



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

13 October 2021 *

(Civil service – Officials – Disciplinary proceedings – Suspension of the invalidity procedure during the disciplinary proceedings – Removal from post – Invalidation procedure devoid of purpose following the official's removal from his post – Action for annulment – Act adversely affecting an official – Admissibility – Principle of sound administration – Duty to have regard for the welfare of officials – Manifest error of assessment)

In Case T-22/20,

IB, represented by N. de Montigny, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by A. Lukošūūtė, acting as Agent, and by B. Wägenbauer, lawyer,

defendant,

APPLICATION under Article 270 TFEU seeking annulment of the decision of EUIPO of 14 March 2019 in so far as it imposes on the applicant the penalty of removing him from his post without reduction of his pension rights and definitively closes his invalidity procedure,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, N. Póltorak and M. Stancu (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 9 March 2021,

gives the following

Judgment¹

...

* Language of the case: French.

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

Procedure and forms of order sought

- 22 By application lodged at the Registry of the General Court on 13 January 2020, the applicant brought the present action.
- 23 By separate document of 16 January 2020, the applicant requested anonymity and the omission of certain information vis-à-vis the public, pursuant to Article 66 of the Rules of Procedure of the General Court. He was granted anonymity on 30 March 2020.
- 24 EUIPO lodged its defence on 26 March 2020.
- 25 The applicant lodged his reply on 20 July 2020.
- 26 The written part of the procedure was closed following the filing of the rejoinder on 1 September 2020.
- 27 EUIPO and the applicant, on 9 and 22 September 2020 respectively, requested a hearing pursuant to Article 106 of the Rules of Procedure.
- 28 On 29 January 2021, the General Court (First Chamber) decided, pursuant to Article 89 of the Rules of Procedure, to put questions to the applicant for written answer, to which he responded within the prescribed time limit.
- 29 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 9 March 2021.
- 30 The applicant claims that the Court should:
- annul the contested decision ‘in so far as it removes [him] from his post and definitively terminates any employment relationship with him, including its consequence as regards the definitive closure of the invalidity procedure’;
 - order EUIPO to pay the costs.
- 31 In the reply, the applicant also requests the Court to ask EUIPO, if appropriate, for a statistical summary of the decisions and penalties it has adopted in disciplinary proceedings against its staff.
- 32 EUIPO contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.

Law

The subject matter of the action and the admissibility thereof in so far as the definitive closure of the invalidity procedure is concerned

- 33 In order to assess whether the action is well founded, it is first necessary to specify its subject matter, since the parties do not agree on that point.
- 34 As is apparent from paragraph 30 above and from the application, the applicant seeks, in essence, the annulment of the contested decision not only in so far as it removes him from his post, but also in that it definitively closes the invalidity procedure.
- 35 EUIPO maintains that the sole aim of the contested decision was to remove the applicant from his post and not to close the invalidity procedure, which has become devoid of purpose following that removal. Accordingly, since the invalidity procedure is different from disciplinary proceedings, it cannot be the subject matter of the contested decision and, therefore, of this action for annulment, so that any complaint against the invalidity procedure must be rejected as inadmissible. That is the case in particular in respect of the first plea, alleging that the suspension of the invalidity procedure was unlawful, and in respect of the first part of the second plea, alleging infringement of the reasonable time limit in disciplinary proceedings.
- 36 More particularly, according to EUIPO, first, it is apparent from settled case-law that the mere silence of an institution cannot be equated with a decision, unless there are express provisions establishing a period on expiry of which such a decision is deemed to be made by the institution invited to adopt a position and defining the content of that decision, which is not the situation in the present case, since no legal text provides that a decision to remove an official from his or her post implicitly includes a decision definitively closing an invalidity procedure which has previously been suspended.
- 37 Second, EUIPO stated, at the hearing, that the applicant should possibly have answered the letter of 16 February 2018, by which the Appointing Authority announced that it was going to open an administrative investigation in order to supplement the facts established by OLAF. Since that investigation followed that of OLAF and could lead to disciplinary proceedings, it was implicit in that letter that the suspension of the invalidity procedure would be maintained not only during that investigation but also during the subsequent disciplinary proceedings.
- 38 Third, according to EUIPO, even if the applicant submitted to the administration, together with the claim of 14 June 2019, a request, within the meaning of Article 90(1) of the Staff Regulations, that it resume the invalidity procedure and the administration did not reply, that request is inadmissible, on the ground that, at the time it was made, the applicant was no longer an official and it was submitted after a reasonable period had elapsed since the date on which the OLAF investigation had been closed, that is, in November 2017. Moreover, even if that request were admissible, the administration's refusal in the decision rejecting the complaint cannot be challenged in the present proceedings, since the applicant did not file a complaint against that implicit rejection, so that it became definitive.
- 39 The applicant contests those arguments. He maintains, first of all, that, as is apparent from the internal note of 26 April 2019, the invalidity procedure was closed at the same time that the contested decision was adopted. Next, since the definitive closure of the invalidity procedure is, in fact, related to the contested decision from which it originates, it is that decision which directly

