

ORDER OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (First Chamber)

15 April 2013 (*)

(Civil service – Officials – Retirement on grounds of invalidity – Article 78 of the Staff Regulations – Action in part manifestly inadmissible and in part manifestly unfounded)

In Case F-1/12,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

Henrik Andersen, former official of the Court of Auditors of the European Union, residing in Hals (Denmark), represented by S. Rodrigues, A. Blot and A. Tymen, lawyers,

applicant,

v

Court of Auditors of the European Union, represented by T. Kennedy, N. Scafarto and B. Schäfer, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

composed of H. Kreppel, President, E. Perillo and R. Barents (Rapporteur), Judges,

Registrar: W. Hakenberg,

makes the following

Order

- 1 By application received at the Registry of the Tribunal on 2 January 2012, Mr Andersen brought the present action seeking, essentially, the annulment of the decision of 21 January 2011 of the Secretary General of the Court of Auditors of the European Union rejecting his application for compensation for losses suffered as a result of his retirement, and the payment by the Court of Auditors of damages for that harm.

Legal context

- 2 Article 12a of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:
 1. Officials shall refrain from any form of psychological or sexual harassment.
 2. An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.

3. “Psychological harassment” means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.

4. “Sexual harassment” means conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment. Sexual harassment shall be treated as discrimination based on gender.’

3 Article 24, first paragraph, of the Staff Regulations provides:

‘The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.’

4 Article 53 of the Staff Regulations provides:

‘An official to whom the Invalidity Committee finds that the provisions of Article 78 apply shall automatically be retired on the last day of the month in which the appointing authority recognises his permanent incapacity to perform his duties.’

5 Article 73 of the Staff Regulations provides:

‘1. An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions [of the European Union] after consulting the Staff Regulations Committee. ...

2. The benefits payable shall be as follows:

...

(b) [i]n the event of total permanent invalidity:

[p]ayment to the official of a lump sum equal to eight times his annual basic salary calculated on the basis of the monthly amounts of salary received during the 12 months before the accident;

(c) [i]n the event of partial permanent invalidity:

[p]ayment to the official of a proportion of the sum provided for [in (b)], calculated by reference to the scale laid down in the rules referred to in paragraph 1 ...’

6 Article 78 of the Staff Regulations provides:

‘An official shall be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity allowance in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his function group.

Article 52 shall apply by analogy to recipients of an invalidity allowance. If the recipient of an invalidity allowance retires before the age of 65 without having reached the maximum pension entitlement, the general rules on retirement pensions shall be applied. The amount of the retirement pension shall be based on the salary for the grade and step occupied by the official when he became an invalid.

The invalidity allowance shall be equal to 70% of the official’s last basic salary. However, it may not be less than the minimum subsistence figure.

The invalidity allowance shall be subject to contributions to the pension scheme, calculated on the basis of that allowance.

Where the invalidity arises from an accident in the course of or in connection with the performance of an official's duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being, the invalidity allowance may not be less than 120% of the minimum subsistence figure. In such cases, moreover, contributions to the pension scheme shall be paid in full from the budget of the institution or body referred to in Article 1a.

- 7 Article 4 of Decision No 61-2006 of the Court of Auditors of 17 October 2006 on the protection of persons working at the Court of Auditors against harassment ('the decision on the protection of staff against harassment') provides:

'Resolving the conflict

The principal concern of a victim of any kind of harassment is to ensure that it stops. As a first step everybody should try to resolve the problem amicably. The alleged harasser may not actually be aware of the impact of his/her behaviour. In some cases, it may be sufficient for the alleged victim to explain to him/her clearly that the behaviour in question is undesirable, offensive, and potentially detrimental to the victim's health or performance at work. However, if it is too difficult for the alleged victim to take this step alone, he/she should know that the support network is available to help him/her find a solution on an informal basis. In any case, everything shall be done to protect the interests of the alleged victim, of the person against whom the complaint is made and of any witnesses.

(a) Informal procedure

In the first instance the alleged victim may try to resolve the problem amicably. If he/she considers that he/she has been the victim of any kind of harassment or that certain kinds of behaviour are inappropriate, he/she should frankly express his/her disapproval and not be afraid to make it clear that such behaviour is unacceptable.

