



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

16 June 2021 *

(Civil Service – Temporary staff – Article 2(c) of the CEOS – Contract for an indefinite period – Early termination with notice – Article 47(c)(i) of the CEOS – Breakdown in the relationship of trust – Terms of notice – Abuse of process – Right to be heard – Principle of sound administration – Rights of the defence – Manifest error of assessment)

In Case T-355/19,

CE, represented by M. Casado García-Hirschfeld, lawyer,

applicant,

v

Committee of the Regions, represented by S. Bachotet and M. Esparrago Arzadun, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

APPLICATION under Article 270 TFEU for, first, annulment, principally, of the decision of 16 April 2019 by which the Committee of the Regions terminated the applicant's employment contract and, in the alternative, of the letter of 16 May 2019 by which it extended the date until which the applicant could collect her personal belongings and access her email during the notice period and, secondly, compensation for the material and non-material damage the applicant alleges to have suffered as a result of those decisions,

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos, President, I. Reine and M. Sampol Pucurull (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 December 2020,

gives the following

* Language of the case: French

Judgment¹

...

II. Procedure and forms of order sought

- 38 By application lodged at the Registry of the General Court on 13 June 2019, the applicant brought the present action. By separate document lodged at the Registry of the General Court on the same date, the applicant made an application for interim measures, based on Articles 278 and 279 TFEU, seeking, first, suspension of the operation of, primarily, the contested decision and, in the alternative, the letter of 16 May 2019 and, secondly, the adoption of interim measures relating to the terms of the notice period. Pursuant to Article 91(4) of the Staff Regulations, the proceedings in the principal action were suspended.
- 39 By order of 12 July 2019, *CE v Committee of the Regions* (T-355/19 R, not published, EU:T:2019:543), the President of the General Court dismissed the applicant's application for interim relief on the ground that the applicant had not established to the requisite legal standard the urgency to suspend the operation of the measures in question and reserved the costs.
- 40 In accordance with Article 91(4) of the Staff Regulations, the proceedings in the principal action were resumed following the adoption, on 10 October 2019, of the express decision rejecting the applicant's complaint.
- 41 Following a change in the composition of the General Court, by decision of 18 October 2019, the President of the General Court, pursuant to Article 27(3) of the Rules of Procedure of the General Court, reallocated the case to a new Judge-Rapporteur, assigned to the Seventh Chamber.
- 42 By document lodged at the Registry of the General Court on 18 October 2019, the applicant requested that she be granted anonymity pursuant to Article 66 of the Rules of Procedure. By decision of 29 October 2019, the General Court granted that request.
- 43 By document lodged at the Registry of the General Court on 20 May 2020, the applicant requested that a hearing be held on the basis of Article 106(2) of the Rules of Procedure.
- 44 On 24 September 2020, by way of a measure of organisation of procedure as provided for in Article 89 of the Rules of Procedure, the General Court put a number of written questions to the parties to be answered orally at the hearing and requested that the Committee of the Regions produce certain documents. The Committee of the Regions complied with that request within the prescribed period.
- 45 The parties presented oral argument and answered the questions put to them by the General Court at the hearing on 10 December 2020.
- 46 The applicant claims that the Court should:
- annul the contested decision and, in the alternative, the letter of 16 May 2019;

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

- order the payment of compensation in respect of the material harm incurred, amounting to the sum of EUR 19 200, and the non-material harm incurred, estimated at EUR 83 208.24;
- order the Committee of the Regions to pay the costs.

47 The Committee of the Regions contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

III. Law

A. The claim for annulment

...

2. Substance

...

