

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

22 October 2002 \*

In Joined Cases T-178/00 and T-341/00,

**Jan Pflugradt**, residing in Frankfurt am Main (Germany), represented in Case T-178/00 by N. Pflüger, lawyer, and in Case T-341/00 by N. Pflüger, R. Steiner and S. Mittländer, lawyers, with an address for service in Luxembourg,

applicant,

v

**European Central Bank**, represented in Case T-178/00 by J. Fernández Martín and V. Saintot, acting as Agents, assisted by B. Wägenbaur, lawyer, and in Case T-341/00 by V. Saintot and T. Gilliams, acting as Agents, assisted by B. Wägenbaur, lawyer, with an address for service in Luxembourg,

defendant,

\* Language of the case: German.

APPLICATION for annulment of the applicant's performance appraisal report for 1999, in Case T-178/00, and for annulment of the note of 28 June 2000 from the Director-General of the Directorate-General for Information Systems (DG IS) of the European Central Bank concerning the duties allocated to the applicant, in Case T-341/00,

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 19 February 2002,

gives the following

## Judgment

### Law

- 1 The Protocol on the Statute of the European System of Central Banks and of the European Central Bank (ECB) annexed to the EC Treaty ('the ESCB Statute') includes the following provisions:

'Article 12

...

- 12.3 The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

...

Article 36

Staff

36.1 The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2 The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.'

2 On the basis of those provisions the Governing Council adopted, by decision of 9 June 1998 as amended on 31 March 1999 (OJ 1999 L 125, p. 32), the Conditions of Employment of the Staff of the European Central Bank ('the Conditions of Employment'), which provide in particular as follows:

'9. (a) 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.

...

(c) 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 the 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.

10. (a) Employment contracts between the ECB and its members of staff shall take the form of letters of appointment which shall be countersigned by members of staff. The letters of appointment shall specify the terms of employment as required by Council Directive 91/533/EEC of 14 October 1991....’

3 Pursuant to Article 12.3 of the ESCB Statute, the Governing Council adopted the Rules of Procedure of the ECB, as amended on 22 April 1999 (OJ 1999 L 125, p. 34), which provide *inter alia* as follows:

‘Article 11

11.1 Each member of the staff of the ECB shall be informed of his/her position within the structure of the ECB, his/her reporting line and his/her professional responsibilities.

...

## Article 21

### Conditions of Employment

- 21.1 The employment relationship between the ECB and its staff shall be determined by the Conditions of Employment and the Staff Rules.
- 21.2 The Conditions of Employment shall be approved and amended by the Governing Council upon a proposal from the Executive Board. The General Council shall be consulted under the procedure laid down in these Rules of Procedure.
- 21.3 The Conditions of Employment shall be implemented by Staff Rules, which shall be adopted and amended by the Executive Board.'

### Facts, procedure and forms of order sought

4 The applicant, a former member of the staff of the European Monetary Institute (EMI), has been employed by the ECB since 1 July 1998. He was appointed to the Directorate-General for Information Systems (DG IS), where from the time he was recruited he has worked as 'UNIX Coordinator'.

5 On 9 October 1998 the applicant agreed to the terms of a document entitled 'UNIX coordinator responsibilities', which had been sent to him on 5 October and which contained a list of the various duties attaching to his post. Those duties included conducting appraisals with members of the UNIX team.

- 6 On 13 October 1998 the ECB sent the applicant a letter of appointment with retroactive effect to 1 July 1998.
  
- 7 On 14 October 1999 the Director-General of DG IS informed the applicant that he would not be responsible for preparing performance appraisals for members of the UNIX team.
  
- 8 On 23 November 1999 the applicant had an appraisal interview with his Head of Division. The Head of Division set out his assessment of the applicant in the latter's performance appraisal report for 1999, which is the document contested in Case T-178/00.
  
- 9 On 12 January 2000 the applicant put forward several observations on the assessment made of him and wrote on his performance appraisal for 1999 that he reserved 'the right to reject an unfair appraisal'.
  
