Reports of Cases

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

5 July 2011 *

(Civil service — Contract staff — Conditions of engagement — Whether physically fit — Pre-recruitment medical examination — Protection of individuals with regard to the processing of personal data — Medical confidentiality — Transfer of medical data between institutions — Right to respect for private life)

In Case F-46/09,

ACTION under Articles 236 EC and 152 EA,

V, candidate for a post as a member of the contract staff at the European Parliament, residing in Brussels (Belgium), represented by É. Boigelot and S. Woog, lawyers,

applicant,

supported by

European Data Protection Supervisor, represented by M. V. Pérez Asinari and by H. Kranenborg, acting as Agents,

intervener,

v

European Parliament, represented by K. Zejdová and S. Seyr, acting as Agents,

defendant,

THE TRIBUNAL (First Chamber),

composed of S. Gervasoni (Rapporteur), President, H. Kreppel and M.I. Rofes i Pujol, Judges,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2011,

gives the following

* Language of the case: French.

Judgment

1 By application lodged at the Registry of the Tribunal on 5 October 2009, V brought the present action seeking, principally, annulment, firstly, of the decision of 19 December 2008 by which the Director for Administrative Management of Personnel of the European Parliament withdrew, on the ground of unfitness for recruitment, the offer of employment which had been made to her on 10 December 2008 and, secondly, of the opinion of the Parliament's medical officer of 18 December 2008, and compensation for the damage which she considers that she suffered.

Legal context

2 Article 82(3) of the Conditions of Employment of Other Servants of the European Communities ('the CEOS') provides:

'A member of the contract staff may be engaged only on condition that he:

…

(d) is physically fit to perform his duties; ...'

3 Under Article 83 of the CEOS:

'Before being engaged, a member of the contract staff shall be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 82(3)(d).

Article 33 of the Staff Regulations [of Officials of the European Union] shall apply by analogy.'

4 The second paragraph of Article 33 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'Where a negative medical opinion is given as a result of the medical examination provided for in the first paragraph, the candidate may, within 20 days of being notified of this opinion by the institution, request that his case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institution's medical officers. The medical officer responsible for the initial negative opinion shall be heard by the medical committee. The candidate may refer the opinion of a doctor of his choice to the medical committee. Where the opinion of the medical committee confirms the conclusions of the medical examination provided for in the first paragraph, the candidate shall pay 50% of the fees and of the incidental costs.'

5 Article 15 of the Decision of the Bureau of the Parliament of 3 May 2004 laying down Internal Rules on the Recruitment of Officials and Other Servants ('the Internal Rules') provides:

'In accordance with Article 83 of the CEOS, a member of the contract staff shall be medically examined before being engaged. The medical status based on the examination shall be valid for one year unless this is considered inadvisable by the [i]nstitution's [m]edical [o]fficer, who, if necessary, may stipulate a shorter period of validity for the medical status.'

6 The Guide to Procedures of the European Commission's Medical Service provides that, if no post is taken up after the applicant has been declared fit or unfit, the file is to be archived after six months.

7 Article 1(1) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) provides:

'In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European [Union], hereinafter referred to as "[Union] institutions or bodies", shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national law of the Member States implementing Directive 95/46/EC.'

8 Article 4 of Regulation No 45/2001 provides:

'1. Personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The [Union] institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes.

2. It shall be for the controller to ensure that paragraph 1 is complied with.'

9 Under Article 6 of Regulation No 45/2001:

'Without prejudice to Articles 4, 5 and 10:

1. Personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the [Union] institution or body.

…'

10 Article 7 of Regulation No 45/2001 provides:

‘Without prejudice to Articles 4, 5, 6 and 10:

‘1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.

…’

11 Article 10(1) to (3) of Regulation No 45/2001 provides:

‘1. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his or her express consent to the processing of those data, except where the internal rules of the [Union] institution or body provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject’s giving his or her consent, or

(b) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the [European Union] or other legal instruments adopted on the basis thereof, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards …

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.’

Facts

12 Between February 1997 and March 2006, the applicant worked in several Commission departments as a member of the auxiliary staff or as a temporary agency worker for a total period of approximately three years. The posts which she held included, most recently, that of assistant in the Multi-agency Investigations unit of the European Anti-Fraud Office (OLAF), from September 2005 to March 2006.

13 By note of 27 February 2006, the applicant was informed that she had passed the contract agent selection tests, known as CAST 25, for the 25 Member States in the secretarial field. Her name was therefore included in the European Personnel Selection Office (EPSO)’s final database of successful candidates, which was valid for three years.

14 In June 2006, two Commission directorates-general expressed the wish to recruit the applicant.

15 The applicant was invited to attend a medical examination to assess her fitness to perform her duties, in accordance with Article 83 of the CEOS.

16 On 26 June 2006, the pre-recruitment medical examination took place at the premises of the Commission’s medical service in Brussels (Belgium) and the applicant was seen by Dr K.

17 On 29 June 2006, the applicant sent an email to Mr F., head of the Commission's Medical Service, to complain about Dr K.'s alleged inappropriate conduct towards her during the pre-recruitment medical examination on 26 June 2006.

18 Mr F. inquired into that complaint in July 2006, firstly, by hearing Dr K., who denied the allegations made against him, and, secondly, by seeing the applicant.

19 Following that inquiry, despite the lack of evidence concerning the facts alleged against Dr K., it was decided to entrust the handling of the applicant's file to another doctor.

20 On 26 September 2006, the Commission's medical officer issued a medical opinion that the applicant was physically unfit.

21 By letter of 9 November 2006, Ms S., a director within the Directorate-General (DG) for Personnel and Administration, informed the applicant that she therefore did not satisfy the requirement of being physically fit to perform her duties and that she could, within 20 days, in accordance with the second paragraph of Article 33 of the Staff Regulations, request that her case be submitted for the opinion of a medical committee.

22 By letter of 18 November 2006, the applicant requested that her case be submitted for the opinion of a medical committee.

23 In its opinion of 17 April 2007, adopted by common consent by its three members, the medical committee stated, after examining all the documents in the applicant's file and seeking an expert psychiatric opinion, that it was 'of the opinion that [the applicant] [did] not possess the required fitness to perform her duties'. It was pointed out, at the end of the opinion, that 'the medical basis for the conclusions [was] being forwarded under medical confidentiality [to the Commission's medical service]'.

24 By letter of 15 May 2007, the Commission informed the applicant that '[a]ccording to the committee's opinion [a copy of which was annexed to the letter], [she] [did] not satisfy the requirement of being physically fit to perform [her] duties. That letter stated that '[t]he medical basis for the conclusions [had] been forwarded under medical confidentiality to the [h]ead of the Commission's medical service in Brussels, who [had] placed it on [the applicant's] medical file'.

25 On 9 May 2007, the applicant submitted a complaint against that decision.

26 By decision of 12 July 2007, the Commission rejected the complaint.

27 On 4 March 2008, the applicant brought an action inter alia against the decision of 15 May 2007, registered as Case F-33/08. By judgment of 21 October 2009, the Tribunal dismissed that action. The General Court, hearing the case on appeal, confirmed that dismissal by judgment of 15 June 2011 (Case T-510/09 P *V* v *Commission*).

28 After the Parliament's medical service, by a note of 9 December 2008, asked the Commission to send it the applicant's medical file, the Parliament, by letter of 10 December 2008, made the applicant an offer of employment as a member of the contract staff, to fill a post in function group II in the Secretariat for the period from 2 February to 2 August 2009. That letter stated that the offer was being made subject to compliance with the conditions of engagement laid down in Article 82 of the CEOS and to the positive outcome of the pre-recruitment medical examination. The applicant was also asked to send by fax, within two weeks at the latest, the necessary documents, in particular a certified copy of the original of the certificates from all her previous employers. By email of the same date, the person

responsible for the management of the applicant's recruitment file informed her, inter alia, of the detailed arrangements for the pre-recruitment medical examination and asked her to bring a passport photo 'for the compilation of [her] medical file'.

