



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

21 June 2023^{*i}

(Civil service – Contract staff – Contract of indefinite duration – Termination of contract – Article 47(c)(i) of the CEOS – Incompetence – Conduct in the service and attitude at work incompatible with the interests of the service – Obligation to state reasons – Right to be heard – Entitlement to parental leave – Article 42a of the Staff Regulations – Application of the minimum requirements in Directives 2010/18/EU and 2002/14/EC to officials and other servants of the European Union – Articles 27, 30 and 33 of the Charter of Fundamental Rights – Workers’ right to information and consultation – Article 24b of the Staff Regulations – Manifest error of assessment – Protection in the event of unjustified dismissal – Indirect challenge to definitive acts – Inadmissibility – Principle of proportionality – Misuse of powers – Liability)

In Case T-571/17 RENV,

UG, represented by M. Richard, lawyer,

applicant,

v

European Commission, represented by L. Radu Bouyon, acting as Agent,

defendant,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed, at the time of the deliberations, of R. da Silva Passos, President, V. Valančius, I. Reine, L. Truchot (Rapporteur) and M. Sampol Pucurull, Judges,

Registrar: L. Ramette, Administrator,

having regard to the judgment of 25 November 2021, *Commission v UG* (C-249/20 P, not published, EU:C:2021:964),

further to the hearing on 27 October 2022,

gives the following

^{*} Language of case: French.

Judgment¹

- 1 By her action under Article 270 TFEU, the applicant, UG, seeks, in essence, first, the annulment of the decision of 17 October 2016 by which the European Commission terminated her contract as a member of the contract staff ('the contested decision') and, second, compensation for the material and non-material damage she claims to have sustained as a result of that decision.

...

II. Forms of order sought after referral

- 20 The applicant claims, in essence, that the Court should:
- annul the decision rejecting the complaint and all the decisions constituting the basis of that decision and reinstate her in the situation preceding the dismissal procedure initiated by the letter of 8 September 2016;
 - order her reinstatement and payment of the outstanding salary;
 - annul the deductions from salary applied by the Commission since August 2016;
 - order the Commission to reimburse to her an overpayment of EUR 6 818.81, together with default interest from the dates on which those deductions from salary were applied;
 - declare that the additional sums claimed by the Commission are not due;
 - annul the decisions in which the Commission considered that her absences on 30 and 31 May 2016 were unjustified;
 - order the Commission to pay damages of EUR 40 000, together with default interest, by way of compensation for the enhanced non-material damage caused by the degrading and discriminatory treatment to which she was subject because of her union activity and because she took parental leave;
 - order the Commission to pay the costs.
- 21 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

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

III. Law

A. The scope of the dispute after referral

- 22 In her observations submitted after delivery of the judgment on appeal, the applicant reiterated all the claims in the application, including the claims for compensation for the material and non-material damage allegedly sustained, and the claims for restitution of the sums which she maintains were illegally deducted from her salary by the Commission.
- 23 The Commission contends, on the contrary, that by the initial judgment the General Court definitively ruled on certain heads of claim submitted by the applicant.
- 24 In that regard, it should be borne in mind that, according to the second paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where a case is referred back to the General Court, that Court is to be bound by the decision of the Court of Justice on points of law (see judgment of 1 October 2020, *CC v Parliament*, C-612/19 P, not published, EU:C:2020:776, paragraph 24 and the case-law cited).
- 25 Thus, when a decision of the General Court has been set aside by the Court of Justice and the case has been referred back to the General Court, that Court is seised of the case by the judgment of the Court of Justice, in application of Article 215 of the Rules of Procedure of the General Court, and must rule on all the claims submitted by the applicant, apart from those reflected in the elements of the operative part of the initial decision of the General Court that were not set aside by the Court of Justice and the grounds constituting the necessary basis of those findings, which have acquired the authority of *res judicata* (see, to that effect, judgment of 15 December 2021, *Czech Republic v Commission*, T-627/16 RENV, not published, EU:T:2021:894, paragraph 105 and the case-law cited).
- 26 In this instance, as stated in paragraph 19 above, by the judgment on appeal the Court of Justice set aside the initial judgment in part, in so far as, first, it annulled the contested decision (judgment on appeal, paragraphs 20 to 44); second, it found that the Commission had committed an illegality capable of giving rise to its liability and invited the parties to seek an agreement on fair financial compensation for material harm (judgment on appeal, paragraph 45); and, third, it rejected as inadmissible the applicant's head of claim relating to her non-material damage (judgment on appeal, paragraphs 55 to 62).
- 27 Consequently, apart from the grounds of the initial judgment which the Court of Justice found to be illegal, as indicated in paragraph 26 above, and which relate to the applicant's head of claim seeking annulment of the contested decision and compensation for the material and non-material damage allegedly sustained as a result of that decision, that judgment has become final.
- 28 Thus, the General Court ruled definitively, first, on the applicant's head of claim seeking annulment of the letter of 8 September 2016, of the 2015 appraisal report, of the deductions from salary and of the decisions whereby the Commission considered that her absences from work on 30 and 31 May 2016 to be unjustified absences; next, on the heads of claim seeking that the applicant be reinstated and put back in the situation preceding the procedure initiated by the letter of 8 September 2016; and, lastly, on the head of claim seeking an order that the Commission should reimburse an overpayment and a declaration by the General Court that the additional amounts claimed by the Commission were not due.

- 29 In those circumstances, the General Court is required to examine, in the present case, only the applicant's heads of claim seeking, first, annulment of the contested decision and, second, compensation for the material and non-material damage which the applicant claims to have sustained as a result of that decision.
- 30 It follows that the applicant's claim which reiterates, in the present proceedings, all the heads of claim set out in paragraph 20 above must be rejected as inadmissible.

B. The head of claim seeking annulment of the contested decision

- 31 As a preliminary point, it should be borne in mind that it is apparent from the application that, although the first head of claim formally seeks annulment of the decision rejecting the complaint, it must be regarded as seeking, in reality, annulment of the contested decision.
- 32 In support of this head of claim, the applicant puts forward, in essence, seven pleas in law, alleging, first, failure to state reasons; second, infringement of Article 51 of the Staff Regulations and of the right to be heard; third, errors of law in relation to the right to parental leave and workers' right to information and consultation; fourth, a number of manifest errors of assessment and errors of fact; fifth, breach of the principle of proportionality; sixth, breach of the disciplinary procedure provided for in Annex IX to the Staff Regulations; and, seventh, misuse of powers.

1. The first plea: failure to state reasons

- 33 The applicant maintains that the grounds set out in the letter of 8 September 2016 and in the contested decision are vague and imprecise, in particular the grounds of dismissal relating to 2015 set out in points (a) to (f) on page 3 and in point (i) on page 4 of the letter of 8 September 2016 and the grounds set out in points (c), (e) and (g) on page 2 and in point (d) on page 5 of that letter.
- 34 The Commission disputes the applicant's claims.
- 35 In that regard, it follows from the case-law that the decision dismissing a member of the temporary staff or the contract staff engaged for an indefinite duration, based on Article 47(c)(i) of the CEOS, is to be subject to the requirement to state reasons laid down in Article 25 of the Staff Regulations, which provides that 'any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned' and that 'any decision adversely affecting an official shall state the grounds on which it is based' (see, to that effect, judgments of 24 October 2011, *P v Parliament*, T-213/10 P, EU:T:2011:617, paragraph 28, and of 4 December 2013, *ETF v Schuerings*, T-107/11 P, EU:T:2013:624, paragraph 77 and the case-law cited).
- 36 According to settled case-law, the statement of reasons for measures adopted by the EU institutions, which is also required under Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union ('the Charter'), must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of

the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 11 June 2020, *Commission v Di Bernardo*, C-114/19 P, EU:C:2020:457, paragraphs 29 and 51 and the case-law cited).

- 37 Consequently, it is in the light of the purpose of the requirement to state reasons and of all the elements set out in paragraphs 35 and 36 above that the statement of reasons for a decision may, in particular, be deemed to be either absent or insufficient.
- 38 In the present case, it is apparent from the contested decision and from the letter of 8 September 2016, to which the contested decision refers, that the Commission terminated the applicant's contract of indefinite duration in accordance with Article 47(c) of the CEOS, on the ground that her standard of performance and her conduct were incompatible with the needs of the service, in so far as it was not possible to rely on the applicant to fulfil the objectives and the tasks set for her, that she made no effort to provide active assistance to her colleagues and that she did not take the interests of the service into account or give them priority, which had had negative consequences on the continuity and the quality of the service provided by the CPE both to the children and to their parents.
- 39 In particular, the AECCE referred to around 20 detailed circumstances in the letter of 8 September 2016, which related to the applicant's conduct between 2013 and 2016.
- 40 Thus, first, as regards 2013, the AECCE referred to the terms of the appraisal report for 2013 ('the 2013 appraisal report'), according to which the applicant had involved herself very little in the working groups '*Cuisine*' (kitchen) and '*Organisation des réunions d'information pour les parents*' (organisation of information meetings for parents) and should have planned her activities in connection with those working groups during the so-called 'flexible' hours, when she was not taking care of the children, as some parents had complained that the applicant was absent from the classroom when they came to collect their children.
- 41 Second, as regards 2014, the AECCE referred to the terms of the appraisal report for 2014 ('the 2014 appraisal report'), according to which the problems which the applicant encountered in reconciling her working life and her personal life, and the failure to take the interests of the service into account when planning the activities connected with her mandate as staff representative, had had negative repercussions on the smooth running of the service.
- 42 More particularly, the AECCE referred to: first, the applicant's last-minute request of 24 April 2014 to work full time, when it had been envisaged since 1 January 2014 that she would work part time from 1 May 2014; second, her unjustified absences on 7 May and 16 June 2014; third, the fact that the applicant had planned to be absent on 2 May 2014 and had advised the service on the very day of that absence; fourth, her unjustified absence on 18 June 2014; fifth, the fact that the applicant had advised her superiors that she would be absent on 26 February 2014, on the ground that she would be taking part in a trade union meeting, only on the day before, at 17.26; sixth, the fact that, on 9 December 2014, one of the applicant's colleagues had complained of her lack of cooperation and communication; seventh, the fact that the applicant had advised her superiors that she would be absent on 11 and 12 December 2014, in order to take part in a plenary session of the CCP, only on the day before 11 December 2014 and that she had not advised the colleagues with whom she was to work on those days that she would be absent; and,

eighth, the fact the applicant had contacted her superiors with a view to resuming her duties full time, after she had been allowed to work half time for medical reasons during the period from 17 November to 23 December 2014, only on 22 December 2014.

- 43 Third, as regards 2015, the AECCE recalled that, according to the 2015 appraisal report, the applicant's standard of performance was considered unsatisfactory.
- 44 More particularly, the AECCE referred to: first, her insufficient or non-existent involvement in the working groups of which she was a member; second, her lack of proactivity when performing the duties of 'mobile' educator; third, the fact that the applicant had not provided her superiors with information about the implementation of the objective of organising yoga activities; fourth, the fact that the applicant had not prepared a table of educational activities; fifth, the lack of continuity in looking after the group of children for whom the applicant was responsible; sixth, the problems encountered by certain colleagues in working with the applicant; and, seventh, her lack of communication concerning certain of her absences in June 2015.
- 45 Fourth, as regards 2016, the AECCE referred to the three objectives which had been set for the applicant in the 2015 appraisal report, namely, first, the preparation of a table of educational activities; second, greater investment on her part in carrying out the tasks of the different working groups of which she was a member as contact person or substitute, by carrying out four specific activities ('compiling and distributing three CPE newsletters', 'maintaining a monthly table listing comments/problems encountered', 'proposing/planning physical activities during school holidays' and 'drawing up an annual report of the group "*Sport*"'); and, third, planning her parental leave well in advance in order to facilitate her replacement and the smooth organisation of the new school year 2016-2017.
- 46 Thus, the AECCE stated that, although the applicant had been aware of the objectives set out in paragraph 45 above since 5 April 2016, it had noted no sign of improvement in her performance with respect to those objectives.
- 47 In that context, the AECCE observed that the difficulties referred to in the 2014 and 2015 appraisal reports had persisted, namely: first, the fact that the applicant had not prepared the table of educational activities, referred to in paragraph 45 above, before going on parental leave on 15 July 2016; second, her lack of proactivity in the working groups, as evidenced by the absence of a monthly report on matters relating to mass catering at the CPE, the lack of active involvement in the working group '*Sport*', the failure to prepare the annual reports of the groups '*Cuisine*' and '*Journal du CPE*' (CPE newsletter) before going on parental leave and the fact that an issue of the CPE newsletter for December 2015 and entitled '*Noël 2015*' ('the Christmas 2015 newsletter') had been sent in July 2016, which her superiors had considered to be no longer relevant; third, the fact that the applicant, in her application for parental leave of 25 April 2016, had ignored the Head of Unit's directions dated 18 February and 21 March 2016 that (i) leave in September was not desirable and (ii) parental leave at the beginning of the school year could be envisaged only for two or three months; fourth, poor communication on her part with her superiors and her colleagues concerning her absences, in particular those of 28 January and 24 May 2016; and, fifth, her unjustified absences on 30 and 31 May 2016.