The contact person could be the first person to contact for that purpose.

The alleged victim may also contact a line manager, the Welfare Officer, Medical Officer, the Human Resources Division, or a colleague.

...'

Factual background to the dispute

- 8 On 16 April 2004, the applicant, an official in grade B 4 at the Commission of the European Communities, was transferred to the Court of Auditors and appointed to an Administrator's post, at grade A 7, step 1, within Audit Group III, dealing with the performance of the TACIS programme in Russia.
- 9 On 10 December 2007, in his comments on his assessment made under the appraisal exercise for the period 2006/2007, the applicant alleged that he was the victim of psychological harassment on the part of his institution and requested that the institution take the necessary measures. On 14 December 2007, the Director of Human Resources of the Court of Auditors asked the applicant to follow the established procedures to contest his appraisal report and the rules and procedures laid down in the decision on the protection of staff against harassment.
- 10 By an email of 11 January 2008, the applicant repeated his comments on his appraisal, made on 10 December 2007, concerning the psychological harassment to which he claimed he was subject on the part of his institution. That email, registered as a complaint alleging psychological harassment, was rejected on 14 March 2008 by the Secretary General of the Court of Auditors.

- 11 On 27 April 2008, the applicant formally lodged a complaint with the President of the Court of Auditors concerning psychological harassment allegedly suffered during the period from 2004 to 2008, raising 21 points of conflict. By decision of 14 May 2008, the Secretary General of the Court of Auditors opened an administrative enquiry into that complaint and instructed Mr X., the Director of an Audit Group at the Court of Auditors, to conduct the enquiry.
- 12 The report of that administrative enquiry was delivered on 22 September 2008. The 21 points raised by the applicant in his complaint of 27 April 2008 were examined in it. That report concluded that a situation of psychological harassment within the meaning of Article 12a of the Staff Regulations had not been proven.
- 13 On 2 April 2009, the Member of the Court of Auditors designated by the President of that court as the appointing authority, in order to avoid a conflict of interest ('the ad hoc appointing authority'), concluded that it had not been proven that there had been psychological harassment within the meaning of Article 12a of the Staff Regulations and, consequently, rejected the complaint lodged by the applicant on 27 April 2008. However, he noted that relations between the applicant and his supervisors were strained.
- 14 Following the report of the administrative enquiry and the suggestion of the ad hoc appointing authority that an interview be arranged, on 22 April 2009, the Secretary General of the Court of Auditors invited the applicant to a meeting to examine together the measures to be taken to improve his working conditions. That meeting took place on 27 April 2009.
- 15 By letter of 29 October 2009 sent to the Secretary General of the Court of Auditors, the applicant claimed that he continued to be subject to psychological harassment and a lack of solicitude on the part of the Court of Auditors, in particular as regards his requests to spend his sick leave in his country of origin. The Secretary General of the Court of Auditors replied by letter of 10 December 2009.
- 16 On 3 March 2010, when the applicant had already been on sick leave during the administrative enquiry since 1 September 2008, leave which was to be extended until his retirement on grounds of invalidity, the Invalidity Commission concluded that the applicant should be considered to be suffering from total permanent invalidity preventing him from carrying out the duties for which he had been recruited. By decision of 5 March 2010, the applicant was retired on grounds of invalidity with effect from 31 March 2010 and granted an invalidity allowance in accordance with the third paragraph of Article 78 of the Staff Regulations.
- 17 Recognition of the occupational origin of the applicant's disease under Article 73 of the Staff Regulations was granted to him on 30 July 2010, following his request to that effect dated 26 March 2009. The applicant was awarded a lump sum of EUR 24 179.56, with his agreement.
- 18 On 11 October 2010, the applicant filed an application with the Court of Auditors for compensation for the harm suffered, in particular financially, because of his retirement on grounds of invalidity, which, he submitted, was a result of the unlawful conduct of the Court of Auditors. That application was rejected by the decision of the Secretary General of the Court of Auditors of 21 January 2011.
- 19 On 1 March 2011, the applicant submitted a complaint, in accordance with Article 90(2) of the Staff Regulations, against the decision of 21 January 2011 rejecting his application for compensation. That complaint was rejected by decision of 22 September 2011.