29 By email of 10 December 2008, the applicant accepted the Parliament's offer of employment. By another email of the same date, she informed the Parliament that she was unable to fax the documents requested within two weeks because of a trip abroad and that, taking into account the Christmas period, she wished to be given until January to do so.

30 By letter of 10 December 2008, the applicant was invited on 7 January 2009 to attend the pre-recruitment medical examination. That letter contained, at the foot of the page, the names of six doctors who were members of the Parliament's medical service in Brussels. The letter was signed by Dr B. The six doctors mentioned included Dr K., who had carried out the applicant's pre-recruitment medical examination of 26 June 2006 at the Commission and whose conduct had been questioned by the applicant.

31 By email of 11 December 2008, the person responsible for the management of the applicant's file replied to her that there was no problem in her sending the requested documents in January, as her recruitment was scheduled for 2 February 2009.

32 On 12 December 2008, the applicant, on her own initiative, went to the Parc Léopold clinic in Brussels to have some blood tests carried out.

33 On 12 December 2008, the Parliament's medical service received a copy of the applicant's pre-recruitment medical file, the original of which had been kept in the Commission's archives following that institution's rejection of her job application.

34 By opinion of 18 December 2008, the Parliament's medical officer, after consulting the information sent by the Commission, concluded that the applicant was physically unfit to perform 'any duties in any European [i]nstitutions'. That opinion is headed 'Result of the medical examination of 26 [June] 2006 performed at the Commission in Brussels' and based on the report that the applicant was found to be unfit on 26 September 2006 by the Commission's medical officer; that unfitness was confirmed on 17 April 2007 by the appellate medical committee and was 'still currently valid for all duties in all European institutions'.

35 By letter of 19 December 2008, the Parliament informed the applicant of the abovementioned opinion of 18 December 2008 finding her unfit and withdrew the offer of employment which had been made to her on 10 December 2008 ('the decision at issue'). In that letter, firstly, the Parliament drew attention to the applicant's obligation to inform it of any other pre-recruitment medical examination carried out in the past at another institution, in order to facilitate the recruitment procedure and to make possible the transfer of the medical file held by the institution in question. Secondly, the Parliament stated that it had secured the transfer of the applicant's medical file held by the Commission after learning, by consulting the CAST database, that the applicant had previously worked for that institution.

36 By letter of 5 January 2009, the applicant submitted a complaint against the decision at issue under Article 90(2) of the Staff Regulations. The Parliament maintains, without being contradicted, that the complaint was received by it on 7 January 2009.

37 By emails of 26 January and 13 March 2009, the applicant supplemented the complaint. In addition, she asked to be informed of the results of the blood tests carried out on 12 December 2008 at the Parc Léopold clinic and on 26 June 2006 by the Commission's medical service and accused Dr K. of having falsified the results of those medical tests.

38 On 18 February 2009, the applicant had a further blood test carried out, showing, according to the sources cited by her, 'a striking difference, on the face of it difficult to explain, compared with the results of the blood tests of 12 December 2008'.

39 By letter of 30 April 2009, the Parliament informed the applicant that it rejected the accusations that Dr K. falsified the results of the abovementioned blood tests.

40 An implied decision rejecting the complaint came into effect on 7 May 2009.

41 By letter of 12 May 2009, the Parliament informed the applicant of the results of the blood tests.

42 By letter of 24 June 2009, served on the applicant on 2 July 2009, the Secretary-General of the Parliament expressly rejected the complaint.

Forms of order sought by the parties and procedure

43 The applicant claims that the Tribunal should:

— order the Parliament, by way of interlocutory judgment, first, to remove from her medical file the results of the blood tests carried out on 12 December 2008 at the Parc Léopold clinic on the ground of falsification by Dr K., and; secondly, to remove, replace or correct in her medical file, the wrong answers which she gave under pressure from Dr K. during the pre-recruitment medical examination at the Commission;

— annul the decision at issue;

— annul the medical officer's opinion of 18 December 2008;

— instruct the Parliament to organise a genuine pre-recruitment examination which is non-discriminatory and to re-open the post which she had been offered in the Communication DG of the Parliament;

— order the Parliament to pay her the sum of EUR 70 000 in respect of the non-material and material damage alleged, together with default interest;

— order the Parliament to pay the costs.

44 The Parliament contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay all the costs.

45 By letter of 12 February 2010, as a measure of organisation of procedure, the Tribunal asked the Parliament to produce the decision of the Bureau of the Parliament of 3 May 2004 laying down Internal Rules on the Recruitment of Officials and Other Servants. The Parliament complied with that request.

46 By letter of 12 April 2010, the Tribunal adopted a measure of inquiry, pursuant to the second subparagraph of Article 58(2) of the Rules of Procedure, by which it asked the Commission to specify inter alia what internal rules of that institution were applicable to transfers of medical data to another institution and in what factual circumstances the transfer of V's medical data to the Parliament had occurred. By letter of 23 April 2010, the Commission complied with that measure.

47 By letter of 12 April 2010, the Tribunal asked the Parliament, firstly, by way of measures of organisation of procedure, to clarify the factual circumstances in which the transfer of the applicant's medical data to it took place, secondly, in accordance with Article 111(1) of the Rules of Procedure, to submit its observations as to whether the European Data Protection Supervisor (EDPS) should be invited to intervene in the proceedings. By letter of 23 April 2010, the Parliament complied with the measure of organisation of procedure and informed the Tribunal that it had no observations to make as to whether the EDPS should be invited to intervene in the proceedings.

48 By letter of 12 April 2010, the Tribunal invited the applicant, in accordance with Article 111(1) of the Rules of Procedure, to submit her observations as to whether the EDPS should be invited to intervene in the proceedings. By letter of 23 April 2010, the applicant replied that such an invitation to intervene seemed to her appropriate.

49 The Tribunal held that there was no need to invite the Commission to intervene in this case, since that institution had provided the Tribunal, by way of the abovementioned measure of inquiry, with the additional information necessary for the file. Furthermore, in this case, the Commission's rights are not capable of being directly prejudiced, since no act of that institution is covered by the forms of order sought in the action.

50 By email of 23 April 2010, the applicant informed the Tribunal that she had suspended the mandate granted to her lawyer pending the ruling on the application to remove the case from the Tribunal which she had made to the Court of Justice of the European Union.

51 Following an exchange of letters and emails between the Tribunal and the applicant, in particular a letter from the Registrar of 21 May 2010 and a letter from the President of the Tribunal of 10 June 2010, the applicant, by letter of 15 June 2010 addressed to the President of the Tribunal, confirmed that she was maintaining her action before the Tribunal and the mandate which she had granted to Mr Boigelot to represent her in the present case. That letter from the applicant was not placed on the file. By letter of 1 July 2010, Mr Boigelot confirmed that he was still authorised by the applicant to represent her in this case. The applicant's letter of 15 June 2010 was annexed to that letter.

52 By letter of 8 July 2010, the Tribunal invited the EDPS to inform it whether he wished to intervene in this case. In that letter, the Tribunal pointed out in particular that the applicant was alleging infringement of Articles 6 and 7 of Regulation No 45/2001.

53 By letter of 31 August 2010, the EDPS replied that he wished to intervene in the present case, in support of the form of order sought by the applicant.

54 By letter of 16 September 2010, the Tribunal invited the parties, in accordance with Article 111(2) of the Rules of Procedure, to indicate to it, where appropriate, any documents which they considered to be secret or confidential and which, in consequence, they did not wish to be disclosed to the intervener. By letter of 20 September 2010, the Parliament replied to the Tribunal that no document placed on the file was secret or confidential. By letter of 24 September 2010, the applicant requested confidential treatment of her personal data in any procedural document in this case, so as to avoid any possibility of identification, and she sent the Tribunal a non-confidential version of the application.

