Reports of Cases

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

12 December 2012*

(Civil service — Staff of the ECB — Complaint of psychological harassment — Administrative inquiry — Access to the file of the inquiry — Report on the inquiry — Manifest error of assessment)

In Case F-43/10,

ACTION under Article 36.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the EU Treaty and the FEU Treaty,

Maria Concetta Cerafogli, member of the staff of the European Central Bank, residing in Frankfurt am Main (Germany), represented by L. Levi and M. Vandenbussche, lawyers,

applicant,

v

European Central Bank (ECB), represented by P. Embley and F. Feyerbacher, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

composed of S. Van Raepenbusch (Rapporteur), President, I. Boruta and E. Perillo, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2012,

gives the following

Judgment

1 By application received at the registry of the Tribunal on 4 June 2010, Ms Cerafogli seeks, essentially, the annulment of the decision of the Executive Board of the European Central Bank (ECB) of 17 November 2009 concluding the internal administrative inquiry opened following her complaint of discrimination ('the contested decision').

* Language of the case: English.

Legal context

2 Article 41(2) of the Charter of Fundamental Rights of the European Union, relating to the 'right to good administration', states:

'1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

…'

3 The Protocol on the Statute of the European System of Central Banks and of the European Central Bank ('Statute of the ESCB and of the ECB'), in the version applicable to the dispute annexed to the EC Treaty, includes the following provisions:

'Article 12

…

12.3 The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

…

Article 36

Staff

36.1 The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2 The Court of Justice of the European Union shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.'

4 On the basis of Article 12.3 of the Statute of the ESCB and of the ECB, the Governing Council of the ECB adopted the Rules of Procedure of the European Central Bank (OJ 2004 L 80, p. 33, 'the Rules of Procedure of the ECB'). In the version applicable to the present dispute, Article 21 of the Rules of Procedure of the ECB provides:

'Conditions of Employment

21.1 The Conditions of Employment and the Staff Rules shall determine the employment relationship between the ECB and its staff.

21.2 The Governing Council, upon a proposal from the Executive Board and following consultation of the General Council shall adopt the Conditions of Employment.

21.3 The Executive Board shall adopt the Staff Rules, that shall implement the Conditions of Employment.

21.4 The Staff Committee shall be consulted before the adoption of new Conditions of Employment or Staff Rules. Its opinion shall be submitted to the Governing Council or the Executive Board respectively.'

5 By decision of 12 October 1999, the ECB adopted the Rules of Procedure of its Executive Board (OJ 1999 L 314, p. 34, 'the Rules of Procedure of the Executive Board'). Article 3(1) of the Rules of Procedure of the Executive Board provides:

'The agenda for each meeting shall be adopted by the Executive Board. A provisional agenda shall be drawn up by the President and shall, in principle, be sent, together with the related documents, to the members of the Executive Board at least two working days before the relevant meeting, except in emergencies, in which case the President shall act appropriately in view of the circumstances.'

6 On the basis of Article 36.1 of the Statute of the ESCB and of the ECB, the Governing Council of the ECB adopted the Conditions of Employment of the Staff of the ECB ('the Conditions of Employment'). The Conditions of Employment provide inter alia as follows:

'9(a) Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the application of these Conditions of Employment.

…

(c) … In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case law which apply to the staff of the [European Union] institutions.

…

41. Members of staff may ask for an administrative review of decisions taken in their individual cases, using the procedure laid down in Part 8 of the Staff Rules. Members of staff who remain dissatisfied following the administrative review procedure may use the grievance procedure laid down in Part 8 of the Staff Rules.

Such procedures may not be used to challenge:

…

(ii) a decision for which special appeals procedures exist;

…

42. After all available internal procedures have been exhausted, the Court of Justice [of the European Union] shall have jurisdiction in any dispute between the ECB and a member of its staff to whom these Conditions of Employment apply.

Such jurisdiction shall be restricted to the legality of the measure or decision, unless the dispute is of a financial nature, in which case the Court of Justice [of the European Union] shall have unlimited jurisdiction.'

7 On the basis of Article 21.3 of the Rules of Procedure of the ECB and of Article 9(a) of the Conditions of Employment, the Executive Board adopted the Staff Rules of the ECB ('the Staff Rules').

8 As regards appeals, the Staff Rules provide:

‘8.1 Administrative review and grievance procedures

…

8.1.6 Decisions taken by the Executive Board shall be subject to a special appeals procedure. A member of staff may initiate an appeal within two months from the date on which the Executive Board’s decision was communicated to them.

The member of staff shall submit the appeal to the President together with any relevant documents. The request shall clearly state the reasons for challenging the decision and the relief sought.

The President shall notify the Executive Board’s decision to the member of staff within two months from the date on which the appeal was submitted.’

9 Administrative Circular 1/2006 of the Executive Board of the ECB of 21 March 2006 on internal administrative inquiries (‘Circular 1/2006’) provides in Article 6(5):

‘The person conducting an inquiry or the panel [tasked with that inquiry], shall report regularly to the lead inquirer on the procedure’s development. … Copies of all relevant documents and minutes of hearings, including the voting’s results, on-the-spot searches or any other inquiry acts performed by the person conducting the inquiry or the panel, shall be annexed to the reasoned report.’

10 Article 7(1) and (3) of Circular 1/2006 provides:

‘1. ECB employees that will be affected by the administrative inquiry shall be informed unless this would be harmful to the administrative inquiry. In any event, conclusions referring to persons by name may not be drawn before the persons have been given the opportunity to express their views on all the facts which concern them.

…

3. ECB employees who are the subject of the administrative inquiry shall be:

(a) informed by the person conducting the inquiry, prior to the submission of the reasoned report, of the content of the alleged breach of professional duties and granted access to documents related to the allegations made against them which disclose facts important for the exercise of their rights of defence; and

(b) granted an opportunity to present their view and add their comments on the conclusions referring to them to ensure the completeness of the inquiry file; the latter shall be included in the reasoned report; and

(c) allowed to seek the assistance of a staff representative.

ECB employees or other individuals involved in the administrative inquiry shall also be granted access to all facts which refer to their person, as well as personal data in order to ensure their completeness and accuracy, and shall have the right to obtain from the lead inquirer acting as the controller the rectification without delay of any such inaccurate or incomplete personal references.’

11 The Code of Conduct of the European Central Bank in accordance with Article 11.3 of the Rules of Procedure of the European Central Bank (OJ 2001 C 76, p. 12, 'the Code of Conduct') provides, under the heading '2.1. Equal treatment and non-discrimination':

'The [members of the staff of the ECB] should avoid any form of discrimination and, in particular, any discrimination based on race, nationality, gender, age, physical disability, sexual preference, political opinions, philosophical views or religious convictions.

… The [members of the staff of the ECB] need both to show sensitivity to and respect for others and to stop any behaviour seen as offensive by another person at his/her first indication. None of the addressees shall be prejudiced in any way whatsoever for preventing or reporting harassment or bullying.'

12 On 19 September 2006 the ECB distributed a note on its 'Dignity at Work' policy ('note on the Dignity at Work policy'). Chapter 2 of that note states:

'…

The intention of an alleged wrongdoer is not the only or even the main issue, the behaviour may even be unintentional on the alleged wrongdoer's part. It is very much also the impact of the behaviour on the recipient that is important in determining whether the behaviour is inappropriate. Everyone should carefully assess the situation of alleged inappropriate behaviour before taking further action. Unfounded allegations with the intent to discredit other persons will not be acceptable. To avoid misunderstandings, it is important for everyone to be aware that particular words, ways of speaking, and actions may be acceptable behaviour in one's own culture, but may be upsetting or offensive to others and may contravene the ECB's values. …

Giving feedback to staff member[s] belongs to the main responsibilities of managers when managing and developing their staff. Negative feedback on or criticising a staff member's performance or behaviour at work is appropriate as long as it is fair and constructive, directly addressed to the staff member, and the staff member is treated throughout with dignity and respect.

Inappropriate behaviour undermines the self-confidence of the recipient. It may impact on their capacity to carry out their role to the best of their abilities. It may also impact on their health and well-being. …'

13 According to Chapter 3 of the note on the Dignity at Work policy :

'…

Area and line managers have a responsibility to act as role models for their staff. They should recognise and be alert to inappropriate behaviour and take the relevant action to ensure compliance with the Policy throughout their area. They should be open and responsive to staff members who feel they are being treated inappropriately.

…'

14 Article 7 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) provides:

'…

Without prejudice to Articles 4, 5, 6 and 10:

(1) Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.

…'

15 Article 20(1) of Regulation No 45/2001 provides:

'The [European Union] institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard:

(a) the prevention, investigation, detection and prosecution of criminal offences;

(b) an important economic or financial interest of a Member State or [of the European Union], including monetary, budgetary and taxation matters;

(c) the protection of the data subject or of the rights and freedoms of others;

(d) the national security, public security or defence of the Member States;

(e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).'

Facts giving rise to the dispute

I – *Background to the present dispute*

16 The applicant, who was a member of the staff of the European Monetary Institute (EMI) from 1 September 1995 and then of the ECB from 1998, was assigned as a senior expert to the Market Infrastructure Division ('MIS Division') of the 'Payments' Directorate-General ('DG Payments') of the ECB.

17 In 1998, following her election, the applicant became a member of the Staff Committee of the ECB and, apart from a short period in 2006, remained a member until June 2008. Throughout that period she also assumed the function of vice-spokesperson of the Staff Committee from September 2000 to December 2001 and from October 2007 to February 2008, and of spokesperson of that committee from May 2001 to July 2002. For the purposes of her staff representation activities the applicant was granted a dispensation from service of between 20% and 50% of her working time. The dispensation from service granted to her for the period from January to July 2006, in particular, represented 50% of working time.

18 From March to May 2007, the applicant, who, at the time, had a dispensation from service of 20% of her working time for her staff representation activities, had her working hours reduced by 35% on medical grounds. At that point the Director-General of DG Payments ('the Director-General') relieved her of the file on standards for payment instruments ('standards file') and gave her, as her sole task, responsibility for preparing a policy note on standards for payment instruments ('the policy note on standards').

19 The applicant was assigned to another division from 1 January 2008 and was given sick leave from 17 January 2008.

20 The applicant believes that for years she has been the victim of discrimination and infringements of the ECB's Dignity at Work policy. Her first complaint against the ECB is that she had to bear a heavy workload because she had to combine her work in the MIS Division with her work for the Staff Committee, and her second that, from April 2007, she was given only the task of preparing the policy note on standards and, further, that, in January 2008, she received neither a salary increase nor a bonus because of her supposed underperformance, whereas it was her Director-General who was responsible for the situation. Finally, she maintained that he had offended her by stating without further explanation that her professional reputation was 'very bad'.

21 Against that background, on 8 April 2008 the applicant applied for a pre-contentious administrative review on the basis of Article 41 of the Conditions of Employment ('the application for pre-contentious review'). That application challenged, first, the allegedly discriminatory conduct of her line managers by reason, inter alia, of her membership of the Staff Committee and, second, the infringement by the ECB of international and European rules of employment law.

22 On 30 May 2008 the ECB informed the applicant of its decision to open an internal administrative inquiry ('the inquiry'), instructing a panel 'to clarify the facts and circumstances of and the existence or absence of sufficient evidence of the allegations relating to the discrimination [allegedly suffered by her] on the grounds of gender, age, nationality and health conditions and … her Staff Committee membership and [her] allegations related to a breach of the Dignity at Work policy, in particular by the management of DG Payments including defamation, isolation, mobbing and intimidation'.

23 On 5 September 2009 a draft inquiry report was sent to the applicant for her comments. The applicant sent her comments on 5 October 2009.

24 The final inquiry report, dated 11 November 2009, concluded that the applicant's allegations were not substantiated. That report was forwarded to the Executive Board of the ECB on 17 November 2009. The same day, the Executive Board adopted the contested decision on the basis of that report. The contested decision, with the report annexed, was served on the applicant on 1 December 2009.