- 10 The applicant asked for a second appraisal interview. That interview was held on 14 January 2000 with the Assistant Director of DG IS, who prepared his report the same day.
  
- 11 On 19 January 2000 the applicant signed the performance appraisal for 1999, adding the following comments:

'I have carefully considered the views expressed by the second appraiser. However, I maintain my position that the comments made in the appraisal document are unfair and unsubstantial [*sic*]. I shall therefore reject the appraisal

and shall arrange for it to be followed up in an administrative review as outlined in the Conditions of Employment.’

- 12 Under the ECB’s internal procedures the applicant challenged, first, the assessment of his work made in the performance appraisal for 1999 and, second, the decision to withdraw from him responsibility for appraising the members of the UNIX team, a decision which was also contained in that report.
  
- 13 On 10 March 2000 the applicant applied, under Article 41 of the Conditions of Employment, for an administrative review of the performance appraisal for 1999 on the ground that it was based on factual errors and therefore infringed his contractual rights. He also requested another appraisal for 1999, to be conducted by other persons who would be unbiased.
  
- 14 On 10 April 2000 the Director-General of DG IS rebutted the applicant’s claims that the performance appraisal for 1999 contained factual errors and turned down the request for another appraisal procedure to be initiated.
  
- 15 On 9 May 2000 the applicant submitted a complaint to the President of the ECB under the grievance procedure, based essentially on the grounds relied on in the context of the administrative review procedure.
  
- 16 On 8 June 2000 the President of the ECB dismissed that complaint.

- 17 As well as taking those steps, the applicant had applied on 17 January 2000 to the Director-General of the Directorate-General (DG) for Administration and Personnel at the ECB, under Article 41 of the Conditions of Employment, for an administrative review of the decision contained in the performance appraisal for 1999 to withdraw from him responsibility for appraising the members of the UNIX team. The applicant contended that that decision constituted a breach of his contractual rights. He asked, first, to have his right to appraise the members of the UNIX team reinstated and, second, that DG IS should in future comply with the terms of his employment contract.
- 18 On 27 January 2000 the Director-General of the DG for Administration and Personnel forwarded that request to DG IS.
- 19 On 10 February 2000 the applicant sent DG IS a note supplementing the terms of his application for an administrative review.
- 20 On 10 March 2000 the Director of DG IS replied that the terms of the applicant's employment contract had not been altered, and so dismissed the applicant's claims.
- 21 On 9 May 2000 the applicant lodged a complaint with the President of the ECB based essentially on the grounds relied on in the context of the administrative review procedure.
- 22 On 8 June 2000 the President of the ECB dismissed that complaint.

- 23 By note of 28 June 2000 the Director-General of DG IS sent the applicant a list of his main responsibilities, stating that that list would provide the basis for his annual appraisal. That document is the subject of the action in Case T-341/00.
- 24 On 11 August 2000 the applicant applied under Article 41 of the Conditions of Employment for an administrative review of the note of 28 June 2000.
- 25 On 8 September 2000 the ECB refused to grant that application.
- 26 On 12 September 2000 the applicant lodged a complaint with the President of the ECB, which the latter dismissed on 25 October 2000.
- 27 By application lodged at the Registry of the Court of First Instance on 4 July 2000 the applicant brought, on the basis of Article 236 EC and Article 36.2 of the ESCB Statute, the action registered as Case T-178/00. By application lodged at the Registry of the Court of First Instance on 10 November 2000, the applicant brought, on the basis of Article 236 EC and Article 36.2 of the ESCB Statute, the action registered as Case T-341/00.
- 28 By order of 6 December 2001, the President of the Fifth Chamber of the Court of First Instance decided to join the two cases for the purposes of the oral procedure.

