



Reports of Cases

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

26 June 2013*

(Civil service — ECB Staff — Retroactive extension of the probationary period — Decision to end the contract during the probationary period — Disciplinary proceedings)

In Case F-78/11,

ACTION brought 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 TEU and the TFEU,

BM, member of staff at 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 initially by P. Embley, M. López Torres and E. Carlini, acting as Agents, and subsequently by M. López Torres and E. Carlini, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

composed of S. Van Raepenbusch, President, R. Barents (Rapporteur) and K. Bradley, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2012,

gives the following

Judgment

- 1 By application lodged at the Tribunal Registry on 1 August 2011, BM, a member of the staff of the European Central Bank (ECB), brought the present action for annulment of the decision of 20 May 2011 terminating his employment contract, and for damages in respect of the material and non-material harm he suffered, assessed at EUR 10 000.

* Language of the case: English.

Legal context

- 2 Article 36 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, in the version applicable to the proceedings (‘the Protocol on the Statute of the ESCB and of the ECB’), provides:

‘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.’

- 3 On the basis of Article 12.3 of the Protocol on the Statute of the ESCB and of the ECB, the Governing Council adopted, on 19 February 2004, the version of the Rules of Procedure of the ECB in force at the material time (OJ 2004 L 80, p. 33) (‘the Rules of Procedure of the ECB’).
- 4 On the basis of Article 36.1 of the Protocol on the Statute of the ESCB and of the ECB, the Governing Council of the ECB adopted, on 9 June 1998, the Conditions of Employment of the staff of the ECB, which have been amended on several occasions (‘the Conditions of Employment’).
- 5 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 version of the ECB Staff Rules in force at the material time (‘the Staff Rules’).
- 6 As provided in Article 21 of the Conditions of Employment, in the version that applies to these proceedings:

‘The ... allowances [referred to in the third part of the Conditions of Employment, namely the household allowance, the child allowance, the expatriation allowance, the education allowance and the pre-school allowance] are complementary to any other allowances of the same nature provided by other sources. Members of staff shall claim and declare such allowances, which shall be deducted from those payable by the ECB.’

- 7 As provided in Article 36 of the Conditions of Employment, in the version that applies to these proceedings:

‘Under the conditions laid down in the Staff Rules, members of staff who are unemployed following termination of their contract with the ECB shall be entitled to:

- (i) a monthly unemployment allowance equal to:
- 60% of their last basic salary for six months; and
 - 30% of their last basic salary for the subsequent six months and additional months in relation to years of service and age;
- (ii) household and child allowances; and
- (iii) cover under the ECB medical scheme and accident insurance scheme.

The period of entitlement to these benefits shall in no case exceed two years.

Should a member of staff resign or refuse an extension of contract, he/she will not be entitled to these unemployment benefits, unless the Executive Board decides otherwise.

The above benefits are complementary to any other benefits of the same nature provided by other sources. Members of staff shall claim and declare such benefits, which shall be deducted from those payable by the ECB.

Members of staff whose service is terminated during or at the end of the probationary period are not entitled to the above benefits.'

- 8 Under Article 41 of the Conditions of Employment, in the version applicable to the proceedings ('Article 41, as amended, of the Conditions of Employment'):

'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 any of the following:

- (i) a Governing Council decision or any ECB policy, including any policy laid down in these Conditions of Employment or in the Staff Rules;
- (ii) a decision for which special appeals procedures exist;
- (iii) a decision not to confirm the appointment of a member of staff serving a probationary period;
- (iv) a decision to initiate an internal administrative inquiry and/or disciplinary proceedings;
- (v) a decision by the Executive Board, or the member of the Executive Board to whom the Directorate Human Resources, Budget and Organisation reports, that imposes a disciplinary measure.

Disciplinary measures may only be challenged by means of the special appeals procedure laid down in the Staff Rules.'

- 9 Prior to 1 January 2009, Article 41 of the Conditions of Employment was worded as follows:

'Members of staff may ask for an administrative review of complaints and grievances in respect of the consistency of actions taken in their individual cases with the personnel policy and Conditions of Employment of the ECB, using the procedure laid down in the Staff Rules. Members of staff who remain dissatisfied following the administrative review procedure may use the grievance procedure laid down in the Staff Rules.