25 On 29 January 2010 the applicant brought a special appeal pursuant to Article 41 of the Conditions of Employment together with Article 8.1.6 of the Staff Rules before the President of the ECB against the contested decision. The annexes to that special appeal were received by the ECB on 5 February 2010.

26 That special appeal was rejected by decision of the President of the ECB of 24 March 2010 ('decision rejecting the special appeal').

II – *Other actions brought before the Tribunal by the applicant*

27 By the action registered as Case F-84/08, the applicant sought an order requiring the ECB to pay compensation in respect of the damage she alleged that she had suffered on account, principally, of the ECB's refusal to allow trade union organisations to play an effective role, of discrimination she allegedly suffered as a result, inter alia, of her membership of the Staff Committee and of the failure to adjust her workload to take account of her dispensation from service for staff representation.

28 By judgment of 28 October 2010 in Case F-84/08 *Cerafogli* v *ECB* ('judgment in Case F-84/08'), the Tribunal held that the ECB had committed a wrongful act such as to give rise to its liability since it had not been able to establish that it had in fact adjusted the workload of the applicant to take account of her dispensation from service for staff representation duties (judgment in Case F-84/08, paragraph 58). Consequently, the Tribunal ordered the ECB to make good the non-material damage

suffered by the applicant, amounting to EUR 5 000 (judgment in Case F-84/08, paragraph 60). The action was dismissed as to the remainder. In particular, the Tribunal held that the applicant could not criticise the ECB, when her working hours were reduced on medical grounds from March to May 2007, for having relieved her of the standards file, the principal piece of work allocated to her, and assigning her the sole task, for the rest of 2007, of drafting the policy note on standards under the supervision of the Director-General. The Tribunal held, in that regard, that such an action could not, in itself, constitute a wrongful act by the ECB, because it could legitimately take the view, without undermining her statutory position, that she was not in a position to deal properly with the standards file because of her dispensation from service and the reduction of her working hours on medical grounds (judgment in Case F-84/08, paragraph 59).

29 By an action registered as Case F-96/08, the applicant then sought, in essence, the annulment of the decision by which the ECB refused, in 2008, to grant her a bonus for 2007 and an *ad personam* promotion.

30 By judgment of 28 October 2010 in Case F-96/08 *Cerafogli* v *ECB* ('the judgment in Case F-96/08'), the Tribunal annulled that decision in so far as it refused to grant the applicant an additional increase in salary for 2008. In its judgment, the Tribunal found, first, that the contested decision was based on a policy paper adopted following a procedure which was unlawful in the absence of consultation of the Staff Committee and, second, that the merits of the applicant had not been classified pursuant to a guide on the annual revision of remuneration and bonuses. The Tribunal also ordered the ECB to make good the non-material damage suffered by the applicant, amounting to EUR 3 000 and dismissed the action as to the remainder.

31 By a third action, registered as Case F-23/09, the applicant asked the Tribunal to annul, first, the decision of the ECB of 17 July 2008 by which the ECB appointed a member of staff to fill a post as adviser *ad interim*, second, notice of vacancy ECB/074/08 published in order to fill that post, and third, the decision of 20 November 2008 to appoint Mr L. to that post. The applicant also sought an order that the ECB pay her damages. By judgment of 28 October 2010 in Case F-23/09 *Cerafogli* v *ECB* ('the judgment in Case F-23/09'), the Tribunal dismissed the action, holding that the various heads of claim were inadmissible or unfounded.

32 Finally, by a fourth action, registered as Case F-26/12, the applicant asked the Tribunal, inter alia, to annul a decision of 21 June 2011 by which the ECB rejected her request for access to all the decisions of the Executive Board and the documents referred to it concerning Cases F-84/08, F-96/08 and F-23/09. That action is still pending.

Forms of order sought and procedure

33 The applicant claims that the Tribunal should:

— annul the contested decision and, if necessary, annul the decision rejecting the special appeal;

— accordingly, uphold her claims made in the application for pre-contentious review and, specifically:

  — put an end to any form of psychological harassment against her, whether by verbal acts or assignments to posts or other working arrangements;

  — order the Director-General to withdraw in writing his offensive and threatening statements;

— in any event grant her compensation for the non-material and material damage suffered assessed *ex aequo et bono* at EUR 50 000 and EUR 15 000 respectively;

— order the ECB to pay the costs;

— order the ECB to produce the full inquiry report with all its annexes, including the minutes of hearings; in addition, order the ECB to produce all the communications between the panel entrusted with the inquiry ('the panel') and the Executive Board and/or the President of the ECB;

— summon Mrs L., former social counsellor with the ECB as a witness.

34 The ECB contends that the Tribunal should:

— declare the application inadmissible;

— dismiss the action as unfounded;

— order the applicant to pay all the costs of the proceedings.

35 By decision of 6 December 2010, the Tribunal decided to authorise a second exchange of pleadings, stipulating, however, that the reply should confine itself to responding to the objections of inadmissibility raised by the ECB and to clarifying the facts.

36 The reply was lodged on 14 February 2011.

37 By letter of 28 February 2011, the ECB pointed out that the reply exceeded the limits set by the Tribunal. Accordingly, the ECB asked that the reply should not be placed on the file or, at least, that the part of the reply which exceeded the limits set by the Tribunal should not be taken into account.

38 By decision of 14 March 2011, the Tribunal decided to take account of the whole of the reply, pointing out that the existence of any unnecessary passages would be taken into account, if necessary, in the decision on costs.

39 Following the close of the written procedure on 5 May 2011, the applicant lodged two documents by letter of 26 January 2012. The first document consisted of an expurgated note by DG Legal Services of the ECB entitled 'Outcome and implications of Court Cases F-84/08, F-96/08 and F-23/09 …' ('the note of 18 November 2010') to which an annex was attached. The second document is a letter of 12 August 2011 by which the ECB sent the abovementioned expurgated note to one of the applicant's lawyers pointing out that the document was disclosed only in part because it contained an opinion of DG Legal Services exploring the options likely to affect the ECB's position as regards its employment relationship with the applicant.

40 In the letter of 26 January 2012, the applicant asked the Tribunal to call on the ECB to produce the unexpurgated version of the note of 18 November 2010.

41 By letter of 29 February 2012, the ECB objected to the Tribunal's ordering production of the unexpurgated version of the note of 18 November 2010 on the ground that access to that document was the subject of a distinct administrative procedure and that the applicant's request was an abuse of process in that the note had no real connection with the present proceedings. Moreover, the ECB asked the Tribunal not to take account of the annex to the note of 18 November 2010 on the ground that it contained a confidential opinion of DG Legal Services and the annex was sent to the applicant only as a result of an administrative error.

Law

I – *The head of claim seeking to have the applicant's claims in the application for pre-contentious review upheld*

42 In her second head of claim, the applicant asks the Tribunal to uphold the claims she put forward in her application for pre-contentious review seeking, specifically, an end to all psychological harassment against her and the withdrawal by the Director-General in writing of his offensive statements and threats.

43 The European Union Courts may not issue injunctions to the administration or make rulings in the abstract in the context of a review of legality based on Article 42 of the Conditions of Employment for Staff of the European Central Bank (judgment of 15 December 2010 in Case F-66/09 *Saracco* v *ECB*, paragraph 39).

44 As the second head of claim is directed towards such ends it must be declared inadmissible.

II – *The head of claim seeking the annulment of the contested decision and of the decision rejecting the special appeal*

A – *Admissibility*

45 The ECB raises five objections of inadmissibility alleging failure to follow the pre-contentious procedure, failure to observe the time-limit applicable to special appeals, absence of an act adversely affecting the applicant, *lis pendens* and infringement of the 'rule of correspondence between the complaint and the action'.

1. Failure to respect the pre-contentious procedure, the time-limit applicable to special appeals and the rule of correspondence between the complaint and the action

a) Arguments of the parties

46 The ECB contends that the special appeal brought on 29 January 2010 did not respect Article 41 of the Conditions of Employment or Article 8.1.6 of the Staff Rules in that it consisted of only six pages containing only general remarks and vague allegations, and that the essential part of the applicant's argument was set out in the 150 pages of annexes submitted subsequently and after expiry of the time-limit. The presentation of the arguments in the annexes, moreover, breached the rule that the special appeal is the act by which the appeal procedure is commenced and the purpose of which is to define the dispute, the annexes having only a probative and instrumental function.

47 Furthermore, the submissions corresponding to the arguments presented in the annexes to the special appeal proper were inadmissible because out of time. The time-limit applicable to the special appeal is a matter of public policy and the dialogue which should be a feature of the pre-contentious procedure should respect the principle of legal certainty which is reflected in the procedural time-limits adopted.

48 In any event, the pleas seeking annulment raised in the application initiating proceedings before the Tribunal, alleging a manifest error of assessment, violation of the concept of psychological harassment and breach of Article 6(5) of Circular 1/2006, of Article 3.1 of the Rules of Procedure of the Executive Board and of Articles 51 and 52 of the Conditions of Employment are not admissible as they did not appear in the special appeal of 29 January 2010.

49 The applicant disputes those objections of inadmissibility.

b) Findings of the Tribunal

50 The pre-contentious procedure established by Article 41 of the Conditions of Employment and by Article 8.1.6 of the Staff Rules is informal in character, like the complaints procedure set up by Article 90(2) of the Staff Regulations of Officials of the European Union ('the Staff Regulations'; see, as regards the complaints procedure set up by Article 90(2) of the Staff Regulations, judgment of 1 July 2010 in Case F-45/07 *Mandt* v *Parliament*, paragraphs 111 and 113).

51 Consequently, the special appeal under Article 41 of the Conditions of Employment, together with Article 8.1.6 of the Staff Rules, does not have to observe fixed procedures in order to be admissible and the ECB is required to examine it with an open mind. In order to be admissible, it is sufficient for the appeal to be sufficiently specific to allow the ECB to understand the pleas in law and arguments which the person concerned has formulated against the contested decision (see, to that effect, judgments of 22 June 1990 in Joined Cases T-32/89 and T-39/89 *Marcopoulos* v *Court of Justice*, paragraph 28, and of 13 January 1998 in Case T-176/96 *Volger* v *Parliament*, paragraph 65).

52 In such circumstances, the late communication of an annex may not automatically be considered to be a breach of the principle that time-limits are a matter of public policy if the special appeal itself was lodged within the time-limit prescribed (see, to that effect, judgment of 7 March 1996 in Case T-146/94 *Williams* v *Court of Auditors*, paragraph 48).

53 In the present case, the six-page document sent to the President of the ECB on 29 January 2010 mentions the existence of three annexes which were not attached. However, it also indicates, briefly but none the less comprehensibly, that the inquiry procedure lacked transparency, that the rights of defence of the applicant were disregarded, that insufficient reasons were stated for the contested decision, that it was taken in breach of the duty to have regard for the welfare of staff and of the duty to provide assistance and that it was adopted following an incomplete inquiry and without it having been established that the ECB had actually seen the inquiry report. In the light of that content and despite the absence of the annexes in question, classification as a special appeal cannot be denied to that document.

54 However, it must be found that the three annexes sent four days after expiry of the time-limit prescribed are not merely probative but, rather, set out in detail the applicant's submissions. That is true not only of annexes 1 and 3 which contain the applicant's comments on the final inquiry report and the account of the discrimination and failures to provide assistance which occurred in 2008, but also of annex 2 which, while it contains about a hundred pages of 'additional documents', also contains observations on the draft inquiry report which were not taken into consideration and which the applicant therefore wanted to repeat. In her special appeal, the applicant, moreover, expressly pointed out that all those annexes were to be regarded as an 'integral part' of the appeal.

55 In that particular context, the applicant's late sending of the annexes which she had failed to attach to her special appeal breaches the time-limit laid down for the lodging of a special appeal.

