JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
16 March 2004 *

(Staff of the European Central Bank – Defamation – Racial discrimination – Disciplinary procedure – Rights of the defence – Characterisation in law of the facts – Claim for compensation)

In Case T-11/03,

Elizabeth Afari, represented by G. Vandersanden and L. Levi, lawyers,

applicant,

v

European Central Bank, represented by V. Saintot, T. Gilliams and N. Urban, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of a decision of the European Central Bank of 5 November 2002 issuing a written reprimand to the applicant and for compensation for the damage allegedly incurred,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, H. Legal and M.E. Martins Ribeiro, Judges,

Registrar: I. Natsinas, Administrator,

gives the following

Judgment

Legal background

1 Under Article 4(a) of the Conditions of Employment for Staff of the European Central Bank ('the Conditions of Employment', adopted by decision of the European Central Bank of 9 June 1998, OJ 1999 L 125, p. 32):

'Members of staff shall perform their duties conscientiously and without regard to self-interest. They shall conduct themselves in a manner befitting their position and the character of the ECB as a Community body.'

2 Article 9(a) of the Conditions of Employment states:

'Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the application of these Conditions of Employment.'

3 Article 9(c) of the Conditions of Employment then provides:

'No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law, and (iii) the rules contained in the EC regulations and directives concerning social policy which are addressed to Member States. Whenever necessary, these legal instruments will be implemented by the ECB. EC recommendations in the area of social policy will be given due consideration. In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions.'

4 In addition, Article 43 of the Conditions of Employment provides:

'The following disciplinary measures may be taken, as appropriate, against members of staff who fail in their duties to the ECB:

(i) a written reprimand may be issued by a member of the Executive Board;

(ii) the Executive Board may decide on:

— a temporary reduction in salary;

— demotion or a change in the employment position of the member of staff within the ECB;

— a permanent reduction in salary;

— dismissal.

Disciplinary measures must be in proportion to the gravity of the breach of discipline and the grounds on which they are based must be stated. They shall be adopted in accordance with the procedure laid down in the Staff Rules. The said procedure shall ensure that no member of staff may be subjected to a disciplinary measure without an opportunity to reply to the relevant charges first being granted.'

5 Under the Code of Conduct of the European Central Bank in accordance with Article 11.3 of the Rules of Procedure of the European Central Bank (OJ 2001 C 76, p. 12):

'2.1 ... The addressees need both to show sensitivity to and respect for others and to stop any behaviour seen as offensive by another person at his/her first indication. None of the addressees shall be prejudiced in any way whatsoever for preventing or reporting harassment or bullying.

...

5.1 ... Proper implementation of this Code depends first and foremost on the professionalism, conscience and common sense of the addressees.'

Origin of the dispute and procedure

6 These proceedings were brought by Elizabeth Afari ('the applicant'), a member of staff of the European Central Bank.

7 On 6 April 1999 the applicant and the European Central Bank entered into a contract under which the applicant was assigned, with effect from 1 June 1999, to the post of assistant accountant in the Back Office Division of Directorate-General Operations of the European Central Bank.

8 The applicant, who is black, submits that during the time she worked in the Back Office Division Mr B., one of her colleagues, put her under strong pressure and harassed and discriminated against her on grounds of race.

9 On 17 March 2000, following an altercation with Mr B., the applicant made an oral complaint to her head of division. She repeated her complaint on 15 June 2000.

10 On 12 June 2001, according to the European Central Bank, Mr B. informed the applicant of a number of mistakes he had detected in reports for which she was responsible. The Bank claims that the applicant then responded by calling Mr B. a 'damn racist'.

11 On 19 June 2001 Mr B. lodged a complaint with his superiors, in which he claimed that the applicant had wrongly accused him of having accessed without her permission a database in which she was working, misrepresented her work and displayed racism. On the same day, the applicant for her part lodged a complaint asking her superiors inter alia to instruct Mr B. to stop such behaviour.

12 On 26 June 2001 the Director of Personnel of the European Central Bank wrote a letter to the applicant to inform her that a meeting had been arranged for 17 July 2001 in order to give her and Mr B. an opportunity to present their views. At that meeting it was not possible to reach an amicable solution to the dispute.

13 On 18 July 2001 a second meeting was held, at which it also proved impossible to find an amicable solution to the dispute between Mr B. and the applicant.

14 On 30 July 2001 the European Central Bank sent the applicant the minutes of the meeting of 17 July 2001. On 31 July 2001 the applicant submitted her comments on those minutes. In her comments she stated in particular:

'I never confirmed using the words "damn racist". What I can confirm is that on the 12 June 2001 I did call Mr [B] a racist and I maintain this stance.'

15 On 12 November 2001 the European Central Bank sent a letter to the applicant informing her that it intended to continue its investigations, since every previous attempt to reach an amicable solution had failed.

16 In reply to that letter, the applicant wrote on 13 November 2001 to the Director of Personnel of the European Central Bank, asserting that the management of the Bank had intimidated her and put her under pressure at the meeting of 18 July 2001 to withdraw her accusations, and that the management had 'never had any good intentions to resolve this conflict amicably'. In her letter the applicant also stated:

'Evidence is abundant that the intention of Management (DG-OP) was to dismiss me because I have identified a racist, and they have all this time been encouraging xenophobia and racist behaviour in the working environment.'

17 On 29 November 2001 the European Central Bank sent the applicant a letter requesting her to produce evidence before 10 December 2001 to substantiate the accusations she had made in her complaint of 19 June 2001, at the meeting of 17 July 2001 and in her letter of 13 November 2001.

18 In response to that request, the applicant on 17 December 2001 sent the European Central Bank a memorandum intended to provide the evidence asked for.

19 On 26 February 2002 the European Central Bank asked a former senior official of the Commission's Legal Service ('the external consultant') to investigate the complaint lodged by Mr B. and to ascertain whether Mr B. had committed racial discrimination against the applicant. In his investigation the external consultant interviewed Mr B., the applicant and several of their colleagues and superiors.

20 On 15 May 2002 the external consultant submitted his report to the European Central Bank. In the report he stated inter alia that he had not found any trace of harassment or discrimination in Mr B.'s attitude towards the applicant and that the strong tensions between those two persons were in his view due to personal and professional disagreements which were not racially or ethnically motivated.

21 On 12 June 2002 the report was sent to the applicant. In his covering letter the Director of Personnel of the European Central Bank, who had in the meantime become Director of Human Resources of the European Central Bank, informed the applicant that the standards prevailing within the Bank did 'not allow staff members to adopt an attitude lacking in professionalism and respect towards a colleague' and that he was obliged to open a disciplinary procedure against her

because of 'the allegation of racism against Mr [B], proven unsubstantiated by the external [consultant's report]' and 'the allegations [she had] made against the management of the ECB mainly accusing it of intimidating [her] ..., of encouraging xenophobia and racism and of having prejudged the outcome of any investigation in relation to [her] complaint'.

22 In that letter the Director of Human Resources of the European Central Bank informed the applicant that she would have until 28 June 2002 to submit observations. At the applicant's request, that period was extended until 15 July 2002.

23 By letter of 13 June 2002, the applicant was informed of her transfer to the Operational Analysis Division of Directorate-General Operations of the European Central Bank as a senior administrative assistant with effect from 17 June 2002.

24 On 14 July 2002 the applicant submitted her observations on the European Central Bank's letter of 12 June 2002.

25 On 23 July and 30 August 2002 the applicant's legal advisers submitted additional observations, in which they asserted in particular that the European Central Bank had committed a number of irregularities during the investigation procedure, in particular because of pressure allegedly brought to bear on the persons interviewed by the external consultant.

26 On 5 November 2002 one of the members of the Executive Board of the European Central Bank sent the applicant a letter issuing a written reprimand against her ('the contested decision'). The member of the Executive Board of the Bank informed her, in conclusion:

'[Y]ou have formulated unsubstantiated accusations in an aggressive and defamatory manner, using very strong terms and subsequently failing to support them with objective elements capable of proving their pertinence in the context of your personal case.