(a) The first plea in law, alleging an abuse of process and infringement of Articles 47 and 49 of the CEOS and Articles 23 and 24 of Annex IX to the Staff Regulations

- 55 The applicant submits that the AECE of the Committee of the Regions was not entitled unilaterally to terminate her contract with notice, in accordance with Article 47(c)(i) of the CEOS, while suspending her from her duties under Article 49(1) of the CEOS, without complying with the rules governing the adoption of the administrative measure of suspension, as laid down in Articles 23 and 24 of Annex IX to the Staff Regulations. Therefore, the applicant considers that a decision of the AECE which provides jointly for the termination of her contract under Article 47(c)(i) of the CEOS and suspension from her duties for the entire notice period constitutes, in accordance with the case-law, an abuse of process.
- 56 In the reply, the applicant states that, contrary to the claims made by the Committee of the Regions, the contested decision does not entail a ‘dispensation from service’ but a suspension measure. In that regard, she points out that, in accordance with the case-law, ‘dispensation from service’ refers to permission not to do what one is required to do. However, the contested decision required her not to perform her duties during the notice period. Moreover, the applicant submits that the continued payment of her salary during the notice period is not relevant in that regard. According to the applicant, it is clear that there is little difference between the dispensation from service imposed on her and a suspension from duties.
- 57 Furthermore, the applicant states that the Committee of the Regions cannot justify its decision to suspend her from her duties during the notice period on the ground that, in the interest of the service, it was impossible to organise that period in any other way. She submits in that regard that, if the Committee of the Regions considered that her conduct amounted to serious misconduct capable of leading to her dismissal without notice, it ought to have initiated disciplinary proceedings against her.

- 58 The Committee of the Regions disputes the applicant's arguments.
- 59 It should be recalled that abuse of process is a particular expression of the concept of misuse of powers, which has a precise scope referring to the use by an administrative authority of its powers for a purpose other than that for which they were conferred upon it. A measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, judgment of 16 October 2019, *ZV v Commission*, T-684/18, not published, EU:T:2019:748, paragraph 35 and the case-law cited).
- 60 With regard to the procedure for terminating the contract for an indefinite period of a member of the temporary staff, it is clear from Article 47(c)(i) of the CEOS that the employment is to cease at the end of the period of notice specified in the contract. Moreover, Article 49(1) of the CEOS provides that, after the disciplinary procedure provided for in Annex IX to the Staff Regulations, which is to apply by analogy, has been followed, employment may be terminated without notice on disciplinary grounds in serious cases of intentional or negligent failure of temporary staff to comply with their obligations, and that, before that termination, the member of temporary staff may be suspended in accordance with Articles 23 and 24 of Annex IX to the Staff Regulations.
- 61 In that regard, according to settled case-law, on account of the broad discretion enjoyed by the AECE where there is wrongful conduct capable of justifying the dismissal of a member of the temporary staff, there is no obligation on that authority to initiate disciplinary proceedings against that person rather than using the option of unilaterally terminating the contract provided for in Article 47(c) of the CEOS and it is only if the AECE intends to dismiss a member of the temporary staff without notice, in a serious case of failure to comply with his obligations, that the disciplinary procedure provided for in Annex IX to the Staff Regulations of Officials, which applies by analogy to members of the temporary staff, should be initiated, as provided for in Article 49(1) of the CEOS (see judgment of 2 April 2019, *Fleig v EEAS*, T-492/17, EU:T:2019:211, paragraph 97 (not published and the case-law cited)).
- 62 In the present case, it should be noted that the reason for terminating the applicant's contract was essentially the breakdown in the relationship of trust between the group and the applicant, on account of the inappropriate management of her colleagues and of the impact which that management had on their health, without any disciplinary reason being relied on against the applicant in the contested decision. The AECE of the Committee of the Regions chose to terminate the applicant's contract pursuant to Article 47(c)(i) of the CEOS and not to apply Article 49(1) of the CEOS.
- 63 It follows that, in principle, the AECE of the Committee of the Regions was entitled to terminate the applicant's contract on the basis of Article 47(c)(i) of the CEOS, before its expiry and with six months' notice, without having to initiate disciplinary proceedings.
- 64 That being so, it is also stated in the contested decision that, in so far as the applicant's direct working relationships with her colleagues risked damaging their health and maintaining a difficult working environment, she was exempted from the performance of services under her contract during the six-month notice period while being assured that she would continue to receive the remuneration and social benefits linked to her contract. Moreover, in the contested decision, the AECE of the Committee of the Regions stated that the applicant could access her office to collect her personal belongings in the fortnight following the start of the notice period