- 48 In those circumstances, it must be held that the contested decision, which was adopted after notification of the letter of 8 September 2016 and therefore in a context known to the applicant, set out both the legal considerations and a sufficient number of facts which were of essential importance in the scheme of that decision and which put the applicant in a position to assess its merits and its legality.
- 49 The applicant's claims that some of the grounds set out in the letter of 8 September 2016, to which the contested decision refers, are insufficiently precise are not capable of calling into question the finding set out in paragraph 48 above.
- 50 First, it is true that the absence of a statement of reasons for a decision of an EU institution may be found even where the decision in question contains certain elements of reasoning. However, such a finding may be made only where the statement of reasons in the contested decision is contradictory or unintelligible or where the statement of reasons in the decision in question is so incomplete that it does not in any way enable the addressee, in the context of its adoption, to understand its author's reasoning (see judgment of 11 June 2020, *Commission v Di Bernardo*, C-114/19 P, EU:C:2020:457, paragraph 55 and the case-law cited).
- 51 In this instance, the statement of reasons in the contested decision is neither contradictory nor unintelligible and, even on the assumption that certain of the reasons might be considered incomplete, the fact nevertheless remains that it discloses its author's reasoning clearly and unequivocally.
- 52 Second, it should be borne in mind that the statement of reasons in a decision consists of the formal expression of the grounds on which that decision is based. If those grounds are vitiated by errors, those errors vitiate the substantive legality of the decision, but not the reasons on which it is based, which may be sufficient although they express incorrect grounds. It follows that the complaints and the arguments seeking to dispute the merits of a measure are irrelevant in the context of a plea alleging lack of or insufficiency of reasoning (see judgment of 12 October 2022, *Paesen v EEAS*, T-88/21, EU:T:2022:631, paragraph 67 and the case-law cited).
- 53 Thus, the applicant cannot properly dispute, in the context of the present plea, the merits of the grounds of the contested decision set out in points (c), (e) and (g) on page 2, in points (b) and (e) on page 3, in point (i) on page 4 and in point (d) on page 5 of the letter of 8 September 2016.
- 54 Consequently, the first plea must be rejected as unfounded.

...

2. The third plea: errors of law in relation to the right to parental leave and workers' right to information and consultation

- 73 The present plea consists of two parts.
- 74 The first part alleges, in essence, infringement of Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the revised Framework Agreement on parental leave concluded on 18 June 2009 by the European cross-industry social partners organisations (BUSINESSEUROPE, UEAPME, CEEP and ETUC) ('the Framework

Agreement'), put into effect by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13).

- 75 The second part of the third plea alleges, in essence, first, an error of law resulting from the Commission's failure to take into account the minimum requirements contained in Article 7 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation (OJ 2002 L 80, p. 29), and, second, breach of the prohibition of the offence of obstruction.

(a) The first part of the third plea: infringement of Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement

- 76 This part of the plea contains two complaints, alleging that the contested decision infringed those provisions, first, by dismissing the applicant while she was on parental leave and, second, by dismissing her on the ground of her application for parental leave.

(1) The taking into account of the minimum requirements contained in Clause 5(4) of the Framework Agreement in the interpretation of Article 42a of the Staff Regulations

- 77 As a preliminary point, it should be borne in mind that the second paragraph of Article 42a of the Staff Regulations provides, inter alia, that during parental leave the official 'shall retain his post'.
- 78 Furthermore, Article 16 of the CEOS provides that Article 42a of the Staff Regulations is to apply by analogy to temporary staff and that parental leave is not to extend beyond the term of the contract. Article 91 of the CEOS provides that Article 16 of the CEOS is itself to apply by analogy to contract staff.
- 79 In addition, the purpose of Directive 2010/18, as Article 1 states, is to put the Framework Agreement into effect.
- 80 Admittedly, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive such as Directive 2010/18, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed' (see, to that effect, judgment of 12 December 2013, *Portgás*, C-425/12, EU:C:2013:829, paragraph 22 and the case-law cited).
- 81 However, Article 1e(2) of the Staff Regulations, applicable by analogy to contract staff pursuant to Article 80(4) of the CEOS, provides that 'officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties'. Furthermore, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter (see judgment of 13 September 2018, *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 53 and the case-law cited).

- 82 Thus, the Court should favour an interpretation of the provisions of the Staff Regulations which ensures the consistency of those regulations with the principles of the social law of the European Union affirmed by the Charter and allows the inclusion in the Staff Regulations of the substance of the provisions of secondary EU law which constitute rules of minimum protection in order to supplement, as necessary, the other provisions of the Staff Regulations (see, to that effect, judgment of 19 September 2013, *Review Commission v Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 46).
- 83 Furthermore, it should be recalled that, as is apparent from Article 51(1) of the Charter, the provisions of the Charter are addressed to, inter alia, the EU institutions, which are, therefore, required to respect the rights enshrined in it. Moreover, since Article 33(2) of the Charter has, pursuant to the first subparagraph of Article 6(1) TEU, the same legal value as the provisions of the Treaties, the EU legislature is required to observe it in particular when it adopts a measure such as the Staff Regulations on the basis of Article 336 TFEU (see, by analogy, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 110 and the case-law cited).
- 84 It was with the objective of facilitating the reconciliation of professional and family responsibilities for working parents that the right to parental leave was included, in Article 33(2) of the Charter, among the fundamental social rights grouped together in Title IV under the heading ‘Solidarity’. That provision states that, in order to reconcile family and professional life, everyone has the right, inter alia, to parental leave following the birth or adoption of a child (see, to that effect, judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 39 and the case-law cited).
- 85 According to the explanations relating to the Charter (OJ 2007 C 303, p. 17, ‘the Explanations’), which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration in the interpretation of the Charter, Article 33(2) of the Charter draws, in particular, on Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4), which was replaced by Directive 2010/18.
- 86 Thus, it follows from the Explanations, as regards Article 33(2) of the Charter, that the reference which they make to Directive 96/34 and, at the date of adoption of the contested decision, to Directive 2010/18, is a reference to the provisions of that directive which reflect and clarify the fundamental right to parental leave, enshrined in that provision of the Charter.
- 87 That is the case of the provision which aims to protect workers against dismissal on the ground of an application for, or the taking of, parental leave, which, according to the case-law of the Court of Justice, must be understood as articulating a particularly important EU social right (see, to that effect, judgments of 27 February 2014, *Lyreco Belgium*, C-588/12, EU:C:2014:99, paragraph 36, and of 25 February 2021, *Caisse pour l’avenir des enfants (Employment at the time of birth)*, C-129/20, EU:C:2021:140, paragraph 44).
- 88 Consequently, the minimum requirements of Clause 5(4) of the Framework Agreement, in so far as they guarantee protection for every worker against less favourable treatment or dismissal on the ground of an application for, or the taking of, parental leave, must be considered to form an integral part of the Staff Regulations and must, without prejudice to the more favourable provisions contained in those regulations, be applied to officials and servants of the EU

institutions (see, by analogy, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 116 and the case-law cited).

- 89 It follows that the applicant is correct to maintain that the Court must take Clause 5(4) of the Framework Agreement, as put into effect by Directive 2010/18, into account when interpreting Article 42a of the Staff Regulations in its examination of the two complaints in this part of the plea.

(2) The substance of the first complaint

- 90 The applicant claims, in essence, that, by dismissing her during the term of her parental leave, the Commission infringed Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement.
- 91 The Commission disputes the applicant's assertions and claims, moreover, that the present complaint is inadmissible.
- 92 As a preliminary point, it should be observed that the applicant claims that there has been an infringement of Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement, on the ground that the AECCE adopted the contested decision while she was on parental leave, and not on the ground that that decision took effect when she was on parental leave, so that, in the latter situation, the adoption of the contested decision would have had the consequence of interrupting her leave.
- 93 Consequently, all that the Court is required to do is to determine whether the AECCE could, without infringing Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement, adopt the contested decision on a date on which the applicant was already on parental leave, without awaiting her return to active service. In order to do so, the Court must consider not only the wording of Article 42a of the Staff Regulations, but also the context in which that provision occurs and the objectives pursued by the provisions of which it is part (see, to that effect, judgment of 29 September 2022, *TC Medical Air Ambulance Agency*, C-633/20, EU:C:2022:733, paragraph 39 and the case-law cited).
- 94 In the first place, it is true that the wording of Article 42a of the Staff Regulations requires the AECCE to maintain the post of an official who is granted parental leave during that period of leave.
- 95 In accordance with Article 1a of the Staff Regulations, officials are appointed to an established post in an EU institution, so that, at the end of the period of parental leave, an official who has been granted such leave is entitled, in principle, to resume his or her post.
- 96 As regards, on the other hand, parental leave granted to a member of the contract staff, who, in application of Article 3a of the CEOS, is not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned, the word 'post' in Article 42a of the Staff Regulations necessarily designates the part-time or full-time duties which that staff member was hired to carry out.

- 97 However, the wording of Article 42a of the Staff Regulations does not prohibit the competent authority from adopting a decision dismissing an official or terminating the contract of a member of the contract or temporary staff, even though that servant is on parental leave on the date of that decision and was, in principle, entitled to resume that post or those duties at the end of that leave.
- 98 In the second place, that interpretation is confirmed by the context of which Article 42a of the Staff Regulations forms part, inter alia by the provisions of the Staff Regulations and of the CEOS relating to the procedures for the termination of service.
- 99 First, Article 47 of the Staff Regulations, which defines, in the case of officials, the various situations in which service is to be terminated, makes no provision for any reservation or derogation connected with the fact that the official concerned is on parental leave. The same applies to Article 51, on dealing with incompetence, and Article 9(1)(h) of Annex IX to the Staff Regulations, on removal from post by way of disciplinary measure.
- 100 Second, that interpretation is confirmed by Article 47 of the CEOS, relating to cessation of the employment of temporary staff, which is applicable by analogy to contract staff pursuant to the first paragraph of Article 119 of the CEOS.
- 101 First of all, Article 47 of the CEOS also makes no provision for a reservation or derogation connected with the fact that the staff member concerned is on parental leave.
- 102 Next, both Article 47(b)(ii) of the CEOS, concerning the termination of fixed-term contracts, and Article 47(c)(i) of the CEOS, concerning the termination of contracts of indefinite duration, provide that the period of notice is not to commence running and is to be suspended during pregnancy if confirmed by a medical certificate, maternity leave or sick leave, provided such sick leave does not exceed three months.
- 103 In that regard, it follows from the case-law that those provisions do not prohibit the adoption of a decision to terminate the contract of a member of the temporary or contract staff during the period of maternity leave or sick leave, but regulate the notice requirement to which such termination is subject (see, to that effect, judgment of 7 November 2019, *WN v Parliament*, T-431/18, not published, EU:T:2019:781, paragraph 114).
- 104 However, parental leave is not among the grounds, laid down in Article 47 of the CEOS, of suspension of the notice period specified in the contract, at the end of which a member of the temporary or contract staff may be dismissed.
- 105 It follows, first, that the AECCE may adopt a decision to terminate the contract of a member of the temporary or contract staff during the term of parental leave granted to the staff member concerned, on the ground, in particular, of his or her incompetence, and, second, that the notice period specified in the contract is neither prevented from running nor suspended by the fact that the staff member concerned is on parental leave.
- 106 In the third place, that interpretation is confirmed by the purpose of Article 42a of the Staff Regulations, as disclosed by the initial recitals of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1)

- 107 In extending, by the adoption of Regulation No 723/2004, the fundamental right to parental leave to officials and other servants of the European Union, the EU legislature intended to adapt the Staff Regulations to substantial advances and innovation in society since the initial adoption of the Staff Regulations and the CEOS in 1962, while respecting a Union administrative culture and tradition based on the principle of service to the citizen (recital 1 of Regulation No 723/2004).
- 108 Thus, according to recital 2 of Regulation No 723/2004, the objective of the European Union is to be equipped with a high-quality public administration capable of performing its tasks to the highest possible standards in accordance with the Treaties. The fundamental right to parental leave enjoyed by officials and servants of the European Union must be reconciled with that objective.
- 109 Having regard to those objectives, the fundamental right to parental leave from which an official or servant may benefit cannot delay the decision to dismiss the official or servant concerned where the competent authority has sufficient evidence to establish his or her incompetence or serious misconduct on his or her part.
- 110 In the fourth and last place, it is necessary, in accordance with paragraphs 79 to 89 above, to interpret Article 42a of the Staff Regulations taking account of the minimum requirements contained in Clause 5(4) of the Framework Agreement, as put into effect by Directive 2010/18.
- 111 In that regard, it follows from the case-law delivered on the basis of Clause 2(4) of the Framework Agreement on parental leave, concluded on 14 December 1995, annexed to Directive 96/34, which corresponds, in essence, to Clause 5(4) of the Framework Agreement, that, in order to ensure that workers can actually exercise their right to parental leave, that clause requires that the necessary measures be taken to protect workers against less favourable treatment or dismissal on the ground of an application for, or the taking of, parental leave (see, to that effect, judgment of 27 February 2014, *Lyreco Belgium*, C-588/12, EU:C:2014:99, paragraph 34).
- 112 Clause 5(4) of the Framework Agreement therefore has neither the object nor the effect of prohibiting an employer from deciding to dismiss a worker, even though, on the date of that decision, the worker is on parental leave, provided that the reason for that dismissal is not that the worker has applied for or has taken parental leave and that it respects the other conditions laid down by the applicable law or provisions.
- 113 Accordingly, it follows from paragraphs 93 to 112 above that the applicant is not correct to rely on an infringement of Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement, on the ground that the contested decision was adopted by the AECCE whilst she was on parental leave.
- 114 Consequently, without there being any need to rule on the plea of inadmissibility raised by the Commission, the first complaint in this part of the plea must be rejected as unfounded (see, to that effect, judgment of 18 May 2022, *TK v Commission*, T-435/21, not published, EU:T:2022:303, paragraph 42).

(3) *The substance of the second complaint*

- 115 The applicant maintains, in essence, that, by dismissing her on the ground of her application for parental leave, the Commission infringed Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement.

