



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

2 April 2019*

(Civil Service – Contract staff – Contract of indefinite duration – Article 47(c)(i) of the CEOS – Termination with notice – Grounds for termination – Breakdown in the relationship of trust – Interests of the service – Manifest error of assessment – Duty to have regard to the welfare of staff – Principle of sound administration – Articles 30 and 41 of the Charter of Fundamental Rights – Procedural issue – Publication on the internet of documents included in the file relating to the proceedings before the General Court – Article 17 of the Staff Regulations)

In Case T-492/17,

Stephan Fleig, former member of contract staff of the European External Action Service, residing in Berlin (Germany), represented by H. Tettenborn, lawyer,

applicant,

v

European External Action Service (EEAS), represented by S. Marquardt, acting as Agent,

defendant

APPLICATION under Article 270 TFEU seeking, first, annulment of the decision of 19 September 2016 by which the director of the ‘Human Resources’ Directorate of the EEAS, acting in his capacity as the authority authorised to conclude contracts of employment, terminated the applicant’s employment contract with effect from 19 June 2017 and, secondly, compensation for the damage which the applicant claims to have suffered as a result of that decision,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, P. Nihoul and J. Svenningsen (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, administrator,

having regard to the written part of the procedure and further to the hearing on 4 December 2018,

gives the following

Judgment¹

...

* Language of the case: German.

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

Law

...

Publication on the internet of documents already included in the General Court's file

- 138 By letter of 30 October 2017, the applicant informed the High Representative of the Union for Foreign Affairs and Security Policy of his intention to make public, via publication on the internet, a number of documents concerning him, namely all the annexes to the complaint and to the requests referred to in paragraph 87 above, as well as the annexes to the application before the Civil Service Tribunal referred to in paragraph 24 above. That information was presented as falling within the scope of the first subparagraph of Article 17a(2) of the Staff Regulations.
- 139 In response to an email which the EEAS sent to the applicant's lawyer in reply to that first letter, the applicant sent a second letter to the High Representative of the Union for Foreign Affairs and Security Policy on 13 November 2017, claiming that the documents concerned had already been made public in 2013 in so far as they had been sent to an unspecified organisation and to 'eight different persons', including his mother. That publication was lawful, since an application for authorisation to publish those documents was made on 27 March 2013 and the EEAS did not object to that publication. Those documents were published on the applicant's website by persons associated with his mother.
- 140 By two letters of 17 and 24 November 2017, the EEAS informed the applicant, inter alia, that publishing certain documents which he had submitted as annexes to his application in the present proceedings constituted a breach of the principle of confidentiality of the legal proceedings pending.
- 141 Following the communication to the applicant of the letter of the EEAS of 4 December 2017 informing the Court of the facts referred to in paragraphs 138 and 139 above (see paragraph 34 above) and of the publication of several documents in the meantime, the applicant submitted observations on those matters in the reply.
- 142 The applicant considers that the publication at issue is not unlawful. Indeed, he reiterates that the documents concerned have already been lawfully published, because the request he made to that end on 27 March 2013 was implicitly granted by the EEAS, since it did not raise any objection to it within the period of 30 working days provided for in the second subparagraph of Article 17a(2) of the Staff Regulations. Accordingly, the fact that those documents, which were no longer confidential, were produced in the context of subsequent legal proceedings cannot restore their confidentiality.
- 143 The EEAS contends that the applicant's arguments are unfounded.
- 144 The applicant admits to the publication on the internet of a number of documents which he has produced in the present proceedings, namely certain documents which had been annexed to the two requests he submitted under Article 90(1) of the Staff Regulations on 20 and 24 March 2013, registered, respectively, under numbers D/227/13 and D/233/13. The latter of those requests concerned events relating to the processing of his medical file. Despite stating that, although those documents were published on his own website, they were published not by him, but by some unidentified persons to whom his mother had sent the documents in question, he recognises that it was through him that those documents were removed from within the realm of strict confidentiality that had initially protected them. However, he claims that that removal was lawful and constituted publication of those documents.