...

Making allegations of racism and accusing members of the management of the ECB of intimidating you, of encouraging xenophobia and racism and of having prejudged the outcome of any investigation when no facts are presented which can support such allegations and accusations, clearly violates your obligations as a staff member of the ECB.

I therefore have to conclude that your behaviour has been lacking professionalism and respect towards colleagues and amounts to misconduct. This behaviour deserves to be sanctioned.

Finally, when you and I met at your initiative on 26 June 2002, I was made aware that you have been on sick leave on account of the stress caused by the prevailing situation. I want to underline that this factor contributed to convince me that a light disciplinary measure would be an appropriate sanction.

Accordingly, I issue hereby a written reprimand.'

27 By application lodged at the Registry on 14 January 2003, the applicant brought the present action.

28 On 28 March 2003 the European Central Bank lodged its defence at the Registry.

29 Pursuant to Article 47 of the Rules of Procedure of the Court of First Instance, the Court decided that a second exchange of pleadings was unnecessary because the documents before it were sufficiently comprehensive to enable the parties to elaborate their pleas and arguments in the course of the oral procedure.

30 A hearing took place on 5 November 2003 at which the parties presented oral argument.

Forms of order sought by the parties

31 The applicant claims that the Court of First Instance should: annul the contested decision; order the European Central Bank to pay her one euro as compensation for the non-material damage suffered; order the European Central Bank to pay the costs.

32 The European Central Bank contends that the Court should: dismiss the action; order the applicant to bear her own costs.

The claim for annulment

Plea of breach of the obligation to state reasons, the right to good administration and the rights of the defence

Arguments of the parties

33 The applicant observes, as a preliminary point, that the right to good administration laid down by Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1) includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, and the obligation of the administration to give reasons for its decisions. The applicant also points out that respect for the rights of defence in any proceedings likely to lead to an act having adverse effect is a fundamental principle of Community law which must be observed even in the absence of an express provision (Case T-169/95 *Quijano* v *Commission* [1997] ECR-SC I-A-91 and II-273, paragraph 44, and Case T-211/98 *F* v *Commission* [2000] ECR-SC I-A-107 and II-471, paragraph 28).

34 According to the applicant, the contested decision is in breach both of her right to be heard and of the obligation of the European Central Bank to state reasons, in that the decision did not address numerous criticisms expressed by her during the disciplinary procedure, in particular in her observations of 14 July, 30 August and 10 September 2002. Furthermore, the Bank treated as valid, with no explanation or justification, the conclusions of the report submitted by the external consultant.

Finally, the statement of reasons in the contested decision gives no indication that the Bank took the applicant's observations into consideration.

35 The European Central Bank rejects those arguments. It states in this respect that the contested decision describes in detail the applicant's accusations against Mr B. and the Bank, thus enabling her to assess whether the decision was well founded and also allowing the Court of First Instance to exercise judicial review.

Findings of the Court

36 This plea consists of three distinct parts, which should be examined successively. They allege, first, breach of the obligation to state reasons, second, breach of the principle of good administration and, third, breach of the rights of the defence.

— Obligation to state reasons

37 According to settled case-law, the statement of the reasons for a decision adversely affecting a person must allow the Community judicature to exercise its review of legality and must provide the person concerned with the information which he needs in order to know whether the decision is well founded (Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 26, and Case T-372/00 *Campolargo* v *Commission* [2002] ECR-SC I-A-49 and II-223, paragraph 49).

38 It is also settled case-law that the statement of reasons for a decision of the administration in a disciplinary procedure must specify the acts which the official is found to have committed and the considerations which have led the appointing authority to impose the particular penalty (Case T-40/95 *V* v *Commission* [1996] ECR-SC I-A-587 and II-1753, paragraph 36). That does not, however, mean that the statement of reasons for the disciplinary decision has to discuss all the points of fact or of law which the person concerned has raised during the procedure (Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission* [1999] ECR-SC I-A-87 and II-463, paragraph 93, and Case T-197/00 *Onidi* v *Commission* [2002] ECR-SC I-A-69 and II-325, paragraph 156).

39 In the present case, the European Central Bank specified in the contested decision the various factors on which it based the adoption of the decision, namely the applicant's allegations against Mr B. and her managers, its view that the applicant had not produced any evidence in support of her allegations, its analysis that those facts constituted a breach on the part of the applicant of Article 4(a) of the Conditions of Employment and Articles 2(1) and 5(1) of the Code of Conduct, and, finally, grounds based on the applicant's state of health.

40 Consequently, without the European Central Bank being required additionally to set out the reasons for which it relied on the external consultant's report, the statement of reasons in the contested decision is sufficient to enable the applicant to assess whether it is well founded and the Court to review its legality.

41 The first part of the applicant's plea must therefore be rejected.

— Principle of good administration

42 According to settled case-law, pursuant to the principle of good administration, the administration is obliged when taking a decision concerning the situation of an official to take into consideration all the factors which may affect its decision, and when so doing it should take account not only of the interests of the service but also of those of the official concerned (Case 417/85 *Maurissen* v *Court of Auditors* [1987] ECR 551, paragraph 12, and Case T-7/01 *Pyres* v *Commission* [2003] ECR-SC I-A-37 and II-239, paragraph 77).

43 In the present case, the applicant complains, first, that the European Central Bank did not reply to all the criticisms expressed by her during the disciplinary procedure.

44 However, that circumstance alone does not suffice as such to show that the European Central Bank did not take into account all the relevant factors of the present case, since in the statement of reasons of the contested decision the Bank was in no way obliged to reply to all the arguments raised by the applicant (*Connolly* v *Commission*, paragraph 93, and *Onidi* v *Commission*, paragraph 156).

45 As regards, second, the fact that the European Central Bank based itself on the external consultant's report, it must be pointed out, to begin with, that no rule required the Bank to appoint an external consultant in order to determine whether the applicant had in fact been discriminated against, so that the fact of nevertheless having displayed such diligence cannot constitute a lack of care on its part, but would rather tend to show that, on the contrary, the Bank took her allegations seriously.

46 Next, the applicant has not produced any specific element to show that the external investigation in some way or other affected the loyalty or impartiality of the European Central Bank. The applicant admittedly submits, in her third plea, that the external consultant was not impartial, in particular in that he knew the Director-General of Operations of the European Central Bank, did not speak English, which is the working language of the Bank, was a former official of the Commission, and was remunerated by the Bank.

47 However, even on the assumption that those facts are established, which is disputed by the European Central Bank in respect of some of them, they could at most entail certain reservations as to the independence of the external consultant in relation to the Bank, but not as to his independence in relation to the applicant. It is clear from the letter instructing the external consultant that his mandate did not relate to the part of the present dispute in which the applicant is opposed to the Bank but solely to the part in which she is opposed to Mr B.

48 The second part of the applicant's plea is therefore unfounded.

— Breach of the rights of the defence

49 According to settled case-law, respect for the rights of the defence constitutes a fundamental principle of Community law which must be must be observed even in the absence of an express provision (*Quijano* v *Commission*, paragraph 44, and *F* v *Commission*, paragraph 28).

50 Furthermore, Article 43 of the Conditions of Employment of the Bank provides, in the same way as Article 87 of the Staff Regulations of Officials of the European Communities, that the disciplinary procedure must ensure that no member of staff may be subjected to a disciplinary measure without first being granted an opportunity to reply to the charges against him (Case T-333/99 *X* v *ECB* [1999] ECR II-3021, paragraphs 176 and 177).

51 In the present case, the applicant criticises the European Central Bank, first, for failing to reply in the contested decision to certain criticisms made in her observations of 14 July, 30 August and 10 September 2002.

52 The statement of reasons for a disciplinary decision is not, however, required to discuss all the points of fact and law which the person concerned has raised during the procedure (*Connolly* v *Commission*, paragraph 93, and *Onidi* v *Commission*, paragraph 156). Consequently, the mere fact that the contested decision does not reply to certain arguments put forward during the disciplinary procedure is not sufficient to show that the applicant was not afforded a proper hearing during that procedure.

