Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 November 2018 [1]

Case C-558/17 P

OZ
v

European Investment Bank (EIB)

(Appeal — Civil service — EIB staff — Sexual harassment — Complaint — Investigation carried out in the context of the 'Dignity at work' programme — Rejection of the complaint — Application for annulment of the decision of the President of the EIB to reject the complaint — Claim for compensation for the damage caused by the conduct of the EIB)

I. Introduction

1. The institutions, bodies, offices and agencies of the European Union are required to protect their staff against any form of bullying or harassment in the workplace. To that end, the European Investment Bank ('the EIB') adopted 'the policy on dignity at work' internal rules.

2. In the present case, the appellant filed a 'complaint' with the EIB under those rules, alleging that she had experienced sexual harassment at the hands of her supervisor from 2011 until her transfer to another post during the year 2012. According to the appellant, the internal investigation procedure opened after she filed her complaint was vitiated by several errors which, ultimately, led to the rejection of her complaint.

3. In addition to relying on an infringement of her procedural rights, the appellant claims, in particular, that it was unlawful to take into account information concerning her private life solely for the purpose of calling into question her credibility.

4. The difficulty of adducing evidence of harassment is inherent in the nature and modus operandi of conduct of that kind. An administrative decision seeking to establish the truth of allegations of harassment, taken at the end of an investigation procedure, is thus always based, at least to some extent, on opinions or assessments relating to aspects of the private lives of the persons concerned. In those circumstances, compliance with the procedural rules governing the decision-making process is of particular importance.

1 Original language: French.

5. This appeal provides the Court with the opportunity to examine, for the first time, the question of which procedural requirements must be fulfilled in an administrative investigation procedure concerning harassment. The present case therefore raises the issue of the validity of the settled case-law of the Civil Service Tribunal and the General Court according to which, in the context of a complaint of harassment, the procedural rights which must be afforded to the person accused of harassment differ from the more limited rights of a complainant who claims to be the victim of harassment. [2]

II. Legal context

A. The Staff Regulations of Officials of the European Union

6. Article 24(1) of the Staff Regulations of Officials of the European Union, as amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union ('the Staff Regulations'), [3] reads as follows:

'The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.'

B. The Staff Regulations of the EIB

7. The Staff Regulations of the EIB, adopted on 20 April 1960 by the Board of Directors of the EIB, in the version amended by the decision of the Board of Directors of the EIB of 4 June 2013, which entered into force on 1 July 2013, provide as follows in Article 41:

'Disputes of any nature between the Bank and individual members of staff shall be brought before the Court of Justice of the European Union. Any proceedings instituted by a member of staff in respect of an action of the Bank which would adversely affect him must be brought within three months.

In addition to proceedings being instituted before the Court of Justice …, an amicable settlement shall be sought, prior to the institution of any proceedings, before the Bank's Conciliation Board in respect of disputes other than such as arise from application of the disciplinary measures provided for under Article 38.

The request for conciliation must be made within three months … of the occurrence of the facts or of the notification of the actions giving rise to the dispute. ...'

2 See, inter alia, judgments of the Civil Service Tribunal of 16 May 2012, *Skareby* v *Commission* (F-42/10, EU:F:2012:64, paragraphs 46 to 48), of 23 October 2013, *BQ* v *Court of Auditors* (F-39/12, EU:F:2013:158, paragraph 72) and of 16 December 2015, *De Loecker* v *EEAS* (F-34/15, EU:F:2015:153, paragraph 43), and the judgment of the General Court of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 40).

3 OJ 2013, L 287, p. 15.

C. The EIB policy on dignity at work

8. The EIB rules on the policy on dignity at work ('the policy on dignity at work'), adopted by the EIB on 18 November 2003,[4] provide:

'Investigation procedure

…

The investigation procedure shall contain the following provisions:

…

– an Investigation Panel composed of three Independent persons shall be formed …

– the Investigation Panel shall hold a number of hearings in order to hear separately both parties, any witnesses and any other person that it wishes to question,

– both parties shall have the right to be heard by the Investigation Panel,

– both parties shall have the right to be represented or accompanied,

– the hearings and deliberations of the Investigation Panel shall lead to a recommendation submitted to the President,

– the President shall decide what measures are to be taken.

Tasks and composition of the Investigation Panel

The Panel's task shall be to provide a structure that guarantees an objective, independent investigation on one or more incidents, resulting in a recommendation to the President who shall decide what measures are to be taken.

…

The procedure

…

2. The Director-General of the Personnel Directorate, in agreement with the Staff Representatives, shall suggest the composition of the Panel to the President and set a date for the beginning of the Investigation, at the latest 30 calendar days after the complaint is received.

3. The Director-General of the Personnel Directorate shall immediately acknowledge receipt of the staff member's memorandum and confirm the initiation of an Investigation procedure …

4. Once the complainant's memorandum has been received, the Director-General of the Personnel Directorate shall

…

4 Unless I am mistaken, that document, produced by the EIB in French at the request of the Registry of the Court, has not been published and is accessible only internally.

d. indicate that the investigation will begin within 30 calendar days of the complaint being officially lodged with the Director-General of the Personnel Directorate and that both parties will be notified of the date, time and location of their individual hearing, their right to be represented or accompanied and the composition of the Panel.

…

The hearing

The purpose of the hearing shall be to establish exactly what happened and collate the fact to enable a reasoned recommendation to be drawn up. The parties shall not have the right to cross-examine as they shall be heard separately. They shall not be obliged to repeat unpleasant or embarrassing details as that is absolutely unnecessary. All parties involved in the investigation and the hearings, including assistants and witnesses, are reminded that they are bound by a duty of confidentiality.

…

The Panel may adopt whichever procedure that it considers appropriate. In general, the hearing shall take the form of a series of separate meetings held in the following order:

– first, the complainant

– any witnesses mentioned by the complainant

– the alleged harasser

– any witnesses mentioned by the alleged harasser

– if deemed necessary by the Panel, both parties may be called for new separate hearings.

If required, the Panel may also question again the persons involved and possibly summon other members of staff or request information or copies of documents if, collectively, it considers that this is justified and relevant. If there is any uncertainty, the President shall have the last word on matters concerning access to files and data or recourse to other Investigation methods, having consulted the Data Protection Officer if necessary. The Panel shall notify the complainant in the event of additional investigations.

Outcome of the investigation

Once all parties have been heard and any other appropriate investigations have been conducted, the Panel is expected to be able to make a decision and propose a reasoned recommendation. It shall not have any decision-making powers.

The Panel may recommend either that

– the case be dropped because the two parties have been able to clarify the situation and a solution for the future, which is acceptable to both parties, has been found,

– the case not be considered to constitute intimidation or harassment but a dispute at work that must be examined in greater detail or monitored,

– the complaint be rejected,

– the necessary measures be taken should it find the complaint to be unfounded or malicious,

– the disciplinary procedure be initiated.

The Panel's written recommendation shall be made within five days of the end of the investigation and sent to the President to decide what measures are to be taken.

Decision by the President

…

Within five working days of the recommendation being sent to the President at the latest, both parties shall be informed in writing of the President's reasoned decision. The Panel's recommendation shall be enclosed with this decision.'