and definitively establishes his situation also as regards the invalidity procedure. That decision therefore adversely affects him in that it removes him from his post, excludes him definitively from the invalidity procedure and deprives him of any remuneration or allowance. In the applicant's view, it is therefore, in essence, a measure of multifaceted decision-making scope. Lastly, he states that even a refusal to adopt a decision may constitute an act having an adverse effect and that such a situation is similar to those in legal proceedings concerning promotion. Moreover, as regards the argument raised at the hearing, the applicant contends that he could not have challenged the letter of 16 February 2018, since that letter was only an intermediate measure.

- 40 In those circumstances, the Court must ascertain whether, as the applicant maintains, EUIPO, by the contested decision, also took a position on the invalidity procedure.
- 41 It should be pointed out, in that regard, that, according to settled case-law, an act adversely affecting an official is one which produces legal effects that are binding on, and capable of affecting, directly and immediately, the interests of the applicant by bringing about a distinct change in his or her legal position, and the measure in question must originate from the competent authority and must set out the administration's definitive position (see order of 20 December 2019, *ZU v EEAS*, T-154/19, not published, EU:T:2019:901, paragraph 27 and the case-law cited). Those effects must be assessed in accordance with objective criteria, such as the content of that measure, taking into account, as appropriate, the context in which it was adopted, and the powers of the institution which adopted the measure (see order of 13 May 2020, *Lucaccioni v Commission*, T-308/19, not published, EU:T:2020:207, paragraph 45 and the case-law cited).
- 42 Moreover, classification of a measure as an act adversely affecting an official does not depend on its form or title, but is determined by its substance and, in particular, by the question of whether it produces legal effects that are binding on, and capable of affecting, directly and immediately, the interests of the applicant, by bringing about a distinct change in his or her legal position (see order of 17 December 2019, *AG v Europol*, T-756/18, not published, EU:T:2019:867, paragraph 43 and the case-law cited).
- 43 In the first place, EUIPO stated, during both the pre-litigation stage and the litigation stage, that the invalidity procedure had become devoid of purpose owing to the decision to remove the applicant from his post, as is evidenced, furthermore, by the internal note of 26 April 2019. In particular, in the decision rejecting the claim, the Appointing Authority considered, in essence, that, since the applicant was no longer in the service of the European Union, he was not entitled to request the initiation of an invalidity procedure. As he had left the service, there was no longer any reason to open that procedure in order to examine whether or not he was capable of carrying out his duties.
- 44 A statement that a decision to remove an official from his or her post renders the invalidity procedure devoid of purpose constitutes a definitive position regarding its outcome.
- 45 In the second place, it should be pointed out, as the applicant rightly notes, that the letter of 16 February 2018 was only an intermediate measure which did not definitively reflect the administration's position regarding the invalidity procedure. According to settled case-law, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, in principle, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that

procedure, and not a provisional measure intended to pave the way for the definitive decision (see order of 13 May 2020, *Lucaccioni v Commission*, T-308/19, not published, EU:T:2020:207, paragraph 47 and the case-law cited).

