of the Joint Committee shall be transmitted to the jobholder, reporting officer, countersigning officer and appeal assessor. The Joint Committee opinion shall, where it has been adopted following a vote, state the majority and minority opinions expressed. ...

The report shall then be closed and communicated to the person concerned, the reporting officer, the countersigning officer and the Joint Committee.'

10 Article 10 of the Implementing rule reads as follows:

'A complaint may not be submitted under Article 90(2) of the Staff Regulations or a matter be referred to the Civil Service Tribunal until a report has been closed.'

11 Article 39 of the Rules of Procedure reads as follows:

'1. Within two months after service of the application, the defendant shall lodge a defence

2. The time-limit laid down in paragraph 1 may, in exceptional circumstances, be extended by the President on a reasoned application by the defendant.'

12 Article 116(1) of the Rules of Procedure provides:

'If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply to the Tribunal for judgment by default.

The application shall be served on the defendant. The Tribunal may decide to open the oral procedure on the application.'

Factual background to the dispute

- 13 Following publication of a vacancy notice, the applicant was recruited on 1 January 2010 as a member of the contract staff in function group IV, grade 14, within the 'Legal and Procurement' section of the 'Management and Coordination' unit of the ECDC, as 'legal assistant'.
- 14 According to his job description, as set out in the vacancy notice referred to in the preceding paragraph, the applicant was to report to the legal advisor and was responsible for the following tasks:
- [a]ssisting and supporting in personal [d]ata [p]rotection tasks ...;
 - [a]ssisting and supporting in legal questions and administrative issues arising in the context of an European [r]egulatory [a]gency ...;
 - [c]ontributing to the development of a legal data base;
 - [d]eveloping/adapting internal procurement procedures and templates as required;
 - [c]ontributing to the quality control of procurement activities;
 - [s]upporting the monitoring of procurement activities; and
 - [p]erforming any other relevant activities and tasks that may be requested by the [h]ead of [u]nit.'
- 15 On 21 September 2010, a new description of the applicant's job was prepared and co-signed by the applicant and Ms A, head of the 'Legal and Procurement' section and the applicant's line manager. That document also referred to Mr B as the applicant's substitute.
- 16 On 14 December 2010, the applicant's title was renamed 'Legal Officer'.
- 17 Under Article 8(3) and (4) of the Implementing rule, the applicant produced a 'self-assessment' on 24 January 2011, which was followed, on 27 January 2011, by an 'appraisal dialogue' between the applicant and Ms A.
- 18 On 8 February 2011, Ms A compiled the applicant's draft appraisal report in respect of the period from 1 January 2010 to 31 December 2010. It is apparent from that draft that the applicant's overall efficiency was considered to be 'above the levels required for the post', which corresponded to the third highest appraisal on a scale of seven possible appraisal levels.
- 19 From 9 February 2011, Ms A took leave, following which she did not return to her post due to her subsequent resignation from the ECDC.
- 20 On 15 February 2011, the applicant refused to accept the appraisal report on grounds of a lack of factual basis, failure to take account of important facts concerning his work, the impossibility of attaining one objective and factual error.
- 21 Following from the dialogue which she had had with the applicant on 23 February 2011, Ms C, the applicant's countersigning officer, who also acted as reporting officer from 13 April 2011, issued a report on 15 April 2011 confirming the draft appraisal report. That report was challenged by the applicant on 2 May 2011.
- 22 The Joint Committee for Appraisals ('the Joint Committee'), to which the matter was referred under Article 8(10) of the Implementing rule, delivered an opinion on 30 June 2011 confirming the appraisal report.

- 23 In its decision of 5 July 2011, the director of the ECDC, acting as appeal assessor, confirmed the Joint Committee's opinion, thereby finalising the applicant's appraisal report.
- 24 On 21 July 2011, the applicant filed a complaint with the Authority Authorised to Conclude Contracts ('AACC') against the decision of 5 July 2011.
- 25 By decision of 9 September 2011, the AACC rejected the complaint.
- 26 At the hearing, the defendant informed the Tribunal that the applicant was, with effect from 1 April 2012, no longer working at the ECDC.