55 The parties were informed by letter of 11 October 2010 that the Tribunal had granted the confidential treatment requested by the applicant. The Parliament was invited to send the Tribunal a non-confidential version of the defence and of the letter of 23 April 2010 by which it had indicated, inter alia, that it had no observations to make as to whether the EDPS should intervene in the proceedings. The Parliament complied with that request.

56 By order of 10 November 2010, the EDPS was granted leave to intervene.

57 On 10 January 2011 the EDPS submitted his statement in intervention. He points out in that statement that he is intervening in support of the forms of order sought by the applicant only in so far as she maintains that the conduct of the Parliament's medical service was contrary to the rules on data protection.

58 By letters of 3 February 2011, the parties submitted their observations on that statement.

Law

1. *The claims for annulment of the medical officer's opinion of 18 December 2008*

59 It is settled case-law that only measures producing binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his legal position constitute acts or decisions against which an action for annulment may be brought (judgment of 15 June 1994 in Case T-6/93 *Pérez Jiménez* v *Commission*, paragraph 34). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act may in principle be the subject of an action for annulment only if it is a measure definitively laying down the position of an institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (see inter alia, with regard to an opinion of the medical committee, judgment of 11 April 2006 in Case T-394/03 *Angeletti* v *Commission*, paragraph 36; with regard to an opinion of the Invalidity Committee, judgment of 4 November 2008 in Case F-41/06 *Marcuccio* v *Commission*, paragraphs 53 and 54).

60 The medical officer's opinion of 18 December 2008 is a measure paving the way for the decision at issue and the applicant is accordingly not entitled to contest it directly. It follows that the claims directed against that opinion must be rejected as inadmissible.

2. *The claim that the Tribunal should order certain measures*

61 The applicant asks the Tribunal to order the Parliament, first, to remove from her medical file the results of the blood tests carried out on 12 December 2008 and, secondly, to remove from her medical file or to replace or correct the wrong answers which she gave under pressure from Dr K. during the pre-recruitment medical examination at the Commission. The applicant also claims that the Tribunal should order the Parliament to organise a pre-recruitment medical examination and to re-open the post which she had been offered in the Parliament's DG Communication.

62 Such requests are, as the Parliament contends, claims seeking the issue of directions.

63 However, it is settled case-law that the Courts of the Union have no jurisdiction to issue injunctions to the institutions (judgment of 21 November 1989 in Joined Cases C-41/88 and C-178/88 *Becker and Starquit* v *Parliament*, summary publication, paragraph 6; judgments of 9 June 1994 in Case T-94/92 *X* v *Commission*, paragraph 33; of 9 June 1998 in Case T-172/95 *Chesi and Others* v *Council*, paragraph 33, of 15 December 1999 in Case T-300/97 *Latino* v *Commission*, paragraph 28, and the case-law cited; and of 7 November 2007 in Case F-57/06 *Hinderyckx* v *Council*, paragraph 65).

64 Consequently, the abovementioned claim must be rejected as inadmissible.

3. *The claim for annulment of the decision at issue*

65 The applicant puts forward in essence four pleas in law:

— the first; alleging the irregularity of the opinion of the Parliament's medical officer, issued on the basis of documents from the Commission's medical service dating back more than two years and without any prior clinical and psychological examination of the applicant;

— the second, alleging failure to observe the procedure laid down in the second paragraph of Article 33 of the Staff Regulations and the principle of respect for the right to a fair hearing, in so far as the decision at issue was adopted without the applicant's having been given the opportunity to submit her case to the appellate medical committee beforehand;

— the third, alleging infringement of the principle of respect for private life and of the provisions of Articles 6 and 7 of Regulation No 45/2001;

— the fourth, alleging psychological harassment.

The first plea, alleging the irregularity of the medical officer's opinion

Arguments of the parties

66 The applicant maintains that the medical officer's opinion, on the basis of which the decision at issue was adopted, was issued in irregular circumstances. The medical officer delivered his opinion without any medical examination of the applicant and on the sole basis of an old medical file from the Commission's medical service, the information in which dated back more than two years and which was contested in Case F-33/08. However, the Courts of the Union take the view that the pre-recruitment medical examination must, if it is not to be completely pointless, necessarily include a clinical examination. Furthermore, under the Commission's rules, an opinion as to fitness has a period of validity limited to six months.

67 The Parliament does not dispute that the applicant was not subjected to a clinical examination by its medical officer. However, in this case, it submits that its medical offer was not required to perform such an examination.

68 In the first place, as a preliminary observation, the Parliament points out that the decision of unfitness adopted by the Commission with regard to the applicant was held to be lawful by the Tribunal in its judgment of 21 October 2009 in *V* v *Commission*. The decision at issue and the medical officer's opinion are therefore based on a decision which the Commission adopted entirely lawfully.

69 In the second place, the Parliament contends that the question of whether or not it is appropriate to carry out a clinical examination of a candidate for recruitment is a purely medical one which is not amenable to judicial review. It recalls in that regard, by analogy, the case-law of the Courts of the Union as to whether it is appropriate for the Invalidity Committee to carry out a medical examination of an official.

70 In the third place, the Parliament asserts that its medical officer was in possession of the applicant's medical file sent by the Commission, a file which included the results of several clinical examinations and further expert reports. The information contained in that file was sufficiently recent and relevant to enable him to issue his opinion, taking into account the chronic and lasting nature of the applicant's pathology.

71 In the fourth place, the Parliament rejects the argument regarding the Guide to Procedures of the Commission's Medical Service, a document which is not applicable to the Parliament. The only internal rule laid down by the Parliament concerning the validity of a pre-recruitment examination is Article 15 of the Internal Rules, which provides for a period of validity of one year for opinions as to fitness. However, that rule applies only to positive opinions and cannot preclude the Parliament's medical officer, in order to deliver the opinion in dispute, from referring to the opinion of the Commission medical officer issued more than one year before that the applicant was unfit.

Findings of the Tribunal

72 Although the Courts of the Union cannot, in the context of the judicial review of the legality of a refusal to recruit on grounds of physical unfitness, substitute their own assessment for an opinion which is specifically medical in nature, it is none the less their task to ascertain whether the recruitment procedure was conducted in a lawful manner and, in particular, to examine whether the refusal to recruit is based on a reasoned medical opinion establishing a comprehensible link between the medical findings which it contains and the conclusion which it draws (judgment of 14 April 1994 in Case T-10/93 *A* v *Commission*, paragraph 61).

73 It is possible for the medical officer of an institution to base a finding that a candidate is unfit not only on the existence of actual disorders but also on a medically justified prognosis of future disorders capable of jeopardising in the foreseeable future the normal performance of the duties in question (*A* v *Commission*, paragraph 62).

74 Moreover, it must be recalled that, where a European Union institution has a wide discretion, the review of observance of guarantees conferred by the Union legal order in administrative procedures is of fundamental importance. The Courts of the Union have had occasion to point out that those guarantees include, in particular for the competent institution, the obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see judgments of 21 November 1991 in Case C-269/90 *Technische Universität München*, paragraph 14; of 7 May 1992 in Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission*, paragraph 26; of 22 November 2007 in Case C-525/04 P *Spain* v *Lenzing*, paragraph 58; and of 8 September 2009 in Case T-404/06 P *ETF* v *Landgren*, paragraph 163).

75 In this case, it is apparent from the actual wording of the opinion of 18 December 2008 that, in order to issue that opinion, the Parliament's medical officer relied exclusively on medical data collected by the Commission in 2006 and 2007, more than one and a half years previously, in the context of another pre-recruitment medical procedure. The Parliament does not in fact dispute that those medical data were obtained by the Commission more than one and a half years prior to the opinion of the Parliament's medical officer, issued on 18 December 2008, finding that the applicant was unfit.

76 However, it must be pointed out, first, that Article 15 of the Internal Rules, a rule of conduct which the Parliament has imposed on itself and from which it cannot depart without specifying the reasons which have led it to do so, limits in general to one year the period of validity of the result of a medical examination performed under the provisions of Article 83 of the CEOS. Accordingly, having regard to that provision, the Parliament should, at the very least, have doubted the validity of the data collected from the Commission, since it could not have considered them valid more than one year after the pre-recruitment examination if they had been obtained during the course of a pre-recruitment procedure conducted by itself.