- 116 The Commission disputes the applicant's arguments.
- 117 In the first place, it should be borne in mind, as a preliminary point, that the wording of Article 42a of the Staff Regulations does not prohibit the competent authority from dismissing an official or other servant on the ground of the application for, or the taking of, parental leave. However, it follows from paragraphs 79 to 89 above that that provision must be given an interpretation that takes the minimum requirements laid down in Clause 5(4) of the Framework Agreement into account.
- 118 As is apparent from the first paragraph in the preamble to the Framework Agreement and from recital 8 of Directive 2010/18, that Framework Agreement constitutes a commitment by the social partners, represented by the general cross-industry organisations, to introduce, through minimum requirements on parental leave, measures to reconcile professional and family responsibilities and to promote equal opportunities and equal treatment for men and women (see, to that effect, judgment of 7 September 2017, *H.*, C-174/16, EU:C:2017:637, paragraphs 29 and 30).
- 119 Thus, the objectives pursued by the Framework Agreement are associated with the improvement of living and working conditions and with the existence of proper social protection for workers, which, as is apparent from Article 151 TFEU, are included among the objectives pursued by EU social policy (see judgment of 7 September 2017, *H.*, C-174/16, EU:C:2017:637, paragraph 33 and the case-law cited).
- 120 Therefore, in order to ensure that workers can actually exercise their right to parental leave, Clause 5(4) of the Framework Agreement requires that the necessary measures are taken to protect workers against, inter alia, dismissal on the ground of an application for, or the taking of, parental leave, in accordance with the applicable law, collective agreements or practices (see, by analogy, judgment of 27 February 2014, *Lyreco Belgium*, C-588/12, EU:C:2014:99, paragraph 34).
- 121 Having regard to the objectives pursued by the Framework Agreement, as recalled in paragraph 118 above, Clause 5(4) must be interpreted as articulating a particularly important European Union social right and may not therefore be interpreted restrictively (see, by analogy, judgment of 27 February 2014, *Lyreco Belgium*, C-588/12, EU:C:2014:99, paragraph 36 and the case-law cited).
- 122 In the second place, the provisions of Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement, prohibit the competent authority from dismissing for incompetence an official or other servant on the ground of an application for, or the taking of, parental leave, in particular on grounds relating to the starting and finishing dates of that leave period or the duration of that leave requested in the application.
- 123 First, it should be observed that, in application of the requirements of the Framework Agreement and also of Article 42a of the Staff Regulations, the right to parental leave is defined by a minimum duration and also by a limitation in time connected with the age of the child in respect of whom that leave is requested. Thus, the application for the grant of such leave necessarily includes information about the dates and the duration of the leave desired by the person applying for leave.

- 124 It is, moreover, that information about the dates and duration of the parental leave that enables the competent authority to determine whether taking that leave is compatible with the needs of the organisation in which the person applying for leave is employed.
- 125 Second, that interpretation is supported by Clause 3(2) of the Framework Agreement, under which the worker is to have a notice period within which to inform the employer not only of his or her intention of exercising the right to parental leave, but also the starting and end dates of the period of leave, the length of that notice period being required to have regard to the interests of workers and employers.
- 126 Third, a practice whereby a worker might be dismissed, in a procedure dealing with incompetence, on the ground that the application for parental leave which he or she submitted does not correspond with the guidance previously defined by the employer could deter the worker from seeking such leave and would run directly counter to the aim of the Framework Agreement, one of the objectives of which is to make it easier to reconcile working and family life (see, to that effect and by analogy, judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 57 and the case-law cited).
- 127 In the present case, it is necessary to examine whether the contested decision is based on the application for parental leave submitted by the applicant on 25 April 2016.
- 128 In that regard, it should be recalled that the contested decision reiterates all the grounds set out in the letter of 8 September 2016, including the ground stated in point (c) on page 4 of that letter, according to which the AECCE found, in relation to the persistence of the difficulties referred to, in particular, in the 2015 appraisal report, that the applicant had not had regard, in her application for parental leave of 25 April 2016, to the advice given by her Head of Unit on 18 February and 21 March 2016. According to that advice, leave in September was not desirable and parental leave at the beginning of the school year could be envisaged only for two or three months.
- 129 It is true that, in the 2015 appraisal report, the AECCE set an objective for the applicant, for 2016, consisting in planning her parental leave sufficiently in advance in order to facilitate her replacement and the smooth organisation of the beginning of the 2016/2017 school year.
- 130 However, as the Court of Justice held in paragraph 34 of the judgment on appeal, it is clear from the letter of 8 September 2016 that the AECCE's criticism regarding the applicant's parental leave related not to the failure to plan such leave sufficiently in advance, but to the dates chosen for that leave.
- 131 It follows from the grounds of the letter of 8 September 2016 that, while the contested decision is based on the overall finding of incompetence on the applicant's part, that finding is itself based on a number of grounds, which include, in point (c) on page 4 of that letter, the fact that the dates of parental leave mentioned in the applicant's application of 25 April 2016 were not consistent with the guidance given by her Head of Unit on 18 February and 21 March 2016.
- 132 Thus, it appears that the contested decision is based in part on the application for parental leave submitted by the applicant on 25 April 2016.
- 133 According to the Commission, the ground stated in point (c) on page 4 of the letter of 8 September 2016 should be understood as a criticism addressed to the applicant because of poor communication on her part concerning a matter that was important for her superiors.

- 134 In that regard, first, it is apparent from the case file that the applicant informed her Head of Unit as early as 21 March 2016, during the dialogue preceding the adoption of the 2015 appraisal report, that she intended to apply for parental leave during 2016.
- 135 It is apparent from an email from the Head of Unit dated 26 May 2016 that, on the occasion of that annual dialogue, the possibility that the applicant would take several months' parental leave at the beginning of the 2016/2017 school year was raised and the Head of Unit made clear that it was preferable, in the interests of the service, that the applicant's parental leave should be taken over a period of two to three months if it were taken at the beginning of the school year. Such an approach would have allowed a replacement educator to establish stability and a cruising speed in the group with a view to facilitating the applicant's return to her duties later in the school year.
- 136 Then, on 25 April 2016, or less than one month after the 2015 appraisal report, in which the applicant had been asked to plan her parental leave sufficiently in advance, was prepared, the applicant submitted an application for parental leave for the period from 15 June to 15 September 2016.
- 137 Second, it is not disputed that on 20 May 2016, or almost one month after the applicant submitted her application for parental leave, the Head of Unit refused that application in part, in so far as it related to the period from 15 June to 14 July 2016.
- 138 On 25 May 2016, the applicant, who in the meantime had requested an extension of her parental leave, repeated her application for parental leave for the period from 1 to 15 July 2016.
- 139 Lastly, by email of 26 May 2016, the applicant's immediate superior agreed that the applicant's parental leave could be extended until 14 November 2016, although she refused to grant her parental leave for the period 1 to 15 July 2016, on the grounds, first, of the late stage at which the application had been made and, second, of the planning of her colleagues' leave. In particular, the applicant's immediate superior explained that she had had to refuse other applications for leave for the first two weeks of July 2016 since that was a busy period from the aspect of the number of children enrolled and since the permanent teaching staff was not sufficient to receive the children in complete safety.
- 140 Thus, while it is apparent from the circumstances of the present case, as set out in paragraphs 134 to 139 above, that the initial application for parental leave submitted by the applicant involved her being absent from service during the first two weeks of September, and not during a period of two or three months from the beginning of the school year, in accordance with the Head of Unit's wishes, it does not however appear that the applicant demonstrated poor communication with her Head of Unit when submitting her application for parental leave.
- 141 On the other hand, those circumstances, and their chronology, show that the AECCE considered that the failure to comply with the Head of Unit's guidance concerning the applicant's parental leave revealed the applicant's failure to take the needs of the service into account and characterised conduct that could be taken into account, together with other factors, for the purposes of dismissal on the ground of incompetence.
- 142 While it was permissible for the AECCE to reject the applicant's application for parental leave on the ground that the dates envisaged for the period of leave were incompatible with the needs of the service, the AECCE could not rely on the dates of parental leave requested by the applicant on 25 April 2016 as constituting one of the grounds of dismissal on the ground of incompetence,

without infringing Article 42a of the Staff Regulations, read in the light of the minimum requirements contained in Clause 5(4) of the Framework Agreement, which guarantee the right of the official or servant to apply for parental leave.

143 Consequently, the second complaint in this part of the plea must be upheld.

144 However, the illegality found in paragraph 142 above cannot in itself entail the annulment of the contested decision.

145 According to the case-law, where a number of grounds are stated, even if one or more of the grounds of the contested measure are unfounded, that defect cannot lead to the annulment of that measure if one or more other grounds suffice to constitute lawful justification for that measure, irrespective of the grounds vitiated by illegality (see, to that effect, judgments of 5 March 2019, *Pethke v EUIPO*, T-169/17, not published, EU:T:2019:135, paragraph 93 and the case-law cited, and of 23 September 2020, *VE v ESMA*, T-77/18 and T-567/18, not published, EU:T:2020:420, paragraph 213 and the case-law cited).

146 In the present case, as the overall finding of the applicant's incompetence is based on a number of grounds, which are separate from the ground relating to the dates which she chose in her application for parental leave of 25 April 2016, it is necessary to examine the second part of the third plea and the other pleas raised.

(b) The second part of the third plea: an error of law resulting from the failure to take the minimum requirements contained in Article 7 of Directive 2002/14 into account, and breach of the prohibition of the offence of obstruction

147 This part of the plea consists of two complaints, alleging, first, an error of law resulting from the Commission's failure to take into account the minimum requirements contained in Article 7 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29), and, second, breach of the rule prohibiting the offence of interference.

(1) The taking into account of the minimum requirements contained in Article 7 of Directive 2002/14 at the time of the adoption by the competent authority of a decision to dismiss for incompetence on the basis of Article 47(c)(i) of the CEOS

148 The applicant claims, in essence, that in adopting the contested decision on the basis of Article 47(c)(i) of the CEOS, the Commission made an error of law, since it did not take the minimum requirements contained in Article 7 of Directive 2002/14 into consideration, on the ground that she was dismissed when she performed trade union duties in the CLP.

149 The Commission disputes the applicant's claims.

150 As follows from paragraphs 80 and 81 above, the Court should favour an interpretation of the Staff Regulations and the CEOS which ensures the consistency of those provisions with the principles of the social law of the European Union now expressly affirmed in the Charter, and allows the

inclusion in the Staff Regulations and the CEOS of the substance of the provisions of secondary EU law which constitute rules of minimum protection in order to supplement, as necessary, the other provisions of the Staff Regulations.

- 151 Article 27 of the Charter, entitled ‘Workers’ right to information and consultation within the undertaking’, provides that workers must, at different levels, be guaranteed information and consultation in the cases and under the conditions provided for by Union law and national laws and practices.
- 152 According to the Explanations, as regards Article 27 of the Charter, that provision has been clarified by Directive 2002/14.
- 153 Thus, it follows from the case-law that the establishment in Directive 2002/14 of a general framework for information and consultation of workers constitutes an expression of general principles of EU law laid down in Article 27 of the Charter which are binding on the institutions (judgment of 15 September 2016, *TAO-AFI and SFIE-PE v Parliament and Council*, T-456/14, EU:T:2016:493, paragraph 76).
- 154 More specifically, under Article 1(1), Article 2(f) and (g) and Article 4 of Directive 2002/14, first, those provisions lay down minimum requirements for employee information and consultation, without prejudice to more favourable provisions for employees and, second, employee information and consultation are to be organised through staff representatives as provided for by the applicable law, regulation or practices (judgment of 15 September 2016, *TAO-AFI and SFIE-Parliament and Council*, T-456/14, EU:T:2016:493, paragraph 80).
- 155 According to the wording of Article 9(3) of the Staff Regulations, the Staff Committee is to ‘represent the interests of the staff vis-à-vis their institution and maintain continuous contact between the institution and the staff’. It is to ‘contribute to the smooth running of the service by providing a channel for the expression of opinion by the staff’.
- 156 It follows that the Commission must apply the minimum requirements relating to workers’ information and consultation provided for in Directive 2002/14 to its Staff Committee and to the members of that representative body.
- 157 In the present case, it is not apparent from the case file that, on the date of her dismissal, the applicant was no longer a member of the CLP and the CCP. She is therefore correct to maintain, in the context of the first complaint in this part of the plea, that, when it adopted the contested decision, on the basis of Article 47(c)(i) of the CEOS, the Commission was required to take the minimum requirements provided for in Article 7 of Directive 2002/14 into account.

(2) The substance of the first complaint

- 158 According to the case-law, the dismissal of an employees’ representative on the ground of his or her status or the functions which he or she performs in his or her capacity as a representative is incompatible with the protection required by Article 7 of Directive 2002/14 (judgment of 11 February 2010, *Ingeniørforeningen i Danmark*, C-405/08, EU:C:2010:69, paragraph 58).
- 159 An employees’ representative who has been the subject of a dismissal decision must therefore be in a position to ascertain, in the context of the appropriate administrative or judicial proceedings, whether that decision was taken on grounds of his or her status or performance of his or her

functions as a representative and adequate sanctions must be applicable should it transpire that there is a connection between that representative's status or functions and the measure dismissing him or her (judgment of 11 February 2010, *Ingeniørforeningen i Danmark*, C-405/08, EU:C:2010:69, paragraph 59).