Forms of order sought and procedure

- 27 The applicant claims that the Tribunal should:
- annul the draft appraisal report of 8 February 2011;
 - so far as necessary, annul the countersigning officer's report of 15 April 2011, the Joint Committee's opinion of 30 June 2011, the appeal assessor's decision of 5 July 2011 and the decision of 9 September 2011 rejecting the applicant's complaint;
 - order the ECDC to pay the costs.
- 28 The ECDC contends that the Tribunal should:
- dismiss the action;
 - order the applicant to pay all of the costs.
- 29 By letter of 11 January 2012, the ECDC requested an extension of the time-limit for lodging the defence, fixed at 17 January 2012, on the grounds that, because of an incident which occurred in its general service for the distribution of mail, the application which had been served on 7 November 2011 was only delivered to the director of the ECDC on 11 January 2012. By letter of 12 January 2012, the Tribunal granted an extension until 7 February 2012.
- 30 The proposal made by the Judge-Rapporteur to the parties for an amicable settlement of the dispute was unsuccessful.
- 31 By letter of 13 June 2012, the applicant submitted observations calling on the Tribunal to declare the defence inadmissible. Those observations were included in the file and, by letter of 22 June 2012, the Registry of the Tribunal informed the parties of the Tribunal's decision to invite the ECDC to submit its observations at the hearing.
- 32 In response to a question put by the Tribunal at the hearing, the applicant specified that his letter of 13 June 2012 was to be interpreted as a request for judgment by default. The applicant also requested the Tribunal to order the defendant to pay all the costs even if it were to decide to dismiss his action.

Admissibility of the action and its subject-matter

Applicant's legal interest in bringing proceedings

- 33 In response to a question put by the Tribunal at the hearing, the ECDC stated, without formally raising a plea of inadmissibility, that, since he left the ECDC, there has been no benefit to the applicant in pursuing his action because the appraisal report will not be disclosed outside that organisation.
- 34 In this connection, the Tribunal observes, first, that the issue of the disappearance of the legal interest in bringing proceedings during the proceedings constitutes an absolute bar to proceedings, which the Courts of the European Union must consider of their own motion (see judgment of 5 October 2011 in Case T-19/06 *Mindo v Commission*, paragraph 60, appealed in Case C-625/11 P). Second, it is settled case-law that, in order for an applicant to be able to pursue an action for annulment of a decision of the administration, he must have a personal, vested and present interest in the annulment of that decision even after his action has been brought (order of 28 September 2009 in Case T-46/08 P *Marcuccio v Commission*, paragraph 50 and the case-law cited).
- 35 Irrespective of its future usefulness, an official's staff report, with which the disputed appraisal report in the present case must be equated, constitutes written, formal evidence of the quality of the work carried out by the person concerned. Such an appraisal does not merely describe the tasks performed during the relevant period, but includes, inter alia, an assessment of the personal qualities shown by the individual assessed in the conduct of his professional activities. Therefore, every staff member has a right to have his work recognised by means of an appraisal carried out in a just and equitable manner. Consequently, in accordance with the right to effective judicial protection, it must be recognised that staff have the right to challenge their staff report on account of its content or because it has not been drawn up in accordance with the rules laid down by the Staff Regulations (judgment of 10 November 2009 in Case F-93/08 *N v Parliament*, paragraph 46).
- 36 Thus, the fact that the applicant no longer works at the ECDC and that his appraisal report will not be disclosed to third parties is not such as to deprive him of his legal interest in bringing proceedings to challenge that report (see, to that effect, *N v Parliament*, paragraph 47).
- 37 In addition, for the sake of completeness, the Tribunal observes that such a finding is confirmed by Article 1(4) of the Implementing rule, which provides that, while it is not necessary to compile systematically an appraisal report for staff who have left the ECDC during the reference year or who are going to leave it the following year, such appraisal reports must be compiled where the staff concerned expressly request them.