Such procedures may not be used to challenge:

- (i) any Governing Council decision or any ECB policy, including any policy laid down in these Conditions of Employment or in the Staff Rules;
- (ii) any decision for which special appeals procedures exist; or
- (iii) any decision not to confirm the appointment of a member of staff serving a probationary period.'

10 According to the version of this provision applicable prior to 1 January 2009, a decision not to confirm the appointment of a member of staff serving a probationary period was not subject to a grievance procedure. Therefore, the General Court of the European Union acknowledged that persons who were still serving a probationary period could bring an action directly against a decision not to confirm their appointment (judgment of 27 June 2002 in Joined Cases T-373/00, T-27/01, T-56/01 and T-69/01 *Tralli v ECB*, paragraph 93).

11 As provided in Article 45 of the Conditions of Employment, in the version that applies to these proceedings:

‘Disciplinary measures shall be proportional to the seriousness of the breach of professional duties and shall state the grounds on which they are based. To determine the seriousness of the breach of professional duties and the disciplinary measure to be imposed, account shall be taken in particular of:

- the nature of the breach of professional duties and the circumstances in which it occurred,
- the extent to which the misconduct adversely affects the ECB’s integrity, reputation or interests,
- the extent to which the misconduct involves intentional actions or negligence,
- the motives of the member of staff’s breach of professional duties,
- the member of staff’s grade and seniority,
- the degree of the member of staff’s responsibility,
- whether the breach of professional duties involves repeated action or behaviour,
- the conduct of the member of staff throughout the course of their career.

Disciplinary measures shall be adopted in accordance with the procedure laid down in the Staff Rules. The said procedure shall ensure that no member of staff or former member of staff to whom these Conditions of Employment apply may be subjected to a disciplinary measure without first being offered an opportunity to reply to the relevant charges. A single case of breach of professional duties shall not give rise to more than one disciplinary measure.’

12 Under Article 2.1.1 of the Staff Rules:

‘Appointments shall be subject to a probationary period of six months unless the Executive Board decides to waive the probationary period. In exceptional circumstances the Executive Board may determine a probationary period longer than six months as set out in 2.1.2 (a) below.’

13 Under Article 2.1.2 of the Staff Rules:

‘...

In addition, the Executive Board may, in exceptional circumstances,

- (a) extend the probationary period up to a maximum of twelve months; or
- (b) extend the probationary period up to a maximum of twelve months and assign the probationer to another function.’

14 In accordance with Article 2.1.3 of the Staff Rules:

‘During the probationary period the Executive Board may terminate the contract, giving one month’s notice, should the probationer’s performance or suitability prove inadequate.

...’

15 Article 6.5.10 of the Staff Rules provides:

‘Unless the Executive Board decides otherwise, there shall be no entitlement to unemployment benefits in the following instances:

- resignation;
- refusal by the member of staff of an extension of contract for the same or an equivalent position;
- dismissal for disciplinary reasons;
- termination during the probationary period.’

16 Article 8.1.6 of the Staff Rules provides:

‘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.’

17 Pursuant to Article 8.3.19 of the Staff Rules:

‘The decision imposing a disciplinary measure shall be removed from the personal file of the member of staff after three years in case of a written warning, after five years in case of a written reprimand and after seven years in any other case.’

Factual background to the dispute

18 The applicant was recruited by the ECB on a two-year fixed term assignment on its Graduate Programme from 1 September 2007 to 31 August 2009. By letter of 31 July 2009, the ECB extended the applicant’s participation in that programme until 31 August 2010. The applicant was then offered a fixed term non-convertible contract of employment, issued on 3 August 2010, as an economist in the ‘Economics’ Directorate General (DG), from 1 September 2010 to 31 October 2011. This contract was subject to a probationary period of six months from its date of commencement.

19 In November 2010, following an internal audit concerning the payments process for child allowance, the Human Resources, Budget and Organisation Directorate General (‘Human Resources DG’) reviewed the right of ECB staff members to child allowance. Eleven members of staff, including the applicant, stated that they also received child allowance from the German authorities (‘Kindergeld’). That allowance additionally received by the applicant for a period of 23 months in 2009/2010, in a total amount of EUR 4 012, was deducted in two parts from his salary.