29 In the written pleadings in Case T-178/00 the applicant claims that the Court should:

- order the ECB to revoke his performance appraisal for 1999 dated 23 November 1999 and to remove it from his personal file;
  
- order the ECB to have a new performance appraisal drawn up for the applicant for 1999 by other, unbiased persons, and in any case by persons other than those who acted as assessors;
  
- order the ECB to provide the applicant, pursuant to his contract, with work corresponding to the activities forming the subject-matter of his job description, namely, 'UNIX coordinator responsibilities';
  
- order the ECB to assign to the applicant responsibility for preparing performance appraisals for all members of the UNIX team;
  
- order the ECB to seek his advice before grading members of the UNIX team;
  
- order the ECB to entrust him with supervision of the work of members of the UNIX team and to use the applicant's conclusions as the basis for the ECB Merit Bonus Scheme and for other bonus decisions;

- order the ECB to entrust him with responsibility as regards personnel matters for all staff employed on UNIX platforms and production systems, and technical and professional responsibility for the latter;
  
- find, as an alternative to those five heads of claim, that the ECB is required to provide the applicant with work corresponding to the job description ‘UNIX coordinator responsibilities’ and, in doing so, to have regard to the contractually defined activities forming the subject-matter of the four preceding heads of claim;
  
- order the ECB to pay the costs.

30 In the written pleadings in Case T-341/00 the applicant claims that the Court of First Instance should:

- find that the ECB infringed his employment contract by providing him with work corresponding to the job description dated 28 June 2000;
  
- find that the job description dated 28 June 2000 is invalid;
  
- order the ECB to withdraw the job description dated 28 June 2000;

- order the ECB to provide him, at any event, with work corresponding to the job description which was the subject-matter of the performance appraisal for 1999, if it does not allow his third head of claim in Case T-178/00;
  
- order the ECB to pay the costs.

31 The ECB contends in both cases that the Court of First Instance should:

- dismiss the application;
  
- make an appropriate order as to costs.

32 The parties presented oral argument and replied to the Court's questions at the hearing on 19 February 2002. The Court of First Instance considers that the two cases should also be joined for the purposes of the judgment, the parties having agreed to this at the hearing.

#### The application in Case T-178/00

33 At the hearing the parties specified the scope of their written pleadings. The applicant essentially requested that his pleadings in Case T-178/00 should be

interpreted as an application for the annulment of the performance appraisal of 1999 in so far as that measure, on the one hand, withdraws certain responsibilities from him as regards personnel matters and, on the other hand, contains assessments based on factual errors. The ECB decided not to rely on a plea of inadmissibility on grounds of failure to comply with the pre-litigation procedure. It pointed out, however, that as the applicant had reworded his pleadings the question arose whether such amendments were admissible at the stage of the oral procedure.

34 The Court observes that it is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance that an application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas in law on which the application is based and that no new plea in law may, in principle, be introduced in the course of proceedings. In this particular case the applicant's statements at the hearing were not designed to alter the subject-matter of the case but to reword some of the pleadings particularly in the light of developments in case-law after the action had been brought. That sort of amendment cannot be interpreted as the production of new pleas. In addition, the statement of the forms of order sought and the pleas in the case is not linked to a particular way of wording them. It is sufficiently clear from the application that the action seeks the annulment of the performance appraisal for 1999, since the applicant stated in paragraph 1 of the application that he disputed the legal validity of that document. Although the applicant's pleadings are at times unclear the ECB has been able to adopt a position on the pleas and complaints he relies on, so that the ECB cannot claim it was not in a position to defend itself.

35 On the basis of that evidence the Court of First Instance finds that the applicant is seeking the annulment of the performance appraisal for 1999, first, in so far as it withdraws certain responsibilities from him and, second, in so far as it contains various assessments of his work.