53 The applicant criticises the European Central Bank, second, for having accepted the external consultant's conclusions as valid, without any explanation or justification.

54 However, the applicant has not shown how the taking of that position in the contested decision could have affected her right to be heard, which, by definition, was exercised before the adoption of the decision.

55 The case-file shows, moreover, that the external consultant's report was annexed to the European Central Bank's letter of 12 June 2002 opening the disciplinary procedure against the applicant. The applicant was invited to make observations on that letter of 12 June 2002, an invitation to which she responded on 14 July 2002 by commenting inter alia on several points of the external consultant's report. The third part of the plea must therefore be rejected.

56 Consequently, the applicant's first plea is unfounded in its entirety.

Plea of breach of the principle of non-discrimination, the principle of impartiality and the rights of the defence

Arguments of the parties

57 The applicant considers that the European Central Bank should have allowed her to be heard by a disciplinary board. She notes that the Staff Regulations of Officials of the European Communities provide for the involvement of a disciplinary board composed jointly of representatives of the administration and representatives of the Staff Committee. It is true that, under Article 87 of the Staff Regulations of Officials of the European Communities, when the appointing authority decides to issue a written warning or reprimand it may do so without consulting a disciplinary board. However, a disciplinary board may also envisage adopting such a disciplinary measure.

58 The applicant also observes that in other disciplinary procedures (see in particular *X* v *ECB*, paragraph 11) the European Central Bank decided to have recourse to a board before adopting its disciplinary decision. The Bank has not explained why it departed in the present case from its previous practice even though that point had been raised by the applicant in her observations of 14 July 2002. Consequently, by failing to refer the matter to a disciplinary board before taking its decision, the Bank failed to ensure that the right to be heard, the principle of impartiality and the principle of non-discrimination were complied with.

59 The European Central Bank submits in reply that it was not obliged to consult a disciplinary board.

Findings of the Court

60 It should be noted, to begin with, that the European Central Bank has not adopted any internal rule expressly requiring a disciplinary board to be consulted before the adoption of a disciplinary measure.

61 Moreover, while Article 9(c) of the Conditions of Employment requires the Bank to show due regard for the Staff Regulations of Officials of the European Communities, Article 87 of those regulations nevertheless provides:

'The appointing authority shall have the right to issue a written warning or a reprimand without consulting the Disciplinary Board, on a proposal from the official's immediate superior or on its own initiative.'

62 No obligation on the European Central Bank to convene a disciplinary board before issuing a written reprimand can therefore follow from the application by analogy of the rules laid down by the Staff Regulations of Officials of the European Communities.

63 The applicant submits that the failure to have recourse to a disciplinary board nevertheless constitutes in the present case a breach of the principle of non-discrimination, the principle of impartiality, and the rights of the defence.

64 As regards, first, the alleged breach of the principle of non-discrimination, the applicant states that a disciplinary board was convened in the disciplinary procedures of the European Central Bank which were previously the subject of judgments of this Court.

65 It is settled case-law, however, that the principle of non-discrimination applies only to persons who are in the same or a similar situation and, moreover, requires that differences in treatment between different categories of officials or temporary staff must be justified on the basis of objective and reasonable criteria and that the difference must be proportionate to the aim pursued by the differential treatment (Case T-8/93 *Huet* v *Court of Auditors* [1994] ECR II-103, paragraph 45).

66 In the present case, it does not follow from paragraph 11 of *X* v *ECB* that in that case the European Central Bank formally had recourse to a disciplinary procedure involving consultation of a disciplinary board, since it merely allowed the applicant, before a disciplinary measure was imposed, to be heard by certain members of the Personnel Department, the division to which he was attached and the Legal Service of the Bank.

67 In any event, the applicant has not referred to any factors capable of showing that she was in a similar situation to that of the member of staff disciplined in the case at issue in *X* v *ECB*, and the latter was moreover dismissed, that is, subjected to a much more serious disciplinary measure than the applicant in the present case.

68 Second, as regards the alleged breach of the principle of impartiality by the European Central Bank, the applicant has not referred, in her application or at the hearing, to anything at all capable of showing why the convening of a disciplinary board was particularly necessary in the present case to remedy the alleged bias of the Bank in the disciplinary procedure, a bias the existence of which she alleges without proving, moreover.

69 As regards, third, the alleged breach of the applicant's rights of defence, the case-file shows that she had an opportunity to submit observations on several occasions before and after the opening of the disciplinary procedure, in particular on 17 December 2001, 14 July and 30 August 2002. In those circumstances, the applicant has also failed to show how the fact that a disciplinary board was not convened could have affected her rights of defence.

70 The applicant's second plea must therefore be rejected.

Plea of breach of the rights of the defence

Arguments of the parties

71 The applicant submits that the European Central Bank breached her rights of defence in three further respects, in addition to those put forward in her first two pleas.

72 In the first part of this plea, the applicant submits that, for the purposes of the contested decision, the European Central Bank could not rely on an external consultant's report whose impartiality and independence were not guaranteed. More specifically, the applicant casts doubt on the external consultant's neutrality for several reasons.

73 First, to the applicant's knowledge, the Director-General of Operations of the European Central Bank took part in the appointment of the external consultant despite being involved in the applicant's case.

74 Second, although the Bank's working language is English, the external consultant did not speak that language, which prevented him from grasping certain nuances and a number of delicate issues, especially as no minutes or transcripts were drawn up of the interviews he carried out.

75 Third, account should also be taken of the fact that the external consultant is a former official of the Commission and that he was paid by the European Central Bank, which could have affected his neutrality.

76 Fourth, the external consultant's mandate was one-sided in that it consisted in investigating solely 'the complaint that Mr B. has lodged with the [Directorate Human Resources] regarding the accusation of racism made against him by ... Ms Afari' and not the complaints made by her.

77 Fifth, at the beginning of his interview with the applicant, the external consultant stated that in his opinion Mr B. was not a racist.

78 Sixth, the external consultant relied on certain witness statements without examining the relevant documents or checking them against other statements.

79 Finally, the external consultant did not draw up transcripts of his interviews, even though they were the justification for the disciplinary measure, at least as regards the first complaint. In the absence of such transcripts the applicant was unable to exercise her rights of defence, that being all the more serious in that the external consultant's report did not properly reflect the statements made by the applicant's colleagues, which had led one of them to ask for his witness statement to be withdrawn from the report.

80 In the second part of the plea, the applicant criticises the Bank for having disciplined her for formulating unsubstantiated complaints 'in an aggressive manner', whereas the complaint of her aggressiveness was not mentioned in the decision of 12 June 2002 opening the disciplinary procedure.

81 In the third part of the plea, the applicant submits that the facts complained of and charges made were characterised in law for the first time in the contested decision, which prevented her from submitting her observations.

82 In reply to the first part of this plea, alleging that the European Central Bank could not rely on the external consultant's report, the Bank submits that there was nothing to prevent it from carrying out its own investigation and that it made use of that consultant precisely to ensure that the procedure was impartial. The Bank states, moreover, that its Director-General of Operations did not take part in appointing the external consultant. Apart from the fact that the applicant does not support her allegations with any evidence, the Director-General of Operations in any event did not know the consultant before he started his investigation.

83 The Bank then states that the applicant's allegations concerning the language spoken by the external consultant, his past as a representative of the Commission and the fact that he was paid by the Bank do not provide any material indication of any lack of objectivity on his part, in that those factors were not capable of impairing his impartiality.

84 The European Central Bank further states that the external consultant's mandate was to establish the truth, whatever it might be, that his remuneration did not depend on the findings of his investigation, and, finally, that he treated the applicant and Mr B. equally.

85 Next, as regards the interviewing of witnesses by the external consultant, the Bank points out that the applicant never asked him to hear particular witnesses, so that she cannot complain of not having been able to call witnesses she wished to be heard.

