



Union  
Syndicale  
Bruxelles

December 2021

## NEWSLETTER N°22

# Staff Matters

Legal News from Union Syndicale

In this newsletter we report about a case in which the Court annulled the Commission's decision to terminate a contract of indefinite duration. The annual appraisal reports, upon which the Commission had also based its decision, did not contain a specific reference to an unjustified absence of the applicant. The Court was further of the opinion that the applicant was not given a chance to restore the relationship of trust with the service within the given, short period of time.

You can continue to send us your suggestions for new subjects or your questions and comments :  
**[StaffMatters@unionsyndicale.eu](mailto:StaffMatters@unionsyndicale.eu)**

Contract of indefinite duration  
— Termination — Manifest error of assessment — Accuracy of the facts  
— Material harm — Duty of care

Court quashes contract termination: Reasons for termination need to be materially correct

Case T-571/17, UG / Commission, judgment of 2 April 2020 and order of 13 November 2020

### Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

## Facts of the Case and Procedure

The applicant was engaged as contract agent attributed to the Commission's Office for 'Infrastructure and Logistics in Luxembourg' (OIL) in the function of a childcare worker. After a first renewal, her contract was extended for an indefinite duration. The applicant was then exempted at 50% from her childcare work, in order to perform the function of political secretary at a trade union. The applicant's appraisal reports for 2013 and 2014 both concluded that her performance was satisfactory. The applicant was elected as member of the local staff committee in 2015 and appointed to sit on the central staff committee. Her appraisal report for 2015 concluded that her performance was unsatisfactory. The applicant lodged an appeal against that report. In 2016, the applicant was placed on parental leave for a period of four months, which was later extended. In September 2016, the Commission informed the applicant of the intention to terminate her employment contract, indicating problems relating to the applicant's conduct in service and her attitude at work; further it indicated that there had been no improvement in performance and pointed to negative consequences of her conduct on the continuity and quality of the service to children and parents. In October 2016, the Commission terminated the applicant's contract with a notice of nine months. In her court action, the applicant sought annulment of the decision terminating her employment contract; secondly, she claimed compensation for the material harm suffered following that decision and for the non-material harm suffered as a result of the degrading treatment she claims to have been suffered because of her trade union activity and her parental leave.



## The Decision of the Court and Reasoning

In its judgment, the General Court annulled the decision of the Commission terminating the applicant's contract of indefinite duration. It ordered the parties to forward to the Court a joint agreement on the quantified amount of financial compensation. The parties have hence agreed extra-court to an amount of 68.000 € to be paid to the applicant (independent of her pension rights and costs of the procedure).

1.) On questions of the admissibility of the application, the Court reminds that merely preparatory acts (here the announcement of the intention to terminate the contract) can neither directly nor incidentally be challenged at the court. As to the sought annulment of the negative appraisal report for the year 2015, although the applicant had introduced an appeal against that appraisal report (Art. 43 SR), she had not filed a complaint (Art. 90, 91(2) SR) against it. The request to annul the report was therefore inadmissible.

2.) The applicant pleaded that the Commission had violated Art. 42a SR, in that she was dismissed while she was on parental leave, further she claimed a violation of the disciplinary procedure provided for in Annex IX SR, a violation of the right to be heard, a lack of real and serious reasons for her dismissal, a violation of the obligation to state reasons, a misuse of power in that the dismissal was allegedly motivated by the applicant's parental leave and by her trade union activities, finally an infringement of the principle of proportionality.

The Court states that the Commission has a **broad discretion** when terminating a contract under Art. 47 lit c CEOS, and that the control of this decision by the judge is limited to the verification of the absence of manifest error of assessment or misuse of powers. Where the administration refers to **specific facts**, the judge must verify that these reasons are **materially correct**. Further, the Court stated, that when deciding on the situation of a staff member, the authority has to take into consideration all the factors which are likely to determine its decision, and in particular the interests of the agent concerned. This results from the administration's **duty of care**, which reflects the balance of reciprocal rights and obligations that the statute and, by analogy, the CEOS have created in relations between the authority and its agents.

The Court then assessed the annual appraisal reports and the objectives set to the applicant thereafter. It concluded that the period provided for the applicant to improve her performance within the ca. three months since she became aware of the objectives, was too short for the applicant to allow her to rebuild the relationship of trust with her service and to fulfil the objectives. The decision to terminate the contract was thus vitiated by



an error. While the appraisal reports did not contain any precise reference to an unjustified absence or miscommunication, only the letter, which had set the objectives, referred to one incident in the year 2015.

The Court concluded that since the appraisal reports for the years 2014 and 2015 did **not contain any specific reference** to an unjustified absence of the applicant in those years, and the fact that the applicant, **within the short period allowed**, was not able to rebuild the relationship of trust with the service and to meet its objectives constitutes a **manifest error of assessment**, leading to the annulment of the decision to terminate the contract.

3.) As to the Commission's liability for **material harm**, the Court reminded that when the Union acts as an employer, then it is subject to increased liability, manifested by the obligation to repair the damage caused to its staff by any illegality committed in its capacity as employer. As to the condition relating to the reality of the damage, the Union can only be held liable if the applicant has **actually suffered a real and certain damage**. The Court then invited the parties to find amongst themselves an agreement about the quantified compensation, while providing some guidelines to the parties of how to determine the material harm suffered by the applicant.

4.) In respect to damages for **immaterial harm** suffered by the applicant, the Court decided that this claim was not related to the decision to terminate her contract, but to the allegedly degrading and discriminatory treatment of the applicant by the administration, due to her trade union activity and the fact that she took parental leave. The applicant, said the Court, had lodged a complaint only against the termination of her leave, not in relation to a degrading and discriminatory treatment. Therefore the claim for damages for immaterial harm was dismissed as inadmissible. Also the request to address injunctions upon the administration or to make legal statements had to be dismissed as inadmissible.

## Comments:

1. The general line of case law to assess the merits in an annulment action is to ask whether an act of the administration is a manifest error of assessment or a misuse of power. These two constellations would justify annulment. According to case law, an error is manifest "where it is easily recognisable and can be readily detected" (cf. Case F-104/09, para. 35 – Canga Fano/Council).

2. The Court, in the present case, scrutinizes the facts underlying the dismissal and the way they are presented in the dismissal decision. If a dismissal does not contain specific reference to facts, it would not be substantiated and not in line with basic requirements of legality and certainty of administrative acts. This would be an easily recognisable error and is meant where the Court demands a **materially correct** reasoning. The question whether a period of three months is sufficient to show improvement in performance may also be decided differently.

3. The Commission has filed an appeal against this decision of the General Court (C-249/20 P) to the ECJ, and based it on two pleas: first, that the General Court had distorted the facts and, secondly, that the Court had not applied the required criterion of "manifest error of assessment", but instead only determined the existence of an "error" in the decision to terminate the applicant's contract.

4. The Court did not decide this case relying on the applicant's function in the staff committee (neither her affiliation to a trade union) or her being on parental leave. Such personal circumstances might - under national labour law - have a protective effect and may fall under explicit prohibitions of contract termination. Under EU civil service law the principle of duty of care may serve to solve these constellations: it can oblige the administration to respect the personal situation of an agent and take her/his interests duly into account.

5. The recommendation to staff members is (in any case, but particularly if the above presented Court decision is upheld in the appeal) to carefully check that the reasoning put forward for a dismissal decision is substantially and accurately referring to the facts and whether these facts actually provide evidence to justify a dismissal. Secondly, it deserves an accurate check if there has been a period destined to restore trust and if this period actually allowed for enough opportunities for the agent to do so.