- 20 Following a decision by the competent member of the Executive Board, of 11 March 2011, after the expiry of the probationary period ('the decision of 11 March 2011'), the applicant was informed by letter dated 14 March 2011 and received on 22 March 2011 that, on account of the ongoing disciplinary procedure, the probationary period was being extended until 31 May 2011.
- 21 On 17 March 2011, the applicant was invited by email to a hearing, which took place on 24 March 2011, concerning a possible breach of his professional duty linked to the double receipt of child allowance.
- 22 On 29 March 2011, the applicant was informed by letter that, first, disciplinary proceedings concerning the double receipt of child allowance had been initiated and that, secondly, he was invited to a hearing before Ms Z., the Deputy Director General of the 'Human Resources' DG, on 5 April 2011.
- 23 On 15 April 2011, the applicant received a letter from Ms Z., dated the same day, informing him that a written reprimand was to be imposed on him for breach of Article 21 of the Conditions of Employment and of several provisions of the Staff Rules. Ms Z. also stated that the reprimand was necessary and at the same time sufficient and that she had taken into account the fact that, first, the child allowance had been paid without a formal application on the applicant's part, secondly, that his conduct had been negligent but not intentional and that it did not constitute gross negligence and, thirdly, that he had admitted his error and apologised for it.
- 24 On 23 May 2011, the applicant received a letter dated 20 May 2011, informing him that the breach of his professional duty which had occurred during his probationary period was the ground for the decision of the competent member of the Executive Board of the ECB to 'terminate his contract as of 31 October 2011', the date of expiry of his contract ('the contested decision').
- 25 The special appeal against the written reprimand, lodged on 14 June 2011, was dismissed by the President of the ECB on 4 August 2011. The decision to impose the written reprimand is the subject of Case F-106/11 (*BM v ECB*).

Forms of order sought by the parties and procedure

- 26 The applicant claims that the Tribunal should:
- annul the contested decision;
 - order the compensation of the material harm he suffered as of 31 October 2011;
 - order the compensation of the non-material harm he suffered, assessed at EUR 10 000;
 - order the ECB to pay the entirety of the costs.
- 27 The ECB contends that the Tribunal should:
- dismiss the action;
 - order the applicant to pay the costs.
- 28 On 24 September 2011, the ECB brought a plea of inadmissibility for the purposes of Article 78 of the Rules of Procedure, asking the Tribunal to make a decision without going to the substance of the case.

- 29 Having regard to the change in the composition of the Chambers of the Tribunal, the President of the Tribunal, on 12 October 2011, reassigned the case to the Third Chamber of the Tribunal and designated a new Judge-Rapporteur.
- 30 By order of 29 March 2012, the Tribunal decided to reserve its decision on the objection of inadmissibility for the final judgment.

Law

The purpose of the dispute

- 31 It must be observed that the purpose of the contested decision is not, strictly speaking, to terminate the applicant's contract since that would have ended in any event on 31 October 2011, pursuant to the terms of that contract. On the other hand, according to the applicant, the effect of that decision, under Article 6.5.10 of the Staff Rules, was to render him ineligible for the unemployment allowances, in so far as it expresses the intention of the Executive Board to terminate the employment relationship. That latter consequence, which is not called into question before the Tribunal, is outside the scope of these proceedings.

Admissibility

- 32 In the plea of inadmissibility, the ECB submits that the action is inadmissible on the ground, first, of failure to bring a prior special appeal, as provided in Article 8.1.6 of the Staff Rules, and, secondly, of lack of legal interest in bringing proceedings.

