Reports of Cases

ORDER OF THE PRESIDENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

16 November 2011*

(Staff case — Application for interim measures — Application for suspension of operation — Inadmissibility of the main action — Balancing of interests)

In Case F-61/11 R,

APPLICATION brought under Articles 278 TFEU and 157 EA and Article 279 TFEU, applicable to the EAEC Treaty by virtue of Article 106a thereof,

Daniele Possanzini, member of the temporary staff of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, residing in Warsaw (Poland), represented by S. Pappas, lawyer,

applicant,

v

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), represented by S. Vuorensola and H. Caniard, acting as Agents, and by D. Waelbroeck and A. Duron, lawyers,

defendant,

THE PRESIDENT OF THE CIVIL SERVICE TRIBUNAL,

makes the following

Order

1 By application lodged at the Registry of the Civil Service Tribunal on 7 July 2011 by fax (the original application being lodged on 13 July 2011), initiating proceedings against the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), registered as Case F-61/11 R, Mr Possanzini seeks, in essence, suspension of the decisions by which Frontex has refused to renew his contract as a member of the temporary staff.

* Language of the case: English.

Background to the dispute

2 By contract concluded with Frontex on 1 August 2006, the applicant was recruited for a period of five years as a member of the temporary staff under Article 2(a) of the Conditions of Employment of Other Servants of the European Union ('the CEOS').

3 In an appraisal undertaken in 2009, the applicant was awarded performance level III by the countersigning officer – also Director of the Administration Division – even though the reporting officer had suggested performance level IB.

4 Similarly, on the applicant's appraisal form A for 2010, the countersigning officer chose performance level III, contrary to the opinion of the reporting officer.

5 By email of 2 August 2010, the Staff Development Coordinator of the Administration Division ('the Staff Development Coordinator') informed the applicant that Frontex wished to make use of the option, provided for in Article 8 of the CEOS, of renewing contracts with members of the temporary staff. With a view to launching the procedure for renewing the applicant's contract, which expired on 31 July 2011, the Staff Development Coordinator asked the applicant in the same email – that is to say, 12 months in advance – whether he would be interested in such a renewal. By email of the same day, the applicant answered in the affirmative.

6 By email of 24 January 2011 to the Staff Development Coordinator, copied inter alia to the Executive Director of Frontex and the Director of the Administration Division, the applicant stated that the Director of the Administrative Division – who was now also his reporting officer – had informed him that his contract as a member of the temporary staff would not be renewed automatically and that a vacancy notice was to be published in order to advertise his post. By the same email, the applicant asked to be sent the formal decision of the Executive Director of Frontex concerning the renewal of his contract.

7 By email of 25 January 2011, the Staff Development Coordinator replied that, until he received the form for renewal of the applicant's contract as a member of the temporary staff signed by the Executive Director, he could not send the applicant the official letter communicating the outcome of the contract renewal procedure.

8 By email of the same day sent to the applicant and to the Staff Development Coordinator and copied inter alia to the Executive Director, the Director of the Administrative Division wrote:

'Dear All,

These matters were discussed clearly – firstly orally with [the applicant] – and he's aware that the paper work is following.

I very much wish to thank [the applicant] for the open minded discussion and understand that [he] is wishing to report that a meeting took place and requesting a confirmation.

I will finish the necessary paper work today and put it in circulation for the required signatures.

Thank you very much.'

9 The applicant lodged a complaint dated 7 February 2011 ('the first complaint') against the 'decision' of the Director of the Administration Division of 24 and 25 January 2011 not to renew his contract.

10 The form for renewal of the applicant's contract as a member of the temporary staff was completed by the Director of the Administration Division on 28 February 2011; he proposed that the applicant's contract should not be renewed. That proposal was confirmed by the Deputy Executive Director of Frontex on 7 March 2011 and then adopted by the Executive Director on 28 March 2011 ('the decision of 28 March 2011').

11 The decision of 28 March 2011 was notified to the applicant on 13 April 2011.

12 By decision of 4 May 2011, the Executive Director of Frontex rejected the first complaint. He stated that, at the time when that complaint was lodged, he had not yet adopted a decision as to whether or not to renew the applicant's contract and that the Director of the Administration Division had merely sought to inform the applicant 'orally, in a transparent way and as early as possible', that he would be recommending that the contract not be renewed.