77 Secondly, it has been held that the pre-recruitment medical examination must, if it is not to be completely pointless, necessarily include a clinical examination and any supplementary biological tests ordered by the medical officer (*A* v *Commission*, paragraphs 49 to 51).

78 Finally, it follows from the case-law cited above in paragraphs 73 and 74 that, in order to be lawful, an opinion finding that a candidate is unfit must establish actual or future disorders and be based on relevant elements.

79 Admittedly, the Parliament, relying on the case-law concerning the finding that invalidity has an occupational origin, contends that the question whether, in a given situation, the person concerned should be clinically examined falls within the discretion conferred on the members of the Invalidity Committee (judgment of 23 November 2004 in Case T-376/02 *O* v *Commission*, paragraph 44).

80 However, that case-law relates to the limits of judicial review of purely medical assessments and cannot justify the medical officer's ignoring the obligation, laid down in Article 83 of the CEOS, to carry out a medical examination in order to satisfy himself that the person concerned is fit to perform his duties.

81 In addition, the discretion in medical matters which a doctor is recognised as having does not preclude the Courts, firstly, from establishing the material accuracy, reliability and consistency of the evidence adduced, and, secondly, from satisfying themselves that that evidence constitutes all the relevant data to be taken into account in order to appraise a complex situation and that it is capable of supporting the conclusions drawn from it (see, to that effect, judgment of 12 May 2004 in Case T-191/01 *Hecq* v *Commission*, paragraph 63).

82 Accordingly, in this case, in view of the age of the medical data made available by the Commission and of the possible changes in those data in the meantime, the medical officer did not have available to him all the relevant information relating to the applicant's state of health when he issued his opinion that she was unfit.

83 The Parliament's argument regarding the pathology on which the Commission's finding that the applicant was unfit in 2007 was based must be rejected. Indeed, it has been held that mental disorders, by nature subject to change, are not capable of justifying the permanent exclusion of the person suffering from them from the service, since the administration is under an obligation to carry out a re-examination of the person concerned at reasonable intervals (see, with regard to the placing of an official on compulsory sick leave, judgment of 13 December 2006 in Case F-17/05 *de Brito Sequeira Carvalho* v *Commission*, paragraphs 129 and 130, confirmed by the judgment of 5 October 2009 in Joined Cases T-40/07 P and T-62/07 P *de Brito Sequeira Carvalho* v *Commission* and *Commission* v *de Brito Sequeira Carvalho*, paragraphs 231 to 240).

84 In the light of the considerations set out in the preceding paragraphs, the fact that the decision that the applicant was unfit, adopted by the Commission in 2007, was found lawful by the Tribunal, has no bearing, on the assessment of the validity of the present plea.

85 Moreover, at the hearing, in reply to the Tribunal's questions, the agents for the Parliament stated that, owing to medical confidentiality, they had not had any more access to the documents on the basis of which the Parliament's medical officer issued his opinion that she was unfit than the appointing authority had when it ruled on the applicant's complaint. They were therefore unable to indicate to the Tribunal the precise nature of those documents or to confirm that the file transferred from the Commission to the Parliament served to enlighten the Parliament's medical officer fully as to the particular context of the pre-recruitment medical procedure conducted at the Commission and as to the fact that the applicant had, in the past, been engaged on a number of occasions by the Commission. Likewise, the competent authority of the Parliament was unable to establish whether the medical officer's opinion was based on all the relevant data.

86 Finally, the Tribunal observes that the Parliament's medical officer issued an opinion expressed in categorical and general terms, without having examined the applicant, even though, in the context of the pre-recruitment medical procedure at the Commission, the experts appointed by the medical committee had expressed a more qualified opinion.

87 Consequently, the plea alleging the irregularity of the medical officer's opinion must be upheld.

The second plea, alleging infringement of the second paragraph of Article 33 of the Staff Regulations

Arguments of the parties

88 The applicant claims that the Parliament infringed the provisions of Article 33 of the Staff Regulations and the principle of observance of the right to a fair hearing. The decision at issue was adopted even before the applicant was able to submit her case to the appellate medical committee provided for by that article.

89 The Parliament contends, in the first place, that the decision at issue made it clear to the applicant that, if she considered it appropriate, the opportunity was available to her to submit her case to the medical committee in order to challenge the medical officer's opinion, but she did not avail herself of that option.

90 In the second place, the Parliament specifies the reasons why the decision at issue was adopted immediately. Firstly, by not informing the medical service of the medical examinations which she had undergone at the Commission, the applicant broke the relationship of trust with the institution. Secondly, it submits that the post offered to the applicant had to be filled quickly in order to cope with the absence of an official on maternity leave. Finally, if the medical officer's opinion had been called into question by the medical committee, the Parliament points out that, in view of the nature of the post offered, it could have offered the applicant an equivalent post.

Findings of the Tribunal

91 It follows from Article 82 in conjunction with Article 83 of the CEOS that a candidate for a post as a member of the contract staff must be medically examined by the institution's medical officer before being engaged, in order to ascertain that he is physically fit to perform the duties involved.

92 The second paragraph of Article 33 of the Staff Regulations, applicable by analogy to members of the contract staff, provides for an internal procedure for appealing against a negative opinion issued by the institution's medical officer.

93 It has been held that by establishing an appellate medical committee under the second paragraph of Article 33 of the Staff Regulations, the legislature intended to provide an additional guarantee for candidates and thereby improve the protection of their rights (*A* v *Commission*, paragraph 23). That guarantee, which relates to the principle of observance of the right to a fair hearing (judgment of 13 December 2007 in Case F-95/05 *N* v *Commission*, paragraphs 69 and 76), constitutes an essential procedural requirement.

94 That guarantee must, furthermore, necessarily be observed before the decision refusing recruitment is adopted, and not at a later stage, since it would then lose its rationale, which is to ensure that the rights of defence of candidates for recruitment are respected (see, by analogy, judgments of 8 July 1999 in Case C-51/92 P *Hercules Chemicals* v *Commission*, paragraphs 75 to 78, and of 8 July 2008 in Case T-48/05 *Franchet and Byk* v *Commission*, paragraph 151). The wording of the second paragraph of Article 33 of the Staff Regulations is clear in that regard: the candidate for recruitment has 20 days in which to submit his case to the medical committee, a period which starts to run, not from notification of the decision refusing recruitment, but from notification of the medical officer's opinion.

95 In this case, it is common ground that the Parliament adopted the decision at issue without having first allowed the applicant to submit her case to the appellate medical committee. Admittedly, the Parliament informed her, at the time of notification of the decision at issue, of that possibility. However, that circumstance has no bearing on the irregularity established, since that decision had already been taken before the applicant was given the opportunity to submit her case to the appellate medical committee, within the period of 20 days following notification of the medical officer's opinion.

96 Finally, in order to justify the infringement of the provisions of Article 33 of the Staff Regulations, the Parliament contends that, in the interests of the service, it had to recruit a member of staff quickly in order to replace an official on maternity leave and that, consequently, it could not await the expiry of the period of 20 days prescribed by the provisions of Article 33 of the Staff Regulations and, in the event of referral to the medical committee, the opinion of the latter, before adopting the decision at issue.

97 However, such a reason could not lawfully justify the Parliament's ignoring the procedural obligations laid down by Article 33 of the Staff Regulations. In any event, the departure of an official on maternity leave is not unusual and it was up to the Parliament either to provide for replacement of the person on maternity leave by another member of the contract staff or to initiate the recruitment process sufficiently early to be able to comply with the essential procedural requirement laid down by the second paragraph of Article 33 of the Staff Regulations. In this case, in any event, in view of the interval between the medical officer's opinion and the date scheduled for recruitment of 2 February 2009, it was not a priori impossible to seek the opinion of the medical committee.