86 Finally, the Bank observes that the investigation took place before the disciplinary procedure was opened on 12 June 2002, so that it is doubtful whether the rights of the defence were applicable at that stage (Case T-273/94 *N* v *Commission* [1997] ECR-SC I-A-97 and II-289, paragraph 79).

87 In reply to the second part of the plea, alleging that the contested decision included a complaint of aggressiveness which had not been previously communicated to the applicant, the European Central Bank states that the letter of 12 June 2002 referred to documents which left no doubt as to the aggressive nature of their tone, and that even if the aggressiveness of the applicant's words were to be regarded as a new fact, the procedure would not have had a different outcome in the absence of that irregularity.

88 In reply to the third part of the plea, alleging that the contested decision contained the first legal characterisation of the acts complained of, the European Central Bank points out that the letter of 12 June 2002 stated clearly that 'the standards prevailing within the ECB do not allow staff members to adopt an attitude lacking in professionalism and respect towards a colleague'. That passage and the events after 12 June 2002 enabled the applicant to know in which duties she had failed in the course of her employment. Consequently, the applicant was able to exercise her rights of defence without the administration needing to specify the provisions infringed, as everyone is presumed to know the law.

89 The factual circumstances described in the Bank's letter of 12 June 2002 provided the applicant with enough information for her not to be able to claim not to know that Articles 2(1) and 5(1) of the Code of Conduct were being referred to.

Findings of the Court

90 In the context of disciplinary procedures, the principle of respect for the rights of the defence is infringed where it is established that the person concerned was not given a proper hearing before the act adversely affecting him was adopted and where it cannot be reasonably precluded that that irregularity could have had a particular impact on the content of that act (Case T-237/00 *Reynolds* v *Parliament* [2002] ECR II-163, paragraph 112).

91 It is in the light of those principles that each of the three parts of this plea should be considered.

— First part: use of an external consultant

92 In this first part, the applicant submits that the use by the European Central Bank of an external consultant constituted a breach of her rights of defence.

93 It must be noted, as a preliminary point, that neither the disciplinary procedure provided for by the Conditions of Employment nor the Staff Rules prohibit the European Central Bank from having recourse to an external consultant to carry out an investigation prior to a disciplinary procedure.

94 However, it must be determined whether, in the present case, the use of the consultant could in one way or other have affected the applicant's right to be heard and effectively to present the arguments necessary for her defence.

95 On this point, the applicant puts forward a number of arguments based essentially on, first, the lack of neutrality of the external consultant as against the European Central Bank, second, the inadequacy of his knowledge of languages, third, the lack of neutrality of his mandate, and, fourth, his failure to examine certain relevant documents.

96 However, even assuming that those circumstances were shown to exist, they could not in the present case have affected the applicant's rights of defence, as the letter of 12 June 2002 by which the European Central Bank opened the disciplinary procedure was accompanied by the external consultant's report and expressly mentioned, among the facts justifying the opening of a disciplinary procedure, the 'allegation of racism against Mr [B], proven unsubstantiated by the external [consultant's report]'.

97 The applicant was thus aware not only of the content of the external consultant's report but also of the Bank's intention of relying on the report for the purposes of the disciplinary procedure. Moreover, the applicant submitted observations on that letter on at least two occasions, on 14 July and 30 August 2002.

98 It is true that, as the applicant says, it is not apparent from the case-file that the external consultant drew up transcripts of his interviews with members of staff. It is apparent, however, first, that those interviews took place before the opening of the disciplinary procedure against the applicant and, second, that the extracts from those interviews which the external consultant considered relevant were described in his report, which was communicated to the applicant when the disciplinary procedure was opened. She was consequently able effectively to submit observations on those findings and the consequences drawn from them by the external consultant and the European Central Bank.

99 Moreover, once the disciplinary procedure was opened, the applicant apparently did not consider it necessary to ask for the persons heard by the external consultant to be heard again in her presence in order to check whether the statements mentioned in his report faithfully reflected the content of those interviews or to clarify those statements by other elements which could confirm the truth of the facts on which her accusations were based.

100 In those circumstances, it does not appear that the use by the European Central Bank of an external consultant could have deprived the applicant of her right to comment effectively on the factual elements relied on by the European Central Bank to support its decision.

101 Consequently, the first part of the applicant's third plea must be rejected.

— Second part: communication of the complaint of aggressiveness

102 The applicant submits in this second part that, by describing the applicant's attitude as 'aggressive' for the first time in the contested decision, the European Central Bank upheld a complaint which had not been communicated to her beforehand.

103 It must therefore be examined whether the letter of 12 June 2002 by which the European Central Bank opened the disciplinary procedure was sufficiently clear to make the applicant aware of the complaints which were ultimately upheld against her in the contested decision.

104 Those complaints consist in the applicant having called a colleague a 'racist' and having made accusations against the European Central Bank without being able to support those allegations by facts.

105 Those complaints were specifically identified in the letter of 12 June 2002.

106 In the contested decision, the European Central Bank likewise considered that the applicant's conduct had been aggressive, since the Bank states there that she 'formulated unsubstantiated accusations in an aggressive and defamatory manner, using very strong terms and subsequently failing to support them with objective elements capable of proving their pertinence in the context of [her] personal case'.

107 As the applicant points out, that aggressiveness was not specifically mentioned in the letter of 12 June 2002.

108 However, regardless of the fact that calling a colleague a 'racist' may constitute an aggressive attitude, the reasoning in the contested decision shows that it was not the aggressiveness of the applicant's conduct as such which gave rise to the disciplinary procedure against her, but the fact of having made unsubstantiated accusations.

109 Consequently, the aggressive tone of the accusations made by the applicant constitutes only an incidental and secondary aspect of the acts the applicant was accused of, and was moreover included by implication in the complaints in the letter of 12 June 2002 and did not therefore have to be identified specifically in that letter.

110 The second part of the plea is therefore unfounded.

— Third part: characterisation in law of the alleged conduct

111 In this third part, the applicant complains that the European Central Bank infringed her rights of defence by characterising in law the conduct she was accused of for the first time in the contested decision.

112 In that decision the European Central Bank considered that the applicant's behaviour had lacked 'professionalism and respect towards colleagues'. The Bank found that the applicant had thereby breached Article 4(a) of the Conditions of Employment and Articles 2(1) and 5(1) of the Code of Conduct.

113 The letter of 12 June 2002 by which the European Central Bank opened a disciplinary procedure against the applicant said that 'the standards prevailing within the ECB do not allow staff members to adopt an attitude lacking in professionalism and respect towards a colleague'. The applicant was thus informed clearly of the fact that the Bank intended to charge her with failing to comply with her duties of professionalism and respect, which in itself constitutes a partial characterisation in law.

114 Nevertheless, as the applicant points out, in its letter of 12 June 2002 the European Central Bank did not refer expressly to Article 4(a) of the Conditions of Employment or to Articles 2(1) and 5(1) of the Code of Conduct. It must therefore be determined whether the failure to mention those provisions deprived the applicant of her right effectively to be heard.

115 As regards, first, the failure to refer to Article 2(1) and 5(1) of the Code of Conduct, it should be noted that Article 1 of the Code states generally that it 'makes explicit the ethical conventions and standards by which the ECB considers it necessary for the addressees to abide and clarifies the benchmarks against which fulfilment of the obligations already assumed by the addressees will be measured'. The express function of the Code of Conduct is thus to constitute a reference guide addressed to the members of the Bank's staff, so that they can know the extent of the duties and obligations expected of them.

116 Moreover, the wording of Articles 2(1) and 5(1) of the Code of Conduct sets out in clear and general terms the duties of respect and professionalism required of members of the staff of the Bank.

117 Consequently, since the applicant was aware that she was accused of failures to comply with her duties of respect and professionalism, simply consulting the Code of Conduct enabled her to find that those duties were expressly mentioned there.