13 The applicant lodged a complaint dated 16 May 2011 against the decision of 28 March 2011 ('the second complaint').

Procedure and forms of order sought

14 By application received at the Registry of the Tribunal on 27 May 2011 (the original application being lodged on 31 May 2011) and registered as Case F-61/11, the applicant claims that the Tribunal should:

'– annul the decision of 24 January 2011 as confirmed by the email of 25 January 2011, by the decision of 28 March 2011 and by the letter of 4 May 2011 of the Executive Director …;

– annul the 2009 appraisal to the extent that it contains a diverging comment by the Countersigning Officer, dated 30 October 2009;

– annul the 2010 Frontex Annual Assessment Report Form A, dated 21 June 2010, to the extent that it contains a diverging comment by the countersigning officer, dated 20 June 2010.'

15 In the present application for suspension of operation, the applicant claims that the President of the Civil Service Tribunal should:

— 'suspend provisionally the operation of the decision of 24 January 2011 as confirmed by the email of 25 January 2011, by the decision of 28 March 2011 and by the letter of 4 May 2011 of the Executive Director of Frontex until a definitive order on the suspension is taken';

— suspend the operation of the decisions referred to above until the Tribunal decides on the main application;

— order Frontex to pay the costs.

16 Frontex contends that the President of the Civil Service Tribunal should:

— dismiss the applications for suspension of operation;

— order the applicant to pay the costs.

Law

The head of claim seeking suspension of operation of the refusal to renew the applicant's contract as a member of the temporary staff

17 It is settled law that, in principle, the question of the admissibility of the main action is not to be examined in proceedings for interim relief but is to be reserved for the examination of the main action, unless it is apparent at first sight that the main action is manifestly inadmissible. To determine admissibility at the interlocutory stage in cases where the admissibility of the main action cannot prima facie be ruled out would be tantamount to prejudging the Tribunal's decision on the main action (order of the President of the General Court of 4 February 1999 in Case T-196/98 R *Peña Abizanda and Others* v *Commission*, paragraph 10 and the case-law cited, and order of the President of the Civil Service Tribunal of 14 December 2006 in Case F-120/06 R *Dálnoky* v *Commission*, paragraph 41).

18 Furthermore, even if has not been contended by way of defence that the main action is manifestly inadmissible, the judge hearing applications for interim measures is not prevented from ruling on that point since inadmissibility in proceedings seeking review by the Court of an act constitutes a ground involving a question of public policy which may, and even must, be raised of their own motion by the Courts of the European Union (order of the President of the Court of Justice of 24 March 2009 in Case C-60/08 P(R) *Cheminov and Others* v *Commission*, paragraph 31 and the case-law cited; see also, concerning the public policy nature of a plea that an action is time-barred, the judgment of 12 December 1967 in Case 4/67 *Muller* v *Commission*).

19 In the specific circumstances of the present case, it must be considered whether prima facie the main action appears to be manifestly inadmissible.

20 By his main action, the applicant seeks annulment not only of the refusal to renew his contract, but also of the appraisals made in his regard. Since, by the present application for interim relief, the applicant claims only that the refusal to renew his contract should be suspended, there is no need to examine the admissibility of the main action in relation to the applicant's claim that his appraisals should be annulled. On the other hand, it is appropriate to examine the admissibility of the main action in relation to the applicant's claim that the refusal to renew his contract should be annulled.

Admissibility of the main action in relation to the head of claim that the refusal to renew the applicant's contract should be annulled

21 First, a distinction must be drawn between the heads of claim seeking respectively: (i) annulment of the alleged decision of the Director of the Administration Division of 24 and 25 January 2011 concerning the non-renewal of the applicant's contract; (ii) annulment of the decision of 28 March 2011; and (iii) annulment of the decision of 4 May 2011 rejecting the first complaint.

– The head of claim seeking annulment of the alleged decision of the Director of the Administration Division of 24 and 25 January 2011

22 It must be determined whether, as the applicant claims, the Director of the Administration Division adopted – orally on 24 January 2011 and by email on 25 January 2011 – a decision refusing to renew the applicant's contract, notwithstanding the fact that, in the rejection of the first complaint, the Executive Director of Frontex challenged the view that such a decision had been adopted on those dates.