98 It is settled case-law that the infringement of a procedural rule, in particular the principle of observance of the right to a fair hearing, is not such as to entail the annulment of the decision except in so far as that infringement affected the content of the final decision. However, that does not apply in this case, since it is conceivable that the appellate medical committee, having available to it all the relevant elements relating to the applicant's state of health at the time of adoption of the decision at issue, could have issued a different opinion from that of the medical officer or have reservations regarding the possibility of acting on the basis of the medical data obtained more than one and a half years previously by the Commission.

99 It follows that the plea alleging infringement of the second paragraph of Article 33 of the Staff Regulations must also be upheld.

The third plea, alleging infringement of the right to respect for privacy and of Articles 6 and 7 of Regulation No 45/2001

Arguments of the parties

100 The applicant submits that the Parliament infringed the right to respect for privacy and the rules relating to the protection of personal data, in particular the rules relating to the transfer of her medical file. The Parliament's medical officer issued his opinion on the basis of documents from the Commission. Firstly, those documents should have been filed away in the Commission's archives in accordance with the Guide to Procedures of that institution's medical service, and no longer constituted documents in a medical file, since the applicant did not hold a post at the Commission. Secondly, Articles 6 and 7 of Regulation No 45/2001 prohibit the transfer of medical data concerning the applicant from the Commission to the Parliament. The medical data held by the Commission were collected exclusively with a view to recruiting the applicant into the services of that institution. Furthermore, the task of the Parliament's medical officer is to carry out a pre-recruitment medical examination and not to inquire into the applicant's medical history.

101 According to the Parliament, the decision at issue does not infringe the rules on the protection of personal data at all. Article 7 of Regulation No 45/2001 provides that transfers of personal data between institutions are possible if they are necessary for the legitimate performance of tasks which fall within the competence of the recipient. The transfer at issue was made for the purpose of enabling the Parliament to carry out one of its tasks, the checking of the physical fitness of a candidate for recruitment. Furthermore, that transfer was justified by the concern to avoid unnecessary medical examinations and to enable the administration to have complete information.

102 The EDPS submits that the transfer and subsequent use of the medical data collected in 2006 and 2007 on the applicant's state of health infringed Regulation No 45/2001. He makes the preliminary point that those data do not form part of the medical file of the applicant as a former member of the Commission's temporary staff and contract staff and that the question of the lawfulness of their transfer does not arise in the same way as that of the transfer between institutions of a medical file of a person employed by an institution. The Guide to Procedures of the Commission's medical service does not indicate for what purposes medical data collected in the context of a recruitment procedure are kept in the archives beyond six months or the circumstances in which those data are accessible. The EDPS recalls that, in two opinions adopted in 2007 and 2008, he recommended to the Parliament and the Commission respectively that, for candidates declared physically unfit for recruitment, the medical data collected in the context of the recruitment procedure should be kept only for a limited period, which could correspond to the period during which it is possible to challenge the data or the decision taken on the basis of them.

103 The EDPS points out that the transfer of personal data between institutions is governed primarily by Article 7 of Regulation No 45/2001, but without prejudice to Articles 4, 5, 6 and 10 of that regulation. Compliance with Article 7 of Regulation No 45/2001 does not therefore render the transfer and subsequent use of the data consistent with that regulation as a whole, contrary to what the Parliament, which limits its defence to Article 7, seems to maintain. The EDPS recalls that, under Article 10(1) of Regulation No 45/2001, the processing of special categories of data, such as medical data, is prohibited and that, for the European Court of Human Rights, the protection of such data is of fundamental importance for the exercise of the right to respect for private and family life, guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). Since the applicant did not give her consent to the processing of the data at issue, the exception provided for in Article 10(2)(a) is not applicable. Furthermore, the Parliament has not demonstrated that the transfer of those data, although legitimate under Article 7 of Regulation No 45/2001, was genuinely necessary for the purposes of complying with its rights and obligations in the field of employment law, within the meaning of the second exception, laid down in Article 10(2)(b) of that regulation. The Parliament could have obtained that information in another way, less prejudicial to privacy, for example, by asking the applicant to provide that information or by having a medical examination carried out by its staff. The EDPS points out in that regard that, in his abovementioned opinion of 2007, he had recommended to the Parliament that it remove from the form for the medical examination prior to recruitment the questions asking the candidate if he had already been refused a post for medical reasons or if he had consulted a neurologist, psychiatrist, psychoanalyst or psychotherapist. The Parliament followed that recommendation.

104 The EDPS further maintains that, at the time when the Parliament received from the Commission's medical service the medical data concerning the applicant, those data were no longer being held for their original purpose, namely, the examination of the applicant's medical fitness for the purposes of holding a post at the Commission. In addition, those data were placed in the Commission's archives, as the period of six months had elapsed since the decision finding her unfit. The transfer and use of those data therefore took place in contravention of Article 4(1)(b) and (e) of Regulation No 45/2001. Furthermore, the change of purpose of the processing of those data cannot be justified on the basis of that regulation. In any event, the Parliament, as the originator of the transfer request, was, together with the Commission, obliged to ensure that the whole of the transfer was legitimate.

105 Finally, the EDPS points out that, even assuming that the applicant deliberately omitted to inform the Parliament of previous medical examinations, that circumstance has no bearing on the right to the protection of her data which she derives from Regulation No 45/2001.

106 In her observations on the statement in intervention, the applicant states that she concurs entirely with the EDPS's analysis according to which Article 4(1)(b) and (e) and Article 10(2)(b) of Regulation No 45/2001 were infringed by the Parliament. The finding that the transfer of medical data was not really necessary, within the meaning of Article 10(1)(b) of that regulation, applies for the same reasons to Article 7(1) of the same regulation, which was also infringed, since the transfer at issue cannot be regarded as necessary for the legitimate performance of the Parliament's tasks. That institution infringed both the principle that the purposes for which data are used must be limited and that data must be accurate and kept up to date and the rules on their storage, and therefore failed to comply with Article 4(1)(b)(d) and (e) of Regulation No 45/2001.

107 In its observations on the statement in intervention, the Parliament points out that the processing of the applicant's personal data was necessary in order to comply with the institution's obligations in the field of employment law, namely, to ascertain whether the applicant was physically fit to perform her duties, as required by Article 83 of the CEOS and Article 33 of the Staff Regulations. The processing of those data is therefore lawful under Article 10(2)(b) of Regulation No 45/2001. Similarly, the processing of those data solely by the members of the Parliament's medical service, who are subject to the obligation of professional secrecy, for the purposes of the medical diagnosis of fitness for work by the medical officer, is necessary and therefore legitimate under Article 10(3) of that regulation. That processing is also in the nature of the exercise of official authority and is therefore lawful under Article 5(a) of that regulation.

108 So far as the transfer of the data is concerned, the Parliament maintains that it was necessary for the legitimate performance of the institution's tasks. The Parliament could not have performed its tasks without that transfer: on the one hand, the applicant did not inform the Parliament's medical service, on the day when she contacted it, of the fact that she had undergone a medical examination previously in another institution; on the other hand, the Parliament's practice of requesting the transfer of a candidate's pre-recruitment medical file where the person concerned has already undergone a pre-recruitment examination for another institution is in the interests of both the institution and the person concerned, since it makes it possible to avoid repeating certain medical examinations. The possibility, mentioned by the EDPS, of carrying out a new medical examination at the Parliament depends on a purely medical assessment, which is left up to the doctor responsible, on the basis of the file transferred.