56 Furthermore, although, as has been observed, the pre-contentious procedure is informal in nature, it is a step towards amicable settlement with which the applicant's conduct in obliging the administration to seek, in the body of her special appeal and in voluminous annexes, the threads of her various arguments is incompatible, given that she had a reasonable period of two months to lodge that appeal.

57 In the light of the foregoing, the ECB was entitled to reject as inadmissible the annexes to the special appeal sent on 5 February 2010.

58 That conclusion is not affected by the solution adopted in the judgment of 4 May 2010 in Case F-100/08 *Petrilli* v *Commission*, paragraphs 34 to 36, which the applicant cites. In that case, it is true that the Tribunal accepted that the refusal by the administration to take account of documents sent late by the applicant would deprive the pre-contentious procedure of a large measure of its practical effect, in so far as it would fix the dispute at the date of the initial act adversely affecting the person concerned and would remove all practical value from the subsequent dialogue and exchanges between the parties. However, the documents in question were probative documents sent by the applicant at the invitation of the administration which had not ruled out reviewing his position in the light of those documents.

59 That being so, the fact that the ECB was entitled to refuse to take account of the arguments appearing in the contested annexes does not make the pre-contentious procedure in the case unlawful, nor, therefore, does it make the present action inadmissible. It has been held, in paragraph 53 of the present judgment, that the document submitted by the applicant on 29 January 2010 was sufficient in itself to be classified as a special appeal within the meaning of Article 41 of the Conditions of Employment and of Article 8.1.6 of the Staff Rules.

60 The fact that the ECB was entitled to take no account of the contested annexes, however, raises the question, as the ECB points out, of the admissibility before the Tribunal of the arguments appearing in the application and which were put forward, in the framework of the pre-contentious procedure, only in those annexes.

61 In line with what has been held with regard to Article 91 of the Staff Regulations, it must be considered that the rule of correspondence between the special appeal and the application is to be understood as meaning that, subject to pleas of illegality and pleas raising an issue of public policy, the cause of action of the dispute will normally be altered, and the action therefore inadmissible on the ground that it fails to observe the correspondence rule, only where the applicant, who criticises in his special appeal solely the formal validity of the act adversely affecting him, including in its procedural aspects, raises substantive pleas in the originating application, or in the opposite case where the applicant, after having disputed in his special appeal only the substantive legality of the act adversely affecting him, submits an application containing pleas relating to the formal validity of that act, including in its procedural aspects (see, as regards the pre-contentious procedure for Article 91 of the Staff Regulations, *Mandt* v *Parliament*, cited in paragraph 50 above, paragraphs 110, 119 and 120, and judgment of 29 September 2011 in Case F-72/10 *da Silva Tenreiro* v *Commission*, paragraph 59, under appeal to the General Court, Case T-643/11 P).

62 In the present case, as was explained in paragraph 53 of the present judgment, examination of the special appeal lodged on 29 January 2010 reveals that the applicant raised, in that six-page document, complaints relating both to formal, procedural matters and to the merits. Consequently, it is admissible for her to raise both categories of pleas in her application initiating proceedings and there is no call to hold inadmissible, on the ground that they were, allegedly, not raised in the special appeal lodged on 29 January 2010 but only in the annexes to that special appeal, the pleas alleging a manifest error of assessment, violation of the concept of psychological harassment and breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006, of Article 3.1 of the Rules of Procedure of the Executive Board and Articles 51 and 52 of the Conditions of Employment.

2. Absence of any act with adverse effect

63 The ECB maintains that the contested decision does not alter the legal situation of the applicant and therefore does not constitute an act with adverse effect. The fact that the inquiry report reached a different conclusion from that which the applicant expected is not equivalent to a negative assessment

of her. Moreover, knowledge of that report was confined to the members of the panel, to the Executive Board, to the person who was the subject of the inquiry and to the applicant. Lastly, the inquiry report was not placed on her personal file.

64 However, as the ECB itself points out, it suffices to note that the Executive Board took the view, in the contested decision, that the applicant's complaint of discrimination was unfounded and closed the inquiry. That decision constitutes an act adversely affecting the applicant and the abovementioned objection of inadmissibility must be rejected.

3. The plea of *lis pendens*

a) Arguments of the parties

65 In its defence, the ECB points out that the present action is between the same parties as and is based on the same discrimination allegedly suffered by the applicant because of her activities on the Staff Committee as that relied on in Case F-84/08. Moreover, by the present action, the applicant is pursuing the same aim as that pursued by the action in Case F-84/08: to obtain compensation for the effect which the conduct of the ECB allegedly had on her health. The ECB also maintains that the allegations raised in the context of the present proceedings were also raised in the action in Case F-96/08 in which the applicant sought annulment of the decision by which the ECB refused to award her, for 2008, an additional increase in salary and an *ad personam* promotion. The ECB concludes that the present action must be declared inadmissible on the ground of *lis pendens* with regard to those two actions.

66 The applicant's response is that the present action 'is limited to the decision taken by the [ECB] in relation to the behaviour of some [ECB] staff members, after the administrative inquiry' and that that aspect was not examined in the judgment in Case F-84/08.

b) Findings of the Tribunal

67 As the actions in Cases F-84/08 and F-96/08 were finally decided by judgments of 28 October 2010 in those cases there was, in any event, no longer a situation of *lis pendens*, as the ECB conceded at the hearing.

68 On the other hand, the court must answer of its own motion the question whether the status of *res judicata* of the judgments in Cases F-84/08 and F-96/08 is such as to bar the admissibility of the present action. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (judgment of 30 September 2003 in Case C-224/01 *Köbler*, paragraph 38).

69 It must be recalled, in that regard, that an action is inadmissible by reason of the status of *res judicata* of an earlier judgment which disposed of an action which was between the same parties, had the same purpose and was based on the same submissions (judgment of 19 September 1985 in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission*, paragraph 9; judgment of 5 June 1996 in Case T-162/94 *NMB France and Others* v *Commission*, paragraph 37; judgment of 25 June 2010 in Case T-66/01 *Imperial Chemical Industries* v *Commission*, paragraph 197). The case-law has also made clear that the act whose annulment is sought is an essential element in the definition of the purpose of an action (*NMB France and Others*, paragraph 38), but that, in cases where several actions are brought against distinct decisions which the administration has formally adopted, it cannot be inferred from that circumstance alone that the purpose of those cases is not the same, where those distinct decisions are essentially identical in content and are based on the same grounds (*Imperial Chemical*

Industries v *Commission*, paragraphs 207 and 208). Finally, it has been held that, although the arguments raised in support of an action may coincide to a certain extent with those put forward in a previous action, the second action is not presented as a repetition of the first but as a new dispute, in that it relies also on other factual and legal submissions (judgment of 12 December 1996 in Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission*, paragraph 52).

70 In the present case, although it comprises submissions which are in part identical, the present action is substantively different from the actions leading to the judgments in Cases F-84/08 and F-96/08. The present action seeks, principally, annulment of the rejection as unfounded of the complaint of discrimination which the applicant made in the light of a number of grievances. The judgment in Case F-84/08, for its part, rejected on decisive grounds of inadmissibility two pleas, one of the alleged refusal by the ECB to allow trade union organisations to play an effective role and the other of discrimination allegedly suffered by the applicant during her career. The judgment in Case F-84/08 held only that the ECB had committed a wrongful act in that it was unable to establish that it had specifically adjusted the applicant's workload to take account of the dispensation from service she had been granted and held that, in contrast, the ECB had not committed any wrongful act in taking the standards file away from her in the context of the reduction of her working time on medical grounds from March to May 2007. As for the judgment in Case F-96/08, it acknowledged that the refusal to grant the applicant an additional salary increase for 2008 was unlawful on the ground that that refusal was based on a policy document adopted following an unlawful procedure and on a situation in which the applicant's merits were not classified in accordance with a guide on the annual revision of salaries and bonuses.

71 In those circumstances, it is not appropriate to conclude that the action is inadmissible because of the status of *res judicata* attaching to the judgments in Cases F-84/08 and F-96/08. However, as the ECB conceded at the hearing, account should be taken of the grounds of those judgments in the examination of the pleas raised in the present case.

B – *Substance*

72 The applicant raises five pleas in law:

— a first plea alleging infringement of the rights of the defence, breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006, breach of the obligation to state reasons, breach of Article 3 of the Rules of Procedure of the Executive Board of the ECB of 12 October 1999 and breach of Articles 51 and 52 of the Conditions of Employment;

— a second plea alleging breach by the panel of its mandate;

— a third plea alleging a manifest error of assessment;

— a fourth plea alleging violation of the concept of psychological harassment; and

— a fifth plea alleging breach of the duty of assistance.

1. The first plea, alleging infringement of the rights of the defence, breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006, breach of the obligation to state reasons, breach of Article 3 of the Rules of Procedure of the Executive Board of the ECB of 12 October 1999 and breach of Articles 51 and 52 of the Conditions of Employment

a) Arguments of the parties

73 The applicant observes that the final inquiry report is based on evidence compiled during the inquiry and frequently makes reference to interviews conducted by the panel without any further information on the content of the witness statements to which she did not have access.

74 Accordingly, the applicant alleges, first, a breach of Article 6(5) of Circular 1/2006 in that the inquiry report served on her did not include copies of all the documents and all the minutes of hearings held during the inquiry.

75 The applicant adds that as a complainant she can rely on the rights of the defence in so far as the contested decision damaged her interests in concluding that she was the victim neither of discrimination nor of a breach of the Dignity at Work policy of the ECB. Consequently, she should have been granted access to the inquiry file by virtue of the rights of the defence. The applicant observes, in that regard, that under competition law, if the European Commission considers that it should not uphold a complaint, the complainant has the right, subject to business confidentiality, to access to the information on which the Commission based its conclusion. Such access to the file reflects the principle that both parties should be heard.

76 Moreover, Article 7(1) and (3) of Circular 1/2006 confers generally on all those concerned by an administrative inquiry internal to the ECB the right to express their point of view on that inquiry and to correct any inaccuracies. Moreover, the exercise of those rights is not limited to what is covered in the draft inquiry report or the final inquiry report. For instance, the applicant needed to have access to all the evidence compiled during the inquiry to allow her to defend her reputation and demonstrate that the rumours damaging her reputation were without foundation. Furthermore, in a letter of 18 February 2009, the Director-General of DG Legal Services of the ECB assured the applicant that, pursuant to Article 7(3) of the abovementioned circular, she would have access to all the facts concerning her and to all her personal data before the lodging of the final inquiry report.

77 The applicant adds that there is, moreover, no provision which requires that the witness statements compiled during the inquiry are to be confidential. Article 7(1) and (3) of Circular 1/2006 breaches the general principle of the rights of the defence if it has to be interpreted as meaning that the rights which it lays down are limited to access to the draft inquiry report and the final inquiry report. In addition, Regulation No 45/2001 cannot preclude the applicant from having access to the whole inquiry file including witness statements. In particular, the exceptions to the right of access to personal data listed in Article 20 of Regulation No 45/2001 should be applied restrictively and should be weighed against the rights of defence of the person invoking his right of access. In that regard, general statements pointing to the need to 're-establish [an] undisturbed business climate' or to 'enable witnesses to cooperate … in a climate of mutual trust' cannot constitute adequate justification for refusing the right of access of such a person.

78 Finally, the applicant maintains, again invoking her rights of defence, that her right to receive the full assistance of her counsel was disregarded in that the panel ignored counsel in making her, personally, the sole addressee of the replies to counsel's letters.

79 The applicant argues, second, that the contested decision states insufficient reasons in that it makes reference to the final inquiry report, which does not, in itself, make it possible to understand the contested decision without access to the inquiry file.

80 Third, the applicant observes that the contested decision makes clear that the Executive Board received the final inquiry report and took account of the facts set out there. In breach of Article 6(5) of Circular 1/2006, the Executive Board thus received a report which did not include copies of the evidence compiled during the inquiry, in particular the minutes of hearings. The Executive Board therefore took the contested decision on the basis of an incomplete file.