Forms of order sought

20 The applicant claims that the Tribunal should:

- annul the decision of 21 January 2011 rejecting his application for compensation for the loss suffered because of his retirement with entitlement to an invalidity allowance;

- if necessary, annul the decision of 22 September 2011 rejecting his complaint of 1 March 2011;
- award him the sum of EUR 1 184 421.06 as compensation for the material harm he has suffered;
- grant him the sum assessed *ex æquo et bono* at EUR 90 000 in compensation for the non-material harm he has suffered;
- order the Court of Auditors to pay the whole of the costs.

21 The Court of Auditors contends that the Tribunal should:

- declare the present application inadmissible;
- in the alternative, dismiss the application as unfounded;
- reject the applicant's applications for compensation;
- order the applicant to pay the costs.

Law

22 Under Article 76 of the Rules of Procedure, where an action is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, the Tribunal may, without taking further steps in the proceedings, give a decision by way of reasoned order.

23 In the present case, the Tribunal considers that it has sufficient information from the documents in the file to rule on the admissibility and the merits of the action and has decided to give a decision, without taking further steps in the proceedings, by way of reasoned order.

The claims for annulment

24 First of all, it must be recalled that it has been consistently held in staff cases that an institution's decision rejecting a claim for compensation forms an integral part of the preliminary administrative procedure which precedes an action for damages before the Tribunal and, consequently, a claim for annulment cannot be assessed in isolation from a claim for damages. The measure setting out the position adopted by the institution during the pre-litigation stage only has the effect of allowing the party who has suffered damage to apply to the Tribunal for compensation (see judgment of 5 December 2002 in Case T-209/99 *Hoyer v Commission*, paragraph 32 and the case-law cited).

25 Thus, there is no need to give a separate ruling on the claims for annulment brought by the applicant, since the sole purpose of the present action is to obtain compensation for the harm that the applicant considers himself to have suffered as a result of unlawful conduct by the Court of Auditors.

The claims for damages

26 In support of his action, the applicant relies on two heads of claim, alleging, first, maladministration and the infringement of the duties to have regard for the interests of officials and of due care and, secondly, an abuse of powers and an abuse of process.

The first head of claim, alleging maladministration and infringement of the duties to have regard for the interests of officials and of due care

27 First of all, it is settled case-law that an action for damages is not admissible where the official seeks to obtain the same result as he would have obtained had he been successful in an action for annulment which

he failed to commence in due time (judgment of 14 February 1989 in Case 346/87 *Bossi v Commission*, paragraph 32; judgment of 28 October 2010 in Case F-84/08 *Cerafogli v ECB*, paragraph 50).

28 It is common ground that the applicant has not challenged the decisions of 14 December 2007, 14 March 2008, 2 April 2009 and 10 December 2009 rejecting his complaints and claims.

29 It must thus be examined whether, and to what extent, the facts and arguments relied on by the applicant to establish the liability of the Court of Auditors towards him were the subject-matter of the rejection decisions referred to in the preceding paragraph and against which he has not brought an action. As the Court of Auditors has submitted, where this is the case, the applicant is seeking to circumvent the inadmissibility, on the ground that he failed to bring an action against those rejection decisions, of the claim alleging those decisions are unlawful.

30 Such a question, which concerns the time-limits for bringing an action, must be raised by the court or tribunal of its own motion (judgment of 5 June 1980 in Case 108/79 *Belfiore v Commission*, paragraph 3; judgment of 13 December 1990 in Case T-29/89 *Moritz v Commission*, paragraph 13).

31 First of all, the applicant criticises the Court of Auditors for not having taken measures either following his allegation of psychological harassment made on 10 December 2007 in his comments on his appraisal under the 2006/2007 appraisal procedure or following his email of 11 January 2008. In this connection, it is sufficient to note that the position adopted by the Court of Auditors is included in its responses given on 14 December 2007 and 14 March 2008, and the applicant did not bring legal proceedings against those decisions adopting a position. Furthermore, that point was examined in the administrative enquiry.