- 46 Indeed, that letter clearly stated that it was not for OLAF to rule on facts of medical origin and that, therefore, the part of the investigation concerning that aspect could be closed only after an appropriate medical examination had been carried out. Moreover, it is also clear from paragraph 54 of the minutes of the hearing before the Disciplinary Board that the Appointing Authority itself stated that any medical decision concerning the applicant had to be taken by doctors, following an appropriate medical examination and procedure, which suggests that EUIPO had not ruled out the possibility of subjecting the applicant to another medical examination in order to ascertain whether or not the illness he claimed to suffer from was confirmed. Therefore, in the light of those considerations, it must be held that the letter of 16 February 2018 constituted only an intermediate measure regarding the invalidity procedure.
- 47 Furthermore, it is necessary to reject EUIPO's argument that the applicant's claim of 14 June 2019 contained a request made pursuant to Article 90(1) of the Staff Regulations that the invalidity procedure be continued, a request which EUIPO implicitly rejected and which the applicant did not duly deny. As the applicant confirmed in the reply and during the hearing, his arguments in that regard were intended only to contest the closure of the invalidity procedure already decided in the contested decision.
- 48 It is apparent from the foregoing and particularly from the context, as set out above, in which the decision to remove the applicant from his post was adopted, that it contains the administration's definitive position regarding the disciplinary proceedings and, implicitly, but definitely, regarding the invalidity procedure. Since the contested decision was in fact the subject of a prior complaint relating to those two aspects, the action must be declared admissible also in so far as it concerns the definitive closure of the invalidity procedure.

The merits of the application

- 49 In support of the application, the applicant relies on three pleas in law, the first alleging, in essence, that the closure of the invalidity procedure was unlawful, the second alleging irregularity in the disciplinary proceedings, and the third alleging infringement of Article 10 of Annex IX to the Staff Regulations.

The first plea, alleging, in essence, that the closure of the invalidity procedure was unlawful

...

- 63 The Court points out that the first plea is divided, in essence, into two parts, the first alleging an infringement of the principle of sound administration and of the duty to have regard for the welfare of officials, and the second alleging misuse of power.

– *The first part of the first plea, alleging infringement of the principle of sound administration and of the duty to have regard for the welfare of officials*

- 64 In the first part, the applicant claims that, since the invalidity procedure was suspended, it has never been either continued or re-initiated, and that its definitive closure, at the time of his removal from his post, is different from the simple suspension to which the administration had committed. In that regard, according to the applicant, EUIPO's assertion that disciplinary proceedings and invalidity procedures are distinct from each other and have no reciprocal influences is irrelevant and cannot justify the discontinuance, purely and simply, of the invalidity procedure. Owing to the definitive closure of the invalidity procedure, the applicant is now without a basic subsistence income and without a pension. Thus, the applicant claims that by depriving him of the invalidity procedure, the administration has clearly failed to act in accordance with its duty to have regard for the welfare of officials, with its duty to provide assistance and with the principle of sound administration.
- 65 At the outset, without it being necessary to rule on the plea of inadmissibility raised by EUIPO, the complaint made by the applicant relating to the existence of an administrative fault must be dismissed, since that argument is insufficiently substantiated, merely stating the existence of that fault, in paragraph 67 of the application, without any supporting argument.
- 66 As regards the duty to have regard for the welfare of officials, it should be pointed out that, according to the case-law, that duty reflects the balance of reciprocal rights and obligations in the relationship between the official authority and the civil servants. That balance implies, in particular, that when the relevant authority takes a decision concerning the position of an official, it should take into consideration all the factors capable of affecting its decision and that, when doing so, it should take into account not only the interests of the service but also, in particular, those of the official concerned. The latter obligation is also imposed on the administration by the principle of sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union (see judgment of 16 October 2019, *Palo v Commission*, T-432/18, EU:T:2019:749, paragraph 60 and the case-law cited).
- 67 Furthermore, it should be emphasised that the administration's obligations arising from the duty to have regard for the welfare of officials are substantially enhanced where what is at issue is the situation of an official where it is established that his or her physical or mental health is, or may be, affected. In such circumstances, the administration must consider his or her requests with a particularly open mind (see, to that effect, judgment of 30 June 2021, *GW v Court of Auditors*, T-709/19, not published, EU:T:2021:389, paragraph 92 and the case-law cited).
- 68 However, although it is conceivable that the duty to have regard for the welfare of officials may, in certain circumstances, lead the Appointing Authority to reduce, or even remove, the penalty envisaged, consideration of the official's interests, including his or her state of health, cannot, on the other hand, go as far as to deprive the Appointing Authority of the possibility of imposing a penalty, even the major penalty of removal from a post, in a case in which the facts are exceptionally serious and cannot be attributed solely, or even mainly, to the state of health of the official concerned (see, to that effect, judgment of 16 July 1998, *Y v Parliament*, T-144/96, EU:T:1998:173, paragraph 50).
- 69 Lastly, it should be noted that there is no provision in the Staff Regulations stipulating that a decision definitively terminating an official's service, such as removal from a post, renders devoid of purpose an invalidity procedure initiated when the official was still in service. In that regard, the