81 Fourth, the applicant points out that the Executive Board received the final inquiry report on the very day it took the contested decision. Such late communication breached Article 3(1) of the Rules of Procedure of the Executive Board, which provides that documents must be made available to the members of that body at least two days before its meeting.

82 The ECB rejects those various arguments.

b) Findings of the Tribunal

83 It appears from the various pleadings produced by the applicant that the first plea in law is in four parts which should be examined in turn.

The first part, criticising the lack of access to the inquiry file on the basis that it was an infringement of the rights of the defence, and breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006

84 The applicant's submissions with regard to the infringement of the rights of the defence should be examined first and those regarding breach of Circular 1/2006 should be considered thereafter.

– Infringement of the rights of the defence

85 It must be observed at the outset that the applicant may not rely on the ECB's obligation to observe the rights of the defence which, according to settled case-law, constitutes a general principle of European Union law in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person (judgment of 9 November 2006 in Case C-344/05 P *Commission* v *De Bry*, paragraph 37; judgment of 17 October 2006 in Case T-406/04 *Bonnet* v *Court of Justice*, paragraph 76; *Wenig* v *Commission*, paragraph 48). An inquiry procedure initiated following a request for assistance from an official with a complaint of psychological harassment cannot be compared to an inquiry procedure opened against that official (judgment of 16 May 2012 in Case F-42/10 *Skareby* v *Commission*, paragraph 46).

86 Moreover, the Court of Justice and the General Court have held that the fact that a decision constitutes, from a procedural point of view, an act adversely affecting the official does not mean that it can be concluded automatically, without regard to the nature of the procedure brought against the official, that the authority was consequently under an obligation to give the person concerned a proper hearing (judgment of 29 April 2004 in Case C-111/02 P *Parliament* v *Reynolds*, paragraph 57; judgment of 12 May 2010 in Case T-491/08 P *Bui Van* v *Commission*, paragraph 75).

87 It follows that, as the applicant was not the subject-matter of the inquiry but was the cause of it, she was not justified in claiming that:

— she should have been granted access to the whole of the file by virtue of the rights of the defence;

— Article 7(1) and (3) of Circular 1/2006 breached those rights if it had to be interpreted as meaning that the witness statements compiled during the inquiry were, by their nature, confidential vis-à-vis her;

— the exceptions to the right of access of the persons concerned to personal data laid down by Regulation No 45/2001 should be weighed against the rights of the defence; and that

— her right to receive the full assistance of her counsel by virtue of the rights of the defence was disregarded and the panel ignored her counsel in making her the sole addressee of the replies to counsel's letters.

88 In her reply, however, on the basis of both the legislation and administrative practice in the area of competition, the applicant relies also on an 'adversarial principle' which she distinguishes from the rights of the defence.

89 As a plea regarding the right to be heard may be raised by the Tribunal of its own motion (judgment of 11 September 2008 in Case F-51/07 *Bui Van* v *Commission*, paragraph 77 and the case-law cited, not set aside on that point by the judgment of the General Court in Case T-491/08 P *Bui Van* v *Commission*, paragraph 86 above), the applicant was entitled to raise that principle at that stage of the written procedure.

90 Accordingly, it must be noted that, although Article 41(2)(a) of the Charter of Fundamental Rights of the European Union provides for the rights of the defence (see, to that effect, *Bui Van* v *Commission*, paragraphs 72 to 74, not set aside on that point by the judgment of the General Court in Case T-491/08 P *Bui Van* v *Commission*, paragraph 86 above), as a part of the right to good administration, the list of rights included in that Article is not exhaustive, as is demonstrated by the use of the word 'includes' in the initial phrase of its second paragraph.

91 Consequently, as the applicant suggests, account should be taken of the principles underlying the legislation, the administrative practice and the case-law of the European Union in the areas of competition, State aid and concentrations of undertakings. Examination of those principles reveals, essentially, that a scale has been established of interested third parties to determine the extent of their right to be heard, according to the degree of the harm liable to be done to their interests (see, for example, judgment of 7 June 2006 in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse* v *Commission*, paragraph 106). Such a scale, distinguishing the rights of persons who are the subject of an inquiry from those affected by or involved in that inquiry, is, moreover, established by Article 7 of Circular 1/2006 (see paragraphs 103 to 107 below). In addition, account must be taken of the case-law illustrated by the judgment of 21 November 1991 in Case C-269/90 *Technische Universität München*, paragraphs 23 to 25, which is expressly cited as a reference in the explanation on Article 41 in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) which must be taken into account under the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter. It is apparent from that judgment that, in the absence of any provision and any circumstances calling for the application of the rights of the defence, the person concerned by an administrative procedure must be enabled, during that procedure, to take a position and to make known his views effectively on the data concerning him, data which he is best placed to provide and which it is not established that the authority can otherwise obtain.

92 In the light of the foregoing considerations, it is appropriate, in the circumstances of the case, to accept that, even if the inquiry was not opened with regard to her, the applicant can rely, by virtue of the principle of good administration, on the right to be heard on the facts concerning her, in so far as a decision rejecting a request for assistance in connection with alleged psychological harassment is liable to entail serious consequences, as psychological harassment can have extremely destructive effects on the health of the victim and any recognition by the administration of the existence of psychological harassment is, in itself, liable to have a beneficial effect in the therapeutic process of recovery of the harassed person.

93 However, the procedural right which the applicant can rely on and which is distinct from the rights of the defence (as regards that distinction, see judgment of 29 June 2010 in Case C-441/07 P *Commission* v *Alrosa*, paragraph 91; judgment of 27 November 1997 in Case T-290/94 *Kaysersberg* v *Commission*, paragraph 108) is not as extensive as the latter rights (*Skareby* v *Commission*, paragraph 48).

94 It must be observed that the applicant had the opportunity to make known her views in the application for pre-contentious review, at her hearing in the course of the inquiry and in her comments of 5 October 2009 on the draft inquiry report sent to her for that purpose.

95 It is true that the applicant did not have access to the statements of witnesses as such. However, given that the procedural right on which she can rely is not as extensive as the rights of the defence, it was enough for her to be given a sufficient opportunity to explain her point of view and to explain why the conclusion envisaged in the draft inquiry report could not be justified (see, to that effect, *Kaysersberg* v *Commission*, paragraph 93 above, paragraph 113).

96 In that regard, importance must be attached to the fact that the draft inquiry report, sent to the applicant for comments, contained, inter alia, an account of the facts concerning her which had been compiled during the inquiry and to the fact that the inquiry report was itself particularly full and informative.

97 Moreover, the procedural right which the applicant has is not absolute. In the context of a factual inquiry into psychological harassment, provided that the inquiry report is full and there is nothing in the file to indicate that it does not reproduce the substance of the testimony given, it is not unreasonable, unless there are special circumstances, to seek to protect witnesses by guaranteeing their anonymity and the confidentiality of any information likely to identify them, in order, in the interests of the complainants, to enable neutral and objective inquiries to be held with the unreserved cooperation of members of staff. As the ECB argues, it does not appear unreasonable, either, to seek to prevent in this way any risk of influence of the witnesses after the event by those incriminated, or even by the complainants. Moreover, nor is it unreasonable to take the view that the confidentiality of witness statements is necessary in order to protect working relationships which ensure the smooth running of services. It is not proven that, where an inquiry does not bear out their opinion, total transparency on the subject is capable of putting an end to the sense of frustration and mistrust of those convinced that they have been subject to psychological harassment.

98 Moreover, contrary to what the applicant appears to claim in her reply, the restrictions surrounding the procedural right which she has are legitimate under Article 20 of Regulation No 45/2001. It should not be forgotten that the testimony given during a factual inquiry into psychological harassment does not concern only the author of the complaint, but also the members of staff called into question and those heard in the course of the investigations. As the ECB argues, such a case, where the rights of persons other than the author of the complaint are called into question, differs clearly from cases where applicants seek to have access to facts which concern them exclusively.

99 It follows that the applicant is not justified, in the present case, in relying on either a breach of the adversarial principle or a breach of the rights of the defence.

100 The letter of 18 February 2009 from the Director-General of the DG Legal Services on which the applicant relies (see paragraph 76 of the present judgment) cannot affect the foregoing argument. In guaranteeing the applicant access to all facts which concern her and to her personal data, the author of that letter did not undertake to send her all the documents of the inquiry, as the access in question could be provided adequately by the communication, as in the present case, of the draft inquiry report. Moreover, that letter cannot bind the Tribunal.

– Breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006

101 The applicant is not justified in complaining of breach of Article 6(5) and Article 7(1) and (3) of Circular 1/2006 either.

102 The obligation imposed by Article 6(5) of Circular 1/2006 to produce all relevant documents and minutes of hearings only applies to the person conducting the inquiry and not to the witnesses or to the complainant.

103 Moreover, the access to documents provided for by the first subparagraph of Article 7(3) of Circular 1/2006 concerns only the employees of the ECB who are the subject of the inquiry and not those at whose initiative that inquiry was opened.

104 As for Article 7(1) and the second subparagraph of Article 7(3) of Circular 1/2006, they concern, more broadly, all those who are affected by an inquiry or are involved in such an inquiry. Those provisions therefore apply to employees of the ECB whose complaints it is planned to reject, so that the applicant could rely on them in the present case. However, they confer on those employees, and on the applicant in particular, only the right to be informed of the existence of an internal administrative inquiry and to take cognisance of the facts and personal data concerning them, in order to be able to present their observations on those facts and have those data corrected before the inquiry is concluded, without those rights necessarily extending to the communication of the whole inquiry file.

105 In the present case, the applicant had access to the draft inquiry report and was able to submit her comments on it. It does not therefore appear that the procedure followed breached the abovementioned provisions.

106 Finally, it is apparent from the fact that the rights of the defence are not applicable in the inquiry procedure (de l'espéce) and that the adversarial principle is more restricted than those rights that Article 6(5) and Article 7(1) and (3) of Circular 1/2006 are not unlawful in that they breach those principles.

107 It follows that the first part of the first plea is unfounded.

The second part, alleging an insufficient statement of reasons

108 It must be found that, apart from a brief summary of the procedure followed before its adoption, the contested decision does not include any statement of reasons. However, it refers to the final inquiry report, which was to be served on the applicant on 30 November 2009 at the same time as that decision. It is settled case-law that the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him. Consequently, a statement of reasons in the form of a reference to a report or an opinion (judgment of 8 June 2011 in Case T-20/09 P *Commission* v *Marcuccio*, paragraphs 67 and 68; judgment of 23 November 2010 in Case F-65/09 *Marcuccio* v *Commission*, paragraph 61), which itself states reasons and is communicated, as the documents were to the applicant in the present case, may be accepted.

109 However, the applicant claims that the inquiry report itself does not contain a sufficient statement of reasons.

110 However, that complaint cannot succeed as the inquiry report is particularly full.

111 Moreover, as has just been explained, the statement of reasons must be assessed according to the context in which the contested measure was taken and, in particular, in the light of all the legal rules governing the matter concerned.

112 It was observed, in the examination of the first part of the first plea, that the legal context could, in a case of psychological harassment, preclude a complainant from having access to all the witness statements compiled during the inquiry. Consequently, it cannot be considered that the contested decision contains insufficient reasons in that it refers only to the inquiry report, which does not include those witness statements.

113 The second part of the first plea must therefore be rejected.

The third part, alleging breach of Article 6(5) of Circular 1/2006

114 The applicant maintains wrongly that the failure to communicate to the Executive Board the minutes of the hearings drawn up during the course of the inquiry breached Article 6(5) of Circular 1/2006. That provision requires the communication of the inquiry report together with the whole file, including the minutes of hearings, only to the person conducting the inquiry, which was not the Executive Board, as is apparent from the letter sent by the ECB to the applicant on 30 May 2008 (paragraph 22 of the present judgment).