Request that the defence be declared inadmissible

- 38 In his observations of 13 June 2012, the applicant contests the extension until 7 February 2012, granted by the Tribunal to the defendant to lodge its defence, claiming, essentially, that the circumstances put forward by the ECDC in support of its request were not exceptional within the meaning of Article 39(2) of the Rules of Procedure.
- 39 First, and without its being necessary to consider the issue of whether the applicant submitted his request within a reasonable period, it is sufficient to observe that, pursuant to Article 39(2) of the Rules of Procedure, on a reasoned application from the defendant, the President may assess whether the circumstances on which such an application is based are exceptional and grant an extension of the time-limit without hearing the applicant (see, to that effect, judgment of 20 January 2011 in Case F-121/07 *Strack v Commission*, paragraph 39, appeals pending before the General Court in Cases T-197/11 P and T-198/11 P). That was the case in the present instance and the arguments put forward by the applicant cannot establish that the Rules of Procedure were not complied with, since

the application for an extension was made before the time-limit for submitting the defence expired. Second, the Tribunal notes that the ECDC was granted, exceptionally, an extension of the time-limit within which to lodge the defence until 7 February 2012 and that the ECDC lodged the defence within the time-limit which it had been set by the Tribunal.

- 40 Consequently, the request that the Tribunal declare the defence inadmissible must be rejected as unfounded.
- 41 In addition, contrary to the requirements of Article 116 of the Rules of Procedure, the observations of 13 July 2012, which moreover do not in any way refer to that provision, do not contain any request by the applicant for judgment by default. Even if those observations could be considered to be an application for judgment by default within the meaning of that article, such an application must be rejected as devoid of any factual basis since, as the Tribunal has noted, the defence was lodged within the prescribed period.

Subject-matter of the action

- 42 It is settled case law that, in the case of acts or decisions whose adoption takes place in stages, in particular at the end of an internal procedure, only measures definitively laying down the position of the institution at the end of that procedure, and not intermediate measures intended to prepare the final decision, are acts against which an action for annulment will lie. Thus, in actions brought by officials or staff members, preparatory acts for a decision are not acts adversely affecting an official or staff member for the purpose of Article 90(2) of the Staff Regulations since they are not measures, first, which produce binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his legal position and, second, which definitively establish the position of the institution (see, to that effect, judgments of 28 September 1993 in Joined Cases T-57/92 and T-75/92 *Yorck von Wartenburg v Parliament*, paragraph 36 and the case-law cited, and of 6 February 2007 in Joined Cases T-246/04 and T-71/05 *Wunenburger v Commission*, paragraph 42 and the case-law cited).
- 43 It is apparent from Articles 1 and 2 of the Implementing rule that the appraisal reports of ECDC staff are compiled in several stages at the end of an internal procedure. A staff member may refuse to accept the appraisal report and, in that case, the countersigning officer delivers a new appraisal report. In the event of a subsequent challenge, the appraisal report is closed only by decision of the director of the ECDC, after the Joint Committee has delivered its opinion.
- 44 In the present case, it is common ground that the applicant refused the initial appraisal report compiled by the reporting officer and countersigning officer. The position of the ECDC on the applicant's appraisal was therefore definitively fixed only by the decision of the director of the ECDC of 5 July 2011. Consequently, only the finalised appraisal report is an act adversely affecting the applicant which may be challenged. By contrast, the draft appraisal report of 8 February 2011, the countersigning officer's report of 15 April 2011 and the Joint Committee's opinion of 30 June 2011 are merely preparatory acts which do not adversely affect the applicant and against which an action for annulment may not be brought, so that the forms of order seeking annulment of those acts are inadmissible (see, to that effect, judgment of 10 November 2009 in Case F-71/08 *N v Parliament*, paragraphs 27 to 30).
- 45 Furthermore, it is settled case-law that claims for annulment formally brought against a decision to reject a complaint, where that decision lacks any independent content, have the effect of bringing before the Tribunal the act against which the complaint was submitted (see, to this effect, judgment of 17 January 1989 in Case 293/87 *Vainker v Parliament*, paragraph 8).