III. The background to the dispute and the procedure before the General Court

9. On 1 December 2008, the appellant, OZ, was recruited by the EIB, where she worked, from the end of 2009, in a Directorate in which Mr F. occupied the post of supervisor of staff. In September 2012 the appellant moved to another post. In January 2014 the appellant stated to her Head of Division that that transfer to another post was connected with sexual harassment which she considered she had experienced at the hands of Mr F. since 2011.

10. On 20 May 2015, the appellant filed with the Director-General of the Personnel Directorate of the EIB a complaint in which she claimed to have been sexually harassed by Mr F.

11. On 18 June 2015, the Director-General of the Personnel Directorate informed the appellant that, following her complaint, a formal investigation procedure ('the investigation procedure') had been initiated pursuant to the internal rules on the policy on dignity at work.

12. On 26 June 2015, the Investigation Panel was officially appointed and the appellant was informed that hearings would take place on 20 July 2015.

13. On 17 September 2015, the Investigation Panel submitted its report ('the Investigation Panel's report') to the President of the EIB.

14. In its report, the panel explained the results of its investigation as follows: it had not been possible to confirm the appellant's allegations on account of the absence of witnesses to the alleged acts. However, all the witnesses had agreed that the appellant's health was a cause for concern. She had experienced a traumatic break-up with her former partner and had subsequently lost a lot of weight. The appellant is also eager to advance in her career and is of a manipulative nature, which is likely to cause serious problems in other people's lives. She also has difficulty in accepting any form of criticism. Finally, the panel recommended that the appellant learn to be more team spirited and adopt a more positive attitude.

15. On 16 October 2015, the President of the EIB decided on the basis of the recommendations of the Investigation Panel to reject the complaint filed by the appellant ('the decision of the President of the EIB'); the Investigation Panel's report was attached to that decision.

16. Following the decision of the President of the EIB, clarifications were sought by him from the Investigation Panel with a view to the possible institution of disciplinary proceedings and the panel submitted its final observations on 12 January 2016. The appellant subsequently lodged a request for conciliation pursuant to Article 41 of the Staff Regulations of the EIB.

17. On 29 June 2016, following the findings of the Conciliation Board of 22 April 2016, the President of the EIB stated that the conciliation procedure had failed.

18. On 22 July 2016, the appellant brought an action before the General Court seeking annulment of the decision of the President of the EIB and the Investigation Panel's report, and an order requiring the EIB to pay the appellant the sum of EUR 20 000 as compensation for the non-material damage suffered by her as well as the sum of EUR 977 (including VAT) and a provisional amount of EUR 5 850 to cover the medical costs incurred following that damage.

19. In support of her action at first instance, the appellant relied, in essence, on two pleas in law. The first plea alleged infringement of the rules of the investigation procedure and infringement of the appellant's procedural rights under Article 6 of the European Convention on Human Rights ('the ECHR') and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), on the basis of a failure to comply with several stages of the investigation procedure. The second plea alleged an infringement of Article 8 of the ECHR and Article 7 of the Charter, on the basis that the Investigation Panel's report and the decision of the President of the EIB contained justifications relating to the appellant's private life, in particular concerning her psychological health, which were irrelevant in the light of the subject matter of the investigation. The appellant took the view that those unlawful acts were such as to justify the annulment of the decision of the President of the EIB and a finding that the EIB was non-contractually liable.

20. In its judgment of 13 July 2017 ('the judgment under appeal'),[5] the General Court first rejected in its entirety the appellant's claim for compensation, holding that none of the appellant's complaints related to an unlawful act which could be attributed to the EIB. As a result, given that the appellant argued that the unlawful acts alleged for the purpose of the claim for annulment corresponded to the conduct attributed to the EIB for the purpose of the claim for compensation, the General Court concluded that it was also necessary to reject the claim for annulment.

IV. The procedure before the Court and the forms of order sought

21. By a document dated 22 September 2017, the appellant brought the present appeal against the judgment of the General Court.

22. The appellant claims that the Court should:

– – set aside in its entirety the judgment under appeal;

– – annul the decision of the President of the EIB of 16 October 2015 not to act on the complaint of sexual harassment lodged by the appellant and annul the report of the Investigation Panel of the EIB of 14 September 2015 (including a sanitisation of the report as described more fully below);

– – order the EIB to pay her compensation for the medical costs incurred as a result of the damage suffered, in an amount of (i) EUR 977 (including VAT) to date and (ii) a provisional amount of EUR 5 850 for future medical costs;

– – order the EIB to pay her damages in relation to the non-material damage suffered, in an amount of EUR 20 000;

– – order the EIB to reimburse the expenses incurred in the present proceedings, in an amount of EUR 35 100 (including VAT);

5 Judgment of the General Court of 13 July 2017, *OZ* v *EIB* (T-607/16, not published, EU:T:2017:495).

– – order the EIB to reimburse the expenses incurred in the present appeal proceedings and before the General Court;

– – order that the case be referred back for the re-opening of the dignity at work procedure by the EIB and/or a new decision from the President of the EIB.

23. The EIB contends that the Court should:

– dismiss the appeal;

– order the appellant to pay the costs.

24. The appellant and the EIB were represented at the hearing of 26 September 2018.

V. Legal assessment

25. The appellant raises three grounds in support of her appeal, alleging, first, infringement of Article 47 of the Charter and Article 6 of the ECHR, secondly, infringement of Article 7 the Charter and Article 8 of the ECHR and, thirdly, a denial of justice.

26. The first ground of appeal relates, in essence, to the assessment made by the General Court concerning the conduct of the investigation procedure in the light of the requirements of the policy on dignity at work and the appellant's procedural rights under Article 47 of the Charter and Article 6 of the ECHR. That ground of appeal is divided into four parts relating to various errors allegedly committed by the General Court: the incorrect assessment of the scope of a complainant's procedural rights, a lack of consequences for non-compliance with the time limits governing the investigation procedure, the incorrect assessment of the fair composition of the Investigation Panel and the rejection of the appellant's arguments challenging the confidential treatment of her complaint.

27. The second and third grounds of appeal concern the rejection by the General Court of the appellant's arguments seeking to demonstrate the illegality, in particular in the light of Article 7 of the Charter and Article 8 of the ECHR, of several elements contained in the Investigation Panel's report and forming the basis of the decision of the President of the EIB to reject the complaint as unfounded.

A. Admissibility

28. In the first place, it should be pointed out that the action before the General Court against the decision of the President of the EIB of 16 October 2015, although brought on 22 July 2016, that is to say more than nine months after the adoption of that decision, was not inadmissible.[6] It follows from the case-law that the time limit of three months provided for in the first paragraph of Article 41 the Staff Regulations of the EIB[7] for bringing of an action before the General Court was interrupted for the duration of the conciliation procedure initiated under the third paragraph of Article 41 of the Staff

6 Concerning the jurisdiction of the Court to raise of its own motion the inadmissibility of the action before the General Court for the first time at the appeal stage, see the judgment of the Court of 23 April 2009, *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2009:243, paragraph 22).