115 The third part of the first plea is therefore unfounded.

The fourth part, alleging breach of Article 3(1) of the Rules of Procedure of the Executive Board

116 According to Article 3(1) of the Rules of Procedure of the Executive Board the documents related to the agenda are, 'in principle', to be sent, to the Executive Board at least two working days before the meeting of that body. It follows that that time-limit concerns only the period within which those documents must be sent to the members of the Executive Board and not the period for which they must be available to them.

117 In any event, in order for breaches of the obligations imposed by the Rules of Procedure of the Executive Board to be capable of constituting substantial irregularities of such a kind as to render its decision invalid, the person concerned must also show that in the absence of those irregularities that decision might have been substantively different (judgment of 9 March 1999 in Case T-212/97 *Hubert* v *Commission*, paragraph 53; judgment of 7 May 2008 in Case F-36/07 *Lebedef* v *Commission*, paragraph 57, and judgment of 13 September 2011 in Case F-68/10 *Behnke* v *Commission*, paragraph 42). Clearly, that condition is not satisfied in the present case, as the applicant confines herself to surmising that, as the members of the Executive Board received the final inquiry report on the day of their meeting, they were unable to take proper cognisance of it before deciding on the conclusions to be drawn from it.

118 The fourth part of the first plea is, accordingly, not founded and the first plea must therefore be rejected in its entirety.

2. The second plea, alleging breach by the panel of its mandate

a) Arguments of the parties

119 The applicant observes that the subject of the inquiry was the conduct of certain of her hierarchical superiors. However, she alleges that the inquiry report concentrated on her and discredited her by recording negative information about her. On the other hand, it contained no finding regarding the conduct of the Director-General of which she complained in particular.

120 Moreover, the panel's brief was, she alleges, to look into breaches of the 'provisions of the Dignity at Work policy, in particular by DG Payments'. That question was not, however, tackled in the final inquiry report and the questions of psychological harassment, damage to dignity and discrimination within the ECB in general were examined only partially in the framework of the question relating to discrimination against the applicant because of her activities within the Staff Committee. What is more, the panel assessed the conduct of the Director-General only in connection with psychological harassment and not in connection with the note on the Dignity at Work policy. Furthermore, the panel confined itself solely to allegations of offensive behaviour, of rumours and threats, leaving out other important elements.

121 In addition, the panel merely verified whether there were rumours calling into question the reputation of the applicant without examining whether they were based on facts and evidence. Thus, in refusing to recognise that those rumours constituted a form of psychological harassment, the panel did not properly take account of the applicant's interests.

122 The panel also breached its mandate in taking the view that it did not need to examine the allegations made against the ECB as an institution, or the question of the quality of the work done by the applicant and the medical documents. In particular, the panel, wrongly, took the view that it had no authority to assess the quality of the work done by the applicant, whereas it could have requested the assistance of experts on that point.

123 Finally, the panel did not investigate the breach by a member of the staff of the ECB of the confidentiality of a letter from the applicant's counsel of 18 January 2008, addressed to that member of staff, which he disclosed to the Director-General. The inquiry report confined itself to observing that that member of staff had forwarded that letter in his capacity as the 'competent senior manager'.

124 The ECB rejects the applicant's arguments.

b) Findings of the Tribunal

125 As is apparent from the letter sent by the ECB to the applicant on 30 May 2008 (see paragraph 22 of the present judgment), the panel's mandate was to clarify the facts and establish whether or not there was sufficient evidence of the allegations relating to:

— 'discrimination … on the grounds of gender, age, nationality and health conditions' which she allegedly suffered;

— 'discrimination related to … her Staff Committee membership'; and

— her allegations relating to 'a breach of the Dignity at Work policy, in particular by the management', including 'defamation, isolation, mobbing and intimidation'.

126 It appears from the inquiry report that the panel examined questions relating to possible discrimination:

— on the ground of the applicant's membership of the Staff Committee which was allegedly manifested in the appraisal of her work, in the determination of her salary and bonus payments and in her career opportunities;

— on the ground of the applicant's membership of the Staff Committee which was allegedly manifested by acts of harassment;

— on the ground of her gender, her age and her nationality, and

— on the ground of her state of health.

127 Although it was formally structured exclusively by reference to discrimination, it is none the less apparent from the content of the inquiry report, which is 61 pages long, that the panel in fact considered whether there was sufficient evidence, not only of discrimination, but also of acts of defamation, isolation, psychological harassment and intimidation, or of acts constituting a breach by DG Payments of the note on the Dignity at Work policy. The panel thus specifically reviewed all the questions mentioned in the mandate given to it. In particular, the panel verified the existence of unfavourable rumours about the applicant.

128 Moreover, the ECB rightly argues that an inquiry report does not discredit the complainant merely by recording objectively the statements of witnesses and reaching conclusions which do not confirm the complainant's accusations. In addition, the mandate given to the panel required it to examine whether the applicant's allegations against members of staff were well founded and not to assess her merits or her state of health.

129 Finally, as regards the alleged breach, by a member of staff of the ECB, of the confidentiality of the letter which the applicant's counsel sent to her on 18 January 2008, the panel pointed out, in its inquiry report, that that letter was addressed to that member of staff in his capacity as Director-General of DG Human Resources, Budget and Organisation, that is to say, as a body of the ECB. That finding is sufficient in itself to allow the panel to see no evidence of harassment in the disclosure of the letter at issue to the Director-General. That is particularly true as that letter stated that the applicant was to ask the Director-General to withdraw the comments he had made about her.

130 The second plea must be dismissed.

3. The third plea, alleging a manifest error of assessment

a) Preliminary observations

131 It must be recalled at the outset that an error is manifest where it is easily recognisable and can be readily detected, in the light of the criteria to which the legislature intended the exercise of a decision-making power to be subject (judgment of 29 September 2011 in Case F-80/10 *AJ* v *Commission*, paragraph 34). Consequently, in order to establish that the administration committed a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence, which it is for the applicant to adduce, must be sufficient to make the findings of the administration implausible. In other words, a plea alleging a manifest error must be rejected if, despite the evidence adduced by the applicant, the challenged assessment may be accepted as being still true or valid (*AJ* v *Commission*, paragraph 35). That is particularly so where the decision at issue is vitiated by errors which, taken together, are of only minor significance unlikely to have influenced the administration (see *AJ* v *Commission*, paragraph 36 and the case-law cited, and judgment of 28 March 2012 in Case F-36/11 *BD* v *Commission*, paragraph 83).

132 Furthermore, in support of this plea, the applicant refers several times to complaints or arguments appearing in an annex to her special appeal, also attached to the present action. As the ECB observes, such references are not admissible as, according to settled case-law, it is not for the Tribunal to look for the applicants' arguments in the documents on their file.

133 Moreover, and as the ECB also points out, several of the applicant's assertions are vague, confused, difficult to understand or even speculative. They are, therefore, not capable of providing evidence of a manifest error. That is the position with regard to:

— the complaint that the panel did not inquire into the unequal treatment which the applicant allegedly suffered in the MIS Division, whereas the inquiry report is formally structured precisely by reference to alleged discrimination;

— the arguments *a contrario* derived from the decision to entrust the applicant only with the drafting of the policy note on standards and the statements made by the Director-General to justify her 'zero salary increase and the lack of a bonus for her work of 2007';

— the inferences which the applicant draws from a reference in the inquiry report to her 'professional problems' compared with her assessments;

— the complaint that 'it seem[ed] that' the reason for the decision to relieve the applicant permanently of the standards file was that the policy note on standards had not been judged satisfactory by the Director-General despite the positive reactions to it.

134 Finally, it should be noted that the applicant sets out her arguments in support of the plea along two axes, namely, first, the incomplete nature of the inquiry report on which the contested decision was based, and, second, the manifest errors directly affecting the assessments contained in the inquiry report, the contested decision and the decision rejecting the special appeal. The Tribunal will accordingly examine the various complaints raised in the same order.

b) The incomplete nature of the inquiry report

135 The applicant claims, first, that the inquiry report is incomplete in that the panel did not examine her complaint relating to the lack of proper support given to her in coping with her excessive workload.

136 It must be pointed out, in that connection, that this complaint, criticising a deficiency in the inquiry report, must be distinguished from what the Tribunal held in its judgment in Case F-84/08, which was that the ECB had not established that it had adjusted the workload of the applicant to take account of the dispensation from service she had obtained for staff representation duties.

137 That said, it is apparent from the inquiry report that the panel did in fact examine the complaint relating to lack of support given to the applicant in coping with her workload. That question was examined in connection with the applicant's allegation that she was discriminated against precisely because of her membership of the Staff Committee and, in a wider sense, in the framework of the examination of the complaints of psychological harassment. The inquiry report points out in that regard that the assessments of the applicant make reference to her difficulties in balancing her work and her commitments in the Staff Committee, but does not find that that amounts to evidence of a lack of specific support. Moreover, the inquiry report mentions that the Director-General granted the applicant a dispensation from service exceeding what is normally allowed and agreed that the reduction in working time for medical reasons which she was allowed in March 2007 could be taken out of the time she had to spend in the MIS Division and not out of the time given to Staff Committee activities. The inquiry report also examines the question whether the applicant's workload was actually reduced and mentions in that connection various examples of special arrangements she was allowed. Finally, the concessions made by the Director-General were also described in the inquiry report in connection with the assessment of possible discrimination against the applicant because of her state of health.

138 Second, the applicant maintains that the panel did not take account of the complaint which she raised that the Director-General took the standards file away from her from March 2007 and declared that she had to leave DG Payments, thus giving rise to uncertainty on her part as to her subsequent career.

139 However, the panel examined the question raised by that complaint. It thus found that the standards file was taken away from the applicant because of her limited availability for the work in the MIS Division and that it was taken away following her request that the reduction in working time granted to her for health reasons should not affect her tasks on the Staff Committee. The panel also examined the statements of the Director-General and took the view that it was established that he had suggested to the applicant that she change department. In the light of witness statements, the panel observed that that suggestion was made in the context of meetings specifically concerning the situation of the applicant which were conducted in a civilised and constructive atmosphere, despite a sometimes tense mood. The panel finally concluded that the facts at issue had not placed the applicant in an unacceptable position of uncertainty with regard to her professional future.

140 Third, the applicant claims that the criticism she made concerning her isolation within the department where she was placed was not covered. However, that criticism was clearly examined both in general terms and in relation to particular facts.

141 Fourth, the applicant claims that the inquiry report did not take account of the lack of any assessment at the appropriate time of her performance for 2007. While it is true that the panel did not conduct any specific analysis with regard to that state of affairs, it none the less did not ignore it in so far as it explained that it had taken account of the applicant's assessment reports for the years 1999 to 2006, but not that for 2007, which had not been finalised because the Director-General had not drawn up that assessment at the end of December and the applicant was on sick leave from January 2008.

142 Fifth, the applicant points out that the panel did not take account of the fact that she was refused a salary increase in 2007 because of her allegedly unsatisfactory performance.

143 It must be observed in that regard that the applicant was complaining more generally of having been discriminated against in terms of salary for eight years, from 1998 to 2007. In response to that complaint, the panel found that the applicant had indeed not been granted any increase in 2007, but also pointed out that there was no indication that her participation in the Staff Committee had had a negative impact on her salary increases, since in 2001 she had received the maximum she could claim given her salary band. What is more, the panel pointed out that, under a clause connected with her status as a former member of staff of the IME and by way of derogation from the rules generally applicable to the majority of ECB employees, it had been possible for her salary to continue to rise beyond the maximum in a higher salary band than that corresponding to her administrative position, so that she was in a more favourable position than other members of staff of the ECB.

144 Sixth, the applicant submits that the panel did not investigate the comments of the Director-General regarding the fact that she received a very high salary compared with her colleagues.

145 However, the inquiry report does tackle that question and points out that those comments were made in the restricted context of a meeting on the situation of the applicant and in front of a limited number of witnesses who were expected to respect confidentiality. The inquiry report also pointed out that the Director-General's comment was true, as the applicant had the highest salary among the senior experts in DG Payments.