118 Having regard to the knowledge the applicant must have had of the provisions governing her employment relationship with the European Central Bank, she must therefore have known or be deemed to have known that the partial characterisation in law in the letter of 12 June 2002 referred to Articles 2(1) and 5(1) of the Code of Conduct.

119 Therefore, even though the European Central Bank's letter of 12 June 2002 lacked detail as regards the points of law the Bank intended to rely on in the disciplinary procedure, in the circumstances of the case the brevity of that explanation did not prevent the applicant from being effectively heard on the application of Articles 2(1) and 5(1) of the Code of Conduct.

120 Next, as regards the European Central Bank's decision to base the contested decision on Article 4(a) of the Conditions of Employment, it is clear that the wording of that provision does not explicitly set out obligations of professionalism and respect. Consequently, the applicant could not, on the sole basis of the letter of 12 June 2002, be taken to know that that provision would be relied on against her in the contested decision. The applicant was not therefore able effectively to submit her observations on that point of law on which the contested decision was based.

121 However, it is clear from the reasoning in the contested decision that from the point of view of the European Central Bank the applicant's breach of Articles 2(1) and 5(1) of the Code of Conduct in itself justified the imposition and severity of the disciplinary measure imposed, so that the fact that it was not possible for the applicant to make observations on the application of Article 4(a) of the Conditions of Employment could not affect that decision.

122 It follows from those considerations that the third part of the plea, and consequently the plea in its entirety, must be rejected.

Plea of lack of proof of the alleged conduct, manifest error of assessment, and breach of the obligation to state reasons

Arguments of the parties

123 First, the applicant states in her application that the contested decision criticises her for an accusation of racism, whereas she merely accused the management of the European Central Bank of encouraging racism by not taking her complaints seriously. The Bank thus failed to comply with its duty to state the reasons justifying such a charge, which also constitutes a breach of its obligation to state reasons.

124 Second, at the hearing, the applicant confirmed that she had indeed called Mr B. a 'racist' and had also accused members of the management of the European Central Bank of intimidating her, encouraging xenophobia and racism, and prejudging the outcome of the investigation. However, in her view, the material in the case-file shows that those allegations were justified.

125 Thus the applicant referred in her letter of 17 December 2001 to her unsuccessful attempt to obtain the assistance of her management and the meetings at which she was put under pressure to withdraw her allegations. Moreover, the management had merely proposed, as an amicable settlement, a transfer to another post with a warning. Since there was no objective justification for those actions, it could reasonably be supposed that the management of the European Central Bank intended to protect Mr B. In addition, while the applicant was described in her staff report as a person given to conflict, no such assessment was made of Mr B.

126 Next, as regards the complaint that the management of the European Central Bank encouraged xenophobia and racism, the applicant observes that none of her requests to her superiors to find a solution to her situation was taken into consideration. Moreover, her head of division had warned her colleagues to be careful what they said because she was black, which opened the way to treating her differently because of her skin colour.

127 Finally, the applicant observes that the solutions which were suggested to her in order to resolve the dispute could not consist in putting pressure on her and asking her to choose between transfer to another post, outside counselling arbitration, continued investigation by the Legal Division of the European Central Bank, and a 'gentlemen's agreement'. Since the Director of Human Resources had informed her that a transfer would be accompanied by a warning, she could only decline it.

128 The European Central Bank contests the applicant's arguments. It submits that she has failed to produce evidence of the existence of the unequal treatment she claims to have been the victim of on the part of Mr B., as was confirmed by the external consultant's investigation. The applicant has also failed to support her accusations against the Bank otherwise than by referring to subjective elements.

Findings of the Court

129 The Court will examine, first, the applicant's argument that she was disciplined in particular for having made accusations of racism against the management of the European Central Bank, whereas those accusations had never been made by her.

130 The paragraph of the contested decision which the applicant relies on to reach that conclusion reads as follows: 'Making allegations of racism and accusing members of the management of the ECB of intimidating you, of encouraging xenophobia and racism and of having prejudged the outcome of any investigation when no facts are presented which can support such allegations and accusations clearly violates your obligations as a staff member of the ECB.'

131 Having regard to the content of the letter of 12 June 2002 and the context in which it was written, the Court considers that the expression '[m]aking allegations of racism' refers solely to the applicant's accusations against Mr B. Consequently, in the contested decision, the European Central Bank did not accuse the applicant of having accused it directly of racism, so that all the applicant's arguments relating to this alleged complaint, including the part of her argument concerning an alleged breach of the obligation to state reasons, may be rejected without further examination.

132 It is apparent, on the other hand, that the contested decision accuses the applicant of having made the following, unsubstantiated, allegations: accusations of racism against Mr B.; accusations of attempts at intimidation on the part of the European Central Bank; accusations that the European Central Bank had encouraged xenophobia and racism; accusations that the European Central Bank had prejudged the outcome of its investigation.

133 Since the applicant confirmed at the hearing that she did not deny having made those accusations, the only material question in this case is whether, contrary to what the European Central Bank asserted in the contested decision, she produced any evidence to substantiate them.

134 With respect, first, to the accusation of racism against Mr B., the case-file shows that the points put forward by the applicant before the contested decision was adopted, in particular in her complaint of 19 June 2001, her memorandum of 31 July 2001, her memorandum of 17 December 2001 and her memorandum of 14 July 2002, do not constitute material and objective evidence from which racist behaviour towards the applicant on the part of Mr B. could be supposed to exist. While it is clear that relations between the applicant and Mr B. were particularly strained, the Court nevertheless considers that there is nothing in the case-file to show, or even raise a supposition, that the bad relations had a racial context.

135 With respect, second, to the accusations that the European Central Bank had attempted to intimidate the applicant, it is clear that the various matters put forward by her to justify her allegations, in particular in her observations of 17 December 2001, are not themselves based on specific objective evidence capable of proving them to a sufficient legal standard.

136 With respect, third, to the allegation that the European Central Bank had encouraged racism and xenophobia, this accusation is essentially based on the fact that the Bank did not take her complaints against Mr B. seriously.

137 The various matters referred to by the applicant are not, however, capable either of establishing to a sufficient legal standard that she made a formal complaint to her superiors of discrimination on grounds of race before submitting her complaint of 19 June 2001 or, in any event, of raising a presumption that the European Central Bank encouraged racism and xenophobia by not following up those complaints.

138 Thus, first, the mere fact that in her comments on her staff report for the period from 1 January to 23 November 1999 the applicant said that her colleagues spoke German in her presence although she does not understand that language does not constitute a complaint of discrimination on racial or ethnic grounds.

139 Next, the applicant has not shown to a sufficient legal standard that the oral complaints she states she made to her head of division on 17 March and 15 June 2000 were also intended as complaints of discrimination on racial or ethnic grounds.

140 Furthermore, while the applicant states that on 13 July 2002 she had lunch with some of her superiors and complained on that occasion of Mr B.'s racist behaviour, those mere allegations do not enable the Court to assess the seriousness and extent of the complaints allegedly made.

141 In addition, while the applicant indeed submitted a formal complaint on 19 June 2001 in which she requested the European Central Bank to point out to Mr B. that acts of discrimination in the workplace constitute offences, an examination of that complaint shows that she nowhere said that the discrimination complained of was linked in her opinion to ethnic or racial grounds. In any event, after the applicant submitted her complaint of 19 June 2001, the Bank arranged several meetings in order to enable her to submit her complaints against Mr B., and before initiating the disciplinary procedure the Bank appointed an external consultant to investigate whether the racist behaviour complained of by the applicant had actually taken place.

142 Moreover, the allegation that the applicant's head of division asked her colleagues to be careful what they said because she was black has not been supported by any factual evidence.

143 Finally, the applicant has not adduced any material from which it could be supposed that the European Central Bank had had the intention to dismiss her because she had identified a racist. In her application, the applicant supports that accusation by relying on certain facts which allowed her to suppose that her superiors intended to protect Mr B. But even supposing that the applicant has shown to a sufficient legal standard that that supposition was a legitimate one, which is not the case, the mere intention of protecting Mr B. rather than the applicant would not in any way demonstrate that the managers of the Bank had the correlative intention to dismiss her.