*The plea concerning withdrawal of responsibility for preparing annual performance appraisals for members of the UNIX team*

- 36 Relying on the existence of a right to occupy a post that complies with the terms of his employment contract, the applicant claims that the ECB unlawfully withdrew some of his personnel responsibilities, namely responsibility for preparing annual performance appraisals for members of the UNIX team and making proposals with regard to their grading.
- 37 The Court observes that the claim that the latter responsibility had been withdrawn is not borne out by the evidence on the file and, at any event, does not appear to relate directly to the performance appraisal for 1999. Indeed, in that appraisal that responsibility was one of the key responsibilities assigned to the applicant during the ECB's first year of activity. Following that appraisal that responsibility was extended into 2000, as stated on page 8 of the performance appraisal for 1999. It is also clear that in his 12th comment the appraiser gave his view of the way in which the applicant had performed duties in connection with making proposals for grading members of the UNIX team, which shows that the applicant had performed those duties.
- 38 The only change in the responsibilities which can be inferred from the performance appraisal for 1999 in relation to the list of duties involved in the applicant's post drawn up in October 1998 concerns withdrawal of responsibility for appraising members of the UNIX team. In those circumstances, it is appropriate to consider the applicant's complaints relating to that point and to dismiss without further consideration the complaints relating to the alleged alteration concerning the grading of members of the UNIX team, a change whose existence the applicant has not proved to the required legal standard.

## Arguments of the parties

- 39 The applicant claims in essence that members of the ECB staff are entitled to occupy a post that complies with the terms of their employment contract. He states that relations between the ECB and its staff are not governed by the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, but are governed by private employment law. In that regard there is a fundamental principle common to the Member States that every worker has the right to be employed in accordance with his employment contract. Under that principle, the ECB cannot unilaterally alter the essential duties allocated by contract to members of its staff. In this case, the ECB infringed that right when it unilaterally withdrew from the applicant responsibility for conducting appraisals for members of the UNIX team.
- 40 The applicant infers the existence of the right to occupy a post that complies with his employment contract from the principle of freedom to contract, recognised by the constitutions of all the Member States, in particular by the German Basic Law. The applicant also connects that right with the freedom to pursue a trade or professional activity and engage in economic activity, principles enshrined in particular in *Case 44/79 Hauer* [1979] ECR 3727, 3750).
- 41 He claims that preparing performance appraisals for members of the UNIX team constitutes an essential aspect of his personnel responsibilities. Withdrawing that responsibility alters the nature of the post as a whole. The policy of the ECB on this point is immaterial since the employment contract provides that that right belongs to the applicant, who exercised it until the adoption of his performance appraisal for 1999.

- 42 The applicant contends that an employer cannot withdraw behind its management powers in order to assign an employee to a post below that which forms the subject of the employment contract. This would be the case, for example, under French and German law.
- 43 The applicant states that when his employment contract was signed no post of principal was formally provided for as regards the UNIX team. It is customary in other divisions of the ECB to employ as appraisers colleagues with no lineal responsibility.
- 44 Lastly, the applicant contends that the ECB could not give as grounds for unilateral alteration of the employment contract professional failings noted in the performance appraisal for 1999. Such failings might warrant dismissal under Article 11(a) of the Conditions of Employment, but in no circumstances would they provide a basis for the ECB to extend its management powers by altering an employee's responsibilities.
- 45 The ECB refutes those complaints. It considers essentially that its staff are not subject to private law relationships and do not have an established right to perform certain specific duties. The ECB denies that it exceeded the limits of its management powers in altering the responsibilities initially allocated to the applicant as regards the annual appraisal of members of the UNIX team.

### Findings of the Court

- 46 The applicant relies essentially on a right to occupy a post that complies with the terms of his employment contract and claims that that right was infringed in so

far as the ECB unlawfully withdrew from him certain responsibilities which constituted essential elements of the duties conferred on him under his employment contract.

47 It is for the Court to consider first of all the nature of the employment relationship between the ECB and the applicant and then to verify whether the ECB, as the applicant's employer, exceeded its powers in withdrawing from the applicant responsibility for appraising the work of members of the UNIX team.

48 Article 36.1 of the ESCB Statute confers functional autonomy on the ECB as regards the arrangements applying to its staff. Those arrangements, defined in the Conditions of Employment and the Staff Rules (Article 21 of the ECB's Rules of Procedure), are not the same as the rules applying to officials and the rules applying to other servants of the European Communities. They are also not dependent on the laws of the Member States. Article 9(c) of the Conditions of Employment states that 'no specific national law governs those Conditions of Employment' and that the 'ECB applies (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 the Member States'.