146 Seventh, the applicant maintains that the inquiry report makes no reference to the specific rules of the ECB applicable in cases of harassment.

147 However, the inquiry report cites the provisions of the code of conduct and the note on the Dignity at Work policy. The inquiry report refers to them in the course of examining alleged discrimination on the basis of the applicant's membership of the Staff Committee. In that connection the report points out that those provisions do not define the terms 'mobbing' and 'psychological harassment' which they use but that the concept of harassment is defined in Article 12a of the Staff Regulations. Finally, the inquiry report also refers to the above provisions in assessing the applicant's allegations that the Director-General threatened her, made offensive remarks and spread rumours about her.

148 Eighth, the applicant claims that the inquiry report does not mention the contribution of the social counsellor of the ECB whose assistance she requested and obtained.

149 However, the inquiry report mentions the participation of the social counsellor of the ECB in meetings between the Director-General and the applicant on the subject of her situation and refers to the content of the witness statements of the participants in those meetings in the analysis of the matters arising in those meetings.

150 Ninth, the applicant alleges that her state of health was not taken into account by the panel in assessing the comments concerning her frequent absences and her lack of participation in meetings and in assessing the refusal of the Director-General to find an appropriate solution for her workload.

151 However, as the ECB observes, the panel's mandate was not to assess the health of the applicant. It none the less examined the frequency of her absences on health grounds, the consequences that situation could have had on the tasks entrusted to her and the arrangements allowed as a result by the Director-General. In addition, the panel examined specifically whether the applicant had been subject to discrimination because of her state of health.

152 Tenth, the applicant complains that the panel did not comment on the inconsistency in the explanations of the Director-General with regard to the offensive remarks he allegedly made about her.

153 However, it must be observed that this alleged inconsistency was not considered by the panel because it did not find the remarks at issue offensive. The rejection of a complaint may be implied if the person concerned can, as in this case, infer the reasons for that rejection from the inquiry report.

154 Eleventh, the applicant criticises the panel for not inquiring into the Director-General's refusal to assign a colleague to assist her.

155 However the panel did note that the possibility of recruiting staff in order to compensate for a dispensation from service was provided for by the provisions in force in the ECB. It also noted that the Director-General had taken the view that the assignment of a colleague to assist the applicant would not be welcomed by the applicant's colleagues and, in the light of information provided by the head of the MIS Division, that they would have refused to work under her.

156 Twelfth, the applicant criticises the fact that the panel failed to seek information regarding the fact that the Director-General asked her to leave the Staff Committee following the reduction in her working time for health reasons.

157 However, the attitude of the Director-General to the applicant's role on the Staff Committee was considered by the panel in so far as the inquiry report establishes on the basis of the witness statements it took that the Director-General did not dispute the applicant's obligations towards that committee and that there was no indication of discrimination on that basis. The panel also took the view that there was not any indication either that the members of the staff of the ECB were, on the whole, discouraged from taking part in the Staff Committee. More specifically, the panel observed that, following the reduction in the applicant's working time for health reasons for a provisional

period, the Director-General had decided, at her request, that that time would not be taken from the time she was allowed to devote to the Staff Committee, an attitude which was hardly consistent with the wish, which the applicant ascribed to the Director-General, that she should leave the Staff Committee. Finally, the panel pointed out that during the meetings held with the applicant about her situation, the Director-General never made any negative comment about her activities on the Staff Committee.

158 Thirteenth, the applicant claims that the inquiry report contains nothing regarding the statements of the Director-General that her reputation was bad and that her performance was not commensurate with her status.

159 However, that point was examined and the report finds that it is established that those comments were made. The inquiry report points out, however, that those statements were not aggressive or negative, even if some of them could have been expressed differently. Moreover, the inquiry report finds that, although some of the applicant's colleagues considered that she had a good reputation at work, the majority of them felt that she had a reputation for frequent absences, delays in delivering work and for being difficult to work with. Finally, the inquiry report tackles the more general question of whether 'rumours' about the applicant had been spread within the ECB. The panel thus found that, in the course of a meeting with the applicant, the Director-General had passed on information from the head of the MIS Division to the effect that his colleagues would not agree to work under her. The panel also observed that the comments of the Director-General regarding the salary of the applicant and her bad reputation at work, too, had been made only in the context of meetings concerning her situation. Ultimately, the panel considered that, in the light of the context in which they were made, the comments in question cannot be deemed to constitute the spreading of rumours.

160 Fourteenth, the applicant alleges other omissions.

161 In that regard, it is true that allegations concerning, inter alia, the salary of another member of staff, the refusal to allocate the applicant her own office and the disclosure of the fact that she received a bonus in 2006, were not covered in the inquiry report. However, the ECB rightly argues that those were insignificant submissions which the applicant does not persist with in her written pleadings.

c) Manifest errors directly vitiating the assessments contained in the inquiry report, the contested decision and the decision rejecting the special appeal

162 As regards the manifest errors of assessment allegedly directly vitiating the inquiry report and, therefore, the contested decision referring to it, which are grouped under nine arguments for the sake of clarity, the applicant submits, first, that the report exonerates the Director-General for the remarks he made about her, which were based on rumours and which were not substantiated. The applicant also claims that the panel did not take account of the fact that those rumours were, in themselves, a form of harassment.

163 However, it appears from the inquiry report that the remarks of the Director-General which the applicant complains of reflected his personal opinion and that the Director-General's opinion of the applicant was based on information from her head of division as to the way she was perceived in the division and was expressed at meetings held specifically to consider the situation of the applicant. Against that background, the panel was entitled to consider that the remarks in question could not be deemed to constitute the spreading of rumours.

164 Moreover, it was explained in paragraph 159 of the present judgment that, while some colleagues felt the applicant had a good reputation at work, the majority of them considered that she had a poor reputation on account of frequent absences, delays in the performance of tasks and the fact that she

was difficult to work with. The fact that, during the inquiry, witnesses were found to share the Director-General's view of the applicant is the outcome of the panel's interviews with those witnesses and cannot, on that basis, constitute a rumour.

165 In so far as, in complaining of the rumours about her, the applicant was referring precisely to her less than spotless reputation at work, it must be observed that her difficulty in balancing her work in the MIS Division with her role on the Staff Committee was mentioned several times in her annual appraisals. On the other hand, her difficult professional relations with her colleagues are not explicitly reflected in those appraisals. However, the appraisals for 2005 and 2006 record her efforts to increase her collaboration with her colleagues in DG Payments, which suggests that that collaboration was not as good as it could be.

166 That being so, it must also be pointed out that it appears from the file before the Tribunal that the Director-General drew the applicant's attention to her 'bad reputation' at work, thus acting transparently, although, in her written pleadings, the applicant alleges that his conduct was not transparent.

167 Moreover, in so far as the applicant alleges that the rumours of which she was a victim were, in themselves, a form of psychological harassment, it must be observed that a negative opinion held by an official or other member of staff about a colleague and the fact that that official or staff member passes on to his superiors complaints about the working time that colleague devotes to her job, about her delays in performing tasks and her difficulties in cooperating do not in themselves constitute psychological harassment.

168 In so far as the 'rumours' alleged by the applicant refer to something other than the 'bad reputation' which the Director-General drew to her attention, given the vagueness of the complaint on that point and the difficulty of investigating the matter, there cannot, here, be any manifest error of assessment.

169 Second, the applicant claims that the panel made a manifest error of assessment in taking the view that the, in her view, offensive statements of the Director-General, their repetition during the inquiry and the latter's refusal to apologise were not intentional acts, when the Director-General was well aware of her fragile mental and physical health.

170 It must be observed in that connection that the panel held it to be established that the Director-General made the remarks at issue. It is apparent, moreover, from the inquiry report that the panel considered that those remarks were not unintentional. However, the witness statements included in the inquiry report show that they were made in the context of meetings specifically concerning the applicant's situation and that those meetings were held in a 'civilised and constructive atmosphere', despite a sometimes tense mood, which is inherent in this type of discussion.

171 It is not disputed that the Director-General was aware of the precarious state of the applicant's psychological and physical health. According to the note on the Dignity at Work policy, '[i]t is very much also the impact of the behaviour on the recipient that is important in determining whether the behaviour is inappropriate'. However, that note also makes clear that 'it is important for everyone to be aware that particular words, ways of speaking and actions may be acceptable in one's own culture, but may be upsetting or offensive to others'. It follows that, while the perception of the person who claims to be the victim of harassment is an important element, that perception must none the less be objective. That is, moreover, the conclusion the Tribunal drew from a reading of Article 12a of the Staff Regulations (judgment of 9 December 2008 in Case F-52/05 *Q* v *Commission*, paragraph 135, not set aside on that point by the judgment of 12 July 2011 in Case T-80/09 P *Commission* v *Q*; see also *Skareby* v *Commission*, paragraph 85 above, paragraph 65). Against that background, having regard to the witness statements recorded and to the fact that negative remarks by a superior about an official or other member of staff cannot be considered offensive with regard to that official or staff member in the

absence of other elements, the panel, which was also aware of the applicant's state of health, did not make a manifest error of assessment in taking the view that the remarks of the Director-General did not constitute an act of harassment.

172 The applicant submits, third, that the inquiry report is vitiated by a manifest error in that it considers the refusal to award her an *ad personam* promotion in 2008 not to be discriminatory on the basis of incorrect information, namely that she did not fulfil the criterion of two years' service at the highest level of merit required for such a promotion.

173 In its judgment in Case F-96/08, the Tribunal annulled the decision of the ECB refusing to award the applicant an additional salary increase for 2008, basing its reasoning, inter alia, on the fact that the Staff Committee was not consulted before the adoption of the document laying down the above criterion (judgment in Case Of-96/08, paragraphs 53 and 54). As those grounds constituted the basis for the operative part, they have the authority of *res judicata*. Consequently, it must be accepted that the panel was wrong to take the fact that the applicant did not fulfil the criterion in question as justification for its view that the refusal to award her an *ad personam* promotion was not open to criticism.

174 Fourth, the applicant argues that the inquiry report was manifestly erroneous in concluding that she had received the support of DG Payments, whereas, despite numerous requests for assistance, no measure had been taken to alleviate her excessive workload before March 2007, when her working time was reduced because of the deterioration in her state of health.

175 The ECB's response on that point is that the applicant was given a working time dispensation over and above that normally authorised and that, from 2006, the Director-General of DG Payments held about 15 meetings to discuss the applicant's situation with her and how she might be helped.

176 However, in the judgment in Case F-84/08, the Tribunal found that there was no evidence capable of establishing that the applicant's workload was in fact adjusted to take account of the 50% dispensation from working time which she was granted in January 2006 for staff representation and that the main task entrusted to her, that is to say the standards file, was not allocated to another member of staff until March 2007, when she was granted a reduction of working time for medical reasons (judgment in Case F-84/08, paragraph 58).

177 Having regard to the authority of *res judicata* attaching to the above grounds of the Tribunal, it must be held that the inquiry report is vitiated by an error in that it considered that measures had been taken to alleviate the applicant's workload before March 2007.

178 The applicant claims, fifth, that the inquiry report stated, in contrast to the annual appraisals to which she was subject, that because of the time she devoted to the Staff Committee and her absences, her working time for her business area was reduced and that the matter had required particular attention from the Director-General of DG Payments.

179 However, it appears from the applicant's appraisal reports for 2003 to 2006 that her work on the Staff Committee required more time than the working time dispensation granted to her for that purpose, that she had had to work overtime and that she herself acknowledged the difficulty of carrying out both tasks, a situation which she even considered to be a challenge. Although, according to her appraisal reports, she none the less managed to meet her objectives during those years, those comments reveal the existence of a problem and the fact that the applicant's superiors were afraid that the increased workload resulting from her duties as staff representative might affect her productivity. Moreover, it appears from the file that the applicant's absences for health reasons exacerbated the problem, which came to a head when she obtained a 35% reduction in working time for health reasons in March 2007. Finally, the Tribunal notes that the applicant herself made several requests for assistance and complained that she should have received more help from her

Directorate-General. Against that background, the abovementioned observation of the panel on the reduction of the applicant's working time dedicated to her business area and the particular attention paid by the Director-General of DG Payments to that question does not appear to be vitiated by a manifest error.