144 The elements relied on by the applicant are not thus sufficient to prove or even raise a supposition that the European Central Bank encouraged racism and xenophobia.

145 With respect, fourth, to the applicant's allegation that the European Central Bank prejudged the outcome of its investigation, it does not appear from the case-file that the Bank displayed such prejudice.

146 Thus, to begin with, the letter of 26 June 2001 by which the European Central Bank called the applicant and Mr B. to the meeting of 17 July 2001 indicated clearly that disciplinary measures could be taken against either of those persons.

147 Next, the applicant's allegations concerning the bias said to have been shown by some of her superiors, in particular at the meetings of 17 and 18 July 2001, are not supported by any specific evidence capable of proving them to a sufficient legal standard.

148 Finally, the letter dated 12 November 2001 sent to the applicant by the Director of Personnel of the European Central Bank, which aroused certain of the applicant's accusations, is worded in altogether neutral terms. The letter also indicates that, since it had not been possible to reach an amicable settlement between Mr B. and the applicant, a disciplinary procedure could be initiated against whichever of them had failed to comply with obligations, without in any way prejudging whether this could be the applicant rather than Mr B.

149 In short, the applicant has not produced any evidence to show, or even to raise a supposition, that her accusations against Mr B. and the European Central Bank were well founded. This plea in law must consequently be rejected.

Plea of infringement of Article 8 of Directive 2000/43

Arguments of the parties

150 The applicant observes that Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) states:

'[W]hen persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

151 The applicant considers that in the present case she established before the European Central Bank facts from which it might be presumed that she had been discriminated against. During the investigation, however, it was the applicant, not the Bank, who had to prove her case.

152 The European Central Bank submits in response that Directive 2000/43 entered into force on 19 July 2000, in other words well after the applicant started to accuse certain colleagues of discrimination, and that the directive was moreover to be transposed by the Member States by 19 July 2003 at the latest. The Bank therefore questions what legal effects the directive could have in the present case. In any event, the Bank also notes, the provisions of the directive were complied with.

Findings of the Court

153 Under Article 9(c) of the Conditions of Employment, the European Central Bank is to apply 'the rules contained in the EC regulations and directives concerning social policy which are addressed to Member States'.

154 In the present case, it is common ground that Directive 2000/43 is addressed to the Member States and concerns social policy. That directive must therefore be applied by the European Central Bank pursuant to Article 9(c) of the Conditions of Employment.

155 The European Central Bank nevertheless questions the potential legal effects of the directive for the Bank before the latest date for its transposition by the Member States.

156 The Court considers that there is no need to rule on that point in the present case and that it suffices to state that the plea raised by the applicant is not supported by the facts.

157 The reversal of the burden of proof prescribed by Article 8 of Directive 2000/43 applies only where the party who considers herself wronged establishes 'facts from which it may be presumed that there has been direct or indirect discrimination'.

158 The expression 'direct or indirect discrimination' for the purposes of Directive 2000/43 is defined in Article 2.

159 Thus, under Article 2(1)(a) of Directive 2000/43, direct discrimination is taken to occur 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.

160 Further, under Article 2(1)(b) of Directive 2000/43, indirect discrimination is taken to occur 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by

a legitimate aim and the means of achieving that aim are appropriate and necessary'.

161 Moreover, Article 2(3) of Directive 2000/43 states that harassment is deemed to be discrimination 'when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.

162 In the present case, as the Court found in its examination of the preceding plea in law, the applicant has not shown that she had adduced evidence from which it might be presumed that the unfavourable treatment she considered to have been shown her by Mr B. and the European Central Bank was related to racial or ethnic grounds. Nor, moreover, has the applicant produced evidence from which it might be presumed that that conduct could put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.

163 The applicant has not thus adduced any facts from which it could be presumed that there was direct or indirect discrimination within the meaning of Directive 2000/43.

164 This plea is therefore unfounded.

Plea of infringement of Articles 7, 8 and 9 of Directive 2000/43

Arguments of the parties

165 The applicant notes that Articles 7(1), 8(1) and 9 of Directive 2000/43 require the Member States to introduce certain procedural guarantees for all persons 'who consider themselves wronged' by failure to comply with the principle of equal treatment, in particular protection against 'any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.

166 In the present case, even though the applicant considered that she had been subjected to differential treatment, the European Central Bank had remained inactive until Mr B. and the applicant made complaints. Moreover, a reprisal measure was subsequently taken against the applicant because she had considered herself wronged by a breach of equal treatment.

167 In reply, the European Central Bank again points out that the facts which gave rise to the reprimand issued to the applicant predated the end of the period prescribed for transposition of the directive, and that it complied with the principles laid down in the directive.

Findings of the Court

168 This plea consists of three parts, based on Articles 7, 8 and 9 of Directive 2000/43 respectively, which should be examined successively.

169 As regards, first, the application in the present case of Article 7 of Directive 2000/43, that article provides that 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended'.

170 In the present case, the applicant complains that 'no action was taken' by the European Central Bank despite her complaints. However, as may be seen from paragraphs 138 to 144 above, first, the applicant has not shown to a sufficient legal standard that she brought complaints intended to enforce compliance with the principle of equal treatment before 19 June 2001 and, second, once her complaint had been lodged on 19 June 2001 the European Central Bank did not remain inactive. This part of the plea must therefore be rejected.

171 The applicant relies, second, on an infringement of Article 8 of Directive 2000/43. However, in this part of the plea, the applicant does not put forward any new argument beyond those relating to the previous plea, so that this part must also be rejected.

172 As regards, finally, Article 9 of Directive 2000/43, that article provides that 'Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.

173 In the present case, the applicant criticises the European Central Bank for disciplining her because she considered herself wronged by reason of a breach of the principle of equal treatment.

174 However, it is apparent from the contested decision that the applicant was not disciplined for having formally made a complaint or having brought legal proceedings aimed at enforcing the principle of equal treatment, but for having directly called Mr B. a 'racist' without producing sufficient evidence to support that accusation and for having made unsupported accusations against the management of the European Central Bank.

175 Consequently, without there being any need to rule on the date on which Directive 2000/43 started to apply to the employment relationships between the European Central Bank and its staff, it is clear that the sixth plea in law has no foundation in fact or in law, and must therefore be rejected.

Plea of infringement of Article 4(a) of the Conditions of Employment, of the Code of Conduct of the European Central Bank and of the obligation to state reasons, and manifest error of assessment

Arguments of the parties

176 The applicant submits that she was in breach neither of Article 4(a) of the Conditions of Employment of the European Central Bank nor of its Code of Conduct. By basing the contested decision on those grounds, the Bank both infringed those two instruments and its obligation to state reasons and also committed a manifest error of discretion.

177 The applicant notes that Article 4(a) of the Conditions of Employment lays down an obligation on the staff of the European Central Bank to act in the sole interest of that institution. The applicant's attitude remained loyal in all respects when she drew the Bank's attention to her difficult working conditions. She never gave her interests priority over the Bank's and was never influenced by any person from outside.

178 The applicant then observes that Article 2(1) of the Code of Conduct provides that no form of harassment is tolerated and that members of staff must show sensibility to and respect for others and stop any behaviour seen as offensive by another person at that person's first indication.

179 The applicant further observes that, according to Article 5(1) of the Code of Conduct, its implementation depends on the professionalism, conscience and common sense of the members of staff. That article mentions the vigilance which must be shown by members of staff in positions of authority and the exemplary conduct expected of them.

180 However, the European Central Bank has not referred to any indication by Mr B. or its management to the applicant that her conduct was seen as offensive. On the contrary, it was the applicant who indicated to Mr B. and her management on several occasions that she considered Mr B.'s behaviour to be offensive.

181 The European Central Bank rejects those arguments. It considers that the applicant infringed Article 4 of the Conditions of Employment, which is based on the fundamental duty of loyalty and cooperation which all officials owe to the institution to which they belong and to their superiors.