7 That time limit was added to the Staff Regulations of the EIB following the judgment of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB* (C-334/12 RX-II, EU:C:2013:134). However, the General Court considers that that new version applies only where the staff member was recruited after 2013; see, for example, judgment of 4 October 2018, *PD* v *EIB* (T-615/16, not published, EU:T:2018:642, paragraph 48). In any event, it is clear from the above-cited judgment of the Court concerning the situation before 2013 that even an action brought outside the three-month period against an act attributable to the EIB cannot, from the outset, be regarded as not having been brought within a reasonable period.

Regulations.[8] Although that procedure is not mandatory, its use cannot prejudice the right of the person concerned to bring proceedings before the Courts of the European Union.[9] That is why the time limit for bringing the action should be regarded as starting to run only from the date of the final decision finding that the conciliation procedure had failed, in this case 29 June 2016.

29. In the second place, the EIB raises two objections of inadmissibility against the appeal. It argues, first, that the appeal does not refer to any specific paragraph of the judgment under appeal and, secondly, that, in essence, the appeal merely reproduces the arguments already set out in the application at first instance.

30. As regards the first objection of inadmissibility, it is sufficient to note that the objection has no factual basis since the appeal actually refers, in the footnotes, to specific paragraphs of the judgment under appeal. Moreover, and in any event, Article 169(2) of the Rules of Procedure of the Court does not lay down a formal requirement to refer to the numbers of the paragraphs of the judgment under appeal. It is sufficient that the arguments contained in the appeal enable the Court to identify the reasoning of the General Court which is alleged to be vitiated by errors of law, so that the Court is able to exercise its function in the area under examination and to carry out its review of legality.[10]

31. As regards the second objection of inadmissibility, it should be noted that most of the arguments raised by the appellant essentially concern the legal assessment made by the General Court. However, it is clear from the case-law of the Court that provided that a party challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may again be discussed in the course of an appeal.[11]

32. However, that is not true of the appellant's arguments relating to the General Court's rejection of the allegation concerning the composition of the Investigation Panel and the confidential treatment of the complaint (third and fourth parts of the first ground of appeal). In that regard, the appellant merely repeats the factual arguments already put forward at first instance. She repeats, in particular, her criticism that the persons appointed lacked the necessary qualifications and impartiality and is thus seeking to challenge the General Court's assessment of the facts, even though she does not rely on any distortion of those facts. Accordingly, those arguments must be rejected as inadmissible in accordance with the second subparagraph of Article 256(1) TFEU and Article 58 of the Statute of the Court, according to which the review of legality carried out by the Court in an appeal is to be limited to points of law.

33. As regards, in the third place, the appellant's request for the deletion of the elements of the Investigation Panel's report which were ruled to be unlawful, it suffices to note that the General Court was fully entitled to hold, in paragraphs 22 and 23 of the judgment under appeal, that the EU courts do not have jurisdiction to issue directions to the institutions.[12] Moreover, the appellant did not challenge that part of the judgment in its appeal. Consequently, that head of claim must from the outset be rejected as inadmissible.

8 See, to that effect, the View of Advocate General Mengozzi in the Review of *Arango Jaramillo and Others* v *EIB* (C-334/12 RX-II, EU:C:2012:733, point 51), and the judgment of the General Court of 6 March 2001, *Dunnett and Others* v *EIB* (T-192/99, EU:T:2001:72, paragraph 56), as well as the judgment of the Civil Service Tribunal of 10 July 2014, *CG* v *EIB* (F-95/11 and F-36/12, EU:F:2014:188, paragraph 80).

9 Before the amendment of the Staff Regulations of the EIB in 2013 as a result of the judgment of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB* (C-334/12 RX-II, EU:C:2013:134), the use of the conciliation procedure was not mandatory.

10 See, to that effect, order of 19 June 2014, *Cartoon Network* v *OHIM* (C-670/13 P, not published, EU:C:2014:2024, paragraphs 42 to 46), and judgment of 7 November 2013, *Wam Industriale* v *Commission* (C-560/12 P, not published, EU:C:2013:726, paragraph 44). That interpretation of Article 169(2) of the Rules of Procedure is also confirmed by the wording of the provision in language versions other than the French version, including the German, English and Polish language versions.

11 See judgment of 26 October 2006, *Koninklijke Coöperatie Cosun* v *Commission* (C-68/05 P, EU:C:2006:674, paragraph 54) and, in particular with regard to assessment of the conduct of an administrative procedure, my Opinion in *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:104, point 77) and the judgment of 7 June 2007 in that case, *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:322, paragraph 92).

12 Judgment of 23 April 2002, *Campogrande* v *Commission* (C-62/01 P, EU:C:2002:248, paragraph 43).

34. Similarly, although annulment of the judgment of the General Court and, where appropriate, annulment of the decision of the President of the EIB may certainly lead to the initiation of a new investigation procedure within the EIB, it is nonetheless not for the Court to order the reopening of the procedure, since it is the administration which must take the necessary measures to comply with a judgment of the Court.[13] It follows that the last head of claim on appeal is inadmissible.

B. Substance

35. The appellant asks the Court to set aside the judgment of the General Court and annul the decision of the President of the EIB and also to rule that the EIB is non-contractually liable.

36. It is therefore necessary to examine, first, whether the errors of law alleged against the General Court are capable of justifying the setting aside of the judgment under appeal (points 1 and 2). If so, it will be necessary to ask, secondly, whether the state of the proceedings permits judgment to be given and whether the EIB's alleged errors justify, where appropriate, the annulment of the decision of the President of the EIB and a ruling that the EIB be held non-contractually liable (point 3).

1. The appeal

(a) The first ground of appeal

37. By its first ground of appeal, the appellant complains that the General Court concluded, after examining the conduct of the investigation procedure, that the irregularities relied on by the appellant did not constitute an infringement of her procedural rights under Article 47 of the Charter and Article 6 of the ECHR and therefore justified neither the annulment of the decision of the President of the EIB nor a finding that the EIB was non-contractually liable.

(1) The first part of the first ground of appeal, alleging an incorrect assessment of the scope of the appellant's procedural rights

38. The appellant complains that the General Court infringed her rights under Article 47 of the Charter and Article 6 of the ECHR in holding, in paragraph 52 of the judgment under appeal, that the complainant's rights in an investigation procedure for sexual harassment under the policy on dignity at work are more limited than the rights conferred on the defendant. By relying on that erroneous premiss, the General Court wrongly disregarded the procedural irregularities relied on by the appellant.

39. Specifically, the appellant submits, in the first place, that the General Court disregarded the principle of equality of arms, the adversarial principle and the appellant's rights of defence by holding that it was legitimate for the Investigation Panel not to disclose to her the statements which were made by the person accused of harassment and by the persons heard in the course of the investigation and which served as the basis for the decision to reject the complaint.

40. In the second place, the appellant complains that the General Court committed an error of law in finding that it was sufficient for the Investigation Panel to hear only two of the eleven witnesses proposed by the appellant on the ground that the Investigation Panel was in no way required to hear all the witnesses proposed by a party to the proceedings.

13 Article 113(1) of the Rules of Procedure of the Court provides that, in an appeal, the form of order sought by the appellant is to seek to set aside, in whole or in part, the judgment of the General Court and, as the case may be, to seek the same form of order, in whole or in part, as that sought at first instance, see judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 205).