49 However, the employment relationship between the ECB and its staff is of a contractual nature (Case T-333/99 *X v ECB* [2001] ECR II-3021, paragraphs 61 and 68). Under Articles 9(a) and 10(a) of the Conditions of Employment (see paragraph 2 above), that relationship is governed by employment contracts which take the form of letters of appointment sent by the ECB to its servants and countersigned by them.

50 In the present case the applicant's employment contract is contained in the letter of appointment of 13 October 1998. That letter expressly provides that the Conditions of Employment and the Staff Rules form an integral part of that

contract. It states in particular that the post offered to the applicant is that of UNIX Coordinator in DG IS. It should be emphasised that that statement is in accordance with the provisions of Article 2 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32), applicable to the ECB (Article 10(a) of the Conditions of Employment), under which an employer is required to bring to the notice of the employee, among other essential elements of the contract or the employment relationship, '(i) the title, grade, nature or category of the work for which the employee is employed; or (ii) a brief specification or description of the work'.

51 In addition, it is clear from the documents on the file that during negotiation of the terms of his employment contract the ECB gave the applicant on 5 October 1998 a document entitled 'UNIX coordinator responsibilities' ('the job description of 5 October 1998'), which contains a list of 18 duties specifically attaching to that job and divided into three categories: 'technical', 'staff related' and 'administration and planning'.

52 It is appropriate to point out, moreover, that the last paragraph of the job description of 5 October 1998 reads: 'However, if Jan considers that he can already satisfactorily accomplish all the tasks listed here, then this will form the overall job description and is the basis upon which any future assessment will be performed'. The applicant stated in an e-mail he sent to his immediate superiors on 9 October 1998 that he accepted that job description and that he considered he was capable of carrying out all of those duties satisfactorily.

53 It cannot be concluded from those considerations, however, that none of the duties and responsibilities listed in the job description of 5 October 1998 could be altered without the express consent of the applicant. Although the binding

force of contracts precludes the ECB as an employer from imposing alterations to the conditions under which employment contracts are performed without the consent of the staff members concerned, that principle applies only to the essential elements of the employment contract.

54 The ECB, like any other institution or undertaking, has management powers in the organisation of its services and in the management of its staff. As a Community institution it even enjoys wide discretion in the organisation of its services and in the assignment of its staff to perform its public service responsibilities (see, by analogy, the judgments of the Court of Justice in Case C-69/83 *Lux v Court of Auditors* [1984] ECR 2447, paragraph 17, and Case C-294/95 P *Ojha v Commission* [1996] ECR I-5863, paragraph 40; and the judgments of the Court of First Instance in Case T-33/90 *Von Bonkewitz-Lindner v Parliament* [1991] ECR II-1251, paragraph 88, and Case T-176/97 *Hick v ESC* [1998] ECR-SC I-A-281 and II-845, paragraph 36). It may therefore over time develop its employment relationships with its staff in the best interests of the service in order to arrive at an effective organisation of work and a consistent allocation of the various duties among members of the staff and to adapt to varying needs. A member of staff recruited to a post for an indefinite period which might last until he reached the age of 65 cannot reasonably expect that every aspect of internal organisation will remain unchanged for his entire career or that he will retain throughout his career the responsibilities allocated to him at the time of his appointment.

55 In that regard, it should be noted that the applicant was recruited and the job description of 5 October 1998 drawn up in the general context of the setting up of the ECB's services during its first year of operation. That is illustrated in particular by the fact that the allocation of the duties and responsibilities which appear in that job description was provisional. For nine of those duties and responsibilities the job description indicates that the applicant may be assisted by a colleague 'during the initial start-up of Stage Three'. In addition, the ECB states in that document that it recommends a review of the allocation of all the duties and responsibilities: 'If it were to be seen after [the first quarter of] 1999 that the overall workload within the UNIX area decreases, it is recommended that all of the UNIX Coordinator tasks should be reviewed (hopefully with a mapping to an

appropriate ECB job family description), taking into account any ECB circumstances and policies applicable at this time’.