Findings of the Court

182 In this plea the applicant contests that she infringed Article 4(a) of the Conditions of Employment and Articles 2(1) and 5(1) of the Code of Conduct. Since in the contested decision the European Central Bank considered that the applicant's breach of Article 4(a) of the Conditions of Employment followed from the breach of more specific duties imposed by Articles 2(1) and 5(1) of the Code of Conduct, the Court will analyse first whether by her conduct the applicant did in fact infringe those two provisions.

— Application of Articles 2(1) and 5(1) of the Code of Conduct

183 Article 2(1) of the Code of Conduct imposes a general duty of 'sensitivity to and respect for others' on the staff of the European Central Bank.

184 Moreover, Article 5(1) of the Code of Conduct provides that application of the code depends in particular on the professionalism and conscience of the staff of the European Central Bank. Article 5(1) of the Code of Conduct thus clearly imposes on the staff of the Bank a general duty of professionalism.

185 In the present case, as appears from paragraph 134 above, the applicant accused a colleague of being a racist without being able to produce objective evidence from which it might be supposed that her allegations were well founded.

186 The applicant also made accusations in forthright terms against her management, again without supporting them by sufficient objective evidence.

187 Those two actions constitute failures on the part of the applicant to comply with her duty of respect to the other members of staff of the European Central Bank and with her duty of professionalism.

188 The European Central Bank thus did not err in law in considering that the applicant had infringed Articles 2(1) and 5(1) of the Code of Conduct.

— Application of Article 4(a) of the Conditions of Employment

189 Under Article 4(a) of the Conditions of Employment, staff of the European Central Bank are required to 'perform their duties conscientiously and without regard to self-interest' and to 'conduct themselves in a manner befitting their position and the character of the ECB as a Community body'.

190 Under Article 9(c) of the Conditions of Employment, '[i]n interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions'.

191 Article 12 of the Staff Regulations of Officials of the European Communities prescribes that '[a]n official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position'. According to settled case-law, that provision is intended to ensure that Community officials, in their conduct, present a dignified image which is in keeping with the particularly correct and respectable behaviour one is entitled to expect from members of an international civil service (see Case T-146/94 *Williams* v *Court of Auditors* [1996] ECR-SC I-A-103 and II-329, paragraph 65, and Case T-273/94 *N* v *Commission* [1997] ECR-SC I-A-97 and II-289, paragraph 127).

192 Moreover, according to settled case-law, the first paragraph of Article 21 of the Staff Regulations of Officials of the European Communities establishes a duty of loyalty and cooperation for all officials in respect of the institution to which they belong and their superiors (Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437, at 448, and Case T-146/89 *Williams* v *Court of Auditors* [1991] ECR II-1293, paragraph 72). That duty of loyalty and cooperation entails not only positive obligations but also, *a fortiori*, a negative obligation, in general terms, to refrain from conduct likely to prejudice the dignity and respect due to the institution and its authorities (see Case T-146/89 *Williams* v *Court of Auditors*, paragraph 72, Case T-259/97 *Teixeira Neves* v *Court of Justice* [2000] ECR-SC I-A-169 and II-773, paragraphs 44 to 47, and *Onidi* v *Commission*, paragraph 73).

193 In view of the express reference in Article 9(c) of the Conditions of Employment to the rules applicable to officials of the European Communities, the obligation on members of staff of the European Central Bank, pursuant to Article 4(a) of the Conditions of Employment, to conduct themselves 'in a manner befitting their position and the character of the ECB as a Community body' must be interpreted as imposing on the staff of the Bank similar duties of loyalty and dignity to those which apply to officials of the European Communities.

194 In the present case, the applicant, first, directly called Mr B. a 'racist' without being able to support her serious accusations and without the internal and external investigations ordered by the European Central Bank being able subsequently to strengthen their credibility.

195 For a member of the staff of the European Central Bank to make such an accusation without being able to produce evidence from which the existence of unequal treatment might be presumed constitutes a breach of the duty of dignity to which that member of staff is subject.

196 Such conduct is also incompatible with the duty on members of the staff of the European Central Bank, pursuant to Article 4(a) of the Conditions of Employment, to perform their duties conscientiously, since it is liable to disturb the proper functioning of the service, in particular because of the tensions it may give rise to and the damage to the reputation of the persons targeted by it.

197 The applicant, second, made accusations against her superiors in her letter of 13 November 2001, without being able to produce sufficient evidence in support of them. Those accusations were made outspokenly, without the slightest objective evidence and in a manner which deprives them of the seemliness and loyalty required of all members of the staff of the European Central Bank with respect to that institution.

198 The European Central Bank thus did not err in law in considering that the applicant had infringed Article 4(a) of the Conditions of Employment. The applicant's seventh plea in law is consequently unfounded.

Plea of manifest error of assessment and breach of the principle of proportionality

Arguments of the parties

199 The applicant recalls that, according to the case-law, the determination of the penalty to be imposed is based on a comprehensive appraisal of all the particular facts and the aggravating or mitigating circumstances peculiar to the case (Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraph 221).

200 However, the European Central Bank took account, as the sole mitigating circumstance, only of the applicant's sick leave. It did not take account of, in particular, the fact that the applicant believed herself wronged by the failure to comply with the principle of equal treatment, the fact that she regarded Mr B.'s conduct as offensive, the fact that she drew her superiors' attention to this

situation on several occasions, the fact that the Bank examined her complaint only after the dispute had reached the point of no return, the fact that the stage of disciplinary measures would never have been reached had the Bank taken the necessary measures at the proper time, the fact that she asked in vain for the protection of her management, the fact that her manager singularised her because of the colour of her skin, the fact that the protection provided for by Directive 2000/43 or the Code of Conduct was refused her, the fact that she was penalised for having reported a case of discrimination, the reasonableness of the facts on which she relied in reporting that discrimination and, finally, the fact that she suffered in her career by marginalisation within the division, lack of a salary increase based on a disputed assessment, an enforced transfer and unjustifiable pressure to withdraw her allegations.

201 Moreover, the European Central Bank did not take account of the entirely satisfactory conditions of the applicant's integration into her new working environment from June 2002.

202 The European Central Bank recalls for its part that, once the truth of the facts has been established, it is for it to choose the appropriate measure, save in cases of manifest error of assessment or misuse of powers (Case 46/72 *De Greef* v *Commission* [1973] ECR 543, paragraphs 44 to 46, and Case 228/83 *F.* v *Commission* [1985] ECR 275, paragraph 34). In the present case, the applicant was given the lightest of the disciplinary measures provided for by the Conditions of Employment, and she has not put forward anything to justify being completely relieved of any penalty.

Findings of the Court

203 Application of the principle of proportionality in disciplinary matters comprises two aspects. First, it is for the appointing authority to choose the appropriate penalty where the truth of the matters alleged against the staff member is established, and it is not open to the Community judicature to criticise that choice unless the penalty imposed is disproportionate to the matters alleged against the person concerned. Second, the penalty to be imposed is to be determined on the basis of an overall assessment by the appointing authority of all the concrete facts and matters appertaining to each individual case, inasmuch as Articles 86 to 89 of the Staff Regulations of Officials of the European Communities, like the Conditions of Employment of the European Central Bank as regards its members of staff, do not specify any fixed relationship between the disciplinary measures

listed by them and the various types of misconduct on the part of officials, and do not state the extent to which aggravating or mitigating circumstances are to be taken into account in the choice of penalty. Examination by the Community judicature is therefore limited to a consideration of the question whether the weight attached by the appointing authority to the aggravating or mitigating circumstances is proportionate, and it cannot substitute its own assessment for that of the appointing authority (*X* v *ECB*, paragraph 221).

204 In the present case, the various factual elements put forward by the applicant do not allow the conclusion that, by issuing her with a written reprimand, the European Central Bank committed a manifest error of assessment or breached the principle of proportionality. They are essentially elements which are subjective or have not been established, or ones which, even if they were shown to be true, would not be capable of releasing the applicant completely from her obligations.