23 In order to substantiate his claims, the applicant has produced three emails. One of those emails cannot, since it was sent by the applicant himself (see paragraph 6 above), establish the existence of an act adversely affecting him where this has been disputed. The other two emails were sent by the Director of the Administration Division and the Staff Development Coordinator respectively.

24 It is apparent from the email sent by the Director of the Administration Division on 25 January 2011 (see paragraph 8 above) that he had had a discussion with the applicant, in the course of which the question of the renewal of the applicant's contract was raised. Although the Director of the Administration Division appears, by implication, to acknowledge in that email that he had already made up his mind on that point, he nevertheless states that the necessary document must be sent for signature to the competent authorities. Accordingly, that email cannot support the inference that a final decision refusing renewal of the applicant's contract had already been adopted on 25 January 2011. The same is true of the email of the same date from the Staff Development Coordinator (see paragraph 7 above), by which he informed the applicant that, until he received the form relating to renewal of the applicant's contract signed by the Executive Director of Frontex, he could not send the applicant the official letter communicating the outcome of the contract renewal procedure.

25 It follows from the foregoing that no decision was adopted by the Director of the Administrative Division – whether orally on 24 January 2011 or by email on 25 January 2011 – definitively establishing the situation of the applicant as regards the renewal of his contract as a member of the temporary staff. Nor – contrary to the assertions made by the applicant, relying on the judgment of 24 February 1981 in Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* – is it possible to identify any measure which could objectively be regarded as amounting to an act adversely affecting the applicant.

26 In the absence of any act adversely affecting the applicant or which could objectively be regarded as amounting to such an act, it is apparent that the heads of claim in the main action seeking annulment of the alleged decision of 24 and 25 January 2011 are, prima facie, manifestly inadmissible.

– The head of claim seeking annulment of the decision of 28 March 2011

27 As has been stated above, the form for the renewal of the applicant's contract as a member of the temporary staff was completed by the Director of the Administrative Division, who proposed that the applicant's contract not be renewed. That proposal was then confirmed by the Deputy Executive Director of Frontex and the decision declining to renew the applicant's contract was finally adopted by the Executive Director of Frontex on 28 March 2011.

28 The only claim challenging the decision of 28 March 2011 which post-dates that decision is the second complaint, submitted by letter of 16 May 2011.

29 However, the applicant brought his action for annulment on 27 May 2011, when no decision, express or implied, rejecting the second complaint had yet been adopted.

30 Accordingly, the head of claim seeking annulment of the decision of 28 March 2011 appears, at first sight, to be premature and therefore manifestly inadmissible.

31 Nor is it possible in the present case to apply Article 91(4) of the Staff Regulations of the European Union, under which the official concerned may file an action with the Tribunal immediately after submitting a complaint, provided that the action is accompanied by an application either for a stay of execution of the contested act or for the adoption of interim measures.

32 The reason for this is that the present application seeking interim measures was not lodged until 7 July 2011, that is to say, more than a month after the main action was brought, in the context of which, moreover, there is no mention of an application for interim measures.

– The head of claim seeking annulment of the decision of 4 May 2011 rejecting the first complaint

33 The decision of 4 May 2011 rejecting the first complaint refers to the facts that: (i) at the time when the first complaint was lodged, no decision had yet been adopted which definitively established the situation of the applicant as regards the renewal of his contract as a member of the temporary staff and (ii) a decision on that point was taken subsequently, on 28 March 2011, which the Executive Director did not propose to re-consider.

34 As regards the statement that, at the time when the first complaint was lodged, no decision had yet been adopted which definitively established the situation of the applicant as regards the renewal of his contract as a member of the temporary staff, it must be held that the Executive Director of Frontex thus did no more than assess the legal nature of the alleged decision of 24 and 25 January 2011, with particular reference to the question whether it amounted to an act adversely affecting the applicant, and that this assessment neither provided the basis for any change in the applicant's legal position nor had the slightest effect on the reasoning underlying the decision, adopted on 28 March 2011, not to renew the applicant's contract as a member of the temporary staff. As it is, according to the case-law, such a statement in the grounds given for the decision of 4 May 2011 is not in itself capable of forming the subject-matter of an action for annulment and its legality cannot be open to review by the Courts of the European Union where it does not constitute the necessary basis for the operative part of the contested decision, which in the present case is the decision not to renew the applicant's contract as a member of the temporary staff (see, to that effect, the judgment of 17 September 1992 in Case T-138/89 *NBV and NVB* v *Commission*, paragraph 31).