- 56 Moreover, by stipulating that the Conditions of Employment ‘as they may read from time to time’, form an integral part of the applicant’s employment contract, that contract provides expressly that the terms of the employment relationship are likely to vary as a result of amendments to the Conditions of Employment.
- 57 It is necessary to ascertain whether the responsibility of conducting the annual appraisals of the work of members of the UNIX team constitutes an essential element as regards the job of the team coordinator and whether withdrawal of that responsibility therefore affects essential aspects of the applicant’s employment contract.
- 58 It is common ground that despite the alteration of his responsibilities the applicant retained his job as ‘UNIX Coordinator’, falling within the category of ‘professionals’ and Grade G, with the relevant remuneration.
- 59 It is clear from the job description of 5 October 1998 that the post of UNIX Coordinator is essentially of a technical nature, and that the staff-related and administrative duties are merely secondary. Thus, withdrawal of the duty of appraising members of the UNIX team did not by itself result in downgrading, as a whole, the applicant’s duties clearly below the responsibilities corresponding to his job. In that regard it is appropriate to point out that it is common ground that the applicant has never had to conduct appraisals for members of the UNIX team, as that responsibility was withdrawn from him even before the ECB embarked upon the first round of annual appraisals for its staff. In those circumstances the alteration in question does not represent a downgrading of the applicant’s job and cannot therefore be regarded as infringing an essential element of the employment contract.

60 Consequently, the applicant's complaints are unfounded. That plea must therefore be rejected.

*The plea relating to the assessment of the applicant's work in 1999*

Arguments of the parties

61 The applicant contends that the performance appraisal for 1999 contains various assessments that might affect his future career, assessments based on material factual errors. The applicant disputes in particular the assessments concerning the following aspects:

- his unnecessary stubbornness;
  
- the fact that he asked the UNIX team to prepare special web documentation instead of the expected DG IS web documentation;
  
- his lack of awareness as regards his activities;
  
- the fact that he did not bring the competent DG IS sectors in on certain essential discussions;

- a failure to communicate regarding his UNIX activities;
  
- his slowness in delegating responsibilities;
  
- the fact that he did not give the necessary priority to recruitment of new members of the UNIX team;
  
- the fact that he synchronised the computers in breach of the instructions he had been given.

62 There are so few grounds for those accusations that the applicant can neither understand them nor refute them. Consequently, the performance appraisal for 1999, as a whole, infringes the employee's rights. The ECB cannot rely on the fact that during the grievance procedure the applicant failed to give sufficient explanation of the extent to which he disputed the grounds. It is for the ECB to enable the applicant, by explaining more fully the accusations made against him, to provide reasoned answers. In the absence of grounds, the applicant could only deny the accuracy of those accusations. The ECB failed during the pre-litigation procedure to provide even summary evidence of the basis for its assessment. In the context of these proceedings it is incumbent upon the ECB to adduce evidence of the relevance of its accusations.

63 In addition, the disputed assessments contained in the performance appraisal for 1999 are based on factual errors and not on complex value judgments that fall outside the scope of judicial review.

- 64 An employee's fundamental safeguards include the right to have removed from his personal file any documents which contain incorrect information and which might affect his future career.
- 65 The ECB is therefore required to carry out a fresh assessment and to entrust that task to persons who did not take part in the disputed appraisal.
- 66 The ECB refutes those complaints. The performance appraisal for 1999 does contain complex value judgments on the applicant's abilities for which the Court cannot substitute its own assessment (*von Bonkewitz-Lindner v Parliament*, cited above, paragraph 62, and Case T-33/91 *Williams v Court of Auditors* [1992] ECR II-2499, paragraph 43).
- 67 The applicant's performance appraisal is particularly detailed and the procedure leading to its adoption respected the applicant's rights of defence, rights which the applicant did not fail to exercise in requiring a second appraisal and in initiating the administrative review and complaint procedures.