205 Thus, first, contrary to the applicant's submissions, the fact that she felt wronged because of an alleged failure to apply equal treatment and drew that to the attention of the European Central Bank on several occasions could not dispense her from fulfilling her duties of respect, professionalism and loyalty, particularly as she has not adduced any elements from which it might be concluded that Mr B. or the European Central Bank failed to comply with the principle of equal treatment.

206 Second, the applicant has not shown to a sufficient legal standard either that her manager had singularised her because of her skin colour or that, assuming that singularisation to be established, however regrettable it may have been, it justified dispensing the applicant completely from any penalty for the misconduct on her part.

207 Third, the applicant cannot rely to any purpose on the refusal of the European Central Bank to give her the protection provided for by Directive 2000/43 or the Code of Conduct. As is apparent from paragraphs 156 to 164 and 168 to 175 above, she has not shown that Directive 2000/43 was applicable to her case. Nor has she shown how the application of the Code of Conduct, in particular the last sentence of Article 2(1), would justify protection to the extent of a complete dispensation from any penalty, particularly as she was not penalised for having prevented or reported harassment or bullying, but for having made several serious

accusations without being able to produce evidence capable of supporting them to a sufficient legal standard.

208 Fourth, contrary to the applicant's submissions, as is apparent from the grounds of the contested decision, the applicant was not penalised for having reported discrimination but for having, by her use of invective, failed to comply with her duties of respect, professionalism, dignity and loyalty.

209 Fifth, the applicant cannot rely to any purpose on the fact that the arguments she put forward to report a case of discrimination were 'reasonable' since, as may be seen from paragraphs 129 to 149 above, she was not able to point to any evidence from which it could be supposed that the facts alleged by her were correct.

210 Sixth, the applicant cannot argue to any purpose that she was penalised, as well as by the contested decision, by 'marginalisation in the division, no salary increase based on [a contested appraisal], forced move and undue pressure ... to withdraw [the] allegation'. She has not proved to a sufficient legal standard either than those events, assuming them to be established, constituted sanctions connected with the events which gave rise to the present case or that they were sufficient to allow the conclusion that the additional imposition on the applicant of a written reprimand constituted a manifest error of assessment or a disproportionate penalty.

211 Seventh and finally, the circumstance that the applicant successfully integrated into her new team did not require the European Central Bank to exempt her from penalties in respect of events prior to that.

212 In addition to examining the points put forward by the applicant, it should be observed that the penalty imposed on her was the least severe of the disciplinary measures mentioned in Article 43 of the Conditions of Employment.

213 Consequently, the European Central Bank did not make a manifest error of assessment and did not infringe the principle of proportionality in issuing a written reprimand against the applicant. The eighth plea must therefore be rejected.

Plea of breach of the duty to have regard to the interests of officials

Arguments of the parties

214 The applicant considers that the European Central Bank did not at any time take account of her situation, which led to her being penalised for raising an issue of discrimination. She submits that she should not have to bear the consequences of the management's omission to take the necessary measures at the proper time.

215 In reply to a written question of the Court, the applicant explained that the alleged breach of the duty to have regard to her interests follows from acts prior to the contested decision and that no disciplinary measure would have been taken against her if the European Central Bank had acted in accordance with that duty.

216 The European Central Bank submits for its part that it did not infringe its duty to have regard to the applicant's interests.

Findings of the Court

217 According to settled case-law, the duty to have regard to the interests of officials implies in particular that when the authority takes a decision concerning the situation of an official, it should take into consideration all the factors which may affect its decision, and that when doing so it should take into account not only the interests of the service but also those of the official concerned (Case T-199/01 *G* v *Commission* [2003] ECR II-1085, paragraph 67).

218 In the present case, this plea by the applicant essentially complains that the European Central Bank did not take her situation and her complaints into account before adopting the contested decision.

219 However, as the Court has already held in paragraphs 138 to 144 above, first, the applicant has not proved to a sufficient legal standard that she made complaints intended to enforce the principle of equal treatment before 19 June 2001 and, second, once her complaint was made the European Central Bank did not remain inactive, since it carried out an investigation into both Mr B.'s complaint and the applicant's.

220 It does not therefore appear from the case-file that the European Central Bank took insufficient account of the applicant's situation before adopting the contested decision, nor indeed that, assuming that were shown to be the case, it could have consequences capable of entailing the annulment of the contested decision.

221 The ninth plea is thus unfounded in fact and must be rejected.

The claim for compensation

Claim for compensation for the non-material damage allegedly incurred by the applicant as a result of the contested decision

Arguments of the parties

222 The applicant submits that because of the very special circumstances of the present case the annulment of the decision would not compensate the non-material damage she incurred. The European Central Bank is responsible for aggravating the dispute on the ground that it did not act in due time. Finally, the decision was the result of a context of harassment of the applicant.

223 The European Central Bank submits that the necessary conditions for its liability to be engaged are not satisfied.

Findings of the Court

224 For there to be non-contractual liability on the part of the Community, a number of conditions must be satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered. A claim by an official seeking compensation for the non-material damage allegedly incurred as a result of the unlawful conduct of the Community body must therefore be rejected if that unlawfulness has not been established (Case T-589/93 *Ryan-Sheridan* v *EFILWC* [1996] ECR-SC I-A-27 and II-77, paragraphs 141 and 142).

225 In the present case, the applicant has not shown that the contested decision was unlawful. Her claim for compensation for the damage allegedly suffered by her as a result of that decision must therefore be rejected.

Claim for compensation for the damage allegedly incurred by the applicant as a result of the disclosure of the report of the investigation

Arguments of the parties

226 In reply to a written question from the Court, the applicant stated that, in her application, she was making a separate claim for compensation for the damage suffered by her as a result of the disclosure of the external consultant's report. Persons other than those who should normally have had access to the report had been able to read it.

227 The applicant, on being invited by the Court to adduce evidence to support her allegations, submitted, first, that the European Central Bank had never confirmed to her that she had been the only person to receive the report in its entirety and, second, that one of her superiors had obtained the observations in defence she had submitted in the disciplinary procedure, from which it could be supposed that he had also obtained the report in its entirety.

228 In response, the European Central Bank submitted at the hearing that the report in question had been transmitted in its entirety only to the applicant, Mr B. and their direct hierarchical superiors. Moreover, it had been communicated to the persons who had been interviewed by the external consultant only to the extent of the sections directly concerning those persons.

Findings of the Court

229 In order to rule on the applicant's claim for compensation, the Court must first examine whether she has shown that the acts of the European Central Bank she complains of are unlawful.

230 In the present case, the Court considers that the arguments put forward by the applicant do not establish to a sufficient legal standard that persons other than the applicant, Mr B. and their immediate hierarchical superiors had access to the full text of the external consultant's report, and in particular that the persons who were interviewed by the external consultant had access to sections other than those directly relating to their interview.

231 Moreover, it does not appear that communication of that report to the applicant's superiors is unlawful, since, first, those superiors are subject to obligations of professional confidentiality and, second, the applicant does not point to any specific provision preventing those superiors from being informed of the results of an investigation which raised questions against some of them and directly concerned the operation of the service.

232 The applicant's claim for compensation must therefore be rejected.

233 It follows that the action must be dismissed in its entirety.

Costs

234 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must be ordered to pay the costs, if costs have been applied for. However, under Article 88 of those Rules, in proceedings between the Communities and their servants, the institutions are to bear their own costs. That rule applies by analogy to the costs incurred by the European Central Bank in the present case (see, to that effect, Joined Cases T-178/00 and T-341/00 *Pflugradt* v *ECB* [2002] ECR II-4035, paragraphs 94 and 95).

235 The parties must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the parties to bear their own costs.**

Vesterdorf | Legal | Martins Ribeiro

Delivered in open court in Luxembourg on 16 March 2004.

H. Jung
Registrar

B. Vesterdorf
President