35 As regards the statement that a decision refusing to renew the applicant's contract was adopted on 28 March 2011, it should be noted that the decision of 4 May 2011 merely mentions the adoption of the decision of 28 March 2011, notified to the applicant on 13 April 2011, and does no more than convey information. It follows from the case-law, however, that letters which simply convey information are not actionable measures since they do not, of themselves, produce binding legal effects such as to affect the interests of their addressees by bringing about a distinct change in their legal position (see, inter alia, the judgment of 27 November 2007 in Joined Cases T-3/00 and T-337/04 *Pitsiorlas* v *Council*, paragraphs 58 and 61).

36 It is apparent from the foregoing that, in the main action, the head of claim seeking annulment of the decision of 4 May 2011 rejecting the first complaint is, prima facie, manifestly inadmissible.

37 In conclusion, the above findings and considerations are a sufficient basis for holding that, in so far as it relates to the refusal to renew the applicant's contract as a member of the temporary staff, the main action for annulment is, prima facie, manifestly inadmissible and that, as a consequence, the application for interim measures is also inadmissible.

In the alternative, consideration of the conditions for granting interim measures

38 Under Articles 278 TFEU and 279 TFEU, the Court of Justice of the European Union may, if it considers that circumstances so require in any cases before it, order that application of the contested act be suspended or prescribe any necessary interim measures.

39 Under Article 39 of the Statute of the Court of Justice of the European Union, applicable to the Tribunal by virtue of Article 7(1) of Annex I to that Statute, and under Article 103(1) of the Rules of Procedure of the Civil Service Tribunal, the President of the Tribunal is competent to grant the interim measures referred to in Articles 278 TFEU and 279 TFEU.

40 Under Article 102(2) of the Rules of Procedure, an application for interim measures must state, in particular, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.

41 In accordance with settled case-law, the conditions relating to urgency and the prima facie merits of the application (fumus boni juris) are cumulative, which means that an application for interim measures must be dismissed where one of those conditions is not satisfied (order of the President of the General Court of 9 August 2001 in Case T-120/01 R *De Nicola* v *EIB*, paragraph 12, and order of the President of the Civil Service Tribunal of 31 May 2006 in Case F-38/06 R *Bianchi* v *ETF*, paragraph 20). Where appropriate, the judge hearing an application for interim relief must also balance the interests involved (order of the President of the General Court of 10 September 1999 in Case T-173/99 R *Elkaïm and Mazuel* v *Commission*, paragraph 18).

42 In the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, in the light of the specific circumstances of the case, the manner in which it must be ascertained whether those various conditions are satisfied, and the order in which this examination is to be carried out, there being no rule of law imposing a pre-established scheme of analysis within which the need to prescribe interim measures must be assessed (*De Nicola* v *EIB*, paragraph 13, and *Bianchi* v *ETF*, paragraph 22).

43 In the circumstances of the present case, it is appropriate first of all to determine whether the condition relating to urgency is satisfied.

44 On this point, the applicant claims to have sustained both financial loss and damage to his professional career.

45 As regards the financial loss, it is clear, given the circumstances of the present case and, in particular, the fact that the applicant – a member of the temporary staff in grade AD 10 – receives unemployment allowances on expiry of his contract, that the condition of urgency is not satisfied (see to that effect, a fortiori, order of the President of the General Court of 27 April 2010 in Case T-103/10 P(R) *Parliament* v *U*).

46 As regards the damage to his professional career, the applicant relies on the fact that a vacancy notice relating to his post has been published and that there is a risk that the post will be filled before a decision is adopted by the Tribunal on his main action. According to the applicant, if that happens, even if he were to be successful in his main action, his contract as a member of the temporary staff could not be renewed in any circumstances; nor could he be recruited to an equivalent post, given that within Frontex there is only one post which matches his skills in information technology and communications.

47 The applicant adds that, if his contract is not renewed, he will suffer irreparable harm because, in view of the fact that little time is left to him before he will have to retire, he will be unable to progress in a new career.

48 In the light of those arguments, against which no effective defence was mounted, it appears probable that the applicant will irrevocably lose any chance of being recruited again to the post which he is occupying.