- 46 In the present case, the decision rejecting the complaint confirms the applicant's appraisal report, finalised by the decision of 5 July 2011, by merely providing some further details as regards its grounds. In such circumstances, it is indeed the legality of the initial act adversely affecting the official or staff member that must be examined, taking into account the grounds given for the decision rejecting the complaint, those grounds being supposed to coincide with that act (see, to that effect, judgment of 9 December 2009 in Case T-377/08 P *Commission v Birkhoff*, paragraphs 58 and 59 and the case-law cited).
- 47 Consequently, the claims for annulment directed against the decision rejecting the complaint lack any independent content and the action must be regarded as being directed against the applicant's appraisal report finalised by the decision of 5 July 2011, the grounds for which are stated in the decision of 9 September 2011 rejecting the complaint (see, to that effect, judgment of 10 June 2004 in Case T-258/01 *Eveillard v Commission*, paragraphs 31 and 32, and judgment of 18 April 2012 in Case F-50/11 *Buxton v Parliament*, paragraph 21).

Substance

- 48 The applicant must be regarded as essentially raising four pleas in support of his claims, alleging, respectively, infringement of procedural rules, unlawful assessment of his conduct, factual error and error of assessment.

First plea, alleging infringement of procedural rules

Arguments of the parties

- 49 The first plea consists of three submissions, concerning, respectively, an alleged conflict of interests in the case of certain members of the Joint Committee, infringement of procedural rules concerning the Joint Committee and failure to check the appraisal procedure.
- 50 As regards the first submission, the applicant claims that he was put under psychological pressure by his reporting officer, Ms A, who attempted to replace him within the ECDC by Mr B.
- 51 More specifically, the applicant challenges his appraisal report, claiming irregularities in the procedure for the recruitment of Mr B and argues that the head of the 'Human Resources' section, who was a member of the Joint Committee under Article 9(1) of the Implementing rule, was involved in that recruitment. In addition, he takes the view that, since in the decision of 9 September 2011 the director of the ECDC stated that all the decisions on staff were adopted by the 'Senior Management Team', composed of all the heads of unit and the director, that same conflict of interests also concerned the other two members of the Joint Committee which were part of that team.
- 52 So far as concerns the second submission, the applicant claims that the Joint Committee, in breach of Article 9(3) of the Implementing rule, did not adopt its Rules of Procedure. He maintains, first, that no signed version of that Committee's Rules of the Procedure could be provided to him despite his request. Secondly, since there was no publication of those Rules of Procedure, he considers that they cannot be relied on against him. Lastly, the applicant observes that the Joint Committee's Rules of Procedure were not adopted by the competent person, namely, the head of the 'Human Resources' section.
- 53 As regards the third submission, the applicant takes the view that, contrary to the provisions of Article 9(4) of the Implementing rule, the Joint Committee made an assessment of the appraisal level of the applicant's performance, without, however, examining whether the appraisal procedure had been lawfully carried out.

- 54 The ECDC is of the opinion that the first submission must be rejected as unfounded, since there was no conflict of interests such as defined by Article 9(6) of the Implementing rule.
- 55 In respect of the second submission, the ECDC replies, first, that the fact that it was not possible to find a signed version of the Joint Committee's Rules of Procedure can be explained by the fact that Ms A, the official signatory of the document, was on annual leave from 9 February 2011 and subsequently did not return to her post. Secondly, the ECDC considers that the Joint Committee is not required to publish its Rules of Procedure and that it is not necessary for those rules to have been published previously in order to be relied on. Lastly, the ECDC points out that the head of the 'Human Resources' section delegated the signing of the Rules of Procedure to Ms A.
- 56 According to the ECDC, the third submission is unfounded because the Joint Committee did indeed check that the report was compiled fairly and objectively.
- 57 In conclusion, the ECDC requests the Tribunal to reject the first plea in its entirety as unfounded.