41. In the third place, the appellant complains that the General Court committed an error of law in holding that it was lawful for the Investigation Panel to disregard the medical reports provided by the appellant in support of her complaint, since those reports were written after the occurrence of the facts at issue. By thus limiting the appellant's possibility of adducing evidence, the General Court infringed her right to be heard and her rights of defence.

42. The General Court's response to the complaints made by the applicant at first instance alleging infringement of her rights by the EIB in the course of the investigation procedure relies on the case-law of the Civil Service Tribunal, [14] confirmed by the General Court, [15] according to which the situation of a complainant, in the context of an investigation procedure for psychological harassment, cannot be equated with that of the person against whom the complaint has been made and that, accordingly, the complainant cannot rely on the same procedural rights as the person accused of harassment.

43. Since that case-law was developed in the context of cases governed by the Staff Regulations, it is appropriate, first, to recall the main characteristics of both the procedure initiated following a request for assistance under the Staff Regulations and the investigation procedure at issue in this case (subpoint (i)). Next, I shall draw conclusions as to the procedural rights which must be conferred on the various persons involved in such a procedure (subpoint (ii)). Finally, I shall examine whether those requirements have been fulfilled in the present case (subpoint (iii)).

(i) The administrative investigation procedures for harassment within the EU institutions

44. The obligation on the part of the EU administration to intervene in support of a member of staff who claims to be a victim of harassment or any other form of bullying stems from the duty of that administration to provide assistance laid down, with respect to employment relationships governed by the Staff Regulations of the European Union, in Article 24 of those Staff Regulations. The submission of a request for assistance under the Staff Regulations is followed by an administrative investigation seeking to establish the facts and to take the appropriate action in full knowledge of the facts. It follows that the administrative investigation does not have the purpose of penalising conduct but seeks, first of all, to establish whether the administration is required to intervene in support of an official. [16] To that end, it is sufficient that prima facie evidence of the truth of the allegations be adduced, without thereby anticipating the outcome of any disciplinary proceedings instituted subsequently. [17]

45. Similarly, the EIB's policy on dignity at work lays down, for employment relationships governed by the Staff Regulations of the EIB, a formal procedure in the course of which the alleged victim has the opportunity to make an official complaint which initiates the investigation procedure. However, it should be noted that that procedure differs from the investigation procedure which is initiated following a request for assistance under the Staff Regulations. [18] The outcomes provided for under the procedure at issue in the present case include not only the rejection of the complaint or the opening of

14 Judgment of the Civil Service Tribunal of 16 December 2015, *De Loecker* v *EEAS* (F-34/15, EU:F:2015:153, paragraph 43).

15 Judgment of the General Court of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 40).

16 Judgments of the Civil Service Tribunal of 16 May 2012, *Skareby* v *Commission* (F-42/10, EU:F:2012:64, paragraph 46); of 23 October 2013, *BQ* v *Court of Auditors* (F-39/12, EU:F:2013:158, paragraph 72); of 10 July 2014, *CG* v *EIB* (F-103/11, EU:F:2014:185, paragraph 148), and judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 68 and 71 to 72). That intervention may take the form of disciplinary proceedings against the alleged harasser but also the form of a distancing measure, see judgment of the Civil Service Tribunal of 9 December 2008, *Q* v *Commission* (F-52/05, EU:F:2008:161, paragraphs 207 to 213).

17 Judgment of the Civil Service Tribunal of 16 December 2015, *De Loecker* v *EEAS* (F-34/15, EU:F:2015:153, paragraph 41).

18 The General Court recently emphasised the difference as regards terminology, namely a 'complaint' provided for by the rules applicable to the staff of the ECB (which are similar in that regard to those of the EIB) and a 'request for assistance' pursuant to the Staff Regulations, in the judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 77 and 78).

disciplinary proceedings against the person accused of harassment, but also the opening of such proceedings against an alleged victim whose complaint is held to be unfounded or malicious. In that regard, the procedure at issue therefore goes further than the procedure provided for following a request for assistance under the Staff Regulations.

(ii) The procedural rights of the parties concerned in an investigation procedure for harassment

46. The General Court recently had the opportunity both to recall the context of the development of the case-law relating to requests for assistance under the Staff Regulations, referred to in point 42 of this Opinion, and to clarify the scope thereof. [19]

47. It follows from that judgment of the General Court that the aforementioned case-law is intended neither to limit a complainant's actual procedural rights in an investigation procedure for harassment, nor to confer upon him, in principle, a less favourable position than that of the defendant, the alleged harasser. [20] It seeks, rather, to draw a distinction between, on the one hand, the administrative investigation procedure initiated by the request for assistance under the Staff Regulations and, on the other hand, any disciplinary proceedings which may, where appropriate, be initiated subsequently. [21] While the administrative procedure is, according to the General Court, governed in principle by the rights arising from Article 41 of the Charter, the rights of defence in the strict sense apply only at the stage of the disciplinary proceedings. [22]

48. It is true that the General Court acknowledges that it is settled case-law that observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the procedure in question. [23] However, given that the role of a person who has submitted a request for assistance under the Staff Regulations is, in essence, to cooperate in the proper conduct of the investigation in order to establish the facts, the General Court concluded that that procedure cannot be regarded as having been brought against that person. [24] On the other hand, the General Court recognises that a person accused of harassment must, from the commencement of the procedure, be in a position to defend himself against the charges against him. [25] It is therefore on account of their respective roles in the investigation procedure that the General Court has held in several judgments that the procedural rights of the persons concerned were different.

49. In that regard, however, it is important to note that, in any event, Article 41 of the Charter applies to any administrative procedure regardless of whether it is of an adversarial or inquisitorial nature and lays down, in particular, the right of every person to be heard before the adoption of a measure which adversely affects him. Moreover, it should be recalled that the rule that the parties should be heard

19 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393).

20 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 69 and 70).

21 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 71 and 72).

22 The similarities between disciplinary proceedings and criminal proceedings were discussed by Advocate General Roemer in his Opinion in *Van Eick* v *Commission* (35/67, not published, EU:C:1968:32, p. 510), and in the Opinion of Advocate General Alber in *Tzoanos* v *Commission* (C-191/98 P, EU:C:1999:127, point 27).

23 Judgments of 9 November 2006, *Commission* v *De Bry* (C-344/05 P, EU:C:2006:710, paragraph 37), and of 14 June 2016, *Marchiani* v *Parliament* (C-566/14 P, EU:C:2016:437, paragraph 51). A decision terminating a period of secondment cannot be regarded as a procedure brought against the person concerned for the purposes of that case-law, see judgment of 29 April 2004, *Parliament* v *Reynolds* (C-111/02 P, EU:C:2004:265, paragraph 57). Disciplinary proceedings must, however, be regarded as being brought against the person concerned for the purposes of that case-law, which justifies the applicability of the rights of defence as provided for by Annex IX to the Staff Regulations.

24 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraph 66), adopting the solution put forward in the judgments of the Civil Service Tribunal of 16 May 2012, *Skareby* v *Commission* (F-42/10, EU:F:2012:64, paragraphs 46 to 48); of 6 October 2015, *CH* v *Parliament* (F-132/14, EU:F:2015:115, paragraph 57), and of 23 October 2013, *BQ* v *Court of Auditors* (F-39/12, EU:F:2013:158, paragraph 72).