and that the office would then be used by the institution in accordance with its needs and would no longer be accessible to the applicant. Furthermore, it stated that access to her email would be solely in 'read-only mode' in the month following the start of the notice period, until the email account was automatically deactivated. Finally, in accordance with the contested decision, the applicant retained the right to enter the premises of the Committee of the Regions during the notice period, but had to return her service card which would be replaced by a new one since she was now prevented from attending meetings of the Bureau of the group and plenary sessions.

- 65 In so doing, the consequences that the AECE of the Committee of the Regions intended to draw from the breakdown in the relationship of trust admittedly consisted mainly of the termination of the applicant's contract on the basis of Article 47(c)(i) of the CEOS, but also, subsidiarily, of the envisaged adjustments to the notice period in so far as they involved a substantial change in her working conditions, including being exempted from the performance of the work under her contract during the notice period.
- 66 In that regard, it must be pointed out that, although Article 47(c)(i) of the CEOS does not expressly provide that the conditions of employment of the staff member whose contract is terminated can be the subject of adjustments during the notice period, so that that period is presumed to constitute a normal period of work, the fact remains that the institutions, bodies, offices and agencies of the European Union have a wide discretion in the organisation of their departments and in assigning the staff available to them, provided that this assignment is carried out in the interest of the service and in conformity with the equivalence of posts, including for staff members who are serving in a notice period (see, by analogy, judgment of 13 December 2017, *CJ v ECDC*, T-703/16 RENV, not published, EU:T:2017:892, paragraph 42).
- 67 Moreover, it has been held that, without infringing the AECE's power, where there is wrongful conduct capable of justifying the dismissal of a staff member, to unilaterally terminate the contract provided for in Article 47(c)(i) of the CEOS rather than initiate disciplinary proceedings against that staff member, it must be considered, nevertheless, that the decision, in such circumstances, to terminate the contract makes it necessary to comply with a notice requirement that constitutes a central element of those provisions. Therefore, if the AECE considers that the deficiencies which it alleges against a staff member preclude the continued performance, under normal conditions, of his or her contract during a notice period, it must draw the appropriate conclusions from this and, therefore, initiate disciplinary proceedings while adopting a suspension measure, in accordance with Article 49(1) of the CEOS, unless the person concerned has been duly exempted from the performance of his or her duties (judgment of 13 December 2017, *CJ v ECDC*, T-703/16 RENV, not published, EU:T:2017:892, paragraph 51).
- 68 Furthermore, where, in a case of misconduct such as to justify the dismissal of a member of staff, the AECE decides to terminate that person's contract with notice instead of initiating disciplinary proceedings against him or her, the onus is on the AECE, under its power to determine the administrative duties which the member of staff concerned must perform during that notice period, to inform him or her, giving reasons, in the text of the decision terminating the contract, if he or she is to abstain from performing certain specific duties (see judgment of 13 December 2017, *CJ v ECDC*, T-703/16 RENV, not published, EU:T:2017:892, paragraph 43 and the case-law cited).
- 69 However, it cannot be ruled out that, in certain specific circumstances, the reasons for the termination of a person's employment contract on the basis of Article 47 of the CEOS arise from a situation which justifies EU institutions, bodies, offices or agencies being able to take the view

that, in the exercise of their broad discretion in the organisation of their departments and in the assignment of staff available to them, the interests of the service require that the person concerned is relieved of all duties during the notice period.