49 Nevertheless, however relevant the applicant's arguments may be, it is clear in any event that the damage to his professional career on which the applicant relies could be adequately remedied by financial compensation.

50 Above all, it should be borne in mind that where, on an application for interim measures, the judge hearing the application before whom it is claimed that the applicant risks serious and irreparable harm balances the various interests involved, he must determine, inter alia, whether annulment of the contested measure by the ruling in the main action would make it possible for the situation which would have been brought about by the immediate operation of the measure to be reversed and, conversely, whether suspension of operation of the measure would prevent it from being fully effective in the event of the main action being dismissed (order of the President of the General Court of 30 April 2008 in Case T-65/08 R *Spain* v *Commission*, paragraph 82 and the case-law cited).

51 In the present case, as regards the consequences of granting suspension of operation of the refusal to renew the applicant's contract, it should be observed that the mere suspension of that refusal would not change the applicant's position since it could not, of itself, in any way entitle him to have his contract renewed; nor, by the same token, could it allow his situation to be reviewed (see, to that effect, order of the President of the Court of Justice of 31 July 1989 in Case 206/89 R *S* v *Commission*, paragraphs 14 and 15). Such a suspension would accordingly be devoid of effect and, in consequence, the applicant has no interest in requesting it.

52 Admittedly, the judge hearing applications for interim measures may, on the basis of Article 279 TFEU, order interim relief in a form other than the suspension of operation of a decision.

53 However, the applicant has not applied for such measures, claiming only that the Tribunal should suspend operation of the refusal to renew his contract. As it is, such measures cannot be ordered in the absence of an appropriate head of claim (order of the President of the Civil Service Tribunal of 14 July 2010 in Case F-41/10 R *Bermejo Garde* v *EESC*, paragraphs 44 to 46).

54 In any event, if the President of the Tribunal were to direct Frontex to renew the applicant's contract as a member of the temporary staff or to take a new decision on his situation, such an order would amount to a reversal of the situation such as to render the main action devoid of purpose (see, to that effect, order of the President of the Court of Justice of 13 January 1978 in Case 4/78 R *Salerno* v *Commission*, paragraph 2) and that would be the position irrespective of whether the order led to a renewal of the applicant's contract or simply to the adoption of a new decision refusing renewal, replacing the decision which it is sought to have annulled in the main action.

55 As it is, the relief ordered by the judge hearing the application for interim measures must be provisional inasmuch as it must not prejudge the points of law or of fact at issue or neutralise in advance the effects of the decision subsequently to be delivered in the main action (order of the President of the General Court of 7 July 1998 in Case T-65/98 R *Van den Bergh Foods* v *Commission*, paragraph 34).

56 Accordingly, even if the applicant's application had sought interim measures other than suspension of the operation of the decision, it would have had to be dismissed.

57 Lastly, to dispose of the remaining points of law, as regards the suspension, pending delivery of the judgment in the main action, of the recruitment procedure launched by Frontex in order to fill the post occupied by the applicant, not only has no such measure been applied for by the applicant, but the connection between that measure and the main action – in which that recruitment procedure is not contested at all – does not appear to be sufficient to enable the President of the Tribunal to make such an order.

The heads of claim seeking provisional suspension of the refusal to renew the applicant's contract as a member of the temporary staff pending adoption of the order made by the President of the Tribunal

58 With regard to the applicant's head of claim seeking the application in the present case of Article 104(3) of the Rules of Procedure, under which the President of the Tribunal may grant an application for interim measures even before the observations of the opposite party have been submitted, there are no circumstances to justify application of that provision.

59 It follows from all the foregoing considerations that the application for interim measures must be dismissed.

Costs

60 Each of the two parties seeks an order directing the opposing party to pay the costs.

61 However, under Article 86 of the Rules of Procedure, a decision as to costs is to be given in the final judgment or in the order which closes the proceedings, which is to be understood as the decision bringing the main action to an end (order in *Bermejo Garde* v *EESC*, paragraph 91).

62 Accordingly, it is appropriate to reserve the costs.

On those grounds,

THE PRESIDENT OF THE CIVIL SERVICE TRIBUNAL

hereby orders:

1. Mr Possanzini's application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 16 November 2011.

W. Hakenberg
Registrar

S. Van Raepenbusch
President