25 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraph 69).

applies also to any procedure which may result in a decision perceptibly affecting a person's interests.[26] There is therefore no need to settle definitively the question whether an administrative investigation procedure, whether governed by the rules of the Staff Regulations or by the rules of the policy on dignity at work of the EIB, falls within the scope of Articles 47 and 48 of the Charter.[27]

50. Although it is true that, from the start of the procedure, the person accused of harassment runs the risk of the adoption of an adverse measure for the purposes of Article 41(2) of the Charter, namely a decision to act on the request for assistance, it is also important to note that the investigation procedure may also adversely affect the person who submitted that request. That is so, in particular, where, during the procedure, it becomes apparent that the request for assistance will be rejected.[28] Accordingly, just as the person accused of harassment must be in a position to defend himself against charges brought against him, which warrants allowing him to be heard, possibly on several occasions, in the course of the investigation, the complainant must, in the same way, be heard in relation to the grounds on which the administration intends to rely in support of the rejecting the complainant's request, where appropriate.[29] Moreover, this has also been acknowledged in the case-law of the General Court.[30]

51. Since the administration is required to give every affected person the opportunity to effectively make known[31] his views, this means, in my view, that the complainant must be in a position to challenge any evidence on which the competent authority intends to base its rejection decision, whether statements made by witnesses or from other sources, and to provide any cogent evidence in that connection. As is clear from the case-law of the General Court in that regard, it is not possible, in particular, to take the view that merely taking into account the original complaint or earlier observations is already sufficient to support the conclusion that the complainant's right to be heard has been observed. It may prove necessary, in particular, to provide the complainant with the opportunity to make her views known on the draft inquiry report.[32]

52. Those considerations, which are applicable to any administrative investigation for harassment, apply *a fortiori* to the investigation procedure initiated under the internal rules of the EIB, since those rules provide for the possibility of adopting several decisions adversely affecting the complainant for the purposes of Article 41(2) of the Charter, including the bringing of proceedings against the complainant.

26 See judgments of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 50); of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 54) and, in relation to the civil service, judgments of 6 October 1982, *Alvarez* v *Parliament* (206/81, EU:C:1982:333, paragraph 6) and of 17 November 1983, *Tréfois* v *Court of Justice* (290/82, EU:C:1983:334, paragraph 19). As regards, in particular, the rejection of a complaint of sexual harassment, see judgment of the General Court of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraphs 35 and 41).

27 To the extent that the appellant complains, in essence, that the General Court infringed her right to be heard and the adversarial principle, principles which are also enshrined in Article 41 of the Charter, it is irrelevant to the outcome of this dispute that she formally connects those principles to Article 47 of the Charter and Article 6 of the ECHR.

28 Judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraph 73).

29 See, to that effect, judgment of 9 November 2006, *Commission* v *De Bry* (C-344/05 P, EU:C:2006:710, paragraphs 37 and 38).

30 Judgments of 24 October 1996, *Commission* v *Lisrestal and Others* (C-32/95 P, EU:C:1996:402, paragraph 21); of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 38), and of 14 June 2016, *Marchiani* v *Parliament* (C-566/14 P, EU:C:2016:437, paragraph 51), and judgments of the General Court of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 34), and of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 69 and 74).

31 Judgments of the General Court of 8 December 2005, *Reynolds* v *Parliament* (T-237/00, EU:T:2005:437, paragraph 101) and of 8 March 2005, *Vlachaki* v *Commission* (T-277/03, EU:T:2005:83, paragraph 64), and judgment of the Court of 20 December 2017, *Prequ'Italia* (C-276/16, EU:C:2017:1010, paragraph 46). On the scope of the right effectively to make known one's views, see the Opinion of Advocate General Poiares Maduro in *Commission* v *De Bry* (C-344/05 P, EU:C:2006:483, point 44 et seq.).

32 This was also required by the General Court in its judgment of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 50), and by the Civil Service Tribunal in the judgment of 23 October 2013, *BQ* v *Court of Auditors* (F-39/12, EU:F:2013:158, paragraphs 73 and 74). In the judgment of 29 June 2018 in *HF* v *Parliament* (T-218/17, EU:T:2018:393), the General Court even ruled that it was insufficient for the administration to have heard the applicant in relation to the reasons justifying the rejection of the request without having given her access to the report of the Advisory Committee.

(iii) Observance of the procedural rights of the appellant in the present case

– The appellant's right to be heard in relation to the statements of the defendant and of the witnesses

53. It follows from the foregoing that at the latest from the moment that it becomes apparent that the complaint will be rejected, the complainant must have, under Article 41 of the Charter, the same procedural rights as those available to the person accused of harassment.[33] The complainant, like the person accused of harassment, may therefore demand to be heard, possibly on several occasions, in relation to the facts concerning him, in particular in so far as the competent authority is carrying out an assessment of his behaviour.

54. Accordingly, and contrary to what the General Court held in paragraph 52 of the judgment under appeal, the complainant's situation in the investigation procedure may, depending on the circumstances of the case, be treated as entirely equivalent to the situation of the person accused of harassment. However, the General Court found that the Investigation Panel rightly refused to disclose to the appellant the content of the statements of the person accused of harassment and of the witness statements for her to be able to make observations. In that regard, the General Court relied, in particular, on the fact that the policy on dignity at work does not provide for the disclosure to the complainant of statements of the person accused of harassment.[34] However, the policy on dignity at work cannot derogate from the principles of EU law set out in point 48 of this Opinion. In so ruling, the General Court therefore failed to have regard to the content of the appellant's right to be heard in the investigation procedure and to the adversarial principle.

55. Clearly, the General Court has failed to take into consideration the fact that the rejection of the complaint is, in itself, an act that adversely affects the appellant, and to infer from this that it was necessary to disclose to the appellant the statements of the witnesses and of the person accused of harassment on which the President intended to base his decision. The failure to take that matter into consideration is all the more surprising, however, since the Civil Service Tribunal had already repeatedly pointed out that any recognition by the administrative authority of the existence of harassment is, in itself, likely to have a beneficial effect in the harassed person's therapeutic process of recovery, with the result that the administrative authority should properly hear the person concerned before rejecting that person's complaint.[35] This applies a fortiori in the appellant's case, in which the rejection of the complaint was, in addition, accompanied by recommendations criticising her for actually being the source of the problems identified, because she did not have a positive attitude.

56. In that regard, it is clear from paragraphs 48 and 49 and paragraphs 69 and 71 of the judgment under appeal that the General Court acknowledged that the statements of the person accused of harassment and of the witness statements regarding the appellant's professional performance, her state of (psychological) health and her private problems were of a decisive nature, which led to the undermining of the appellant's credibility and, ultimately, to the rejection by the President of the EIB of the complaint. However, since the appellant was naturally unaware of that evidence when filing her complaint and at the time of the hearing, and was unable to acquaint herself with it subsequently, she cannot be regarded as having been properly heard before her complaint was rejected.