Court of Justice has stated that the termination of the contract of employment of a member of temporary staff cannot jeopardise the completion of the Invalidation Committee's work or the possible recognition, by the Committee, of invalidity arising before such termination and cannot affect the rights of the employee concerned once the procedure in question has been concluded (judgment of 19 June 1992, *V. v Parliament*, C-18/91 P, EU:C:1992:269, paragraph 40).

- 70 In the present case, it is certain that the invalidity procedure was suspended during the course of the OLAF investigation and was not resumed subsequently, and that EUIPO considered that the invalidity procedure had become devoid of purpose owing to the decision to remove the official from his post, so that it was no longer possible to continue it, once the applicant had been removed from his post.
- 71 It is worth highlighting, first of all, that, as is apparent from the case-law cited in paragraph 69 above, there is no provision in the Staff Regulations stipulating that, where an invalidity procedure, initiated when the official was still in the service, has been suspended by the institution, that procedure cannot continue once the person concerned has left the service following a decision to remove him or her from their post.
- 72 Next, the General Court has stated, in paragraph 53 of the judgment [*confidential*], that, although EUIPO was under no obligation to endorse automatically the findings of the Invalidation Committee, its discretion as to the further action to be taken concerning the Invalidation Committee's opinion cannot allow it to refuse indefinitely, and without reason, to adopt a decision on the basis of that committee's opinion.
- 73 Accordingly, the administration is not entitled to claim that the invalidity procedure, initiated when the applicant was in service, could not be continued owing to the fact that he has now been removed from his post. On the contrary, by definitively closing the invalidity procedure without taking into account the applicant's interest in the continuance of that procedure, EUIPO failed to fulfil its duty to have regard for the welfare of officials and infringed the principle of sound administration. As pointed out in paragraph 66 above, when the relevant authority takes a decision concerning the position of an official, it should take into consideration all the factors capable of affecting its decision and that, when doing so, it should take into account not only the interests of the service but also, in particular, those of the official concerned. Therefore, during the invalidity procedure, the administration should have taken into consideration the existence of disciplinary proceedings, the outcome of which could possibly lead to the removal of the applicant from his post and, taking into account the applicant's interests, should either have closed the invalidity procedure before adopting the decision to remove him from his post, or allowed it to be continued subsequently.
- 74 Lastly, it should be noted that that the EU legislature itself intended, in Article 9 of Annex IX to the Staff Regulations, to give officials or former officials who can no longer work, owing to their age or state of health, the assurance that they will receive, even in the case of the most serious disciplinary penalty, namely removal from post, at least a minimum subsistence amount.
- 75 That conclusion that EUIPO failed to fulfil its duty to have regard for the welfare of officials and infringed the principle of sound administration is not called into question by its argument that it was for the applicant to request that the administration, within a reasonable period, resume the invalidity procedure. First, as is also apparent from paragraph 53 of the judgment [*confidential*], such an initiative should come from the institution, not from the applicant.

- 76 Second, it is apparent from the general scheme of Article 59(4) of the Staff Regulations that, where it is the Appointing Authority which initiates the invalidity procedure, by referring to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years, it is for that authority, even more so, to resume a suspended procedure and to close it.
- 77 On the basis of the foregoing considerations, the first part of the first plea must be upheld and, consequently, without it being necessary to rule on the second part, alleging a misuse of power, the contested decision must be annulled in so far as it definitively closes the invalidity procedure.

...

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls the decision of the European Union Intellectual Property Office (EUIPO) of 14 March 2019 in so far as it definitively closes IB's invalidity procedure;**
- 2. Dismisses the remainder of the application;**
- 3. Orders each party to bear its own costs.**

Kanninen

Póltorak

Stancu

Delivered in open court in Luxembourg on 13 October 2021.

[Signatures]