- 160 As regards, in particular, officials and servants of the European Union, it is also necessary to take account of Article 24b of the Staff Regulations, according to which 'officials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials'. The EU institutions must refrain from doing anything that might impede the freedom of trade union activity recognised by Article 24b of the Staff Regulations (see, by analogy, judgment of 18 January 1990, *Maurissen and Union syndicale v Court of Auditors*, C-193/87 and C-194/87, EU:C:1990:18, paragraph 12).
- 161 The freedom of trade union activity thus recognised to officials and other servants of the European Union means that trade union or employees' organisations ('the TUEOs') have the right to do anything lawful to protect the interests of their members as employees (see judgment of 18 January 1990, *Maurissen and Union syndicale v Court of Auditors*, C-193/87 and C-194/87, EU:C:1990:18, paragraph 13 and the case-law cited).
- 162 It follows, first, that the EU institutions must allow the TUEOs to carry out their representative and consultative tasks on all matters affecting staff and, second, that they cannot impose any penalty whatsoever on officials or servants by reason of their trade union activities (see, to that effect, judgment of 18 January 1990, *Maurissen and Union syndicale v Court of Auditors*, C-193/87 and C-194/87, EU:C:1990:18, paragraphs 14 and 15).
- 163 It is by reference to those provisions and principles that the substance of the first complaint in this part of the plea must be assessed.
- 164 In the first place, it is not apparent from either the statement of reasons of the contested decision or the documents in the case file that that decision is based solely on the status as member of the CCP and the CLP which the applicant had held since 13 May 2014, irrespective of the exercise of those functions as staff representative or, more broadly, her trade union activities.
- 165 In the second place, the contested decision contains no ground whereby the AECCE considered that the way in which, at the date of adoption of that decision, the applicant exercised her role as staff representative or, more broadly, her trade union activities characterised conduct of such a kind as to justify the termination of her contract on the ground of incompetence.
- 166 It is, moreover, apparent from the discussion at the hearing that, in answer to a question from the Court on that point, the applicant confirmed that she had ceased to take part in the activities of the CLP and the CCP when she went on parental leave on 15 July 2016 and that she had had to be replaced in the CCP and the CLP by a substitute.
- 167 Thus, the fact that the applicant no longer actually performed her duties as staff representative on the date of adoption of the contested decision indicates that that decision is not based on the applicant's performance of those duties on that date.
- 168 In the third place, it is true that one of the reasons that led the AECCE to dismiss the applicant for incompetence is the failure to take the interests of the service into account when planning the activities connected with her mandate as staff representative during 2014 and 2016.

- 169 In particular, it is apparent from paragraphs 41 and 42 above that the AECCE took issue with the applicant, with regard to 2014, for having advised her superiors at the last minute that she would be taking part in the CCP and CLP meetings and sometimes for not having advised her colleagues that she would be taking part in those meetings. In addition, it is apparent from paragraph 47 above that, with regard to 2016, the AECCE took issue with the applicant for having informed her superiors at the last minute that she would be taking part in certain meetings of the CCP and for not having informed her colleagues that she would be doing so or for sometimes having so informed them at the last minute.
- 170 Thus, it must be determined whether the competent authority could base the contested decision on such a reason without breaching its obligation to take the minimum requirements laid down in Article 7 of Directive 2002/14 into account.
- 171 In that regard, it should be borne in mind that the sixth paragraph of Article 1 of Annex II to the Staff Regulations provides that the duties undertaken by, among others, members of the Staff Committee are to be deemed to be part of their normal service in their institution. The institutions are therefore required to create the conditions necessary to ensure the exercise of the duties of staff representation and, in that respect, the fact of performing such duties cannot be prejudicial to an official (see judgment of 26 September 1996, *Maurissen v Court of Auditors*, T-192/94, EU:T:1996:133, paragraph 40 and the case-law cited).
- 172 Likewise, the sixth paragraph of Article 1 of Annex II to the Staff Regulations aims, by its second sentence, to protect the rights of, among others, members of the Staff Committee, by protecting them against any prejudice which they might suffer on account of their activities as staff representatives. It is for that reason that the activities as staff representative must be taken into consideration in the preparation of the appraisal reports of the officials and servants concerned (judgments of 26 September 1996, *Maurissen v Court of Auditors*, T-192/94, EU:T:1996:133, paragraph 41, and of 5 November 2003, *Lebedef v Commission*, T-326/01, EU:T:2003:291, paragraph 49). That provision also aims, by its first sentence, to facilitate the participation of officials in the representation of the staff of their institution, by allowing them, in particular, to participate in the context of the working time normally devoted to the services which they are required to provide in their institution and not in addition to that time (judgment of 16 December 2010, *Lebedef v Commission*, T-364/09 P, EU:T:2010:539, paragraph 23), or again in the context of secondment to a TUEO, which entails partial or total exemption from work in the services of the institution.
- 173 Nevertheless, an official or servant who is on 50% secondment for trade union purposes must, in accordance with Article 60 of the Staff Regulations, obtain prior permission from his or her immediate superior in order to be absent from the service and to take part in the meetings to which he or she is invited on the basis of his or her trade union mandate or mandate as a staff representative. The requirement to obtain prior permission laid down in Article 60 of the Staff Regulations is subject to derogation only in the event of sickness or accident and not in the event of participation in staff trade union representation or in meetings of a representative body such as the CCP or the CLP (see, to that effect, judgment of 16 December 2010, *Lebedef v Commission*, T-52/10 P, EU:T:2010:543, paragraph 30).

174 In that context, it should be observed that under point 3.1 of Article 7 of Commission Decision C(2011) 3588 final of 27 May 2011 ('Decision C(2011) 3588') the applicant was required to inform her immediate superior 'in good time' that she had been invited to meetings of the CCP and the CLP, and that, where necessary, her immediate superior could refuse to allow her to take part in those meetings, by a reasoned decision in writing.

175 Thus, the contested decision could, without failing to comply with the minimum requirements of Article 7 of Directive 2002/14, be based on the ground alleging breach by the applicant of the obligation to inform her immediate superior in good time, before the meetings of the CLP and of the CCP of which she was a member, that she would be taking part in those meetings, since such a reason is not based on the exercise of the applicant's duties as staff representative, but on her failure to comply with the conditions of the organisation of the service necessary for the exercise of her mandate.

176 Consequently, the first complaint in this part of the plea must be rejected as unfounded.

(3) The second complaint

177 The applicant maintains that, by the contested decision, the Commission infringed the rule prohibiting the offence of obstruction.

...

3. The fourth plea: manifest errors of assessment and errors of fact

...

(a) The extent of review by the Courts of the European Union

184 As a preliminary point, it is necessary to clarify the extent of the review which the Court must carry out when it is requested to determine the legality of a decision dismissing a member of the contract staff on the ground of his or her incompetence.

185 The applicant maintains that the settled case-law according to which review by the Courts of the European Union of the legality of a decision to dismiss an official or servant for incompetence is limited to manifest error of assessment is contrary to Article 30 of the Charter, on protection against unjustified dismissal. In addition, she claims that the burden of proof of the legality of a decision such as the contested decision should be borne by the employer, if Article 30 of the Charter is not to be rendered nugatory. Lastly, she maintains that, when assessing the burden of proof, the Court should take into account the abnormal length of the judicial proceedings, having regard to the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR').

186 The Commission contends that the applicant's arguments are inadmissible and unfounded.

187 In that regard, it is settled case-law that, where a contract for an indefinite duration as a member of the temporary staff or the contract staff is terminated, the AECCE, in accordance with Article 47(c)(i) of the CEOS and observing the notice period stipulated in the contract, has a wide discretion and review by the Courts of the European Union must therefore be confined to

ascertaining that there has been no manifest error or misuse of powers (see, to that effect, judgment of 26 February 1981, *de Briey v Commission*, 25/80, EU:C:1981:56, paragraph 7; see also, to that effect, judgment of 6 July 2022, *YF v EFCA*, T-664/21, not published, EU:T:2022:425, paragraph 44 and the case-law cited).

- 188 The appraisal of the professional competence of officials and servants of the institutions of the European Union is primarily a matter for those institutions (see, to that effect, judgment of 19 July 1955, *Kergall v Common Assembly*, 1/55, EU:C:1955:9, p. 23).
- 189 In that context, an error may be classified as manifest only where it can be readily detected, in the light of the criteria to which the legislature intended the administration's exercise of its discretion to be subject. In other words, the plea alleging a manifest error must be rejected if, despite the evidence adduced by the applicant, the disputed assessment may still be accepted as justified and consistent (see judgment of 2 April 2019, *Fleig v EEAS*, T-492/17, EU:T:2019:211, paragraph 55 (not published) and the case-law cited).
- 190 In addition, it should be borne in mind that acts of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see judgment of 10 September 2019, *HTTS v Council*, C-123/18 P, EU:C:2019:694, paragraph 100 and the case-law cited).
- 191 Thus, it follows from the principle of presumption of legality of acts of the EU institutions that it is for the member of the temporary or contract staff who is the subject of a dismissal decision and who brings an action before the Courts of the European Union to demonstrate the illegality of such a decision.
- 192 Article 30 of the Charter cannot call into question the principles and the case-law cited in paragraphs 187 to 191 above.
- 193 First, it follows from Article 30 of the Charter, which provides that 'every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practice', that its wording does not define precise obligations (judgment of 4 December 2013, *ETF v Schuerings*, T-107/11 P, EU:T:2013:624, paragraph 100). Thus, Article 30 of the Charter does not lay down any rule capable of calling into question the review restricted to manifest error of assessment which the Court carries out when it is requested to determine the legality of the decision terminating a contract of indefinite duration of a member of the temporary or contract staff.
- 194 Second, the same applies to paragraph 24 of Part I of the European Social Charter, signed at Turin on 18 October 1961, as revised, on which, according to the Explanations on Article 30 of the Charter, that article draws, and according to which 'every worker has the right to protection against unjustified dismissal'.
- 195 Third, the Explanations, as regards Article 30 of the Charter, refer specifically to Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16), and to Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member State relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

However, even on the assumption that Article 30 of the Charter might be interpreted as conferring special protection on dismissed workers in application of those specific provisions of EU secondary law, it must be held that the applicant's situation is not covered by those provisions.

- 196 Consequently, it cannot be inferred from Article 30 of the Charter that the Court is required, when it must assess the legality of a decision dismissing an official or a member of the temporary or contract staff for incompetence, to carry out a more precise review than that of manifest error of assessment, or to place the burden of proof of the legality of such a decision on the institution concerned.
- 197 In addition, it should be noted that, although, as Article 6(3) TEU confirms, the fundamental rights enshrined in the ECHR constitute general principles of EU law and although Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (see judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser v Commission*, C-702/19 P, EU:C:2020:857, paragraph 24 and the case-law cited).
- 198 In that regard, in so far as the Charter contains rights corresponding to rights guaranteed under the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR, 'without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'. According to the Explanations, concerning the second paragraph of Article 47 of the Charter, that provision corresponds to Article 6(1) ECHR (see judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser v Commission*, C-702/19 P, EU:C:2020:857, paragraph 25 and the case-law cited).
- 199 Therefore, the argument alleging infringement of Article 6 ECHR should be understood as seeking to assert, in essence, that, in applying a review restricted to manifest error of assessment when, following the referral of the case back to it by the Court of Justice, it examines the legality of the contested decision, even where the judicial proceedings, owing to their abnormal length, did not respect the rule that the case must be heard within a reasonable time, the General Court would infringe the right to a fair trial laid down, inter alia, in the second paragraph of Article 47 of the Charter.
- 200 It follows from the case-law that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy (see judgment of 13 December 2018, *European Union v Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 32 and the case-law cited).
- 201 In addition, where such a claim for damages is brought before the General Court, which has jurisdiction under Article 256(1) TFEU, it must determine such a claim sitting in a different composition from that which heard the dispute giving rise to the procedure the duration of which is criticised (see judgment of 14 September 2016, *Trafilerie Meridionali v Commission*, C-519/15 P, EU:C:2016:682, paragraph 66 and the case-law cited).

202 Therefore, it follows from the case-law cited in paragraphs 200 and 201 above that, when it examines claims for annulment together, where relevant, with claims for compensation, after a case has been referred back to it by the Court of Justice in accordance with Article 61 of the Statute of the Court of Justice of the European Union, the composition of the General Court responsible for adjudicating on those claims does not have jurisdiction to determine whether the duration of the judicial proceedings is excessive and cannot therefore seek to provide a remedy, in particular by altering the scope of its review of the legality of the grounds of the decision annulment of which is sought.

203 Consequently, the applicant's arguments set out in paragraph 185 above must be rejected, without its being necessary to examine the plea of inadmissibility raised by the Commission.

(b) The first part of the fourth plea: manifest error of assessment vitiating the ground based on the applicant's last-minute request for the withdrawal of authorisation to work part time

204 By this part of the plea, the applicant claims, in essence, that the events described in point (a) on page 2 of the letter of 8 September 2016 could not seriously substantiate the Commission's finding of incompetence on her part, in so far as she experienced difficulties in reconciling professional life and her family life.

205 In particular, the applicant states that, in April 2014, following divorce proceedings, she was in the position of being a single parent with three dependent children, and it was therefore permissible for her to seek to work more hours in order to meet her family responsibilities. She also maintains that the Commission has not shown that the withdrawal of her request to work part time had disrupted the service.

206 In that regard, in point (a) on page 2 of the letter of 8 September 2016, the AECCE stated that, in January 2014, the applicant's request to work part time from 1 May 2014 until the end of the school year had been accepted but that, however, on 24 April 2014, the applicant had made a last-minute request, for family reasons, to continue to work full time and that the manager had made the necessary efforts to assist the applicant and to adapt the organisation of the service, so that the applicant was able to work on a full-time basis from 15 May 2014 onwards.

207 In addition, the AECCE stated that, since the information that the applicant was to work full time from 15 May 2014 arrived at the Human Resources Unit at a late stage, unusual efforts had had to be made to adapt the service's needs to the applicant's personal needs.

208 As a preliminary point, it should be observed that the applicant does not dispute the AECCE's reference, on page 2 of the letter of 8 September 2016, to the appraisal contained in the 2014 appraisal report, according to which she had experienced difficulties in 2014 in reconciling her professional and family life, but only the ground of the contested decision set out in point (a) of page 2 on the letter of 8 September 2016. That ground does not apply to an appraisal contained in the 2014 appraisal report.