The failure to bring a special appeal

– Arguments of the parties

- 33 The ECB observes that, according to Article 41 of the Conditions of Employment, as applicable prior to 1 January 2009, a decision not to confirm the appointment of a member of staff serving a probationary period is not subject to a grievance procedure. Therefore, the General Court has acknowledged that persons who were still serving their probationary period when the decision not to confirm their appointment was taken could bring an action directly against that decision (*Tralli v ECB*, paragraph 93). According to the ECB, the aim of the amendments to Article 41 was to close a loophole revealed by *Tralli v ECB*.
- 34 The ECB submits that it is apparent from point (iii) of Article 41, as amended, of the Conditions of Employment that a decision not to confirm the appointment of a member of staff serving a probationary period is not subject to a grievance procedure, but that, from now on, those decisions can be reviewed under the special appeals procedure. That procedure, introduced by Article 8.1.6 of the Staff Rules, will thus henceforth allow staff members to challenge the decisions of the Executive Board and the decisions of members of the Executive Board. The ECB adds that, since the amendment of Article 41, point (iii), relating to decisions not to confirm the appointment of a member of staff serving a probationary period, has in fact become an unnecessary duplication of point (ii), relating to decisions for which special appeals procedures exist, without however contradicting it.
- 35 According to the applicant, the distinction between points (ii) and (iii) of Article 41, as amended, of the Conditions of Employment seems to imply that the decision not to confirm the appointment of a member of staff serving a probationary period is not subject to a special procedure. That

interpretation is confirmed by the wording of that article according to which disciplinary measures can only be challenged by the implementation of the special appeals procedure provided for by the Staff Rules. That wording, however, is absent from point (iii) of Article 41, as amended, of the Conditions of Employment, which implies, in the applicant's view, that the special appeals procedure provided for in Article 8.1.6 of the Staff Rules is not applicable to decisions not to confirm the appointment of a member of staff serving a probationary period. Consequently, as that decision is not subject either to a special procedure or to a grievance procedure, the matter can be brought directly before the Tribunal.

36 In the alternative, the applicant submits that he has made an excusable error caused by the ECB.

– Findings of the Tribunal

37 It must be observed that, in the interests of sound administration and effective legal protection, the provisions governing the internal appeals procedure of an institution must be clear, precise and certain.

38 The second paragraph of Article 41, as amended, of the Conditions of Employment, applicable as of 1 January 2009, makes a distinction between decisions for which special appeals procedures exist, on the one hand, and decisions not to confirm the appointment of a member of staff serving a probationary period, on the other. As such, that distinction is capable of being interpreted as meaning that those latter decisions are not subject to a special appeals procedure.

39 This interpretation is borne out by the last paragraph of Article 41, as amended, of the Conditions of Employment. First, that article states that disciplinary measures may only be challenged by means of the special appeals procedure laid down in the Staff Rules, without mentioning or indicating a possible appeals procedure for decisions concerning the failure to confirm the appointment of a member of staff serving a probationary period and, secondly, Article 8.1.6 of the Staff Rules, to which Article 41, as amended, of the Conditions of Employment refers with regard to disciplinary measures, provides that decisions taken by the Executive Board are to be subject to a special appeals procedure. In the absence of any other information, an averagely diligent reader may therefore infer that that provision could be interpreted as meaning that it is not applicable to the decisions, referred to in point (iii), not to confirm the appointment of a member of staff serving a probationary period.

40 It must be stated that it is not clear from Article 41, as amended, of the Conditions of Employment that decisions not to confirm the appointment of a member of staff serving a probationary period are subject to a special appeals procedure.

41 In any event, the excusable error relied on the applicant is justified in so far as it is apparent from a statement made by a member of the Staff Committee annexed to the observations on the plea of inadmissibility, without the content of that statement being called into question, that the competent Deputy Director informed the applicant, at a meeting on 23 May 2011, that there was no internal procedure against the decision not to confirm the appointment of a member of staff serving a probationary period and that, therefore, he should bring proceedings directly before the Tribunal.

42 Accordingly, the plea of inadmissibility alleging a failure to bring a prior special appeal must be rejected.

The lack of a legal interest in bringing proceedings

– Arguments of the parties

- 43 The ECB claims that the applicant has no legal interest in bringing proceedings against the decision to terminate his contract, since it has no direct and immediate effect on the applicant's situation in so far as the date set for the end of the contract corresponds to that on which the contract would have ended in any event. There is therefore no effect on the applicant's financial rights. In addition, the ECB states that the reduction in the chance of being appointed again within its departments, relied on by the applicant, is attributable only to the reprimand imposed on him. This, however, does not form part of the subject-matter of this action.
- 44 The applicant takes the view that, even if the decision had no effect on the duration of the contract, it will nevertheless have a significant impact on his future career, both within the ECB and outside it. He adds that, even if the reprimand is not the subject-matter of these proceedings, that reprimand was the direct cause of the decision taken to terminate his contract.