32 So far as concerns the applicant's argument that the Court of Auditors did not take measures to separate him from his hierarchical superior in order to protect him against alleged psychological harassment, it must be stated that his superior was transferred to another Audit Group from 1 May 2008. The applicant's argument that that transfer was in fact merely the consequence of the application of the Court of Auditor's internal rules on staff mobility is irrelevant in this regard.

33 Secondly, the applicant submits that the Court of Auditors failed to fulfil its obligations in a certain number of cases: by failing to take the necessary measures following his complaints and communications on the approval process in the ASSYST documentary management structure; in the case of the Russian and Albanian files; by failing to respond to his communications concerning the conduct of the Russian Court of Auditors; concerning an alleged breach in a recruitment procedure; on account of the existence, in addition to his staff file, of a staff file concerning him held by his hierarchical superior; by misplaced comments made about him and in no longer entrusting a full workload to him.

34 It must be pointed out in this regard that each of the cases referred to in the previous paragraph was examined in the administrative enquiry, which concluded that, although there had been some inappropriate behaviour, a situation of psychological harassment within the meaning of Article 12a of the Staff Regulations had not been proven. It must be stated that the applicant did not challenge the rejection of his complaint, lodged on 27 April 2008, by the decision of the ad hoc appointing authority of 2 April 2009.

35 It follows from the foregoing that the abovementioned facts and arguments relied on by the applicant to demonstrate maladministration, failure to have regard for the interests of officials and an infringement by the Court of Auditors of its obligation of due care are the same as those which were the subject-matter of the four decisions rejecting the applicant's complaints and claims and referred to in paragraph 28 above, against which the applicant has not brought legal proceedings. It follows that that part of his action is manifestly inadmissible.

36 The applicant also criticises the Court of Auditors for not having implemented the network for combating harassment ('personnes d'écoute') created by the decision on the protection of staff against harassment, either at the time he filed his complaint or when he went on sick leave. He was consequently unable to benefit from this support, even though he felt he was being harassed.

- 37 That argument is manifestly inadmissible. The decision on the protection of staff against harassment provides, in addition to the formal procedure on harassment provided for at the Court of Auditors, for the implementation of an informal procedure intended to prevent and to attempt to resolve amicably situations of conflict. That decision had already been implemented on 6 November 2006, with the exception of the ‘personnes d’écoute’ system, and therefore offered the applicant the possibility of contacting other persons such as the Welfare Officer or the Medical Officer.
- 38 Under the first head of claim, the applicant also alleges that the Court of Auditors failed to fulfil its obligation to have regard for the interests of officials on the grounds that, since 1 May 2008 and until he went on sick leave, he was obliged to work under the supervision of an official in the assistant function group, whereas he was in the administrator function group and held grade AD 8.
- 39 Without it being necessary to rule on whether this is an act adversely affecting an official, that argument is manifestly unfounded. As the Court of Auditors has submitted, without being contradicted by the applicant, the person concerned was acting as head of unit, following the transfer of the head of unit who was the applicant’s hierarchical superior.
- 40 Lastly, the applicant alleges that the Court of Auditors failed to fulfil its obligations to have regard for the interests of officials and of due care on the grounds that he was not treated with respect after he went on sick leave. He claims in this connection that the Court of Auditors did not answer several requests submitted under the second paragraph of Article 60 of the Staff Regulations for permission to spend his sick leave in his country of origin and did not pay him the correct amount of invalidity allowance.
- 41 The arguments submitted by the applicant as regards the infringement by the Court of Auditors of its obligations to have regard for the interests of officials and of due care are manifestly unfounded. So far as concerns its obligation of due care, as the Court of Auditors has observed, it was normal practice for requests submitted under the second paragraph of Article 60 of the Staff Regulations to be granted automatically and only refusals of permission were communicated in writing. As regards its duty to have regard for the interests of officials, the Director of Human Resources of the Court of Auditors, by an email of 20 February 2009, apologised to the applicant for not having replied to him. As regards the errors in the calculation of the applicant’s invalidity allowance, it is sufficient to observe that the Secretary General, by his note of 22 December 2010, replied to the applicant’s emails, dated 8 and 15 December 2010 respectively, and instructed the relevant departments to make a detailed check of the applicant’s entitlements and the amounts paid.
- 42 It follows that the first head of claim must be rejected as manifestly inadmissible as regards the facts and arguments which were the subject-matter of the Court of Auditor’s decisions rejecting the applicant’s complaints, against which he has not brought legal proceedings, and as manifestly lacking any foundation in law as to the remainder.