Findings of the Tribunal

- 58 So far as concerns the first submission in this plea, the Tribunal notes at the outset that the applicant merely claims that the management and recruitment of staff are vitiated by supposed irregularities, without, however, adducing any evidence of those irregularities.
- 59 Next, the Tribunal notes that the applicant has not provided any evidence that might prove that there is a conflict of interests within the meaning of Article 9(6) of the Implementing rule, which provides that there is a conflict of interests where the chair or a member of the Joint Committee is also the reporting officer, countersigning officer or appeal assessor for the staff member under appraisal or where the staff member under appraisal, acting on the authority of the Staff Committee or as a representative of a trade union or staff association, has been in contact with the chair or one of the members on matters of personnel management. At no time did the applicant claim that one of those two situations had occurred in the present case.
- 60 It follows that the first submission must be rejected.
- 61 In the light of the applicant's arguments, the second submission must be interpreted as raising a plea of illegality on the grounds of the lack of signature and publication of the Joint Committee's Rules of Procedure and on the grounds that that the authority which adopted them was not competent to do so.
- 62 It is settled case-law that, for a plea of illegality to be declared admissible, the general measure which it is sought to have declared unlawful must be applicable, directly or indirectly, to the issue with which the application is concerned and there must be a direct legal connection between the contested individual measure and the general measure which it is sought to have declared unlawful (judgment of 22 May 2008 in Case T-250/06 P *Ott and Others v Commission*, paragraph 99 and the case-law cited). Those conditions are not met in the present case, since the Joint Committee's Rules of Procedure do not constitute the legal basis of the applicant's appraisal report and do not have a direct legal connection with the act against which the action has been brought (see, to that effect, order of 27 September 2011 in Case F-82/07 *Dittert v Commission*, paragraph 72). The abovementioned plea of illegality must therefore be declared inadmissible.
- 63 So far as concerns the third submission, the applicant merely challenges the fact that the Joint Committee did not take into consideration the correct conduct of the procedure without however putting forward any argument capable of substantiating its claims, so that that submission must be rejected as inadmissible pursuant to Article 35(1)(e) of the Rules of Procedure.

- 64 On the other hand, it must be stated that the Joint Committee's opinion, although in summary form, mentions a dialogue taking place between the various stakeholders and the delay with which the countersigning officer adopted her decision and notes that, in the light of the documents which were submitted to it, the assessment made of the ability, efficiency and conduct in the service of the applicant is not inappropriate. It follows that the third submission must also be rejected.
- 65 It follows from all the foregoing that the first plea must be rejected in its entirety.

Second plea, alleging that the assessment made of the applicant's conduct was unlawful

- 66 The applicant submits that the reporting officer did not bring to his notice during the reference period the problems in his conduct which are highlighted in the appraisal report, which states that '[the applicant] would gain from enhanced team spirit and interpersonal skills' and that he 'could further progress in interpersonal and communication skills as well as team spirit'.
- 67 Essentially, in the applicant's view, the most appropriate means of remedying his behavioural weaknesses would have been to inform him of them before the appraisal report was drawn up, so that bringing them to his notice at the time when his appraisal report was drawn up infringes the principle of proportionality.
- 68 In this connection, it must be recalled that, according to case-law, the improvement of the conduct in the service of the staff member under appraisal is indeed an objective which the appraisal report aims to meet (see, to that effect, judgment of 9 November 2006 in Case C-344/05 P *Commission v De Bry*, paragraph 44). Thus, even if it were to be established that the reporting officer did not bring to the applicant's notice the weaknesses in his conduct in the service during the reference period, the ECDC cannot be accused of having acted unlawfully on account of the fact that the reporting officer's observations on the applicant's conduct in the service are included in the appraisal report.
- 69 Consequently, the second plea must be rejected.