109 So far as the quality of the data is concerned, the Parliament contends that it did not infringe Article 4(1)(b) and (e) of Regulation No 45/2001. It submits that they were collected for a specified purpose, namely, to ascertain the applicant's physical fitness to perform duties in the service of the Union, which is an explicit and legitimate purpose since it is provided for inter alia in Article 33 of the Staff Regulations, and that those data were processed subsequently for the same purpose. The pre-recruitment examination is in fact carried out by all the institutions on the same legal basis and takes place under the same conditions. The fitness requirements to be satisfied are in general the same in all the institutions. The transfer of data at issue is analogous to that of the medical file of an official being transferred to another institution, which was considered legitimate by the EDPS in his opinion of 14 June 2007. Furthermore, the data collected by the Commission were not kept for any longer than was necessary for the purposes for which they were collected and processed. The EDPS expressly recognised, in his 'Guidelines concerning the processing operations in the field of staff recruitment', dating from October 2008, that the personal data of unsuccessful candidates could be retained for two years after the end of the procedure, a period which, in this case, was not exceeded. Finally, the period of one year laid down by Article 15 of the Parliament's Internal Rules relates only to the validity of an examination.

Findings of the Tribunal

– The first part of the plea, alleging infringement of the right to respect for privacy

110 The parties paid particular attention in their written pleadings and at the hearing to the second part of the plea, alleging infringement of Articles 6 and 7 of Regulation No 45/2001. The intervention of the EDPS was instrumental in focusing the proceedings on that second part. The Tribunal nevertheless takes the view that the first part of the plea, alleging infringement of the right to respect for privacy, is put forward with sufficient precision in paragraphs 14.1 and 16.12 of the action, which were subsequently expanded on during the hearing, to be dealt with separately.

111 The Court of Justice has held that the right to respect for private life, embodied in Article 8 of the ECHR and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the European Union. It includes in particular a person's right to keep his state of health secret (see, inter alia, judgment of 5 October 1994 in Case C-404/92 P *X* v *Commission*, paragraph 17; see also Eur. Court HR, Z v Finland judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 71, and S. and Marper v United Kingdom judgment of 4 December 2008, No 30562/04 and No 30566/04, § 66).

112 The transfer to a third party, including to another institution, of personal data relating to a person's state of health collected by an institution constitutes in itself an interference with the private life of the person concerned, whatever the subsequent use of the information thus communicated (see, by analogy, judgment of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others*, paragraphs 73 to 75).

113 However, it has been held that restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected (Case C-404/92 P *X* v *Commission*, paragraph 18). In that regard, Article 8(2) of the ECHR must be taken as a reference point. Under that provision, interference by a public authority with private life may be justified provided that (i) it is 'in accordance with the law', (ii) it pursues one or more of the – exhaustively listed – objectives and (iii) it is 'necessary' in order to achieve that (those) objective(s).

114 It is therefore necessary to examine, in this case, whether the transfer of medical data from one institution to another to facilitate the work of the medical officer in connection with a pre-recruitment medical examination may be considered lawful in the light of the abovementioned three conditions.

115 In the first place, as regards the first condition, the provisions of Regulation No 45/2001 make it possible for the transfer of personal data from one institution to another to be regarded as being 'in accordance with the law'.

116 Indeed, the provisions of Article 7 of Regulation No 45/2001 serve as the framework for that type of processing of personal data.

117 However, the question arises as to whether that article is worded with sufficient precision to enable those to whom the law applies to regulate their conduct and thus satisfies the requirement of foreseeability developed by the case-law of the European Court of Human Rights (see, inter alia, Eur. Court HR, Rekvényi v Hungary judgment of 20 May 1999, *Reports of Judgments and Decisions* 1999-III, § 34). Article 7 of Regulation No 45/2001 provides in very general terms that transfers of data between institutions are possible only if the data communicated 'are necessary for the legitimate performance of tasks covered by the competence of the recipient'.

118 In addition, Article 6 of Regulation No 45/2001 expressly provides that '[p]ersonal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body'.

119 However, it must be observed that the Parliament has in no way claimed that there is any written rule providing for the transfer of medical data between the institutions or for an exchange of medical information between the medical services of the institutions concerning, not persons serving in those institutions, but candidates for recruitment.

120 In the second place, the Parliament submits that the transfer of medical data from one institution to another has the objective of making it possible to ascertain that a candidate is physically fit to perform the duties offered to him and that, in the event of recruitment, he will actually be able to perform those duties. In that regard, the Court of Justice has held that the pre-recruitment examination serves a legitimate interest of the European Union institutions (Case C-404/92 P *X* v *Commission*, paragraph 20). Thus, the objective invoked is capable of justifying, for the purpose of Article 8(2) of the ECHR, interference with the right to respect for private life.

121 In the third place, it must be determined whether the interference in question is necessary, in a democratic society, in order to attain the legitimate objective pursued.

122 According to the European Court of Human Rights, interference is regarded as necessary in a democratic society in order to achieve a legitimate aim if it satisfies a pressing social need and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons invoked by the national authorities to justify it appear relevant and sufficient. The national authorities enjoy a certain margin of appreciation in the matter. However, the breadth of that margin is variable and depends on a number of factors, including the nature of the right in question guaranteed by the ECHR, its importance for the person concerned, and the nature and purpose of the interference. The more important the right in question is for ensuring the individual's effective enjoyment of his recognised fundamental or 'intimate' rights, the more that margin is restricted. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (Eur. Court HR, Evans v United Kingdom judgment of 10 April 2007, No 6339/05, § 77).

123 In this case, as has been stated previously, the protection of personal data plays a fundamental role in the exercise of the right to respect for private and family life, embodied in Article 8 of the ECHR. Respect for the confidentiality of health information constitutes one of the fundamental rights protected by the legal order of the European Union (see judgments of 8 April 1992 in Case C-62/90 *Commission* v *Germany*, paragraph 23, and of 5 October 1994 in *X* v *Commission*, paragraph 17). That principle is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general (Eur. Court HR, Z v Finland judgment, § 95). In view of the extremely intimate and sensitive nature of medical data, the possibility of being able to transfer or communicate such information to a third party, even where that party is another European Union institution or body, without the consent of the person concerned, calls for particularly rigorous examination (see, by analogy, Eur. Court HR, Z v Finland judgment, § 95, and S. and Marper v United Kingdom judgment, § 103). Regulation No 45/2001 provides, in that regard, in Article 10(1), that the processing of medical data is prohibited, in principle, subject to derogations laid down in Article 10(2).

124 The interest of the Parliament in satisfying itself that it is recruiting a person fit to perform the duties which are going to be entrusted to him must therefore be weighed in the balance against the seriousness of the infringement of the right of the person concerned to respect for his private life.

125 However, in this case, the Tribunal holds that, although the pre-recruitment examination serves the legitimate interest of the European Union institutions, which must be in a position to fulfil the tasks required of them, that interest does not justify carrying out a transfer of medical data from one

institution to another without the consent of the person concerned (see, by analogy, Case C-404/92 P *X* v *Commission*, paragraph 20). It must first be pointed out that, as has been stated previously, medical data are particularly sensitive data. Secondly, those data were collected nearly two years beforehand, for a well-defined purpose, by an institution with which the applicant did not, as a consequence of the procedure for ascertaining medical fitness for recruitment, have an employment relationship. Finally, the Parliament could have fulfilled its task under conditions involving less interference with the applicant's fundamental rights. It could thus have carried out the medical examination which was arranged for 7 January 2009, conducted new medical examinations if necessary or requested the applicant's permission to obtain the transfer of the medical data at issue, or else acted on the basis of the information which the applicant had undertaken to send it in January 2009.

126 Contrary to what the Parliament maintains, the decision by which its medical officer requested the transfer of the data collected by the Commission is not an act which is purely medical in scope and exempted from judicial review. The transfer was requested even before the medical officer examined the applicant and even before she provided the medical service with the information which she had been asked for.

127 It follows from all the foregoing considerations that the medical officer's opinion was issued in disregard of the applicant's right to respect for private life and that the decision at issue is, accordingly, also unlawful for that reason. Consequently, the first part of the plea must be upheld.

– The second part of the plea, alleging infringement of Articles 6 and 7 of Regulation No 45/2001

128 As a preliminary point, it should be recalled that Article 1 of Regulation No 45/2001 expressly provides that, in accordance with that regulation, the institutions and bodies of the European Union are to protect the fundamental rights and freedoms of natural persons. Consequently, the provisions of that regulation cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life as guaranteed by Article 8 of the ECHR (see *Österreichischer Rundfunk and Others*, paragraph 91).