The second head of claim, alleging abuse of powers and an abuse of process

- 43 The applicant alleges that the Court of Auditors committed an abuse of powers and an abuse of process in attempting to delay the procedure provided for in the fifth paragraph of Article 78 of the Staff Regulations, after the Court of Auditors was informed, on 31 August 2010, that his disease had been recognised as an occupational disease.
- 44 It must be noted in this connection that the applicant refused to allow his medical file to be forwarded from the Commission to the Court of Auditors, with the consequence that the Invalidity Commission, meeting on 20 May 2011, was unable to adopt a view on the applicant’s request for the implementation of the fifth paragraph of Article 78 of the Staff Regulations. The Invalidity Commission was not able to decide to recognise that the applicant’s invalidity results from his occupational disease, in accordance with the fifth paragraph of Article 78 of the Staff Regulations, until 23 March 2012 when the latter agreed to allow his medical file to be forwarded.

- 45 Lastly, the applicant submits that the Secretary General of the Court of Auditors attempted to circumvent the procedures for implementing Articles 73 and 78 of the Staff Regulations by adopting, on 29 October 2010, Decision No 81-2010 seeking to withdraw from the Commission the delegated powers of the appointing authority as regards the cover for risks of disease and for risks of accident and occupational disease ‘in so far as it concerns him’.
- 46 That argument misses the point. As is apparent from two notes of the Secretary General of the Court of Auditors to the applicant, of 12 November and 7 December 2010, the decision of 29 October 2010 was taken with a view to safeguarding the applicant’s interests and in the light of contradictory information received from the Commission concerning the procedure for recognition of the applicant’s disease as an occupational disease. It is also common ground that, after being in touch with the Commission regarding this matter, the Secretary General withdrew the decision of 29 October 2010 with effect from 12 November 2010, so that it had no effect on the management of the applicant’s file, as is apparent from a letter of the Deputy Director General of the Commission’s Human Resources and Security Directorate General sent by email to the applicant on 17 March 2011. Furthermore, in his note of 7 December 2010, the Secretary General of the Court of Auditors drew to the applicant’s attention his right of appeal against the response given to his requests of 11 and 28 October 2010 and of 15, 17 and 25 November 2010, which the applicant did not make use of.
- 47 Lastly, the applicant alleges that the Court of Auditors made use of the procedure for retirement on the grounds of invalidity so as not to have to continue to employ him.
- 48 It is sufficient to note in this connection that the applicant did not challenge the decision of 5 March 2010 on his retirement on grounds of invalidity from 31 March 2010, with entitlement to an invalidity allowance in accordance with the third paragraph of Article 78 of the Staff Regulations.
- 49 Therefore, the second head of claim must be rejected as manifestly unfounded.
- 50 It follows from the foregoing that the action must be dismissed as, in part, manifestly inadmissible and, in part, manifestly unfounded.

Costs

- 51 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that that party is not to be ordered to pay any.
- 52 It follows from the reasoning set out above that the applicant has failed in his action. Furthermore, in its submissions the Court of Auditors has expressly claimed that the applicant should be ordered to pay the costs. As the circumstances of the present case do not justify the application of the provisions of Article 87(2) of the Rules of Procedure, the applicant must bear his own costs and is ordered to pay the costs incurred by the Court of Auditors.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby orders:

- 1. The action is dismissed as in part manifestly inadmissible and in part manifestly unfounded.**
- 2. Mr Andersen shall bear his own costs and pay the costs incurred by the Court of Auditors of the European Union.**

Luxembourg, 15 April 2013.

W. Hakenberg

H. Kreppel

Registrar

President

* Language of the case: English.