Third plea, alleging factual error

- 70 The applicant alleges that the ECDC committed a factual error in stating that the legal team consisted of the head of section and two legal officers. The applicant considers himself to have been the only legal officer, as Mr B was only an interim 'legal assistant', and could not be considered to be a legal officer. It follows from that error that the applicant's workload appears in the appraisal report to be less than it was in actual fact, which affected the overall mark given in his appraisal.
- 71 The Tribunal observes in this connection that, in the defence, the defendant submitted, without having been contradicted at the hearing by the applicant, that until 14 December 2010 the applicant's post was named 'legal assistant'. From that date onwards, that post was designated as being that of a 'legal officer', without, nevertheless, that having entailed any change in the tasks allocated to the applicant. Thus, for almost all of the reference period, the applicant and Mr B had the same title, that of 'legal assistant', even if Mr B was not a member of the contract staff like the applicant but was employed by the ECDC on the basis of a short term contract concluded under a framework contract between the ECDC and a Swedish interim employment agency. It follows that that plea lacks a factual basis and the applicant has not been able to demonstrate that the ECDC committed any error in the assessment of his workload.
- 72 Moreover, the applicant has not even attempted to demonstrate that the change in the title of his post resulted in a substantial increase in his workload in respect of the period from 14 December 2010 to 31 December 2010, in order to show a factual error as regards the description of the service.

- 73 It follows from the foregoing that the third plea is devoid of any factual basis and must therefore be rejected.

Fourth plea, alleging an error of assessment

- 74 The applicant takes the view that the ECDC has not provided any example of the behavioural weaknesses highlighted in his appraisal report, according to which '[he] would gain from enhanced team spirit and interpersonal skills' and he 'could further progress in interpersonal and communication skills as well as team spirit'.
- 75 In addition, the applicant submits that the appraisal report does not take account of certain exceptional circumstances, such as the psychological pressure he was under as a result of the recruitment of another legal officer and his exceptional workload, both with regard to the quantity of the files handled and their importance. In that regard, relying on his previous experience acquired in a European Union body, the applicant claims that he handled a volume of files which, in terms of their quantity, nature and level of their importance, were equivalent to that handled by 'at least' five legal officers and a senior legal officer.
- 76 Lastly, the applicant submits that the appraisal report does not take into consideration his observations relating to the implementation of a computer application, an objective assessed as having been 'partly achieved'. The applicant explains in that regard that the fact that he did not completely achieve this objective was due to his hierarchical superior's lack of initiative and the unrealistic character of that objective.
- 77 As a preliminary point, the Tribunal observes that, although in the applicant's pleadings the submissions mentioned previously are presented as concerning an alleged infringement of the obligation to state reasons, they must be interpreted as relating to a manifest error of assessment.
- 78 Next, it must be pointed out that it is not for the Tribunal to substitute its assessment for that of the persons responsible for appraising the work of the person under appraisal, since the European Union institutions have a wide discretion in the appraisal of the work of their officials and staff members (see judgment of 13 September 2011 in Case F-4/10 *Nastvogel v Council*, paragraph 32). Thus it is not for the Tribunal, save in the case of factual errors, manifest error of assessment or misuse of powers, to review the merits of the assessment made by the administration of the occupational abilities of an official or a staff member where it involves complex value judgments which, by their very nature, are not amenable to objective verification (see the judgment of 25 October 2005 in Case T-96/04 *Cwik v Commission*, paragraph 41 and the case-law cited).
- 79 In the first place, the Tribunal observes that the remarks concerning the applicant's behaviour must be read in the context in which they were made. In particular, the reporting officer noted the positive aspects of the applicant's performance, stating, inter alia, that he performed very well, demonstrating a high level of organisation and a strong ability to carry out his tasks in a timely and effective manner. In addition, the reporting officer observed that the applicant successfully contributed to the activities of the legal team and that his advice was very much appreciated. It follows that, far from being statements relating to alleged 'behavioural weaknesses' or from being comparable to 'negative remarks' as the applicant claims, the disputed remarks must be regarded as suggestions indicating to the applicant the fields in which he could further improve his performance, which was already clearly appreciated by his superiors.
- 80 In the second place, so far as concerns the alleged psychological pressure to which the applicant was subject, this related to Ms A's supposed wish to replace the applicant by Mr B. However, the Tribunal notes that the applicant merely makes assumptions without producing any evidence capable of proving his claims.