209 Consequently, the argument developed by the applicant in this part of the plea cannot be considered to call into question an appraisal contained in the 2014 appraisal report, which in the Commission's contention has become final.

- 210 As regards the substance of the arguments developed in this part of the plea, first, it should be borne in mind that Article 55a of the Staff Regulations, applicable by analogy to contract staff pursuant to Article 16 in conjunction with Article 91 of the CEOS, sets out the conditions in which a member of the contract staff may work part time. The rules on part-time activity and the procedure for granting authorisation are defined in Annex IVa to the Staff Regulations and, where appropriate, in the implementing rules adopted by the competent authority.
- 211 In particular, the first paragraph of Article 2 of Annex IVa to the Staff Regulations provides as follows:
- ‘The AECCE may, at the request of the official concerned, withdraw the authorisation before expiry of the period for which it is granted. The date of withdrawal may not be more than two months after the date proposed by the official or four months after that date if the part-time work was authorised for more than one year.’
- 212 It follows from those provisions that, in seeking withdrawal of the authorisation to work part time before the expiry of the period in respect of which authorisation had been granted, the applicant exercised an option expressly granted to her by the Staff Regulations.
- 213 Second, it does not follow either from the statement of reasons in the contested decision or from the documents in the case file that the period between the submission, on 24 April 2014, of the applicant’s request for withdrawal of the authorisation to work part time and the date on which that authorisation became effective, 1 May 2014, failed to comply with Article 55a of and Annex IVa to the Staff Regulations or the implementing rules which the Commission had adopted for the implementation of those provisions.
- 214 Third, as the applicant was authorised to resume work on a full-time basis with effect from 15 May 2014, it does not appear that the early return to full-time work was incompatible with the needs of the service. Nor is it apparent from the documents in the case file that dealing with the applicant’s request required unusual efforts on the part of the competent services.
- 215 Fourth, it is not disputed that the applicant’s request of 24 April 2014 to work on a full-time basis was the consequence of divorce proceedings which had been initiated in that month and which had the effect of putting her in the position of being a single parent with three dependent children. Thus, while that last-minute request was based on private reasons, those reasons were nonetheless of a serious and legitimate nature.
- 216 Fifth, it is apparent from the case file that, in answer to the applicant’s argument, the Commission merely stated that, in order to facilitate the reconciliation of her professional life and her personal life, the applicant had been able to take parental leave and have an adapted timetable when she had worked part time on medical grounds, in November and December 2014. In addition, the Commission maintained that the administration had not criticised the applicant for requesting that her working hours be adjusted to accommodate her needs.
- 217 In so doing, the Commission did not establish the justified and consistent nature of the appraisal in the contested decision, according to which the applicant’s request of 24 April 2014 for withdrawal of the authorisation to work part time demonstrated that she encountered difficulties in reconciling her personal life and her professional life, having regard to the circumstances, set out in paragraphs 210 to 215 above, in which such a request had been submitted.

218 In those circumstances, the applicant is correct to maintain that, in relying on the ground set out in point (a) on page 2 of the letter of 8 September 2016 to support its conclusion that she encountered difficulties in reconciling her professional life and her family life, the Commission vitiated the contested decision by a manifest error of assessment.

(c) The second part of the fourth plea: manifest error of assessment vitiating the ground relating to the applicant's allegedly irregular absences

219 By this part of the plea, the applicant puts forward two complaints, alleging, first, that the ground of the contested decision based on her allegedly irregular absences in 2014 was put forward at a late stage and is unfair and, second, that the ground relating to her absences on 7 May 2014, 16 and 18 June 2014 and 30 and 31 May 2016 is unfounded.

220 The Commission contends that this part of the plea is inadmissible, as the applicant did not develop it in the prior complaint or challenge the decisions finding that her absences were irregular within the period prescribed in the Staff Regulations and the CEOS.

221 In that regard, the AECCE stated, in point (b) on page 2 of the letter of 8 September 2016, that the applicant's absences on 7 May and 16 June 2014, then, in point (d) on page 2 of that letter, her absence on 18 June 2014, were unjustified. Lastly, in point (e) on page 5 of the letter of 8 September 2016, the AECCE also relied on the applicant's unjustified absences on 30 and 31 May 2016.

222 In the first place, it should be borne in mind that the decision to dismiss a member of the temporary or contract staff based on Article 47(c)(i) of the CEOS, which is, in essence, the consequence of the alleged incompetence of the person concerned, may be justified by the reference to a number of precise and consistent material facts, supported where relevant by several annual appraisal reports which reveal unsatisfactory performance, although, taken in isolation, those facts would not appear to be sufficiently serious to justify such a measure (see, to that effect, judgment of 6 July 2022, *YF v EFCA*, T-664/21, not published, EU:T:2022:425, paragraph 46 and the case-law cited).

223 The incompetence of an official or member of the temporary or contract staff must be assessed, in particular, in the light of his or her ability, efficiency and conduct in the service (see, to that effect, judgment of 21 October 1980, *Vecchioli v Commission*, 101/79, EU:C:1980:243, paragraph 7).

224 As regards, in particular, officials, it should be noted that Article 51(1)(a) of the Staff Regulations provides that, if five consecutive annual reports show unsatisfactory performance on the part of an official, he or she is to be dismissed.

225 It follows from that provision that, where the AECCE decides to dismiss an official for incompetence, it may rely on facts of such a kind as to establish such incompetence over the last five years preceding the decision to dismiss.

226 Whilst it must be pointed out that Article 51 of the Staff Regulations is not applicable, even by analogy, to members of the contract or temporary staff, the latter cannot be placed, from the aspect of the procedures for dealing with incompetence laid down in the Staff Regulations and the CEOS, in a more favourable position than officials.

- 227 Although contracts of employment of indefinite duration are distinguished, from the aspect of job security, from fixed-term contracts of employment, it cannot be denied that European Union civil servants engaged under a contract concluded for an indefinite duration cannot be unaware of the temporary nature of their employment or of the fact that it does not guarantee them employment (see judgment of 6 July 2022, *YF v EFCA*, T-664/21, not published, EU:T:2022:425, paragraph 42 and the case-law cited).
- 228 Consequently, it follows from the case-law cited in paragraphs 222 and 227 above that it is permissible for the AECCE to base a decision to dismiss a member of the temporary or contract staff for incompetence on facts established, as in the present case, over the three years preceding the adoption of such a decision.
- 229 It follows that the first complaint in this part of the plea must be rejected, without its being necessary to examine the two pleas of inadmissibility put forward by the Commission and referred to in paragraph 220 above.
- 230 In the second place, it is appropriate to examine the two pleas of inadmissibility put forward by the Commission in response to the second complaint in this part of the plea.
- 231 First, according to the case-law, the rule of correspondence between a complaint, within the meaning of Article 91(2) of the Staff Regulations, and the subsequent application requires that, for a plea before the Courts of the European Union to be admissible, it must have already been raised in the pre-litigation procedure, allowing the competent authority to know the criticisms made by the person concerned of the contested decision. That rule is justified by the very purpose of the pre-litigation procedure, which is to allow an amicable settlement of the differences that have arisen between the officials or temporary or contract staff in question, on the one hand, and the administration, on the other. It follows, as is also apparent from settled case-law, that claims submitted before the Courts of the European Union may contain only heads of claim based on the same matters as those forming the basis of the heads of claim put forward in the complaint, although those heads of claim may be developed before the Courts of the European Union by the presentation of pleas and arguments which do not necessarily appear in the complaint but are closely linked to it (see judgment of 28 September 2022, *Zegers v Commission*, T-663/21, not published, EU:T:2022:589, paragraph 63 and the case-law cited).
- 232 The applicant, in her prior complaint of 17 January 2017, had ‘categorically’ disputed the ‘alleged unjustified absences’ imputed to her for 2014 and maintained that, in any event, those facts were not sufficiently serious. She had also submitted that the alleged unjustified absence from 30 May to 1 June 2016 was not proved and was contradicted by medical certificates.
- 233 Consequently, the Commission is not correct to maintain that the second complaint in this part of the plea does not observe the rule of correspondence between the complaint and the application referred to in paragraph 231 above.
- 234 Second, it should be noted that the time limits for lodging a request, complaint or appeal laid down in Articles 90 and 91 of the Staff Regulations are a matter of public policy and are not subject to the discretion of the parties or the Court, since they were established in order to ensure that legal positions are clear and certain. Any exceptions to or derogations from those time limits must be interpreted strictly (see judgment of 25 June 2020, *XH v Commission*, T-511/18, EU:T:2020:291, paragraph 74 (not published) and the case-law cited).

- 235 Thus, although, under Article 90(2) of the Staff Regulations, any official or any member of the temporary or contract staff may lodge a complaint with the competent authority against an act that adversely affects him or her, that right does not allow the official or servant concerned to disregard the time limits for lodging a complaint or an appeal laid down in Articles 90 and 91 thereof by indirectly calling into question, by means of a request, a previous decision which had not been challenged within the prescribed time limits. Only the existence of new and material facts may justify the submission of a request seeking re-examination of a decision that was not challenged within the time limits (see, to that effect, judgments of 21 February 2006, *V v Commission*, T-200/03 and T-313/03, EU:T:2006:57, paragraphs 94 and 95 and the case-law cited, and of 25 June 2020, *XH v Commission*, T-511/18, EU:T:2020:291, paragraph 75 (not published) and the case-law cited).
- 236 However, in an action against an act which adversely affects him or her, an applicant is entitled, in particular in the context of a plea alleging manifest error of assessment, to challenge the inferences which the institution has drawn from a prior act which also adversely affects him or her, even though it has become final and its grounds can no longer be challenged (see, to that effect, judgment of 23 September 2020, *VE v ESMA*, T-77/18 and T-567/18, not published, EU:T:2020:420, paragraph 41 and the case-law cited).
- 237 As regards, first of all, what are alleged to be the unjustified absences on 7 May and 16 June 2014, the applicant maintains that she is alleged, in reality, to have been late in submitting medical certificates showing that one of her children was seriously ill on those two days and that the contested decision makes no reference to any time factors relating to that delay.
- 238 Thus, the applicant does not deny having been late in submitting the medical certificates justifying her absence from the service on 7 May and 16 June 2014, but maintains, in essence, that the AECCE could not rely on the decision finding that her absence on those two days was unjustified without vitiating the contested decision by a manifest error of assessment.
- 239 Consequently, by her argument, the applicant does not seek to call into question the decision, now final, finding that her absences on 7 May and 16 June 2014 were unjustified, with the result that the second plea of inadmissibility put forward by the Commission must be rejected in so far as it relates to the applicant's argument concerning those absences.
- 240 As regards, next, the allegedly irregular absence on 18 June 2014, it must be noted that, although the applicant maintains that she always provided a medical certificate in the event of absence for health reasons, she does not state the reason for her absence from the service on that day and does not refer to any document placed on the file that might justify that absence.
- 241 Thus, the applicant's argument cannot call into question the decision finding that her absence on 18 June 2014 was irregular, and the present complaint, in so far as it is addressed to the ground set out in point (d) on page 2 of the letter of 8 September 2016, must be rejected as unfounded, without its being necessary to examine in that respect the second plea of inadmissibility put forward by the Commission.
- 242 As regards, lastly, the applicant's allegedly irregular absences on 30 and 31 May 2016, she maintains, in essence, that the AECCE was not entitled to rely on an opinion of the examining doctor of 27 May 2016, since, on the occasion of that medical examination, the doctor could not foresee that she would be admitted to the emergency department owing to paraesthesia of the left side with effect from 30 May 2016. She also claims that she produced justification for that absence.

- 243 By that argument, the applicant seeks to call into question the decision of 1 June 2016 whereby the AECCE considered that her absences on 30 and 31 May 2016 were unjustified on the ground that she had not resumed work on those days notwithstanding an opinion of the examining doctor of 27 May 2016 declaring her fit to return to work.
- 244 In addition, it is apparent from the case file that that decision was notified to the applicant by email on 1 June 2016. As the General Court found in paragraph 46 of the initial judgment, the applicant did not lodge a complaint, according to the requirements set out in Article 90(2) of the Staff Regulations, against that decision, which clearly adversely affected her.
- 245 Lastly, the applicant does not put forward any new and substantial fact that would justify a re-examination of the legality of that decision.
- 246 Therefore, the argument whereby the applicant seeks to challenge indirectly the decision of 1 June 2016 is inadmissible in that she seeks to call into question an act that has become final.
- 247 In the third place, it is necessary to examine the merits of the applicant's argument relating to the ground of the contested decision based on her allegedly unjustified absences on 7 May and 16 June 2014.
- 248 In that regard, it is apparent from the ground of the contested decision stated in point (b) on page 2 of the letter of 8 September 2016 that, on 7 and 28 February 2014 and on 7 May and 16 June 2014, the applicant sought special leave because one of her children was seriously ill. It is also apparent that the AECCE considered that the absences on 7 May and 16 June 2014 were unjustified in so far as the applicant had not produced the appropriate supporting documents within the prescribed period.
- 249 As a preliminary point, it should be borne in mind that Article 60 of the Staff Regulations, which is applicable to contract staff pursuant to Articles 16 and 91 of the CEOS, provides as follows:
- 'Except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior. Without prejudice to any disciplinary measures that may apply, any unauthorised absence which is duly established shall be deducted from the annual leave of the official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period.'
- 250 Furthermore, according to the wording of the second paragraph of Article 57 of the Staff Regulations, which is applicable to contract staff pursuant to Articles 16 and 91 of the CEOS, a member of the contract staff may, on application, exceptionally, be granted special leave, the rules relating to granting such leave being laid down in Annex V to the Staff Regulations.
- 251 Thus, Article 6 of Annex V to the Staff Regulations provides that, in addition to annual leave, an official may, on application, be granted special leave of up to two days for the serious illness of a child and up to five days for the very serious illness of a child, as certified by a doctor, or hospitalisation of a child aged 12 or under.
- 252 In the present case, it is apparent from the grounds of the contested decision that the finding that the applicant's absences on 7 May and 16 June 2014 were unjustified results solely from the delay in the submission by the applicant of the medical certificates relating to the serious illness of one of her children.