- 145 It should be noted that Articles 17 and 17a of the Staff Regulations have different purposes, and that the applicant confuses the two. Article 17 prohibits all officials or other members of staff from disclosing any type of non-public information, in any form whatsoever, if the official or member of staff in question has received the information in the line of duty, unless disclosure of that information has already been authorised. An official continues to be subject to that prohibition after leaving the service. Article 17a, on the other hand, refers to the publication of any documents concerning, in particular, work, studies or opinions which relate to activities of the European Union. Such publication is specifically protected under the freedom of expression and in accordance with the provisions of that article concerning respect for the principles of loyalty and impartiality, the dignity of the service and the prohibition of the disclosure of information received in the line of duty, and is subject to a particular authorisation process in the context of which the absence of a reply within 30 working days is regarded as implicit authorisation.
- 146 In the present case, the request to which the applicant refers, namely the letter he sent to the EEAS on 27 March 2013, despite its reference to Article 17a of the Staff Regulations, was in fact - according to the express terms thereof but also in terms of its content - concerned with the disclosure of information, which is governed by Article 17 of the Staff Regulations. Therefore, contrary to what the applicant submits, the absence of a decision within 30 working days was not tantamount to an implicit absence of any objections. That request for authorisation was governed by Article 90(1) of the Staff Regulations, under which the authority had a period of four months in which to make a decision, and the absence of any decision within that period could be deemed to constitute an implied decision rejecting the request.
- 147 It is apparent from the case file that the EEAS replied to the applicant's request for authorisation by letter of 5 May 2013, within the period of four months provided for in Article 90(1) of the Staff Regulations. In that letter, which opened with a brief clarification of the scope of Article 17a of the Staff Regulations, the EEAS authorised the applicant to disclose the documents concerned only in so far as this would enable him to obtain assistance in the context of his medical file. Having regard to the principle of confidentiality laid down in Article 17 of the Staff Regulations, that authorisation should have been interpreted strictly. Therefore, in the context of the applicant's request and of the reply that he received, any disclosure of the documents in question that was not strictly related to the applicant's personal assistance (social, medical, psychological or legal) in the context of his medical file was precluded. In the event of uncertainty, it was incumbent on the applicant to check with the EEAS that a planned disclosure was indeed covered by the limited authorisation he had been granted. That was all the more so since that authorisation was accompanied by a reminder of his obligations under the Staff Regulations, in particular the obligation to refrain from any unauthorised disclosure of information received in the line of duty and to respect the principles of loyalty and impartiality.
- 148 It follows from the foregoing considerations that the applicant cannot legitimately justify in any way the publication on the internet of all or some of the documents specified in his request of 27 March 2013 by reference to that request and the reply to that request.
- 149 Moreover, the applicant cannot legitimately use the fact that he received authorisation to disclose those documents to qualified persons in order to obtain personal assistance, as described in paragraph 147 above, as an argument in support of the claim that those documents were made public before the start of the present proceedings and that the production of those documents during these proceedings is therefore not subject to the obligation not to disclose documents and pleadings which form part of legal proceedings.
- 150 Finally, the applicant cannot legitimately argue that it was his mother, or persons connected with her, who published the documents at issue. Apart from the fact that it seems implausible that the documents at issue could have been published on his own website by third parties, or at least that this could have occurred without his consent, it is also the case that sending the documents to his mother constituted a breach of the terms of the authorisation that he was granted. Furthermore, even if an

official or other member of staff lawfully transmits a confidential document to a third party under an authorisation to disclose documents, it is his or her responsibility to ensure that that person also complies with the terms of that authorisation. Therefore, even if it were true that the publication itself took place without the participation of the applicant, it should still be found that, through his disregard of the limits of the authorisation to disclose documents granted to him, the applicant objectively created the risk that that publication would occur and is involved in that publication (see, to that effect, order of 16 March 2016, *One of Us and Others v Commission*, T-561/14, not published, EU:T:2016:173, paragraphs 58 and 59).

- 151 It should be recalled that the disclosure of procedural documents by a party to third persons in a situation where those documents were not communicated for the purposes of pursuing that party's case constitutes an abuse of procedure (see judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraph 108 and the case-law cited). That is a fortiori the case where such documents are published, as in the present case.
- 152 That abuse of procedure must be taken into account in awarding costs, since this incident gave rise to the need for a specific notification and additional submissions (see, to that effect, judgment of 17 June 1998, *Svenska Journalistförbundet v Council*, T-174/95, EU:T:1998:127, paragraph 139).
- 153 Accordingly, the applicant should be ordered to pay the costs associated with that abuse of procedure.

Costs

- 154 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the EEAS, including the costs relating to the procedural issue referred to in paragraphs 138 to 153 above.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Mr Stephan Fleig to pay the costs.**

Pelikánová

Nihoul

Svenningsen

Delivered in open court in Luxembourg on 2 April 2019.

[Signatures]