### Findings of the Court

- 68 Although he claims that the performance appraisal for 1999 is based on material factual errors, the applicant is seeking in fact to challenge the validity of the assessments made by his superiors of his work during 1999.

- 69 It is not, however, for the Court to substitute its assessment for that of the persons responsible for appraising the applicant's work. The ECB, like other institutions and bodies of the Community, enjoys wide discretion in appraising the work of members of its staff. Judicial review by the Court of the assessments contained in the annual performance appraisal of a member of the ECB staff relates only to possible procedural irregularities, manifest factual errors in such assessments and any misuse of power (see, by analogy, Case T-63/89 *Latham v Commission* [1991] ECR II-19, paragraph 19).
- 70 In the present case, as the applicant has failed to establish the existence of circumstances of that nature his complaints cannot be accepted.
- 71 Moreover, the reasoning in the performance appraisal for 1999 is sufficiently precise to satisfy the requirements of Article 253 EC, applicable under Article 34.2 of the ESCB Statute to decisions taken by the ECB.
- 72 That plea relating to the assessments contained in the performance appraisal for 1999 must therefore be rejected.
- 73 The application in Case T-178/00 must therefore be dismissed as unfounded.

## The application in Case T-341/00

- 74 At the hearing the applicant indicated to the Court that the application in Case T-341/00 sought merely to obtain the annulment of the decision contained in the note of 28 June 2000 in which the ECB, in his opinion, altered his responsibilities. The Court takes note of that detail, which is reflected in the substance of the arguments put forward by the applicant in the written pleadings and the second head of claim made in this case.

### *Admissibility*

#### Arguments of the parties

- 75 Although it does not raise an objection of inadmissibility under Article 114 of the Rules of Procedure, the ECB considers that the present action is inadmissible since the note of 28 June 2000, annulment of which the applicant is seeking, does not constitute an act adversely affecting the applicant.
- 76 The ECB points out that the note of 28 June 2000 has no binding legal effects that would affect the applicant's interests by significantly altering his legal position (order of the Court of First Instance of 25 October 1996 in Case T-26/96 *Lopes v Court of Justice* [1996] ECR-SC I-A-487 and II-1357). The ECB points out in that regard that a mere management decision, such as a measure to reallocate duties within an administrative unit, which is not likely to affect the official's position under the Staff Rules or infringe the principle that the post to

which an official is assigned should correspond to his grade is not an act adversely affecting an official (Case 280/87 *Hecq v Commission* [1988] ECR 6433).

- 77 In the present case the note of 28 June 2000 is a purely internal organisational measure which does not affect the position of the person concerned under the Staff Rules. The applicant was not ‘downgraded’. The post of ‘UNIX Coordinator’ does not appear on the ECB’s organisation chart of 6 October 2000 because the ECB had carried out an internal reorganisation of all the ‘Coordinator’ posts. The post occupied by the applicant was thus reappraised.
- 78 At the time the action was brought the applicant had not yet been informed of his new title and salary. The ECB states that it subsequently altered the applicant’s post in two respects. First, the job title ‘UNIX Coordinator’ was replaced by ‘Senior UNIX Expert’. Second, the applicant was promoted from Grade G to Grade H with a corresponding increase in salary backdated to 1 January 2000. Apart from those two points there was no significant qualitative or quantitative difference between the duties attaching to the applicant’s post before and after 28 June 2000.
- 79 The ECB concludes that the applicant’s responsibilities did not change in such a way as to have a significant effect on his legal situation. Hence, the note of 28 June 2000 was an internal organisational measure and not an actionable decision. The application in Case T-341/00 is therefore inadmissible.
- 80 The applicant objects that the case-law relied on by the ECB is irrelevant because the note of 28 June 2000 does affect his legal situation. He claims he suffered a downgrading of his job as a result of the ECB withdrawing certain responsibilities specifically attributed to him when he signed his employment contract in 1998.