57. It follows that the General Court committed an error of law in not acknowledging, in such circumstances, the appellant's right to acquaint herself with the defendant's observations and the content of any witness statements, so as to submit observations or present new evidence to support her allegations. That applies a fortiori, in so far as the General Court noted in paragraph 48 of the

33 See also, to that effect, judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraph 69).

34 See paragraph 54 of the judgment under appeal.

35 See judgments of the Civil Service Tribunal of 23 October 2013, *BQ* v *Court of Auditors* (F-39/12, EU:F:2013:158, paragraph 72) and of 16 December 2015, *De Loecker* v *EEAS* (F-34/15, EU:F:2015:153, paragraph 43); see now also judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraph 64).

judgment under appeal that the subject matter of the investigation had actually changed in the course of the procedure, since the President of the EIB was considering the adoption of disciplinary measures against the appellant, without her having been heard in relation to the facts justifying that change of course.

58. The fact that disciplinary proceedings were ultimately not initiated cannot call into question that finding. Contrary to what the representative of the EIB submitted at the hearing, it is the rejection of the complaint which adversely affects the appellant for the purposes of Article 41 of the Charter, and not the bringing of subsequent disciplinary proceedings alone.

59. In any event, nor did the General Court refer either to any circumstances which might allow a finding that the Bank was acting in an effort to avert a risk of influencing witnesses on the part of the appellant or to any other reasons of confidentiality which might, where appropriate, justify restricting her access to the witness statements.[36] Moreover, if that had been the case, it would have been sufficient to disclose to the appellant only the content of the witness statements or a summary of the information used as the basis for the investigation report, without disclosing the identity of the persons providing those witness statements.

60. It follows from the foregoing that by holding, in such circumstances, that the Investigation Panel was not required to disclose to the appellant the content of the statements of the person accused of harassment and of the witness statements on which the Investigation Panel intended to base its recommendations, the General Court erred in law. The first complaint of the first part of the first ground of appeal must therefore be upheld.

– *The appellant's right to demand that the proposed witnesses be called*

61. The appellant also complains that the General Court held that observance of her right to be heard and the adversarial principle did not require that all her proposed witnesses be called.

62. In that regard, it should be noted that, according to the case-law of the Civil Service Tribunal cited in paragraph 55 of the judgment under appeal, an Investigation Panel is certainly not required to call all the witnesses proposed by a complainant, because of its discretion with regard to the conduct of the investigation.[37] However, that discretion is also governed by the principle of good administration and the procedural rights of the parties concerned as enshrined in Article 41 of the Charter. Accordingly, the decisions of the Investigation Panel regarding the conduct of the investigation do not, from the outset, escape all judicial scrutiny. Thus, the Investigation Panel cannot, in particular, fail without cause and justification to hear the proposed witnesses, but must ensure that the parties are given a fair hearing in order to safeguard their right to be heard.

63. On this view, the Civil Service Tribunal considered that it was justified in not calling additional witnesses in a case in which the Investigation Panel had already called fifteen of the eighteen witnesses proposed by the person concerned, as well as twenty others.[38] It can be inferred from this that there cannot be an obligation to call all the witnesses proposed by a party where the

36 Judgment of the General Court of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 45). In that case, however, the appellant had had access to the draft report of the Investigation Panel summarising the witness statements.

37 Judgments of the Civil Service Tribunal of 13 December 2012, *Donati* v *ECB* (F-63/09, EU:F:2012:193, paragraph 187) and of 10 July 2014, *CG* v *EIB* (F-103/11, EU:F:2014:185, paragraph 157); see now also judgment of the General Court of 29 June 2018, *HF* v *Parliament* (T-218/17, EU:T:2018:393, paragraphs 97 to 101).

38 Judgment of the Civil Service Tribunal of 13 December 2012, *Donati* v *ECB* (F-63/09, EU:F:2012:193, paragraph 187).

Investigation Panel considers that it has sufficient information as to the facts and when the parties concerned have been properly heard. Similarly, in another case, the Civil Service Tribunal relied on the fact that an investigator had sufficient evidence on the file in order to uphold that investigator's decision to call only twelve of the 52 witnesses proposed by the applicant.[39]

64. However, in the judgment under appeal, the General Court did not consider whether the panel was already sufficiently informed or whether the appellant had already been properly heard. On the contrary, it appears from the appeal, on the one hand, that only a minority of the witnesses proposed by the appellant was called and, on the other hand, that she had had no warning of this. By merely finding, in those circumstances, that the Investigation Panel was under no obligation to call all the appellant's witnesses, the General Court therefore committed an error of law.

65. It follows that the second complaint of the first part of the first ground of appeal must also be upheld.

– *The rejection of the medical certificates*

66. The General Court held, in paragraph 58 of the judgment under appeal, that the EIB could rightly reject the medical certificates submitted by the appellant as evidence of the existence of acts constituting harassment, since the persons who had drawn up those certificates had not witnessed the alleged acts at issue.

67. In that context, it should be noted that such medical certificates may certainly shed light on the existence or even the nature of the damage suffered by the alleged victim of harassment, depending on their content and the date on which they were drawn up. That was also recognised by the General Court in paragraph 58 of the judgment under appeal. A medical certificate cannot, however, be attributed the same probative value as the direct testimony of a person who witnessed the act at issue. However, since the purpose of the investigation was to establish whether the specific acts alleged by the complainant took place and to assess them in the light of the definition of sexual harassment, the General Court was fully entitled to find that the medical certificates produced by the appellant could not be used to determine whether or not those events occurred.[40]

(iv) Interim conclusion

68. It follows from the foregoing that the General Court erred in law in holding that the rights which were available to the appellant in the context of the investigation were less extensive than those available to the person accused of harassment and that the appellant therefore had neither the right to disclosure of the content of the statements of the person accused of harassment and of the witness statements nor the right to make observations on them or to demand the calling of additional witnesses in so far as this was necessary to observe her right to be heard.

39 Judgment of the Civil Service Tribunal of 11 July 2013, *Tzirani* v *Commission* (F-46/11, EU:F:2013:115, paragraph 125).

40 Following that logic, the Court upheld a judgment in which the General Court ruled that it was appropriate for an Investigation Panel to refrain from calling witnesses who were not present for the whole or even part of the incident at issue, see order of 16 October 1997, *Dimitriadis* v *Court of Auditors* (C-140/96 P, EU:C:1997:493, paragraph 38).

(2) The second part of the first ground of appeal, alleging a lack of consequences for non-compliance with the time limits governing the investigation procedure

69. The second part of the first ground of appeal concerns the assessment by the General Court of the consequences of failure to comply with certain time limits laid down in the policy on dignity at work. The General Court held, in paragraphs 47 to 49 of the judgment under appeal that, despite the failure to comply with those time limits, no unlawful conduct can be imputed to the EIB, since the appellant had received the notification of the hearing and the decision within a reasonable period and the EIB had acted with due diligence. The appellant, however, is of the view that the General Court should have concluded that the time limits at issue were strictly binding in nature.