180 The applicant alleges, sixth, that the inquiry report is contradictory in that it states, on the one hand, that the staff of the MIS Division were opposed to her having the assistance of a colleague and, on the other hand, that they had shown that they were prepared to work with her.

181 According to the inquiry report, the applicant's colleagues did in fact state that they were willing to work with her, some of them, however, specifying that the practical arrangements for such cooperation would have to be set out beforehand. The inquiry report also mentions that the Director-General was of the opinion that the assignment of a colleague to assist the applicant would have been unacceptable to her colleagues and that they would refuse to work under her supervision. However, there is no contradiction here, since the panel's first finding is derived from the hearings of members of staff, while the second conveys the opinion of the Director-General. Moreover, that opinion, based on information provided by the Head of the MIS Division, may have been weakened or at least greatly moderated during the inquiry by the members of the MIS Division themselves, without that difference in viewpoint amounting to evidence of harassment.

182 The applicant observes, seventh, that the inquiry report contains an error in that, in its assessment of the fact that the standards file was definitively taken away from her after the reduction of her working time on medical grounds ended in May 2007, the panel failed to consider the fact that the other members of DG Payments who had been on sick leave were able to resume their duties on their return.

183 However, that allegation, even if substantiated, could not constitute evidence of a manifest error of assessment in so far as the applicant had been complaining of an excessive workload for a long time. Moreover, in its judgment in Case F-84/08, the Tribunal held that the ECB, which is empowered to organise and reorganise its departments according to its needs …, was entitled to take the view, without prejudicing the applicant's status, that, because of her working time dispensation and the reduction of her working time on medical grounds, she was no longer able to follow the standards file properly (Case F-84/08, paragraph 59).

184 The applicant claims, eighth, that the content of the inquiry report, of the contested decision and of the decision rejecting the special appeal resulted in further defamation.

185 In addition to the fact that, as has been explained above, the defamatory nature of the remarks made about the applicant has not been proven, the ECB points out correctly that it is a feature of any internal administrative inquiry that it may result in findings which do not confirm the statements put forward by the author of the complaint giving rise to the inquiry and may comprise findings which are contrary to the complainant's expectations. Accordingly, such a situation cannot be defamatory in itself.

186 Ninth and finally, the applicant alleges that the decision rejecting the special appeal relies on extracts from her annual appraisals which are unfavourable to her because they are altered or taken out of context.

187 However, it appears from the file that the quotations complained of are correct. In addition, if they really are only short extracts from the applicant's annual appraisals, that does not explain, generally, in what way the ECB distorted their scope in the decision rejecting the special appeal. The applicant compares only her appraisal for 2006 with one of the grounds of the decision rejecting the special appeal. According to that decision, the 2006 appraisal suggested that the applicant 'should increase the interaction with the colleagues [in the MIS Division]' whereas in the appraisal report at issue the

appraisor wrote that he 'fully support[ed] the efforts which have been made by [the applicant] to increase the interaction with … colleagues …'. However, it must be found that, although the remark in that appraisal report is presented in a positive way, it none the less implies a finding by the appraisor of a failing and of the need for the applicant to remedy it. In any event, it does not appear that the quotations criticised were a decisive factor.

188 Having examined the submissions relating to the alleged incompleteness of the inquiry report and those alleging that the findings of the panel were directly vitiated by manifest errors of assessment, the Tribunal must now sum up this analysis.

d) Overall assessment

189 On conclusion of the above analysis, it appears that most of the applicant's criticisms are not founded.

190 Whilst it has been pointed out that certain of the applicant's allegations were not examined by the panel, it has also been observed that, in the overall context of the inquiry report, those allegations were complaints of secondary importance and not crucial (paragraph 161 of the present judgment).

191 It has also been accepted, in the light of the judgment in Case F-96/08, that the panel wrongly took the fact that the applicant did not fulfil the criterion of two years' service at the highest level of merit as justification for its view that the refusal to award her an *ad personam* promotion was not open to criticism (paragraph 173 of the present judgment).

192 Finally, it has been observed that the Tribunal held in its judgment in Case F-84/08 that there was no evidence capable of establishing that the applicant's workload was in fact adjusted to take account of the 50% dispensation from working time which she was granted in January 2006 for staff representation and that the standards file was not allocated to another member of staff until March 2007, when she was granted a reduction of working time for medical reasons (paragraph 176 of the present judgment).

193 However, those few elements, taken in isolation or even as a whole, are not such as to lead to the conclusion that the contested decision is vitiated, overall, by a manifest error of assessment. Applying the criterion used in paragraph 131 of the present judgment, they do not render implausible the ECB's view that the applicant was not subject to discrimination, harassment or an infringement of the Dignity at Work policy, particularly as the inquiry appears to have been conducted with great attention to detail, with the panel hearing 38 people and analysing the situation at length in the 61-page inquiry report. Moreover, it must be pointed out that the applicant herself infers the manifest error allegedly vitiating the contested decision, not only from the submissions set out in the preceding paragraphs, but from a much longer series of grievances which are not substantiated.

194 Therefore, the third plea is unfounded.

4. The fourth plea, of violation of the concept of psychological harassment

a) Arguments of the parties

195 The applicant claims that the panel disregarded the provisions of the note on the Dignity at Work policy in favour of the rules of the Staff Regulations, whereas, unlike the Staff Regulations, those provisions did not require the inappropriate acts to be intentional. In particular, the inquiry report did not contain any assessment of the conduct of the Director-General in the light of those provisions, despite the fact that he offended her by calling her reputation into question.

196 Moreover, the conclusion of the inquiry report that the remarks of the Director-General were not intentional is, she argues, manifestly incorrect because he knew of the applicant's health problems and was aware both of the fact that she perceived his statements as offensive and of the consequences they had on her psychological state.

197 Finally, the inquiry report failed to take account of the fact that the Director-General repeated his offensive statements.

198 The ECB disputes this plea.

b) Findings of the Tribunal

199 Although the argument put forward by the applicant is confused and vague, it must be understood as meaning that the panel did not assess the Director-General's discrediting of the applicant's reputation in the light of the note on the Dignity at Work policy, whereas, according to that note, '[t]he intention of an alleged wrongdoer is not the only or even the main issue[;] the behaviour may even be unintentional on the alleged wrongdoer's part'.

200 As has already been found at paragraph 147 of the present judgment, the panel, after setting out the rules contained in the note on the Dignity at Work policy, found that those provisions did not define psychological harassment and, therefore, made reference to its definition in Article 12a of the Staff Regulations.

201 However, it must be pointed out that, following various findings concerning offensive conduct and psychological harassment in general, the spreading of rumours, and the threats of which the Director-General was allegedly guilty, it was precisely in the light of the note on the Dignity at Work policy that the panel assessed the applicant's allegations.

202 Moreover, it appears from the file that in pointing out that the Director-General had no intention of offending or threatening the applicant, the panel was responding to her argument, set out in her comments of 5 October 2009 on the draft inquiry report, that the Director-General was well aware of her negative perception of his remarks, of her state of health and of the damage he was causing her. In that light, the panel was able to reject that argument by pointing out that those statements were made in an atmosphere of civility, in good faith, in a constructive context and with respect for the dignity of the applicant, without establishing a principle that the intention to cause damage must be present in order for facts to be described as psychological harassment in the light of the provisions of the note on the Dignity at Work policy.

203 Moreover, the applicant cannot rely, as she does in her application, on her fragile psychological and physical health to establish that the concept of psychological harassment has been misinterpreted. Research must be undertaken as to whether the impugned facts justify, objectively, such a classification, for, while the note on the Dignity at Work policy states that 'it is very much … the impact of the behaviour on the recipient that is important', it also makes clear that 'it is important for everyone to be aware that particular words, ways of speaking and actions may be acceptable behaviour in one's own culture, but may be upsetting or offensive to others', with the result that, while the perception of the person concerned is an important aspect of the assessment, that perception must none the less be capable of being objectively confirmed (see, to that effect, on the basis of Article 12a of the Staff Regulations, *Skareby* v *Commission*, paragraph 85 above, paragraph 65).

204 Finally, it is apparent from the inquiry report that the panel listed the various meetings at which the Director-General allegedly caused offence to the applicant inter alia by referring to her 'bad reputation' at work, which demonstrates that the panel did not ignore the claim that the Director-General repeated the allegedly offensive remarks.

205 In the light of the foregoing, it must be held that the fourth plea is unfounded.

5. The fifth plea, alleging breach of the duty to provide assistance

a) Arguments of the parties

206 The applicant considers, first, that there is a breach of the duty to provide assistance in the fact that she was not granted a sufficient working time dispensation for the work she was carrying out for the Staff Committee, in the refusal to provide her with the assistance of a colleague because of her excessive workload on the standards file or to take any other effective measure, in the fact that negative rumours about her were allowed to circulate, in the refusal to take her out of the managerial framework as she requested and as her doctor advised and, finally, in the absence of any impartial assessment of the work she did in 2007.

207 The applicant then argued that the panel did not properly assess the circumstances, particularly as regards her situation in DG Payments, where she had always had positive assessments. Moreover, it failed to take account of the fact that psychological harassment is not always obvious. In addition, it confirmed that rumours calling into question her reputation because of her absences, her delays in the completion of tasks and her character had been spread but did not verify whether they were substantiated or assess them with regard to the claim of psychological harassment.

208 In her reply, the applicant, moreover, disputes the impartiality of the panel, referring to a letter of 11 June 2008 in which her counsel requested that the inquiry be entrusted to persons external to the ECB, essentially because she had personal knowledge of various persons after 10 years of working for the Staff Committee.

209 The ECB disputes those arguments and maintains that the plea is not founded and that the plea of absence of impartiality raised in the reply is, for its part, out of time.

b) Findings of the Tribunal

210 It must be borne in mind that the applicant seeks the annulment of the decision of the ECB closing the inquiry opened in response to her complaint, concerning, first, discrimination on the grounds of her sex, age, nationality and state of health, and, second, concerning discrimination on the ground of her membership of the Staff Committee and, finally, concerning breach of the Dignity at Work policy, in particular by the Director-General, including by defamation, isolation, psychological harassment and intimidation. Therefore, the fifth plea is ineffective in that it challenges, not the failure to provide assistance resulting from rejection of her complaint, but a failure to provide assistance resulting from the acts or conduct referred to in paragraph 206 of the present judgment.

211 As regards the submission that the panel did not properly assess the circumstances of the case, it is apparent from consideration of the third plea that that submission is not founded. In particular, it must be recalled that the panel examined, inter alia, the problem of the alleged rumours spread about the applicant and reached the conclusion that that submission was not justified.

212 Finally, as regards the allegation raised in the reply of the panel's lack of impartiality, it must be held that, as the administration's obligation to act impartially is an essential procedural requirement (see, to that effect, judgment of 20 September 2011 in Case T-461/08 *Evropaïki Dynamiki* v *EIB*, paragraphs 130 and 131), a plea of its breach raises an issue of public policy, which cannot therefore be out of time. However, the mere fact that the applicant worked for 10 years on the Staff Committee is not sufficient to call into question the impartiality of the panel.

213 The fifth plea in law must accordingly be rejected.

214 It follows from the foregoing that, in the absence of any pleas that are founded, the claims for annulment must be rejected.