129 It follows from Article 7 of Regulation No 45/2001 that an institution or body of the Union may transfer personal data to another institution or body of the Union if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient Union institution or body.

130 In this particular case, it cannot be disputed that ascertainment of the applicant's physical fitness for recruitment by the services of the Parliament is in the nature of the legitimate performance of that institution's tasks.

131 However, as the EDPS rightly points out in his statement in intervention, that finding does not, on its own, prove that the transfer at issue of the applicant's medical data is consistent with the provisions of Regulation No 45/2001. On the one hand, the transfer must be 'necessary' for the legitimate performance of the institution's tasks. In these proceedings, it must therefore be established that the transfer was indispensable for the assessment of the applicant's physical fitness by the services of the Parliament. On the other hand, Article 7 of that regulation expressly provides that it applies '[w]ithout prejudice to Articles 4, 5, 6 and 10' of the same text.

132 In order to deal with the applicant's complaint alleging infringement of the Regulation, and Article 7 in particular, it must therefore be examined whether that transfer was carried out in compliance with the requirement of necessity laid down by that article and in accordance with the provisions to which that article refers, in particular Article 6 of the Regulation. In these proceedings, the Tribunal must first examine Articles 4, 6 and 10 of Regulation No 45/2001, infringement of which has been alleged by the applicant, before considering whether the requirement of the necessity for the transfer, referred to in Article 7 of the same regulation, can be regarded as satisfied.

133 First, as regards Articles 4 and 6 of Regulation 45/2001, it must be noted that, under Article 4(1) of that regulation, personal data must be processed fairly and lawfully and collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. In addition, Article 6 of that regulation provides that personal data may only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the European Union institution or body.

134 In this case, as the applicant and the EDPS rightly maintain, it is established that the sole purpose of the medical data regarding the applicant, which were collected by the Commission in connection with the pre-recruitment medical examination provided for by Article 83 of the CEOS, was to make it possible to determine whether the applicant was, at the time of her recruitment, physically fit to perform her duties in the Commission's services.

135 However, it must be noted, on the one hand, that the further processing of those medical data in order to ascertain the applicant's fitness to perform duties within the Parliament in December 2008 constitutes a different purpose from than that for which those data were originally collected. The Parliament cannot legitimately rely in that regard on the fact that the medical examinations carried out by all the institutions have the same legal basis, take place according to the same procedures and are based on identical fitness criteria. The Courts of the Union have drawn attention in several of their judgments to the importance of the autonomy of each institution as an employer, rejecting arguments based on the unified character of the European Union civil service. It has thus been held that officials recruited by one institution could not claim the same grading as that granted to officials of another institution, even though all those officials passed the same competition (judgment of 9 December 2010 in Case F-83/05 *Liljeberg and Others* v *Commission*, paragraph 58). Similarly, although, under the principle of a single administration, as laid down in Article 9(3) of the Treaty of Amsterdam, all the officials of all the institutions of the Union are subject to a single body of Staff Regulations, such a principle does not mean that the institutions are required to make identical use of the discretion afforded to them by the Staff Regulations given that, on the contrary, in the management of their staff, the 'principle of the autonomy of the institutions' applies, to adopt the words used by the Court of First Instance of the European Communities in its judgment of 16 September 1997 in Case T-220/95 *Gimenez* v *Committee of the Regions*, paragraph 72).

136 On the other hand, even though, under Article 6 of Regulation No 45/2001, a change of the purpose of the collection of data must be expressly provided for by an internal rule of the institution, it is apparent from the written pleadings and from the hearing that the change of the purpose for which the applicant's medical data were collected by the Commission in 2006 and 2007 is not provided for by any text adopted by that institution or the Parliament. The transfer of such data between the institutions concerned is based only on a mere practice, of which the candidates for recruitment are not informed at all. In addition, the EDPS maintained at the hearing without being contradicted that the Parliament's practice of requesting the transfer of medical data relating to candidates for recruitment had not been notified to him, whereas such notification is required by Article 27 of Regulation No 45/2001. So far as concerns the Commission, the EDPS points out that, in an opinion of 10 September 2007, delivered in the context of his prior checking of that institution's dossier entitled 'Management of the activities of the Medical Service in Brussels and Luxembourg, in particular via the SERMED computer application', he examined exclusively the compatibility with the provisions of Regulation No 45/2001 of transfers of medical data, in exceptional cases, to the Commission's Legal Service, to the Tribunal or to the European Ombudsman at his request. On the other hand, the EDPS did not consider at all in that opinion the question of the transfer of medical data collected by one institution, on the occasion of a pre-recruitment medical examination, to another Union institution or body, since the Commission's Data Protection Officer had not declared that type of data transfer. The EDPS points out that, in that opinion, he recommended to the Commission that, for candidates declared physically unfit for recruitment, the medical data collected during the recruitment procedure should be retained only for a limited period, which could correspond to the period during which it is possible to challenge the data or the decision taken on the basis of them. It was thus legitimate for

the Commission to retain the data collected in 2006 and 2007 concerning the applicant's state of health, but solely for the purpose of follow-up action on the litigation brought by her before the Courts of the Union in Cases F-33/08 and T-510/09 P following the Commission's refusal to engage her.

137 Secondly, as regards Article 10 of Regulation No 45/2001, it must be pointed out that, pursuant to paragraph 1 of that article, the processing of medical data is, in principle, prohibited. Paragraph 2 of Article 10 provides inter alia that paragraph 1 does not apply if the data subject gives his or her consent to processing or if processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law.

138 On the one hand, it is common ground that the applicant did not give her consent to the transfer from the Commission to the Parliament of the medical data concerning her.

139 On the other hand, although it is true that the transfer at issue was carried out in order to enable the Parliament to ascertain the applicant's physical fitness to perform her duties in that institution, an obligation which arises from Articles 82 and 83 of the CEOS and which can be regarded as an 'obligation in the field of employment law' within the meaning of Article 10(2)(b) of Regulation No 45/2001, it is not established that that transfer was 'necessary' for the purposes of complying with that obligation. As the EDPS points out and was stated in paragraph 125, other measures involving less interference with private life were possible, enabling the Parliament to ensure the full application of Articles 82 and 83 of the CEOS. Before asking the Commission to transfer those data to it, the Parliament could, in particular, have invited the applicant to provide certain information on her medical history and had the necessary medical examinations performed by its own staff. In addition, the fact that the data transferred were relatively old, having been collected in 2006 and 2007, more than one and a half years prior to the decision at issue, does not support the Parliament's argument that that transfer was necessary.

140 As the applicant rightly points out, the Parliament equally cannot claim that the transfer at issue has as its legal basis Article 10(3) of Regulation No 45/2001. Although that article entitles the members of an institution's medical service to process the data necessary for the medical diagnosis of a person's fitness to perform his duties, it has neither the purpose nor the effect of authorising a transfer of medical data such as that contested in these proceedings, albeit one carried out between the members of the respective medical services of the two institutions concerned.

141 Thirdly, as regards Article 7 of Regulation No 45/2001, it must be observed, as the applicant rightly submits, that a transfer which is not regarded as 'necessary' within the meaning of Article 10 of the Regulation equally cannot be so regarded for the purposes of Article 7 of the same text, since the same task, namely, the examination of the applicant's physical fitness for recruitment, is involved.

142 It follows from the foregoing that, in view of the particularly sensitive nature of the applicant's medical data and of the circumstances in which they were obtained, the Tribunal holds that the Parliament, by processing those data, did not perform legitimately the task entrusted to it under the provisions of Articles 82 and 83 of the CEOS. In order to do so, it was incumbent on the Parliament to request the applicant's agreement to the transfer of the data or to perform specific medical examinations and not to act, without the applicant's prior permission, on the basis of medical data obtained in connection with another procedure by another institution.