70. First of all, it must be held that the policy on dignity at work, since it forms part of the internal rules of the EIB, is legally binding in nature, as is recognised, moreover, by the General Court in paragraph 33 of the judgment under appeal.[41] Accordingly, and contrary to what the General Court nevertheless seems to maintain in paragraph 47 of the judgment under appeal, there is no reason to regard the time limits laid down in those rules as merely indicative targets of good administration intended to promote the conduct of the procedure within a reasonable period of time.[42]

71. However, it follows from settled case-law that even the infringement of a binding time limit does not in itself justify in every case the annulment of the measure adopted as a result of the procedure at issue.[43] In those circumstances, the General Court was fully entitled, in paragraph 47 of the judgment under appeal, to start from the premiss that the consequences of non-compliance with a time limit can be assessed only on the basis of the particular circumstances of the case.

72. In that regard, it should be noted that the policy on dignity at work makes the various stages of the investigation procedure subject to very short time limits, sometimes as few as five working days. Given the potentially serious impact of the investigation on relationships within the team and the exposed position of the complainant, as well as the interests of the person accused of harassment in clearing himself of any accusations against him as quickly as possible, those time limits are intended to avoid any prolongation of a situation of uncertainty. It follows that the purpose of the time limits governing the investigation procedure is not merely to determine the time frame for that procedure but is rather to protect the interests of the persons concerned.

73. That purpose does not, however, justify annulment of a decision taken out of time. On the contrary, annulment of the decision for the simple reason that it was taken out of time would actually perpetuate the state of uncertainty which the time limits are intended to avoid.

74. In any event, it also follows from settled case-law that failure to comply with a time limit may give rise to a right to compensation. In that context, the EU judicature must make an overall assessment of the situation in question in order to determine whether the duration of the procedure was unreasonable.[44] In the present case, it is clear that, in examining whether the notification of the hearing and the communication of the decision of the President of the EIB had taken place within a reasonable time in view of the circumstances in question, the General Court correctly applied that case-law. In particular, it took into consideration, first, as regards the time limit for opening the investigation, the fact that the appellant had been informed on several occasions of the then current

41 See also judgment of the Civil Service Tribunal of 11 November 2014, *De Nicola* v *EIB* (F-52/11, EU:F:2014:243, paragraph 143).

42 See, to that effect, judgment of the General Court of 10 May 2005, *Piro* v *Commission* (T-193/03, EU:T:2005:164, paragraph 78).

43 Judgment of 20 May 2010, *Gogos* v *Commission* (C-583/08 P, EU:C:2010:287, paragraph 56).

44 Reasonableness must be assessed in the light of the circumstances of the case, see judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 229 to 235), and of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB* (C-334/12 RX-II, EU:C:2013:134, paragraphs 28 and 29).

state of her complaint (paragraph 36 of the judgment under appeal) and, secondly, as regards the time limit for communication of the decision of the President, the fact that the subject matter of the investigation had changed in the course of the procedure, which necessitated the gathering of additional information (paragraphs 48 and 49 of the judgment under appeal).

75. Leaving aside those findings, the General Court's conclusion that the time between the filing of the complaint on 20 May 2015 and the decision of the President of 16 October 2015 was not unreasonably long falls within the exercise of its exclusive jurisdiction to assess the facts. That conclusion cannot therefore be called into question at the appeal stage.

76. It follows that it is necessary to reject the appellant's argument that the failure to comply with the time limits laid down in the investigation procedure should have led to the annulment of the decision of the President of the EIB and a finding that the EIB was non-contractually liable.

(b) The second and third grounds of appeal, alleging an erroneous assessment of the legality of certain justifications in the Investigation Panel's report in the light of Article 7 of the Charter and Article 8 of the ECHR

77. By her second and third grounds of appeal, the appellant essentially complains that the General Court failed to rule that it was unlawful for the President of the EIB to base his decision on witness statements made by persons without relevant qualifications, which described the appellant as a person with psychological problems who had experienced a difficult break-up with her former partner, following which she had lost a lot of weight, and who had difficulty in accepting any form of criticism and was manipulative in nature, and which suggested that her complaint was motivated by reasons other than the sexual harassment that she allegedly suffered.

78. In that context, the appellant also complains that the General Court erred in its reasoning, in that it contradicted itself by holding, in paragraph 76 of the judgment under appeal, that, despite the fact that the reference to those elements was 'both superfluous and regrettable', it did not constitute unlawful conduct which could be imputed to the EIB.

79. In rejecting the appellant's arguments, the General Court relied, in paragraph 71 of the judgment under appeal, on the fact that the Investigation Panel and the President themselves made no statements concerning the appellant's private life or psychological health, but merely reproduced the witness statements on that subject. The General Court seems to conclude from this that those remarks could thus not be imputed to the EIB.

80. However, in paragraph 71 and paragraph 81 of the judgment under appeal, the General Court pointed out that the panel had indeed relied on those statements to justify its recommendation to reject the complaint. In that context, it should be noted that that recommendation called into question the appellant's credibility as a person rather than the credibility of her allegations. Accordingly, the assessment of the appellant's personality allegedly made by the witnesses was used by the Investigation Panel as the very basis of the rejection of the complaint. However, it is not permissible for the panel and subsequently the President of the EIB to base their decision adversely affecting the appellant on an assessment which they have not endorsed. Indeed, it is the specific task of the Investigation Panel to establish the facts justifying the final decision. At the hearing, it was stated in that regard that it is not for the President of the EIB to carry out additional factual checks. In those circumstances, the General Court should have concluded that the observations concerning the appellant's personality and conduct in the Investigation Panel's report could be attributed to the EIB. Conversely, if the General Court had concluded that the panel merely reproduced, but did not adopt, the assessments contained in the witness statements, the General Court would then have had

to conclude that the President had failed to state adequate reasons in his decision, which was based on nothing other than the panel's report and the witness statements reproduced therein. The General Court's reasoning concerning whether or not the assessments contained in the witness statements may be attributed to the EIB is therefore vitiated by an error of law.

81. Moreover, the General Court rejected the appellant's arguments intended to demonstrate an infringement of Article 7 of the Charter, holding, in paragraphs 74 and 75 of the judgment under appeal, that the Investigation Panel's report and the decision of the President of the EIB were not distributed and that the elements in that report ultimately had no effect, in particular in terms of disciplinary proceedings, on the appellant's professional situation.

82. As regards the latter of those two arguments, the fact that the assessment of the appellant's conduct and personality did not result in disciplinary proceedings is irrelevant to the examination of whether the statements thus made constitute an infringement of Article 7 of the Charter or even Article 8 of the ECHR.

83. Accordingly, it remains to be determined whether the General Court was correct to conclude that an infringement of Article 7 of the Charter could be ruled out, since the report was disclosed only to the person accused of harassment and the President of the EIB.

84. In that regard, it should be noted, first of all, that the Civil Service Tribunal has held, in a case concerning an investigation for psychological harassment, that the disclosure, albeit only to the persons accused of harassment, of information likely to give rise to negative rumours about an applicant and to undermine her reputation and her credibility was sufficient to support the conclusion that there had been unlawful conduct conferring a right to compensation. [45]

85. However, in a case in which the Commission rejected an application for promotion in a decision accompanied by offensive comments, the Court also took into consideration the aggravating fact that the document in question had been disseminated throughout the division. [46]

86. According to the case-law of the European Court of Human Rights ('the ECtHR), the question whether a comment deemed offensive or likely to discredit the person concerned has been disseminated may certainly be taken into consideration in order to establish an infringement of the right to privacy under Article 8 of the ECHR, which includes respect not only for a person's reputation but also for his honour. [47] Moreover, the ECtHR has repeatedly held that psychological integrity also falls within the scope of the right to privacy enshrined in Article 8 of the ECHR. [48] However, in order to establish an infringement of Article 8 of the ECHR, both the gravity of the statement [49] and its purpose, [50] as well as any justifications, must also be taken into account. It follows that an infringement of Article 8 of the ECHR cannot be assessed by examining only the question whether the remarks were disseminated.