- 81 The only considerations put forward by the applicant in support of his arguments concern the alleged irregularities in Mr B's recruitment procedure, the allocation to Mr B of files which were at the level of responsibility of an administrator and the publication of a new vacancy notice, the vacancy notice ECDC/CA/IV/2010/RMU-LO, concerning a post which the applicant considered to be identical to his own. Even if those factual elements could be regarded as indications of an intention to replace the applicant by Mr B, it is clear from the file that they have not been proved by the applicant.
- 82 First, in respect of the alleged irregularities in the recruitment of Mr B, the Tribunal has already observed in paragraph 58 above that the applicant has not provided any evidence of those irregularities. Even if it is established that Mr B was allocated files at the level of responsibility of an administrator, that is perfectly consistent with the functions carried out by Mr B, which were those of a 'legal assistant', like the applicant. Second, the applicant's job description was set out in the vacancy notice relating to his post, confirmed by the report at the end of his probationary period and then amended by the description signed by the applicant himself on 21 September 2010. Also, the vacancy notice ECDC/CA/IV/2010/RMU-LO did not concern the same post as that of the applicant, as the different descriptions of the two posts show.
- 83 In the third place, so far as concerns the applicant's workload, it must be stated that this was taken into consideration in the appraisal report, which indicates that his efficiency was above the level required for the post. In this connection, the applicant claims that he was recruited to deal with 'all aspects of EU administrative law' but had demonstrated knowledge at a 'level well above', having dealt with a very high number of files on data protection and on copyright law. However, it is sufficient to observe that the issues which related to data protection and to copyright were expressly provided for in the applicant's job description, so that the fact that he took care of those matters did not exceed his job description.
- 84 In the fourth place, the appraisal report mentions that the achievement of the objective relating to the implementation of a computer application did not only depend upon the applicant's activity but also on other factors, such as organisational changes within the unit and the existence of other, more pressing, objectives, so that the statement that that specific objective had not been achieved is merely a finding of fact and not an assessment of the applicant's efficiency.
- 85 It follows that the present plea is not well founded and must therefore be rejected.
- 86 It follows from all the foregoing that the action must be dismissed in its entirety as unfounded.

Costs

- 87 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he or she is not to be ordered to pay any. Lastly, under Article 88 of the Rules of Procedure, a party, even if successful, may be ordered to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought.
- 88 It is apparent from the grounds stated above that the applicant has been unsuccessful in his action and the ECDC has expressly requested that the applicant be ordered to pay the costs.
- 89 As it is, the circumstances of the present case do not justify application of Article 87(2) of the Rules of Procedure.

- ⁹⁰ In addition, at the hearing the applicant requested that the ECDC be ordered to pay all the costs where, in the event that the action were dismissed, the Tribunal based its decision on the arguments developed by the ECDC in the defence. The applicant is basing his request on an alleged failure to state adequate reasons in the appraisal report, a failure which forced him to bring the present action. However, in the light of the circumstances of the case, and in particular of the fact that the Tribunal has not found that the appraisal report was vitiated by any failure to state reasons, this request should not be granted.
- ⁹¹ It is therefore appropriate to rule that the applicant must bear his own costs and be ordered to pay the costs incurred by the ECDC.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Mr Ntouvas to bear his own costs and to pay the costs incurred by the European Center for Disease Prevention and Control.**

Rofes i Pujol

Boruta

Bradley

Delivered in open court in Luxembourg on 11 December 2012.

W. Hakenberg
Registrar

M.I. Rofes i Pujol
President