- 70 That may be the case specifically in the event of a dismissal on the ground of a breakdown in the relationship of trust with a member of staff who, like the applicant, was recruited on the basis of Article 2(c) of the CEOS and against whom, as is also the case with the applicant, no serious misconduct within the meaning of Article 23 of Annex IX to the Staff Regulations has been found or even alleged.
- 71 All temporary staff recruited on the basis of Article 2(c) of the CEOS have an employment contract concluded *intuitu personae*, the essential part of which is mutual trust (see, to that effect, judgment of 17 October 2006, *Bonnet v Court of Justice*, T-406/04, EU:T:2006:322, paragraphs 47 and 101).
- 72 As the Committee of the Regions pointed out at the hearing, the breakdown in such a relationship of mutual trust may be such that it is impossible for the person or entity responsible for recruiting the member of the temporary staff to entrust him or her with any tasks during the notice period.
- 73 In such a situation, the decision not to assign any tasks during the notice period to the member of the temporary staff whose contract is terminated constitutes a measure taken in the interest of the service and cannot necessarily be treated, as the applicant essentially claims, as a suspension decision taken under Articles 23 and 24 of Annex IX to the Staff Regulations. Similarly, where the situation which gave rise to the breakdown in the relationship of trust with a member of the temporary staff recruited on the basis of Article 2(c) of the CEOS makes it impossible for that staff member to be assigned tasks during the notice period, the AECE cannot be required to initiate disciplinary proceedings during that period.
- 74 Moreover, the applicant has not put forward any evidence capable of demonstrating that she was in fact suspended and dismissed on disciplinary grounds.
- 75 In those circumstances it must be concluded that the applicant's argument in support of her first plea in law is based on the incorrect premiss that the AECE of the Committee of the Regions adopted a suspension measure against her on disciplinary grounds on the basis of Articles 23 and 24 of Annex IX to the Staff Regulations, a measure which required the termination of her contract of employment to be adopted following a disciplinary procedure in accordance with Article 49 of the CEOS.
- 76 Accordingly, the AECE of the Committee of the Regions, without this entailing an abuse of process, was able to terminate the applicant's employment contract on the basis of Article 47 of the CEOS while deciding that she should not work during the notice period.
- 77 It follows that the first plea in law must be rejected as unfounded.

(b) The second plea in law, alleging infringement of the right to fair and just working conditions, of the principle of sound administration and of the prohibition of any form of harassment

...

(1) *The first part, alleging, in essence, infringement of the principle of sound administration, the rights of the defence and the right to be heard*

...

(ii) *The alleged infringement of the right to be heard in the context of the adoption of the contested decision in so far as it lays down the terms of the adjustments to the applicant's notice period*

- 92 In accordance with Article 41(2) of the Charter, the right to good administration includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.
- 93 More specifically, the right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgments of 4 April 2019, *OZ v EIB*, C-558/17 P, EU:C:2019:289, paragraph 53 and the case-law cited, and of 10 January 2019, *RY v Commission*, T-160/17, EU:T:2019:1, paragraph 24 and the case-law cited).
- 94 The purpose of that right, in order to ensure that the person concerned is in fact protected, is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (see, to that effect, judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 37 and the case-law cited).
- 95 In circumstances such as those of the present case, proof that the interested party's right to be heard has been respected must be adduced by the AECE (see, to that effect, judgments of 6 December 2007, *Marcuccio v Commission*, C-59/06 P, EU:C:2007:756, paragraph 47; of 10 January 2019, *RY v Commission*, T-160/17, EU:T:2019:1, paragraph 48; and of 7 November 2019, *WN v Parliament*, T-431/18, not published, EU:T:2019:781, paragraph 44).
- 96 It should be noted that, before the contested decision was adopted, the AECE of the Committee of the Regions had never raised the possibility of adjusting the applicant's notice period. Although that authority heard the applicant with respect to the existence and imputability of the facts and with regard to the legal basis on which the contested decision could be adopted, the applicant did not have the opportunity to submit observations on the specific terms implementing the notice which that authority intended to adopt and in particular on the fact that the applicant would no longer perform the role of Secretary-General of the group and that adjustments would be made to the way in which she could access her email, and her office and the premises of the Committee of the Regions.
- 97 Such measures could not be adopted without having first heard the applicant in order to ensure that she was able to express her views on them. In that regard, it should be noted that the right to be heard is intended, inter alia, to enable the person concerned to clarify certain information or to submit further information, for example relating to his or her personal circumstances, as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (see, to that effect, judgment of 13 December 2017, *CJ v ECDC*, T-703/16 RENV, not published, EU:T:2017:892, paragraph 48).