– Findings of the Tribunal

- 45 An applicant is not deprived of a legal interest in bringing proceedings for annulment of a decision to terminate his contract, particularly with regard to the reasons put forward to justify that termination, on the ground that an annulment of that decision would not necessarily lead to the extension of his contract or a new appointment (see, to that effect, judgment of the 23 February 2001 in Joined Cases T-7/98, T-208/98 and T-109/99 *De Nicola v EIB*, paragraph 127).
- 46 Furthermore, under Article 6.5.10 of the Staff Rules, the unemployment allowance provided for by Article 36 of the Conditions of Employment is not granted in the event that the decision to terminate the contract is taken during the probationary period. That finding is sufficient to establish that there is, on the applicant's part, a legal interest in bringing proceedings against the contested decision, without it being necessary to raise the issue of the exact consequences following, in the present case, from the aforementioned Article 6.5.10, even though that decision, as is apparent from paragraph 31 above, took effect on the date agreed upon at the time the contract was signed as its termination date.
- 47 The plea of inadmissibility alleging the lack of a legal interest in bringing proceedings must, consequently, also be rejected.

The claims for annulment

- 48 In support of his action, the applicant puts forward seven pleas in law, alleging, respectively:
- infringement of the rights of the defence and a misuse of power or abuse of process;
 - the imposition of a disguised disciplinary penalty and the infringement of the *non bis in idem* principle;
 - an erroneous legal basis and infringement of the principle that it is necessary to state the reasons for a decision;
 - a manifest error of assessment and infringement of the obligation to state reasons and of the principle of legal certainty;
 - infringement of the principle of proportionality;

- infringement of the principle of legitimate expectations and of the principles of the duty to have regard for the welfare of staff and sound administration;
 - infringement of the right of the staff committee to be consulted.
- 49 For reasons of the sound administration of justice, economy of procedure and convenience, it is appropriate, first, to examine the third, fourth and fifth pleas together.

Arguments of the parties

- 50 The applicant argues that the legal basis of the contested decision is flawed. In this connection, he maintains that the facts of his case are fundamentally different from those which gave rise to the judgment of 14 February 2007 in Case F-1/06 *Fernández Ortiz v Commission*. First, the Staff Regulations of Officials of the European Union requires a decision of the appointing authority to establish an official after successful completion of the probationary period, whereas the ECB's Staff Rules do not contain any provision to that effect. Consequently, the appointment of a member of staff is confirmed when the line manager informs the person concerned that he has successfully completed the probationary period. In the applicant's case, this was done on 8 March 2011. Secondly, the Probationary Record Report indicates that the applicant's performance was satisfactory, whereas in the case which gave rise to *Fernández Ortiz v Commission*, the performance was assessed as unsatisfactory. Thirdly, the aforementioned case concerned an official whereas the present case concerns a member of staff employed on a fixed term, fourteen-month non-convertible contract. It follows, the applicant also submits, that, since he did not receive, before the end of the probationary period, any decision, whether that be a decision to extend that period or even a decision to terminate his contract, he could legitimately believe that his appointment was confirmed.
- 51 Next, the applicant submits that the letter received on 22 March 2011, informing him of the decision of 11 March 2011 to extend the probationary period, justified by the 'ongoing disciplinary procedure', is flawed in so far as that disciplinary procedure was only initiated on 29 March 2011.
- 52 Lastly, the applicant claims that the decision of 11 March 2011 is flawed in that it imposed *ex post* an extension of his probationary period, in so far as that period expired on 28 February 2011. Far from being based on exceptional circumstances within the meaning of Article 2.1.2 of the Staff Rules, the extension could, in this case, be regarded as an abuse or a misuse of powers, in so far as the only purpose or effect of that decision was to dispense with a disciplinary procedure leading to a measure terminating the contract and thereby to deprive the applicant of unemployment benefits and other related advantages.
- 53 The ECB contends that the applicant did not challenge the decision of 11 March 2011 by which his probationary period was extended until 31 May 2011.
- 54 Next, the ECB observes that a positive evaluation made by a line manager does not prevent it from legitimately extending a member of staff's probationary period. The Executive Board can, in exceptional cases, decline to follow the proposal of the line manager, who in fact analyses only the professional performance of the probationer. The Executive Board can thus consider a candidate's performance, although 'unexceptionable', to be insufficient for the post proposed, taking account of other reasons such as, as in the present case, a breach of professional duties. It may consequently, applying its broad discretion and the principle of sound administration, decide to extend the probationary period.
- 55 In addition, the extension of the probationary period should, according to the ECB, be decided upon as a rule before the end of that period, but even though in the present case it was only decided upon after the six-month probationary period, the decision was taken within a reasonable period of fourteen days.