- 253 However, whilst it is true that the requisite time limit for submission of such a certificate in the present case, and the period within which the applicant eventually communicated those certificates to the Office for Infrastructure and Logistics (OIL), are not apparent either from the grounds of the contested decision or from the documents on the file, the applicant does not establish or even claim that she provided the certificates necessary to regularise her administrative situation within a brief period by reference to the period allowed to her.
- 254 Nor does the applicant put forward reasons that might have properly explained the delay in submitting those documents.
- 255 Failure, in particular repeated failure, to comply with the time limit given to an official or a temporary or contract staff member to submit documents justifying absence from the service is capable of characterising inappropriate conduct on the part of the official or servant concerned.
- 256 In those circumstances, the applicant has not established that the AECCE had made a manifest error of assessment by referring, when adopting the contested decision, to an earlier decision finding that her absences on 7 May and 16 June 2014 were unjustified because of the delay in submitting documents capable of justifying those absences.
- 257 Consequently, the present complaint must be rejected, as must this part of the plea in its entirety.

(d) The third part of the fourth plea: manifest error of assessment and errors of fact vitiating the ground relating to the applicant's involvement in her work

- 258 By this part of the plea, the applicant puts forward eight complaints. First, the applicant claims that her involvement in the working groups in 2014 was recognised in her appraisal report for that year. Second, she maintains that in 2015 she was fully involved in her duties as mobile educator at the CPE Mamer, Luxembourg and that she did send the table of educational activities to one of her colleagues, on 22 April 2015. Third, she claims that she did organise yoga courses with the children, although that activity was not an objective which had been formally set for her. Fourth, the applicant disputes her alleged lack of proactivity concerning her participation in the working groups, in particular the working group ‘*Cuisine*’. Fifth, she maintains that, as regards the working group ‘*Sport*’, she was merely a substitute. Sixth, the applicant denies having sent her superiors the Christmas 2015 newsletter in July 2016. Seventh, the applicant maintains that the plan of educational activities was not necessarily formalised and that it was not appropriate that she should communicate such a plan for the beginning of the school year in September 2016 when she was going on parental leave. Eighth, the applicant claims that the AECCE considered that she had not satisfied the objectives set for 2016 when she had been present for only two months.
- 259 The Commission contends that the applicant is precluded from criticising the assessments in the 2013, 2014 and 2015 appraisal reports on which the contested decision is based, since she did not challenge those reports within the periods prescribed in the Staff Regulations. Furthermore, the Commission disputes the applicant's assertions.
- 260 In the first place, as regards the plea of inadmissibility put forward by the Commission, reference should be made to the case-law referred to in paragraphs 235 and 236 above.
- 261 In the present case, it should be borne in mind that the reasoning in the contested decision refers to certain appraisals contained, inter alia, in the applicant's 2013, 2014 and 2015 appraisal reports.

- 262 In particular, it is apparent from the case file that the reasons set out in the last paragraph on page 1 of the letter of 8 September 2016 refer to the 2013 appraisal report. It is also apparent that the ground relating to the difficulty which the applicant experienced in reconciling her personal life and her professional life, which appears in the second paragraph on page 2 of that letter, refers to the 2014 appraisal report. Lastly, the grounds which appear in points (a) to (e) on page 3 of that letter reiterate the qualitative appraisal relating to the applicant's efficiency, which corresponds to point 3.1 of the 2015 appraisal report.
- 263 By the argument which she develops in the context of the second to fifth complaints in this part of the plea, the applicant seeks to call into question the content of that qualitative appraisal and, therefore, of the 2015 appraisal report.
- 264 However, it is common ground that the applicant was notified of the 2015 appraisal report concerning her and that she did not challenge it within the time limits laid down in Articles 90 and 91 of the Staff Regulations, so that both that report and the appraisals contained therein became final.
- 265 Nor has the applicant relied on the existence of any new and substantial factor for the purpose of establishing that she was not precluded from challenging the 2015 appraisal report.
- 266 In those circumstances, the applicant cannot challenge the 2015 appraisal report indirectly in the context of the present action against the contested decision, with regard to which that report played a preparatory role. The second to fifth complaints in the third part of the fourth plea are therefore inadmissible in that they seek to call into question an act which has become final.
- 267 Conversely, the first, sixth, seventh and eighth complaints do not seek to call into question appraisals contained in the 2013, 2014 and 2015 appraisal reports. The Commission's plea of inadmissibility must therefore be rejected to that extent.
- 268 In the second place, as regards the first complaint, the applicant relies on appraisals contained in the 2014 appraisal report relating to her involvement in the working groups '*Organisation des réunions d'informations pour les parents*' and '*Cuisine*'.
- 269 However, it follows from the 2013 and 2015 appraisal reports, to which the contested decision refers, that, in 2013, the applicant's involvement in the working groups '*Cuisine*' and '*Organisation des réunions d'informations pour les parents*' was very limited and that, in 2015, her involvement in the working groups '*Journal du CPE*', '*Cuisine*' and '*Sport*' was insufficient, indeed non-existent.
- 270 In addition, it is apparent from the grounds of the contested decision set out on page 4 of the letter of 8 September 2016 that the 2015 appraisal report set as an objective for the applicant, for 2016, inter alia, that she should show more investment in achieving the tasks of the various working groups as contact person or substitute by preparing a (precise and factual) monthly table setting out the comments or the problems encountered, by making proposals or plans for physical activities during the school holidays and by preparing an annual report of the working group '*Sport*'. It is apparent, however, that no sign of improvement was found in the applicant's performance with respect to that objective, of which she had been aware since 5 April 2016.

- 271 Indeed, in point (b) on page 4 of the letter of 8 September 2016, the AECCE considered that, before the applicant went on parental leave on 15 July 2016, her involvement in the tasks to be carried out by the various working groups to which she belonged were characterised by the same lack of proactivity. In particular, the AECCE took issue with the applicant for not having taken the initiative to prepare the monthly table setting out the problems encountered in the group ‘*Cuisine*’, for not having been actively involved in the working group ‘*Sport*’ and for not having provided the annual reports for the groups ‘*Cuisine*’ and ‘*Journal du CPE*’ before going on parental leave, in spite of being asked to do so by her Head of Unit on 26 May 2016.
- 272 Thus, the fact that the applicant demonstrated, in 2014, the involvement required of her in the working groups of which she was a member has no impact on the finding which appears on page 1, in point (a) on page 3 and in point (b) on page 4 of the letter of 8 September 2016. That finding relates to the applicant’s lack of involvement in the working groups to which she belonged in 2013 and 2015 and for the period from 5 April to 15 July 2016.
- 273 Consequently, the applicant has not shown that the grounds of the contested decision based on her lack of involvement in the working groups of which she was a member in 2013, 2015 and part of 2016 were vitiated by a manifest error of assessment and the present complaint must therefore be rejected as unfounded.
- 274 In the third place, by the sixth complaint, the applicant maintains that the contested decision is vitiated by an error of fact, since she sent the draft Christmas 2015 newsletter to those responsible for validating that draft on 22 January 2016 and not in July 2016. She explains that a computer malfunction caused the delay in the transmission of her email to which that draft newsletter was attached and that the delay in its publication is attributable to two of her colleagues and her immediate superior.
- 275 In that regard, it is apparent from the grounds of the contested decision set out on page 4 of the letter of 8 September 2016 that the 2015 appraisal report set as an objective for the applicant, for 2016, inter alia, that she was to show greater involvement in achieving the tasks of the various working groups as contact person or substitute by compiling and distributing three CPE newsletters. According to that ground, no sign of improvement had been found in the applicant’s performance in relation to that objective, of which she had been aware since 5 April 2016.
- 276 In particular, in point (b) on page 4 of the letter of 8 September 2016, the AECCE took issue with the applicant for having sent, on 18 July 2016, the Christmas 2015 newsletter, which her superiors considered to be no longer relevant.
- 277 In that regard, first, it should be noted that the applicant refers to an email which she claims to have sent on 22 January 2016 and a copy of which she has produced as an annex to her application.
- 278 However, as the Commission notes, that document is not sufficiently probative, since, while that email includes the message ‘I am attaching our draft Christmas Special Edition newsletter for printing’ and a reference to an attached document entitled ‘Le petit journal garderie NOEL.edition specialdocx’, it is also stated that the ‘Carnival newsletter will follow as soon as possible’, although Carnival took place that year in February.
- 279 Second, the Commission produced an email stating 18 July 2016 as the date on which it was sent, from the applicant and to the same addressees, and containing exactly the same message as that contained in the email on which the applicant relies.

- 280 Third, although the applicant maintains that the email whereby she sent the draft Christmas 2015 newsletter to her colleagues did not reach its addressees because of a computer malfunction, she provides no evidence to support that assertion.
- 281 Fourth, the applicant maintains that the publication of the Christmas 2015 newsletter, after it was sent on 22 January 2016, was delayed because of two of her colleagues, then because of the coordinator at the CPE at Kirchberg, Luxembourg, which explains why she sent the draft Christmas 2015 newsletter to her immediate superior twice.
- 282 However, the applicant provides no evidence in support of her assertions, which, moreover, are contradicted in part by the documents on the file.
- 283 It should be noted that the name of one of the two colleagues referred to in paragraph 281 above does not appear either in the list of addressees of the email dated 22 January 2016 on which the applicant relies or in the composition of the working group '*Journal du CPE*' produced by the applicant.
- 284 In addition, although the applicant maintains that the draft Christmas 2015 newsletter was to be validated by the coordinator at the CPE Kirchberg, both the email dated 22 January 2016, on which she relies, and the email dated 18 July 2016, produced by the Commission, mention that person only as being copied in to those emails, while the addressees were three other persons whom the applicant claims to have been members of the working group '*Journal du CPE*'.
- 285 Thus, that circumstance is of such a kind as to support the Commission's claims that the draft Christmas 2015 newsletter did not have to be validated by the coordinator at the CPE Kirchberg, but only by the other members of the working group '*Journal du CPE*'.
- 286 In those circumstances, the applicant has not adduced evidence capable of invalidating the evidence adduced by the Commission, according to which she sent the members of the working group '*Journal du CPE*' the draft Christmas 2015 newsletter, for validation, only on 18 July 2016.
- 287 Consequently, the present complaint must be rejected as unfounded.
- 288 In the fourth place, by the seventh complaint, the applicant maintains that the failure to communicate the educational activities plan in respect of which she is criticised for 2016 does not mean that such a plan did not exist, although, previously, the educational activities plan had not been formalised. In addition, she maintains that it is necessary to question the need for a staff member who is going on parental leave to prepare a plan of educational activities for the period during which she will be absent from the service, in so far as such a plan must be adapted to the children being cared for and personalised.
- 289 In that regard, it follows from the grounds of the contested decision set out on page 4 of the letter of 8 September 2016 that the 2015 appraisal report set as an objective for the applicant for 2016, inter alia, the preparation of a table of educational activities. In point (a) on page 4 of that letter, the AECCE took issue with the applicant for not having provided that table before going on parental leave on 15 July 2016, in spite of having been reminded to do so on 26 May 2016 and in spite of the fact that the applicant had 112.5 flexible hours to prepare that table, or the equivalent of 14 working days.

- 290 The applicant's claims that the preparation of a table of educational activities did not previously correspond to a formalised practice and, moreover, that such a table was neither necessary nor appropriate since she had expected to go on parental leave cannot validly call into question the compulsory nature of the objective of preparing that table that was set for her in the 2015 appraisal report, and of which she does not deny having been aware as early as 5 April 2016.
- 291 It is, moreover, apparent from an email sent to the applicant by the Head of Unit on 26 May 2016 that the Head of Unit asked her to prepare the table of educational activities with a view to preparing for the 2016/2017 school year, following a model attached to that email. Furthermore, the Head of Unit reminded her that that planning exercise had to be done every school year, in accordance with an instruction implemented since 2014. Lastly, that table of educational activities was to serve as a working basis for the person who was to assume responsibility, in September 2016, for the group of children assigned to the applicant for the 2016/2017 school year, pending her return from parental leave.
- 292 Thus, it should be borne in mind that the first paragraph of Article 21 of the Staff Regulations, applicable by analogy to contract staff pursuant to Articles 11 and 81 of the CEOS, provides that 'an official, whatever his rank, shall assist and tender advice to his superiors; he shall be responsible for the performance of the duties assigned to him'.
- 293 In accordance with Article 21a of the Staff Regulations, also applicable by analogy to contract staff pursuant to Articles 11 and 81 of the CEOS, an official may ignore the duty of obedience laid down in Article 21 of the Staff Regulations only if the order addressed to him or her by the hierarchical authority immediately above is manifestly illegal or constitutes a breach of the relevant safety standards.
- 294 In the present case, the applicant does not show or even claim that the instruction given to her to prepare a table of educational activities before going on parental leave was manifestly illegal or constituted a breach of the relevant safety standards.
- 295 In those circumstances, the AECCE did not make a manifest error of assessment when it considered that the fact that the applicant had not sent her immediate superior, before going on parental leave, the table of educational activities which her immediate superior had asked her to prepare constituted inappropriate conduct on the applicant's part and could be included in the grounds of the contested decision.
- 296 Consequently, the present complaint must be rejected as unfounded.
- 297 In the fifth and last place, by the eighth complaint, the applicant maintains, in essence, that the AECCE could not, without making a manifest error of assessment, determine whether the objectives set for 2016 had been achieved when she had been present for only two months.
- 298 However, as the Court of Justice held in paragraph 28 of the judgment on appeal, it follows explicitly from the letter of 8 September 2016 that, in its general assessment of the way the applicant had taken those objectives into account, the AECCE merely found that there had been no sign of improvement in her performance in that respect.
- 299 Although the AECCE did indeed take issue with the applicant for not having met in full the first objective which had been set for her in her 2015 appraisal report, namely the preparation of a table of educational activities, the same does not apply to the other two objectives consisting,

first, in making greater investment in achieving the tasks of the various working groups in which she participated and, second, in planning her parental leave sufficiently in advance (see, to that effect, judgment on appeal, paragraph 29).