- 98 The Committee of the Regions cannot reasonably maintain in that regard that the context in which the letter of intent was used implied implicitly, but inherently, the possibility of the termination of the applicant's contract of employment being accompanied by an exemption from the performance of the work under her contract during the notice period and that the applicant could not have been unaware that adjustments to the notice period were envisaged when she was invited to submit her observations on the facts alleged against her.
- 99 It should be noted that the various documents in the file, in particular the emails exchanged between one of the members of the group and the applicant, do not support the conclusion that the applicant was in a position to understand with certainty that the AECE of the Committee of the Regions was considering adjusting the notice period. In addition to the fact that they did not come from that authority, the documents in the file mentioned by the Committee of the Regions in support of its argument did not refer to those measures, but mentioned or suggested the possibility that the applicant might resign under a compromise agreement.
- 100 Consequently, with regard to the measures adjusting the applicant's notice period referred to in paragraph 96 above, the Committee of the Regions infringed the applicant's right to be heard, in breach of Article 41(2)(a) of the Charter.
- 101 However, an infringement of the right to be heard results in the annulment of the decision adopted at the end of the administrative procedure at issue only if, had it not been for that irregularity, the outcome of the procedure might have been different (see judgments of 4 April 2019, *OZ v EIB*, C-558/17 P, EU:C:2019:289, paragraph 76 and the case-law cited, and of 10 January 2019, *RY v Commission*, T-160/17, EU:T:2019:1, paragraph 51 and the case-law cited).
- 102 In the present case, had the applicant had the opportunity to be heard on the terms laid down for the notice period, referred to in paragraph 96 above, this could have led the AECE of the Committee of the Regions to consider other arrangements for that period (see, to that effect and by analogy, judgment of 13 December 2017, *CJ v ECDC*, T-703/16 RENV, not published, EU:T:2017:892, paragraph 49).
- 103 In addition, when questioned at the hearing, the applicant argued that the right to be heard was not limited to the mere possibility of expressing opposition to the specific terms implementing the notice as such, but also involved the opportunity to submit observations capable of influencing the content of the proposed decision. In that regard, the applicant stated that, if she had been heard before a decision was taken on the terms implementing the notice at issue, she could have argued that a measure such as carrying out her work from home could have been envisaged.
- 104 In those circumstances, it cannot reasonably be ruled out that the specific terms implementing the notice contained in the contested decision, in particular that exempting the applicant from performing the work under her contract during the notice period, might have had a different outcome if the applicant had been duly heard.
- 105 Therefore, the applicant's right to be heard before the contested decision was adopted was infringed in respect of the specific terms of the adjustments to the notice period referred to in paragraph 96 above.

106 Consequently, the present complaint must be upheld, and therefore the contested decision must be annulled in so far as it determines specific terms implementing the notice on account of the infringement of the applicant's right to be heard. However, that unlawful act does not, in itself, call into question the legality of that decision in so far as it terminated the applicant's contract (see, to that effect and by analogy, judgment of 23 October 2013, *Gomes Moreira v ECDC*, F-80/11, EU:F:2013:159, paragraph 54).

...

IV. Costs

151 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared. In the present case, as the application for annulment has been partially upheld and the claim for damages has been rejected, it must be held that each party must bear its own costs, including those relating to the application for interim measures, which had been reserved.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

- 1. Annuls the decision of the Committee of the Regions of 16 April 2019 terminating CE's contract of employment in relation to the specific terms implementing the notice.**
- 2. Dismisses the action as to the remainder.**
- 3. Orders each party to bear its own costs, including those relating to the application for interim measures.**

da Silva Passos

Reine

Sampol Pucurull

Delivered in open court in Luxembourg on 16 June 2021.

[Signatures]