45 The Civil Service Tribunal did not expressly examine that unlawful conduct from the perspective of an infringement of Article 7 of the Charter but acknowledged that it had caused the applicant non-material damage, see judgment of 10 July 2014, *CG* v *EIB* (F-103/11, EU:F:2014:185, paragraph 151).

46 See judgment of 7 February 1990, *Culin* v *Commission* (C-343/87, EU:C:1990:49, paragraphs 27 to 29).

47 Judgments of the ECtHR of 29 June 2004, *Chauvy and Others v. France* (No 64915/01, CE:ECHR:2004:0629JUD006491501, paragraph 70), and of 15 November 2007, *Pfeifer v. Austria* (No 12556/03, CE:ECHR:2007:1115JUD001255603, paragraph 35).

48 Judgment of the ECtHR of 9 April 2009, *A. v. Norway* (No 28070/06, CE:ECHR:2009:0409JUD002807006, paragraph 64).

49 The statement must be such as to undermine the right of the person concerned to respect for private life, see judgments of the ECtHR of 9 April 2009, *A. v. Norway* (No 28070/06, CE:ECHR:2009:0409JUD002807006, paragraph 64); of 10 July 2014, *Axel Springer AG v. Germany* (No 39954/08, CE:ECHR:2012:0207JUD003995408, paragraph 83), and of 16 July 2015, *Delphi AS v. Estonia* (No 64569/09, CE:ECHR:2015:0616JUD006456909, paragraph 137).

50 In a judgment of 4 October 2007, *Sanchez Cardenas v. Norway* (No 12148/03, CE:ECHR:2007:1004JUD001214803, paragraph 37), the ECtHR took into account the fact that the statement at issue, in that case made by a court in a judgment, served no purpose for the resolution of the dispute.

87. However, the General Court did not carry out an assessment of the gravity of the comments and their effect on the appellant's psychological integrity, as she had attempted to do by means of medical certificates. Nor did it examine whether the statements could reasonably and objectively contribute to an assessment of whether or not the complaint was malicious. Finally, as regards possible justification, the General Court should have examined whether the investigation concerning aspects of the appellant's private life and the references to them in the Investigation Panel's report and in the decision of the President of the EIB were relevant in the light of the purpose of the investigation, that is to say establishing whether or not the acts alleged against the person accused of harassment took place.

88. It follows from all the foregoing considerations that the General Court's reasoning that any infringement of Article 7 of the Charter and Article 8 of the ECHR can be ruled out solely based on the absence of disciplinary consequences arising from the observations concerning the appellant's personality and conduct and on the non-disclosure of the report within her unit is vitiated by errors of law.

2. The consequences of the finding that the first part of the first ground of appeal and the second ground of appeal are well founded

89. The well-founded nature of the first part of the first ground of appeal, concerning the scope of the appellant's procedural rights, in itself justifies the setting aside of the judgment under appeal. It is indeed by relying on the incorrect premiss that the procedural rights to be conferred on the appellant were in principle less extensive than those of the person accused of harassment that the General Court rejected the appellant's arguments seeking to demonstrate the existence of irregularities in the conduct of the investigation procedure. In so far as the rejection of the claim for annulment and the claim for compensation was based entirely on the absence of any unlawful conduct in that procedure, the judgment under appeal must therefore be set aside.

90. Accordingly, there is no need to examine whether the well-founded nature of the second ground of appeal, concerning errors of law made by the General Court in assessing whether there was an infringement of Article 7 of the Charter, also justifies the setting aside of the judgment under appeal. Following the setting aside of the judgment under appeal, however, those considerations remain relevant for the purpose of assessing the claim for compensation relied on at first instance.

3. The action before the General Court

91. Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, if the judgment of the General Court is set aside, the Court of Justice may give final judgment in the matter where the state of the proceedings so permits.

92. That is the position in the present case as regards the annulment of the decision of the President of the EIB sought by the appellant at first instance, since a correct interpretation of the scope of the appellant's procedural rights by the General Court should have led to the annulment of the decision of the President of the EIB.

93. It is true that, according to settled case-law, an infringement of procedural rights, in particular of the right to be heard, justifies the annulment of a decision adopted at the end of a procedure only if, had it not been for such an irregularity, the outcome of that procedure might have been different.[51] This does not apply, in particular, where the administration has no discretion as to the decision to be taken at the end of the procedure.

94. However, in the present case, it cannot be ruled out that the decision of the President of the EIB might have been different if the appellant had had the right either to challenge the statements of the person accused of harassment and the witness statements or to adduce new evidence in support of her complaint. That is all the more true since the subject matter of the investigation had changed from the time when the appellant had filed the complaint and thus became focused on the appellant's conduct and her personality, matters in relation to which the appellant had not yet had the opportunity to make observations.

95. It is therefore appropriate to grant the application for annulment submitted at first instance and to annul the decision of the President of the EIB rejecting the appellant's complaint. Moreover, if the Court adopts this proposal and annuls the decision, it will be for the EIB to take the necessary measures to comply with the judgment annulling the decision.

96. However, the state of the proceedings does not permit judgment to be given in relation to the claim for compensation.[52]

97. It follows from the considerations set out in the context of the second ground of appeal[53] that the General Court must again assess the argument alleging an infringement of Article 7 of the Charter, taking into account the gravity and purpose of the comments contained in the panel's report and their possible justification. Moreover, the question whether it is possible to justify holding the EIB non-contractually liable having regard to the damage which the appellant claims to have suffered and to its link with the unlawful acts relied on has not yet been considered by the General Court.

98. It follows that it is necessary to refer the case back to the General Court for a decision on the claim for compensation.

C. Costs

99. Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

VI. Conclusion

100. In the light of the foregoing considerations, I propose that the Court should:

(1) Set aside the judgment of the General Court of the European Union (Sixth Chamber) of 13 July 2017, *OZ* v *EIB* (T-607/16);

(2) Annul the decision of the President of the EIB of 16 October 2015 rejecting the appellant's complaint of sexual harassment under the policy on dignity at work of the EIB;

51 See, to that effect, judgments of 14 February 1990, *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 31); of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598, paragraph 94); of 6 September 2012, *Storck* v *OHIM* (C-96/11 P, EU:C:2012:537, paragraph 80); of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 38), and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 79).

52 On the possibility for the Court to give final judgment on certain parts of the dispute and to refer the case back to the General Court as to the remainder, see judgment of 14 May 1998, *Council* v *de Nil and Impens* (C-259/96 P, EU:C:1998:224).

53 See point 83 et seq. of this Opinion.

(3) Refer the case back to the General Court for a decision on the claim for compensation;

(4) Reserve the costs.