## Findings of the Court

- 81 As regards admissibility, it should be observed that the note of 28 June 2000 alters certain specific duties which the ECB had allocated to the applicant with regard to the appraisal, grading and recruitment of members of the UNIX team. Those duties relate to staff responsibilities generally linked to the exercise of hierarchical authority. In view of the nature of those duties, and since the applicant claims to have suffered a downgrading of his job as a result of their withdrawal, the alterations in question may not be regarded as mere internal organisational measures such as those at issue in the cases relied on by the ECB.
- 82 Therefore, the note of 28 June 2000 constitutes a measure adversely affecting the applicant. In those circumstances the application must be declared admissible.

## *Substance*

### Arguments of the parties

- 83 The applicant essentially repeats the legal arguments he put forward in Case T-178/00. By altering unilaterally and substantively the list of his responsibilities in the note of 28 June 2000 the ECB infringed the applicant's right to be appointed to a job that complied with his employment contract.

- 84 The applicant points out that the post of ‘Coordinator’ no longer appears on the ECB’s organisation chart adopted on 6 December 2000.
- 85 He states that, in the technical field, in view of his qualifications, only a few of his responsibilities can be performed by other employees. Certain duties fall within his exclusive area of responsibility, such as, in particular, the design and introduction of a system ensuring the safety of all UNIX production systems. However, the note of 28 June 2000 does not allocate him any overall responsibility for UNIX systems and platforms. The applicant’s area of responsibility was thus reduced to developing UNIX systems. The applicant now has only responsibilities at a level lower than those set out in his contract when he was appointed in 1998.
- 86 As regards staff management, another essential aspect of the job in question, the note of 28 June 2000 has the effect of downgrading the applicant’s position. Thus, his responsibilities with regard to staff appraisal, grading proposals and performance monitoring, which fell within his exclusive area of responsibility, have been withdrawn from him.
- 87 Lastly, the applicant considers that the ECB acted in accordance with Directive 91/533 when, in 1998, it described to the applicant the specific duties relating to his job. He considers, however, that the ECB was not entitled to alter that description by its note of 28 June 2000.

- 88 The ECB refutes those complaints. In essence it argues that the contract which binds it to the applicant is not subject to German employment law, and that the job description does not form part of that employment contract but comes under its organisational powers. It also considers that it complied with the provisions of Article 2(2) of Directive 91/533 in sending the applicant a letter of appointment giving a brief description of his job.

### Findings of the Court

- 89 First, as the Court has held in paragraph 54 in relation to Case T-178/00, the applicant cannot reasonably expect to retain until retirement age certain specific duties which may have been allocated to him when he was appointed by the ECB. Therefore the applicant's claims with regard to his allegedly exclusive areas of responsibility must be dismissed.
- 90 Second, as regards whether the ECB manifestly exceeded the limits of its organisational authority by unilaterally altering the applicant's responsibilities, it should be noted first that it is not disputed that those alterations were made in the interest of the service. Secondly, the applicant has not supported his arguments with detailed evidence sufficient to demonstrate that those alterations affect essential aspects of his employment contract by reducing his responsibilities as a whole clearly below those which correspond to his post and that they therefore constitute a downgrading of that post. On the contrary, it is plain that the applicant retains his essential duties with regard to the UNIX systems and the coordination of the UNIX specialists. The applicant's complaints regarding an alleged downgrading of his post must therefore be rejected.

- 91 Third, as regards Directive 91/533, suffice it to say that, since the applicant has stated that he is not pleading infringement of that directive, it is not necessary to rule on that aspect of the application.
- 92 All the pleas, complaints and arguments in Case T-341/00 must therefore be rejected.
- 93 Since none of the pleas relied on in order to challenge the contested measures has been upheld the applications must be dismissed.

## Costs

- 94 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they 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.
- 95 In Cases T-178/00 and T-341/00 each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Orders that Cases T-178/00 and T-341/00 shall be joined for the purposes of the judgment;
2. Dismisses the applications in Cases T-178/00 and T-341/00;
3. Orders the parties to bear their own costs.

Cooke

García-Valdecasas

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Delivered in open court in Luxembourg on 22 October 2002.

H. Jung

R. García-Valdecasas

Registrar

President