- 300 Furthermore, as regards, more particularly, the first objective, relating to the preparation of the table of educational activities, of which the applicant does not deny having been aware on 5 April 2016, she does not prove or even claim that she did not have time to achieve it before going on parental leave on 15 July 2016, while the contested decision states that she had time available to prepare that table equivalent to 14 working days.
- 301 In those circumstances, the applicant has not established that the AECCE had made a manifest error of assessment in finding, at the end of a period of around three months, that she had not met the first objective set for her in the 2015 appraisal report, relating to the preparation of a table of educational activities.
- 302 Consequently, the present complaint must be rejected as unfounded, as must this part of the plea in its entirety.

(e) The fourth part of the fourth plea: manifest error of assessment vitiating the ground linked with the failure to inform the applicant's immediate superiors and colleagues that she would be taking part in certain meetings of the CCP and the CLP

- 303 By this part of the plea, the applicant puts forward, in essence, two complaints. First, she maintains that no provision of EU law required her to warn her work colleagues that she would be taking part in the meetings of the CCP and the CLP meetings to which she was invited. Second, she claims that she always informed her immediate superiors in advance of the meetings in which she had to take part because of her mandate as staff delegate, that her superiors had a calendar of CCP and CLP meetings and that she had been invited at the last minute to take part in the CCP meeting on 11 and 12 December 2014.
- 304 The Commission disputes the applicant's claims.
- 305 In that regard, it should be observed that the overall finding of incompetence which the AECCE made in the contested decision is based, inter alia, on the ground that the applicant did not always take the interests of the service into account when planning her activities connected with her mandate as staff representative.
- 306 In particular, in point (e) on page 2 of the letter of 8 September 2016, the AECCE took issue with the applicant for having informed her immediate superiors that she would be taking part on 26 February 2014 in a meeting connected with her trade union mandate only on the day before, at 17.26.
- 307 Furthermore, in point (f) on page 2 of the letter of 8 September 2016, the AECCE took issue with the applicant for not having informed her colleagues that she would be attending a CCP meeting on 9 December 2014.
- 308 Next, in point (g) on page 2 of the letter of 8 September 2016, the AECCE took issue with the applicant, first, for having informed her superiors that she would be taking part on 11 and 12 December 2014 in a plenary meeting of the CCP only on the day before and, second, for not having informed her colleagues that she would be doing so.

- 309 Lastly, in point (d) on page 5 of the letter of 8 September 2016, the AECCE took issue with the applicant for having informed her superiors and her colleagues that she would be taking part in the CCP meetings on 28 January and 24 May 2016 only on the day of those meetings.
- 310 As a preliminary point, it should be observed that the applicant does not dispute the reference made by the AECCE on page 2 of the letter of 8 September 2016 to the appraisal contained in the 2014 appraisal report, to the effect that she had not always taken the interests of the service into account when planning her trade union activities, but only the grounds of the contested decision set out in points (e) to (g) on page 2 of the letter of 8 September 2016, which do not reiterate an appraisal contained in the 2014 appraisal report.
- 311 Consequently, the line of argument developed by the applicant in this part of the plea cannot be regarded as calling into question an appraisal contained in 2014 appraisal report, which in the Commission's submission has become final.
- 312 In the first place, as regards the first complaint, and as stated in paragraph 173 above, an official or servant who is seconded on the basis of a union mandate or a mandate as staff representative must, in accordance with Article 60 of the Staff Regulations, obtain prior authorisation from his or her immediate superior in order to be absent from the service and to take part in the meetings to which he or she is invited on the basis of that mandate. There can be no derogation from the requirement to obtain prior authorisation laid down in Article 60 of the Staff Regulations except in case of sickness or accident, and not in case of participation in trade union activities or in meetings of a body representing the staff such as the CLP or the CCP.
- 313 In that context, as stated in paragraph 174 above, under point 3.1 of Article 7 of Decision C(2011) 3588 the applicant was required to inform her immediate superior 'in good time' that she had been invited to meetings of the CCP and the CLP, while her immediate superior could, where necessary, refuse to allow her to take part in those meetings, by a reasoned decision in writing.
- 314 However, first, it should be noted that neither Article 60 of the Staff Regulations nor Decision C(2011) 3588 requires a staff member with a union mandate or a mandate as staff representative to inform his or her colleagues that he or she will be taking part in the meetings connected with the exercise of that mandate.
- 315 Second, contrary to the Commission's contention, it does not follow from the documents on the file that the applicant was given a formal instruction by her superiors to advise her colleagues of her absences because of her participation in the meetings of the CLP and the CCP.
- 316 First of all, it is true that it follows from an email sent to the applicant by her Head of Unit on 6 September 2011 that the Head of Unit considered that the particular needs of the CPE and the nature of the applicant's duties did not allow her to take part systematically in the meetings connected with the exercise of her union mandate. By that email, the applicant was authorised to take part in trade union meetings on the twofold condition (i) that she made arrangements with the colleague with whom she was responsible for a group of children and (ii) that she advised the secretariat of the unit and the administrator of the nursery.
- 317 However, it is not apparent from the documents on the file that that instruction was renewed beyond the 2011/2012 school year and, in particular, after the applicant was designated a member of the CLP and the CCP during 2014.

- 318 In particular, although it follows from a note from the Head of Unit to the applicant dated 7 February 2017 that the implementation of her union mandate had been the subject of an arrangement with the president of the union of which the applicant was a member, it is not apparent that that arrangement, which was in force between 16 July 2011 and 1 April 2014, was renewed after that date.
- 319 Next, it is apparent from the email referred to in point (f) on page 2 of the letter of 8 September 2016 that, by that email, one of the applicant's colleagues informed the coordinator of the crèche at the CPE Mamer that she was surprised not to have been informed by the applicant of her absence on 9 December 2014. According to that email, the colleague asked that coordinator about the existence of a protocol on cooperation between colleagues.
- 320 Lastly, the documents to which the Commission refers do not support the existence of a formal instruction to the applicant to advise her colleagues of her absences due to her participation in meetings of the CLP and the CCP.
- 321 On that point, the 2014 appraisal report contains only a reference to the fact that the applicant had to systematically take account of the organisation of the service when she intended to take part in her trade union activities and that she had to avoid being absent in September.
- 322 Similarly, the email which the applicant sent to the functional mailbox of the CPE Mamer on 27 April 2015, and copied to certain of her colleagues, in which she set out her future absences in the following month does not suffice to establish the existence of a formal instruction to her to advise her colleagues systematically of her participation in the meetings of the CCP and the CLP.
- 323 Moreover, in a note of 15 July 2016 to which the Commission also refers, the applicant's Head of Unit considered that while the applicant, in her capacity as staff representative, was entitled to take part in a meeting of the CCP scheduled for December 2014 without prior authorisation, informing her immediate superiors and her colleagues sufficiently in advance was 'good practice'.
- 324 In those circumstances, the Commission has not established that the applicant had failed to comply with a formal instruction from her superiors in application of which she ought to have advised her colleagues that she would be taking part in meetings of the CCP and the CLP and had thus failed to fulfil the obligations of loyalty and obedience that result from Articles 11 and 21 of the Staff Regulations.
- 325 It follows from the foregoing that the applicant is correct to maintain that the AECCE vitiated the contested decision by a manifest error of assessment by considering that the failure to inform her colleagues in advance of her participation in the meetings of 9, 11 and 12 December 2014 and of 28 January and 24 May 2016 constituted inappropriate conduct on her part.
- 326 In the second place, as regards the second complaint in this part of the plea, first, it should be noted that the fact that the applicant's immediate superiors had a calendar of meetings of the CCP and the CLP did not absolve her from her obligation to seek authorisation for absence in order to take part in those meetings, in accordance with the first paragraph of Article 60 of the Staff Regulations.

327 Second, although the applicant claims that she always informed her superiors in advance of the meetings in which she took part under her mandate as staff delegate, she adduces no evidence capable of showing that, immediately on receipt of the invitations to the meetings referred to in the contested decision, she sought authorisation for absence allowing her superiors to make immediate provision for her replacement and to ensure the continuity of the service.

328 In particular, the applicant does not establish or even claim that she was invited at the last minute to the trade union meeting held on 26 February 2014.

329 Furthermore, it is apparent from the file that the meetings of the CCP on 11 and 12 December 2014 and on 28 January and 24 May 2016 were held in Brussels (Belgium), so that, having regard to the time involved, depending on the means of transport, in travelling between Luxembourg and Brussels, it is unlikely that the applicant was informed only on the day before or on the actual day of those meetings.

330 In those circumstances, the AECCE did not vitiate the contested decision by a manifest error of assessment by considering that the applicant's failure to inform her immediate superiors that she would be taking part in the meetings held on 26 February 2014, 11 and 12 December 2014 and 28 January and 24 May 2016 constituted inappropriate conduct on her part.

(f) The fifth part of the fourth plea: manifest error of assessment vitiating the ground relating to the late submission of the applicant's request to be returned to full-time work after being on medical part-time

331 By this part of the plea, the applicant maintains, in essence, that the ground of the contested decision which appears in point (h) on page 3 of the letter of 8 September 2016 is vitiated by a manifest error of assessment, in so far as the period during which she was authorised to work half time on medical grounds might have been extended, that her return to full-time work followed an initiative on her part and that that ground does not state precisely the criticism against her.

332 The Commission disputes the applicant's arguments.

333 In that regard, it should be borne in mind that, in point (h) on page 3 of the letter of 8 September 2016, the AECCE found that, after the applicant had worked half time on medical grounds from 17 November to 23 December 2014, the medical service had advised her to meet her immediate superior to organise her return to full-time work in January 2015. The AECCE also stated that the applicant had contacted her immediate superior only on 22 December 2014.

334 As a preliminary point, it should be noted that the ground set out in point (h) on page 3 of the letter of 8 September 2016 does not reproduce an appraisal that appears in the 2014 appraisal report, which in the Commission's submission has become final.

335 As regards the merits of the arguments developed in this part of the plea, first, it follows from the third to the fifth paragraphs of Article 59 of the Staff Regulations, which is applicable by analogy to contract staff pursuant to Articles 16 and 91 of the CEOS, that an official or member of the temporary or contract staff on sick leave may at any time be required to undergo a medical examination arranged by the institution, that if the finding made in that medical examination is that the official is able to carry out his or her duties, his or her absence is to be regarded as unjustified from the day of the examination, unless the official or staff member concerned

considers the conclusions of the medical examination arranged by the competent authority to be unjustified on medical grounds, in which case the official or staff member concerned, or a doctor acting on his or her behalf, may within two days submit to the institution a request that the matter be referred to an independent doctor for an opinion.

336 In the present case, it is apparent from the file that the applicant was authorised to work half time on medical grounds from 17 November 2014 and that, on 16 December 2014, the doctor carrying out the medical examination recommended that she should resume full-time work from January 2015.

337 However, it is not apparent either from the grounds of the contested decision or from the documents in the case file that, in contacting her employer on Monday 22 December 2014, in order to make the arrangements for her return to full-time work in January 2015, the applicant failed to observe a time limit laid down by a provision of EU law or an instruction from her superiors.

338 Second, while it is common ground that, on 22 December 2014, the *garderie* of the CPE was closed because of the Christmas leave period, it is not claimed by the Commission that the administration of the CPE did not maintain a permanent service during that period in order to ensure the continuity of the service, so that it is not apparent from the documents in the case file that the arrangements for the applicant's return to full-time work could not be made between 22 December 2014 and 5 January 2015.

339 Nor, third, is it apparent that a period of two weeks was not sufficient to arrange the applicant's return to full-time work.

340 Consequently, the applicant is correct to maintain that, in relying on the ground stated in point (h) on page 3 of the letter of 8 September 2016, the AECCE vitiated the contested decision by a manifest error of assessment.

(g) The sixth part of the fourth plea: manifest error of assessment vitiating the ground relating to a situation of conflict at the crèche of the CPE Mamer

341 By this part of the plea, the applicant maintains, in essence, that the ground stated in point (f) on page 4 of the letter of 8 September 2016 is vitiated by a manifest error of assessment, in so far as the AECCE did not take into account the particularly hostile reception which she was given by certain of her colleagues upon her arrival at the crèche of the CPE Mamer.

342 In that regard, in point (f) on page 4 of the letter of 8 September 2016, the AECCE stated that some of the applicant's work colleagues had reported difficulties which they encountered in working with the applicant and that, in particular, in April 2015, the coordinator of the CPE Mamer had sent the applicant's Head of Unit an email stating that, although the applicant had just started working at the crèche of the CPE Mamer, there had already been 'great conflict', 'things [were going] wrong' and 'all the good atmosphere (morning) [was] gone'.