Findings of the Tribunal

- 56 It is common ground that the applicant was recruited under a contract subject to a probationary period of six months, in accordance with Article 2.1.1 of the Staff Rules. Since the applicant was recruited as from 1 September 2010, that six-month period therefore ended on 28 February 2011, as the applicant's Probationary Record Report drawn up on 4 March 2011 indeed confirms.
- 57 It is also not disputed that the applicant was informed by a letter dated 14 March 2011 of the decision of 11 March 2011 taken by the competent member of the Executive Board to extend his probationary period until 31 May 2011. Therefore, the decision to extend the applicant's probationary period was taken after the expiry of the initial six-month probationary period.
- 58 It follows that the ECB decided retroactively to extend the applicant's probationary period and to terminate the contract on the basis of Article 2.1.3 of the Staff Rules.
- 59 So far as concerns the ECB's argument that the applicant cannot rely on the illegality of the decision of 11 March 2011, it is common ground that the contested decision is based on Article 2.1.3 of the Staff Rules and that, under the terms of that provision, such a decision can only be adopted during the probationary period. It is also not disputed that, under Article 2.1.2 of the Staff Rules, a staff member's probationary period can be extended.
- 60 It must be stated that, in the present case, the decision of 11 March 2011 constituted a necessary condition for the adoption of the contested decision, which is indeed confirmed by the reasoning of that latter decision. It follows that there is a close link between the decision of 11 March 2011 and the contested decision so that the decision of 11 March 2011 constitutes a preparatory measure in relation to the contested decision. That close link therefore warrants the examination by the Tribunal of the lawfulness of that preparatory measure.
- 61 Next, it must be recalled that the purpose of the probationary period provided for in Article 2.1.1 of the Staff Rules is to enable the ECB to make a concrete assessment of a candidate's suitability for a particular post, the manner in which he performs his duties and his efficiency in the service (see judgment of 1 April 1992 in Case T-26/91 *Kupka-Floridi v ESC*, paragraph 43). It is particularly during this period that the ECB must satisfy itself that the probationer meets all the personal and professional requirements needed to fill the post for which he was recruited and to perform the duties connected with it. In that context, an extension of the probationary period may be an appropriate measure for that purpose. Consequently, the existence of doubts as to the suitability of a newly-recruited employee can constitute an 'exceptional circumstance' within the meaning of Article 2.1.2 of the ECB Staff Rules, thereby justifying an extension of his probationary period (see judgment of 26 May 2005 in Case C-301/02 P *Tralli v ECB*, paragraph 73).
- 62 It follows that the expiry of the probationary period substantially changes the legal situation of the member of staff concerned in so far as, from that date, Article 2.1.3 of the Staff Rules does not apply so far as concerns an employee's suitability to fill a post for which he was recruited and to perform the duties connected with it after the expiry of the probationary period.
- 63 In those circumstances, and without it being necessary to rule on the issue of whether the ECB could legally extend the applicant's probationary period with retroactive effect, as it contends, in the present case, in the absence of any information to the contrary from the administration, the applicant was entitled, from 4 March 2011 (the date of his Probationary Record Report) to a legitimate expectation that the ECB would not adopt a decision to extend his probationary period.
- 64 While, admittedly, the administration has a broad discretion as regards the issue of whether a candidate meets all the personal and professional requirements needed to fill the post for which he was recruited and to perform the duties connected with it, any individual measure taken in the