III – *The head of claim seeking compensation for the damage to the applicant*

215 The applicant claims that the ECB did not grant her the aid to which she was entitled in the context of her work and even added to the rumours, the defamation and the attack on her dignity in the framework of the inquiry. That conduct damaged her health. Consequently, the applicant considers that she has suffered non-material damage which she assesses *ex aequo et bono* at EUR 50 000. Furthermore, she considers that the conduct of the ECB forced her to seek the assistance of a lawyer whose costs the ECB should bear by way of reparation for her material loss, costs which she estimates at EUR 15 000.

216 It must be borne in mind that, where the damage on which an applicant relies arises from the adoption of a decision whose annulment is sought, the rejection of the claim for annulment entails the rejection of the claim for damages, where those claims are closely linked, as in the present case.

217 Moreover, the applicant has already received compensation through the judgment in Case F-84/08 for the fact that the ECB failed to establish that it had adjusted her workload to take account of the working time dispensation which she had been granted in order to carry out her staff representation duties (judgment in Case F-84/08, paragraphs 58 and 60).

218 In so far as the claim for compensation for material damage must be interpreted as being based on conduct of the ECB distinct from the alleged illegality of the contested decision, it must be borne in mind that lawyer's fees during the pre-contentious procedure constitute recoverable costs on the terms laid down in Article 86 et seq. of the Rules of Procedure of the Tribunal and that they must be dealt with in that framework. As regards the lawyer's costs incurred during the pre-contentious procedure, it must also be borne in mind that Article 91 of those rules refers only to the costs inherent in proceedings before the Tribunal, to the exclusion of those incurred during the prior stage. Therefore, to regard such costs as a loss for which compensation may be claimed in an action for damages would be inconsistent with the fact that costs incurred during the phase before the judicial proceedings are not recoverable (order of 14 September 2005 in Case T-140/04 *Ehcon* v *Commission*, paragraph 79; judgment of 8 November 2011 in Case T-88/09 *Idromacchine and Others* v *Commission*, paragraph 100, under appeal to the Court of Justice, Case C-34/12 P).

219 The applicant's claim for compensation for damage must, therefore, be rejected.

IV – *The requests for measures of inquiry and measures of organisation of the procedure*

A – *The measures of inquiry and measures of organisation of the procedure sought in the application*

220 By her fifth and sixth heads of claim, the applicant asks the Tribunal to order the ECB to produce, pursuant to Article 55 of the Rules of Procedure, the file of the inquiry including the annexes to the inquiry report and the minutes of the hearings. Those documents were indispensable, she claimed, in order to allow 'proper debates'. The applicant argues, in that regard, that Article 7 of Regulation No 45/2001 allows the transfer of personal data from one institution of the Union to another and that, in an order of 26 September 2007 in Case F-52/05 *Q* v *Commission*, paragraphs 10 and 11, also on the subject of psychological harassment, the Tribunal has already held that an applicant should be allowed access to all witness statements without any exception. Moreover, pursuant to Article 59 of the Rules of Procedure, the applicant asks the Tribunal to call as a witness the former social counsellor at the ECB who was a privileged witness of what happened and whose statements collected by the panel were not reproduced in the inquiry report.

221 However, the Tribunal does not see the need, in the present case, to order the production of the annexes to the inquiry report, or, in particular, the lodging of the minutes of the hearings of witnesses, with regard to which it was found, on examination of the first plea in support of annulment of the contested decision, that the ECB was entitled not to communicate them to the applicant during the administrative procedure.

222 It must be observed, in that regard, that the inquiry report sent to the applicant contains, inter alia, an account of the facts compiled during the inquiry and that the report is particularly full and informative in itself. Moreover, in the context of a complaint of psychological harassment, the Tribunal takes the view that it is appropriate, except in special circumstances, to guarantee the confidentiality of witness statements collected, including during the contentious proceedings, since it is not unreasonable to take the view that the prospect of a possible removal of that confidentiality at the stage of contentious proceedings may impede the holding of neutral and objective inquiries with the unreserved cooperation of the members of staff called as witnesses. The applicant has not adduced sufficient evidence to warrant the Tribunal's derogating from that precaution in the present case.

223 As to the hearing as a witness of the former social counsellor at the ECB, a few emails from whom appear in the file, the applicant confined herself to stating that this person was a privileged witness of what happened, without indicating clearly the points on which she could provide crucial evidence and in what way it would be crucial.

224 The fifth and sixth heads of claim of the applicant cannot therefore be upheld.

B – *The request for production of the note of 18 November 2010 in full and its removal from the file*

225 In her letter of 26 January 2012 (mentioned in paragraph 39 of the present judgment) the applicant asked the Tribunal to request the ECB to produce the unexpurgated version of the note of 18 November 2010. By its note of 29 February 2012, the ECB not only refused to produce the note of 18 November 2010 but also asked the Tribunal not to take account of the annex to the note.

226 It must be observed that the note of 18 November 2010 and its annex were drawn up while the present case was already pending and that they contain an opinion emanating from DG Legal Services of the ECB, and the fact that DG Legal Services consulted DG Human Resources, Budget and Organisation does not affect their origin or nature in any way. As their heading indicates, the note of 18 November 2010 and its annex examine the outcome and implications of Court Cases F-84/08, F-96/08 and F-23/09. The annex covers, inter alia, the consequences of the judgment in Case F-84/08 for the present case.

227 Against that background, it must be borne in mind that public policy requires that the institutions can receive the advice of their legal service, given in full independence (order of 23 October 2002 in Case C-445/00 *Austria* v *Council*, paragraph 12; judgment of 8 November 2000 in Case T-44/97 *Ghignone and Others* v *Council*, paragraph 48; order of 30 April 2010 in Case T-18/10 R *Inuit Tapiriit Kanatami and Others* v *Council*, paragraph 19) and that the unauthorised disclosure by the institution of such an opinion in the context of a dispute concerning precisely the validity of the decision to which that opinion relates would conflict, generally, with the right of that institution to a fair hearing (see, to that effect, order of 29 January 2009 in Case C-9/08 *Donnici* v *Parliament*, paragraph 18; judgment of 21 July 2011 in Case C-506/08 P *Sweden* v *MyTravel and Commission*, paragraphs 117 and 118). None the less, it is possible for the Courts of the European Union to order the production of such a document if a higher public interest justifies it (order in *Donnici* v *Parliament*, paragraphs 20 and 22).

228 In the present case, the applicant points out, first, that the production of the note of 18 November 2010 in full would allow account to be taken of the true assessment by the ECB of the implications of the judgments in Cases F-84/08, F-96/08 and F-23/09 for the present dispute.

229 Even if such was in fact the scope of the passages of the note of 18 November 2010 which were omitted when the note was communicated to the applicant, it must be observed that those passages are said to contain an opinion of DG Legal Services drawn up in the context of a dispute concerning precisely the validity of the decision to which those parts of that opinion relate. Such a perspective would undeniably affect the fairness of the procedure to which the ECB is entitled and would inevitably have repercussions on its interest in receiving frank, objective and full opinions from its DG Legal Services (see, to that effect, *Donnici* v *Parliament*, paragraph 227 above, paragraph 21). The applicant has not pleaded a higher interest, properly substantiated, which would justify the production before the Tribunal of the passages omitted from the note in question. Moreover, ordering the communication of the note of 18 November 2010 in full is all the more unnecessary in that the note post-dates the contested decision, so that, unlike a preparatory measure, it is not such as to vitiate the legality of the decision in itself. Furthermore, the Tribunal has already taken account, in the course of examining the present case, of the findings in the judgments in Cases F-84/08 and F-96/08.

230 The applicant argues, second, that the production of the note of 18 November 2010 in full would make it possible to assess whether the inquiry report is likely to have a negative impact on her future prospects at the ECB. However, such a ground, which is of a personal nature, cannot constitute a higher public interest warranting a derogation from the principle of the confidential nature of opinions of DG Legal Services concerning pending contentious proceedings. Even the applicant herself does not claim that.

231 However, it cannot be ruled out that the passages omitted from the note of 18 November 2010 which the applicant is asking the ECB to produce before the Tribunal contain considerations other than an assessment of the impact of the judgments in Cases F-84/08, F-96/08 and F-23/09 on the present case. In that case, the applicant's interest in gaining possession of the note in full to enable her to know whether the inquiry report might in future damage her position at the ECB, would have no connection with the present action, but would concern a future hypothetical dispute. Therefore, there can be no basis for the applicant's request in Article 54(2) of the Rules of Procedure which allows each party to propose the adoption or modification of measures of organisation of procedure 'at any stage of the proceedings'. In any event, as recalled in paragraph 32 of the present judgment, the applicant brought an action registered as Case F-26/12 essentially seeking the annulment of a decision of 21 June 2011 by which the ECB rejected her request for access to all the decisions of the Executive Board and the documents provided to it concerning Cases F-84/08, F-96/08 and F-23/09. Thus, in the situation envisaged here, it would not be appropriate for the Tribunal to order the production in the present proceedings, as an ancillary matter, of a document the refusal of access to which is the subject of separate and distinct proceedings, without subverting the guarantees offered by those proceedings.

232 The ECB's request for the withdrawal from the file of the annex to the note of 18 November 2010 remains to be examined. As has already been explained below, that annex summarises the implications of the judgment in Case F-84/08 for the present case. As such it could have benefited from the confidentiality of opinions of DG Legal Services in pending proceedings. However, the case-law allows an institution, such as the ECB, to authorise the production of such an internal document (orders in *Austria* v *Council*, paragraph 227 above, paragraph 12, and *Donnici* v *Parliament*, paragraph 227 above, paragraph 13; order in *Inuit Tapiriit Kanatami and Others* v *Council*, paragraph 227 above, paragraph 19). The ECB sent the annex in question to one of the applicant's counsel by a letter of 12 August 2011 from the Director-General of DG Human Resources, Budget and Organisation. Against that background, the ECB's request for removal of that document on the sole ground, not backed by evidence, that the annex in question was disclosed to the applicant as a result of an administrative error cannot be upheld.

233 In conclusion, it is not appropriate to uphold either the applicant's request for the production of the note of 18 November 2010 in full or the ECB's request for the removal from the file in the present proceedings before the Tribunal of the annex to that note.

Costs

234 The applicant has applied for an order that the ECB bear all the costs of the present proceedings even if her application is dismissed, because the ECB's conduct has allegedly caused the 'proliferation of proceedings' and the present action. Moreover, her right to bring proceedings cannot be limited by financial considerations connected with the ECB's choosing always to engage the services of a lawyer although it has a legal service including a unit specialising in staff cases.

235 For its part, the ECB knows of no consideration of equity which would justify the application of Article 87(2) of the Rules of Procedure and notes that it is apparent from Article 19 of the Statute of the Court of Justice of the European Union that the institutions are free to engage the services of a lawyer.

236 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he or she is not to be ordered to pay any. Furthermore, under Article 88 of the Rules of Procedure, a party, even if successful, may be ordered to pay some or all of the costs, if this appears justified by the conduct of that party.

237 In the present case, it is apparent from the reasons set out above that the applicant has been unsuccessful. Furthermore, in its pleadings the ECB has expressly requested that the applicant be ordered to pay the costs.

238 Moreover, the Tribunal is not aware of, and the applicant has not explained, the reasons of equity or the aspect of the ECB's conduct which are alleged to justify its being ordered to pay the costs when the action must be dismissed as none of the pleas is well founded.

239 Since the circumstances of this case do not warrant application of the provisions of Article 87(2) of the Rules of Procedure, the ECB must bear its own costs and be ordered to pay the costs incurred by the applicant.

240 The question whether the costs incurred by the ECB may include the costs relating to the services of a lawyer is a dispute concerning the amount and nature of the costs which it would be premature to decide in the present judgment and which may only be decided pursuant to Article 92 of the Rules of Procedure.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Declares that Mrs Cerafogli must bear her own costs and orders her to pay the costs of the European Central Bank.**

Van Raepenbusch Boruta Perillo

Delivered in open court in Luxembourg on 12 December 2012.

W. Hakenberg
Registrar

S. Van Raepenbusch
President

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