343 In the first place, it is apparent from the documents in the case file that in April 2015 the applicant was posted to the crèche of the CPE Mamer as a 'mobile educator'. It is also apparent from those documents that, by email of 23 April 2015 to the applicant's Head of Unit, with the subject 'Conflict at the *garderie*', the coordinator of the CPE Mamer stated that, although the applicant had just started working at the CPE Mamer, there had already been a great conflict, things were

going wrong, all the good atmosphere in the mornings at the nursery had disappeared and one of the applicant's colleagues was crying while another was yelling on the telephone. It was also stated that the coordinator of the CPE Mamer and one of her colleagues had done their best to calm the situation, that, in particular, the coordinator had spent more than an hour with the applicant while the colleague in question had spoken to the other colleagues and that it was extremely urgent to hold a meeting with everyone before they 'kill each other'.

- 344 However, in the absence of more precise information about the cause of the situation of conflict described in point (f) on page 4 of the letter of 8 September 2016 and evidenced by the email of 23 April 2015 referred to in paragraph 343 above, it is not apparent either from that email or from the other documents in the case file that responsibility for the conflict was exclusively or mainly attributable to the applicant.
- 345 In the second place, it must be noted that the documents to which the Commission refers do not contain sufficiently probative material to substantiate that the applicant was mainly responsible for causing the conflict at the crèche of the CPE Mamer on 23 April 2015.
- 346 The content of the email from one of the applicant's colleagues dated 9 December 2014, forwarded by the coordinator of the CPE Mamer on the same day, sheds no light on the causes of the situation of conflict in the crèche of the CPE Mamer on 23 April 2015.
- 347 The same applies to the exchange of emails on 25 June 2015 between the applicant's Head of Unit and the coordinator of the CPE Mamer, which mentions only the difficulties which the coordinator faced in replacing the applicant on 24 and 25 June 2015, owing to applicant's absence which was announced only on the morning of 24 June 2015.
- 348 Likewise, the statements of the coordinator and the administrator of the CPE Mamer and of the applicant's Head of Unit, all dated 18 December 2018, state, in general terms, that certain colleagues reported to them, directly and on several occasions, their difficulties in working calmly with the applicant, but without mentioning the situation of conflict within the crèche of the CPE Mamer on 23 April 2015.
- 349 Lastly, although the Commission also refers to an email of 21 October 2015 from a parent of a child who had been in the applicant's care in the 'garderie' of the CPE Kirchberg during the 2014/2015 school year, that email gives no indication of the causes of the situation of conflict in the crèche of the CPE Mamer on 23 April 2015.
- 350 Consequently, the applicant is correct to maintain that, in relying on the ground set out in point (f) on page 4 of the letter of 8 September 2016, the AECCE vitiated the contested decision by a manifest error of assessment.

(h) The seventh part of the fourth plea: manifest error of assessment vitiating the overall finding of the applicant's incompetence

- 351 This part of the plea consists of five complaints, alleging, first, lack of repetition of the applicant's alleged misconduct from one year to another in her appraisal reports; second, lack of objectivity in the appraisals in the 2015 appraisal report; third, that a considerable time has elapsed since the facts alleged to have occurred in 2014 and 2015; fourth, lack of misconduct or negligence by the

applicant when she was in charge of the children entrusted to her; and, fifth, failure by the Commission to take into account the length of the applicant's service and of the fact that she had never been the subject of a reprimand or a warning.

- 352 In the first place, it is necessary, before examining the complaints referred to in paragraph 351 above, and having regard to the examination of the third and fourth pleas in paragraphs 73 to 350 above, to determine whether the illegalities found by the Court when it examined those pleas entail the annulment of the contested decision or whether the grounds which the applicant has not disputed or the illegality of which she has not established are sufficient to constitute lawful justification for that decision, irrespective of the grounds which the Court found to be vitiated by illegality.
- 353 In that regard, first, as regards the applicant's conduct during 2013, she has not established the illegality of the grounds of the contested decision set out on page 1 of the letter of 8 September 2016, according to which the applicant had very little involvement in the working groups '*Cuisine*' and '*Organisation des réunions d'informations pour les parents*' and ought to have scheduled her activities connected with those working groups during 'flexible' hours, when she was not in charge of the children, while some parents had complained that she was absent from the classroom when they came to collect their children.
- 354 Nor, second, as regards the grounds of the contested decision related to the applicant's conduct in 2014, has she established the illegality of the appraisals in the 2014 appraisal report, which are set out on page 2 of the letter of 8 September 2016 and relate to the difficulty which she found in reconciling her personal life and her professional life and, furthermore, to the failure to take the interests of the service into account when planning the activities associated with her mandate as a staff representative.
- 355 Similarly, nor has the applicant demonstrated the illegality of the following grounds, which appear in points (b) to (g) on page 2 of the letter of 8 September 2016, namely, respectively: her irregular absences on 7 May and 16 June 2014; the fact that she had planned her absence on 2 May 2014 and had notified the service only on the day of her absence; her unjustified absence on 18 June 2014; the fact that she advised her immediate superiors of her absence on 26 February 2014, for the purpose of taking part in a trade union meeting, only on the day before at 17.26; the fact that, on 9 December 2014, she had rearranged the classroom without the consent of the colleague with whom she worked and had not put it back in its original state; and, lastly, the fact that she had advised her superiors that she would be absent on 11 and 12 December 2014, for the purpose of taking part in a plenary session of the CCP, only on the day before, 11 December 2014.
- 356 Third, as regards the applicant's conduct in 2015, she has not disputed the ground of the contested decision that appears on page 3 of the letter of 8 September 2016, according to which, in the context of the 2015 appraisal report, her overall performance was deemed unsatisfactory in 2015.
- 357 Similarly, nor has the applicant established the illegality of the following grounds, set out in points (a) to (e) and (i) on page 3 of the letter of 8 September 2016, namely, respectively: her insufficient or non-existent involvement in the working groups of which she was a member; her lack of proactivity when performing the duties of a 'mobile' educator; the failure to inform her superiors of the implementation of the objective of organising yoga activities; the failure to prepare a table of educational activities; the fact that the lack of continuity in looking after the group of children for whom she was responsible had given rise to two complaints from two parents; and, lastly, her lack of communication about certain of her absences in June 2015.

- 358 Fourth, as regards the applicant's conduct in 2016, she has not established the illegality of the ground of the contested decision which appears on page 4 of the letter of 8 September 2016 and according to which there was no sign of improvement in her performance in relation to the three objectives which she had been set for 2016.
- 359 Similarly, nor has the applicant established the illegality of the grounds of the contested decision which appear in points (a) and (b) on page 4 and in points (d) and (e) on page 5 of the letter of 8 September 2016, namely, respectively: the failure to provide the table of educational activities which she had been asked to prepare before going on parental leave on 15 July 2016; the failure to provide the monthly reports on collective catering at the CPE, the lack of active involvement in the working group '*Sport*', the failure to prepare the annual reports of the groups '*Cuisine*' and '*Journal du CPE*' before going on parental leave and the fact that she sent, in July 2016, the draft Christmas 2015 newsletter, which her superiors had considered to be no longer of relevance; the lack of proper communication to her superiors about her absences, in particular her absences on 28 January and 24 May 2016; and, lastly, her unjustified absences on 30 and 31 May 2016.
- 360 Thus, the contested decision contains a number of grounds the illegality of which has not been shown and which are sufficiently important to substantiate the overall finding of incompetence which the AECCE made, having regard, essentially, to the applicant's lack of involvement in the working groups of which she was a member in 2013, 2015 and 2016, her unjustified absences in 2014 and 2016, the failure to inform her superiors in good time that she would be taking part in certain meetings associated with her union mandate or her mandate as staff representative in 2014 and 2016 and her failure to comply with certain instructions given by her superiors in 2015 and 2016.
- 361 In those circumstances, the legality of the overall finding of incompetence on the applicant's part cannot be called into question by the error of law affecting the ground of the contested decision set out in point (c) on page 4 of the letter of 8 September 2016, relating to the dates and the period in respect of which the application for parental leave was made, or by the manifest errors of assessment that vitiate the grounds of the contested decision set out in points (a), (f) and (g) on page 2, and also point (h) on page 3, point (f) on page 4 and point (d) on page 5 of that letter, which concern, respectively: the applicant's last-minute request, for family reasons, for withdrawal of the authorisation to work part time; her failure to inform her colleagues that she would be taking part in a meeting of the CCP on 9 December 2014; her failure to inform her colleagues that she would be taking part in a meeting of the CCP on 11 and 12 December 2014; her request that arrangements be made for her return to full-time work after being on medical part-time; the situation of conflict at the crèche of the CPE Mamer on 23 April 2015; and, lastly, her failure to inform her colleagues that she would be taking part in the meetings of the CCP on 28 January and 24 May 2016.
- 362 Consequently, it follows from the foregoing that the illegalities found by the Court when it examined the third and fourth pleas in paragraphs 73 to 350 above are not such as to entail the annulment of the contested decision.
- 363 In the second place, as regards the first complaint in this part of the plea, the applicant claims that, in so far as the criticisms addressed in her appraisal reports are not the same from one year to another, the AECCE could not allege that her misconduct had continued over several years.

- 364 First of all, it must be borne in mind that, as Article 51 of the Staff Regulations does not apply, even by analogy, to contract staff, no provision of the CEOS requires the AECCE, when adopting a decision to terminate the contract of a member of the contract staff for incompetence, to base itself exclusively on repeated misconduct that would have to be recorded in the appraisal reports of the staff member concerned.
- 365 Thus, in the present case, the AECCE could properly base the contested decision not only on the applicant's conduct which had been the subject of certain appraisals in her appraisal reports for 2013, 2014 and 2015, but also on conduct not mentioned in those reports.
- 366 Next, it should be noted that certain conduct in respect of which the AECCE took issue with the applicant, whether or not it gave rise to appraisals in her appraisal reports, corresponds to the repetition of the same misconduct between 2013 and 2016.
- 367 That is the case, in particular, of the applicant's lack of involvement in the working groups of which she was a member, in 2013, 2015 and 2016, of her irregular absences in 2014 and 2016, of her failure to inform her superiors in good time that she would be taking part in meetings associated with her union mandate and her mandate as a staff representative, in 2014 and 2016, and her failure to comply with certain instructions, in particular the instruction requiring her to prepare a table of educational activities, in 2015 and in 2016.
- 368 Consequently, the applicant cannot validly maintain that the contested decision is vitiated by a manifest error of assessment in the absence of a repetition of the same misconduct from one year to another. This complaint must therefore be rejected as unfounded.
- 369 In the third place, as regards the second complaint in this part of the plea, it follows from paragraph 266 above that the applicant cannot challenge the 2015 appraisal report indirectly in the context of the present action against the contested decision, with regard to which that report played a preparatory role.
- 370 It should be pointed out that, by this complaint, the applicant seeks to call into question the objectivity of her 2015 appraisal report, in the light of the assessments made by the ad hoc group of persons on secondment and mandated persons of the Commission on the exercise of her mandate as a staff representative.
- 371 Consequently, this complaint must be rejected as inadmissible.
- 372 In the fourth place, as regards the third complaint in this part of the plea, based on the time that has elapsed since the facts alleged to have occurred in 2014 and 2015, it follows from paragraph 228 above and from the case-law cited in paragraphs 222 and 227 above that it is permissible for the AECCE to base a decision to dismiss a member of the temporary or contract staff for incompetence on facts established, as in the present case, over the three years preceding the adoption of such a decision.
- 373 Consequently, this complaint must be rejected as unfounded.
- 374 In the fifth place, as regards the fourth complaint in this part of the plea, the applicant claims that the contested decision does not rely on any misconduct or negligence on her part while she was looking after the children entrusted to her.

- 375 This complaint is based on the premiss that the contract of a member of the contract or temporary staff can be terminated on the ground of incompetence only where the staff member concerned has demonstrated misconduct or negligence in the exercise of his or her principal duties.
- 376 Although misconduct or negligence in the exercise of the principal duties entrusted to a member of the temporary or contract staff may, where appropriate, give rise to a disciplinary measure, the fact nevertheless remains that, in the absence of such misconduct or negligence, it is permissible for the AECCE to terminate the contract of a member of the temporary or contract staff on the ground of incompetence where, as in the present case, the general conduct of the staff member concerned, as a result of its inappropriate nature and the fact that it continued over several consecutive years, has negative repercussions on the smooth running of the employing institution.
- 377 Consequently, having regard to the erroneous nature of the premiss referred to in paragraph 375 above, this complaint cannot but be rejected.
- 378 In the sixth and last place, as regards the fifth complaint in this part of the plea, the applicant takes issue with the AECCE for not having taken into account her length of service or the fact that she was not the subject of a reprimand or warning.
- 379 However, as is apparent from paragraph 376 above, it is permissible for the AECCE to terminate the contract of a member of the temporary or contract staff on the ground of incompetence where, as in the present case, the general conduct of the staff member concerned, as a result of its inappropriate nature and the fact that it continued over several consecutive years, has negative repercussions on the smooth running of the employing institution.
- 380 Thus, the mere fact that, first, the applicant had six years of service before inappropriate conduct on her part became evident and that, second, she had never been the subjective of a disciplinary measure is not of such a kind as to establish the manifestly erroneous nature of the contested decision, when it is indisputable that, on a continuous basis between 2013 and 2016, the applicant, by her inappropriate conduct, had a negative effect on the smooth running of the CPE to which she was posted.
- 381 Consequently, it follows from all of the foregoing that this complaint must be rejected, as must this part of the plea and the fourth plea in its entirety.

...

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders UG and the European Commission to bear their own costs in the cases registered under numbers T-571/17 and C-249/20 P;**

3. Orders UG to bear her own costs and to pay a third of the costs incurred by the Commission in the case registered under the number T-571/17 RENV.

da Silva Passos

Valančius

Reine

Truchot

Sampol Pucurull

Delivered in open court in Luxembourg on 21 June 2023.

[Signatures]

ⁱ The wording of paragraph 188 of this document has been amended since it was first put online.