exercise of that broad discretion, which adversely affects a member of staff and has an impact on his personal legal situation, must comply with the principle of legal certainty to which any European Union institution is subject in its staff management. In particular, such a principle precludes an individual measure from taking effect as from a date prior to its adoption (see, to that effect, regarding a measure of general application, judgment of 13 June 2012 in Case F-31/10 *Guittet v Commission*, paragraph 63 and the case-law cited). However, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of the addressee of the measure are duly respected (see, to that effect, regarding a measure of general application, judgment of 25 January 1979 in Case 98/78 *Racke*, paragraph 20; judgment of 13 November 1990 in Case C-331/88 *Fedesa and Others*, paragraph 45; judgment of 22 November 2001 in Case C-110/97 *Netherlands v Council*, paragraph 151, and *Guittet v Commission*, paragraph 64; and, regarding an individual measure, judgment of 26 May 2011 in Case F-83/09 *Kalmár v Europol*, paragraph 92, under appeal to the General Court of the European Union in Case T-455/11 P).

- 65 It is undisputed that it was not until 22 March 2011 that the applicant received the decision of 11 March 2011 informing him that, because of an ongoing disciplinary procedure, his probationary period was being extended.
- 66 It follows that the decision of 11 March 2011 is unlawful on the grounds of infringement of the principle of legal certainty, in so far as it extends the probationary period with retroactive effect. Consequently, since the applicant was no longer serving his probationary period as of 28 February 2011, the contested decision must be annulled.
- 67 There is therefore no need to adjudicate on the other pleas in law.

The application for damages

Arguments of the parties

- 68 The applicant claims that he suffered material harm as a result of the contested decision of 20 May 2011, in so far as he is not eligible for the allowances provided for by Article 36 of the Conditions of Employment.
- 69 The applicant also alleges non-material harm assessed at EUR 10 000 in so far as his contract was terminated without a valid reason and his professional reputation, his integrity, his dignity and his professional career were thereby compromised.
- 70 The ECB contends in reply that it granted the applicant a substantial financial advantage in making the date on which the termination of the contract took effect coincide with its planned expiry date. It adds that, as to the remainder, there is no basis to the claim of material or non-material harm, since the contested decision was not unlawful.

Findings of the Tribunal

- 71 It is settled case-law that the annulment of an act of the administration which has been challenged by an official in itself constitutes appropriate and, in principle (that is to say, in the absence from that act of any expressly negative assessment of the applicant's abilities likely to cause him damage), sufficient reparation for any non-material harm which the applicant may have suffered by reason of the annulled act (see, to that effect, judgment of 7 February 1990 in Case C-343/87 *Culin v Commission*, paragraph 27; judgment of 26 January 1995 in Case T-60/94 *Pierrat v Court of Justice*, paragraph 62; judgment of 13 December 2007 in Case F-42/06 *Sundholm v Commission*, paragraph 44).

- 72 In the present case, it is common ground that any loss of employment is likely to lead to a feeling of injustice, insecurity and frustration on the part of the person concerned. However, it must be stated that none of the applicant's pleadings contains any demonstration as regards the extent of the non-material harm he has allegedly suffered, or, *a fortiori*, as regards the issue of whether that harm cannot be fully compensated for by the annulment of the decision to terminate the contract, which caused it, since the contract was due in any case to expire on 31 October 2011 and the applicant also indicated at the hearing that he has new employment.
- 73 In those circumstances, the annulment of the contested decision constitutes, in the present case, adequate compensation for the harm suffered.
- 74 The claims for damages must consequently be rejected.

Costs

- 75 Under Article 87(1) of the Rules of Procedure, subject 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 that party is not to be ordered to pay any.
- 76 It follows from the grounds set out above that the ECB is the unsuccessful party. Furthermore, in his pleadings the applicant has expressly applied for the ECB to be ordered pay the costs. 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 is ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

hereby:

- 1. Annuls the decision of the Executive Board of the European Central Bank of 20 May 2011, which terminates BM's contract as of 31 October 2011;**
- 2. Dismisses the action as to the remainder;**
- 3. Declares that the European Central Bank is to bear its own costs and orders it to pay the costs incurred by BM.**

Van Raepenbusch

Barents

Bradley

Delivered in open court in Luxembourg on 26 June 2013.

W. Hakenberg
Registrar

S. Van Raepenbusch
President