143 Consequently, the applicant is justified in maintaining that, by asking the Commission for the transfer of those medical data, the Parliament's medical officer infringed the provisions of Articles 6 and 7 of Regulation No 45/2001 and, by acting on the basis of those data, issued an irregular opinion on her physical fitness The second part of the plea must therefore be upheld.

144 The Parliament nevertheless contends in its pleadings that the decision at issue is based not only on the physical unfitness but also on the breaking down of the relationship of trust.

145 The Tribunal must therefore ascertain whether that second ground was in fact relied on and whether it is capable of justifying the decision at issue.

146 Although the Parliament refers, in the decision at issue and in the decision rejecting the complaint, to the fact that the applicant allegedly did not comply with the obligation upon her to declare that she had undergone a medical examination previously in another European institution, it does not draw any legal inference directly from that, since those decisions are legally based solely on the finding that the applicant was not physically fit to perform her duties. Thus, contrary to what the Parliament maintains, the decision at issue is not based on the breaking down of the relationship of trust.

147 If the Parliament, by its line of argument, intends to put forward before the Tribunal a substitution of grounds, it must be pointed out that reliance on a ground during the proceedings which could as a matter of law have justified the decision at issue cannot preclude annulment of that decision (see, to that effect, judgments of 10 December 2003 in Case T-173/02 *Tomarchio* v *Commission*, paragraph 86, and of 15 March 2006 in Case T-10/04 *Leite Mateus* v *Commission*, paragraph 43), except where the administration has circumscribed powers in the matter.

148 However, in this case, the Parliament cannot claim that it was in such a situation of circumscribed powers, since it has a wide discretion as regards the ground relating to the breaking of the relationship of trust (see, to that effect, judgment of 15 December 2010 in Case F-67/09 *Angulo Sánchez* v *Council*, paragraphs 76 to 78).

149 Furthermore, at the time, the Parliament was in any event not in a position to assert that the applicant had deliberately omitted to inform it that she had worked for the Commission or that she had already undergone a medical examination at another institution. It is apparent from paragraphs 29 and 31 of this judgment that the applicant and the administration had agreed that the applicant should send to the Parliament in January 2009 the documents necessary for compiling the recruitment file. It was therefore possible for the applicant to provide the Parliament with that information before she took up her duties or on the occasion of the medical examination which she had been invited to attend and which was due to take place on 7 January 2009.

150 It follows, without there being any need to examine the final plea, alleging psychological harassment, that the decision at issue must be annulled.

4. *The claim for compensation*

Arguments of the parties

151 The applicant submits that the irregularities in the pre-recruitment medical procedure constitute faults sufficient to make the Parliament liable, since, firstly, they caused her material damage and non-material damage and, secondly, they are directly connected with the damage which she alleges.

152 As regards the material damage, the applicant maintains that the faults committed by the Parliament deprived her of a very real chance of holding a post to be filled within the Parliament, a post which she might have stood a chance of holding for an indefinite period. She therefore claims compensation equivalent to 95% of the difference between the remuneration which she should have received during the period from 2 February to 2 August 2009 and the unemployment benefit which she actually received for that period. She claims in that regard ‘provisional’ compensation of EUR 50 000.

153 As regards the non-material damage, the applicant claims the sum of EUR 20 000, having regard to the feeling of injustice which she experienced as a result of the blocking of her recruitment at the Parliament and to the numerous illegalities committed, in particular the infringement of the right to respect for her privacy.

154 The Parliament contends that the claims for compensation must be rejected as the applicant has not established the existence of a fault.

155 Furthermore, concerning the material damage, the Parliament contends, firstly, that it is not actual and certain, since it is not established that the applicant would have been recruited if the medical examination had been carried out without the medical data transferred by the Commission. Secondly, the Parliament submits that that damage has been overestimated and cannot in any way be equivalent to the sum of EUR 50 000. According to the Parliament, the remuneration which the applicant could have received during the period from 2 February to 2 August 2009 would have amounted at most to EUR 15 600.60. Furthermore, it would have been necessary to deduct from that sum the unemployment benefits received for the same period. Finally, the sum thus calculated would have to be weighted by a reduction factor in order to take account of the fact that the applicant's chance of being recruited was small.

156 As regards the non-material damage, the Parliament contends that the applicant does not establish with sufficient certainty what that damage consists in and recalls the settled case-law that the annulment of the contested decision constitutes, in principle, appropriate and sufficient reparation for the non-material harm suffered.

Findings of the Tribunal

157 In accordance with settled case-law, the administration can be held liable in damages only if a number of conditions are satisfied: the illegality of the allegedly wrongful act committed by the institutions, actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered (judgments of 1 June 1994 in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others*, paragraph 42, and of 21 February 2008 in Case C-348/06 P *Commission* v *Girardot*, paragraph 52. Those three conditions are cumulative. The absence of any one of them is sufficient for the claim for damages to be dismissed.

158 As regards the causal link, the applicant must, in principle, adduce proof of a direct and certain causal nexus between the fault committed by the institution concerned and the injury pleaded (judgment of 28 September 1999 in Case T-140/97 *Hautem* v *EIB*, paragraph 85).

159 However, the degree of certainty of the causal link required by the case-law is attained where the unlawful act committed by a European Union institution has definitely deprived a person, not necessarily of recruitment, to which the person concerned could never prove he had a right, but of a genuine chance of being recruited as an official or other member of staff, resulting in material damage for the person concerned in the form of loss of income. Where it seems eminently probable, in the circumstances of the case, that, if it had abided by the law, the institution concerned would have recruited the member of staff, the theoretical uncertainty as regards the outcome of a properly conducted recruitment procedure cannot preclude reparation for the genuine material damage sustained by the person concerned through the rejection of his candidature for the post which he would have had every chance of securing (judgments of 5 October 2004 in Case T-45/01 *Sanders and Others* v *Commission*, paragraph 150; and 22 October 2008 in Case F-46/07 *Tzirani* v *Commission*, paragraph 218).

160 Concerning the material damage, the applicant is justified in maintaining that without the illegality committed by the Parliament, whose medical officer used as a basis out of date medical data and did not himself perform the medical examination of fitness provided for by the CEOS, she had a genuine chance of being recruited.

161 Firstly, the Parliament had already informed the applicant that she was being recruited. The recruitment decision was therefore not merely potential but actual, and the applicant's engagement was dependent only on the establishment of her physical fitness to perform her duties.

162 Secondly, contrary to what the Parliament contends, it is not established that, if the medical examination for recruitment had been conducted in a regular manner, on the basis solely of the information collected by the Parliament's medical service on the applicant's state of health in January 2009, the applicant would not have been recruited. Indeed, it was possible that the medical data which had justified the Commission's refusal to recruit the applicant in 2007 had changed and could have justified a finding that that she was fit for recruitment by the Parliament.

163 Finally, a person who is a candidate for recruitment cannot be required to disclose all his medical history to his future employer. As the Court of Justice has held, the right to respect for private life, embodied in Article 8 of the ECHR and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the European Union (see the judgment in *Commission* v *Germany*, paragraph 23). It includes in particular a person's right to keep his state of health secret (Case C-404/92 P *X* v *Commission*, paragraph 17).

164 Admittedly, the employer is entitled to carry out examinations enabling it to evaluate the physical suitability of the person whom it is recruiting, and if that person, as he is entitled to do, refuses to undergo such examinations, the employer is entitled to draw whatever inferences it considers appropriate from such a refusal by not taking the risk of recruiting him (see, to that effect, Case C-404/92 P *X* v *Commission*, paragraphs 20 and 21).

165 However, in this case, it is not certain that, in the absence of the information which it obtained from the Commission's medical service, the Parliament would have been led to have doubts about the applicant's state of health and to carry out thorough examinations, knowing, moreover, that she had been offered only a short-term contract. Even if, as she seems to maintain, the applicant informed the Parliament, in connection with the medical examination which should have taken place in January 2009, that she had suffered from certain disorders justifying the consultation of psychiatrists, it is not certain that such information would have led the institution to reject her candidature. If the mere knowledge of disorders other than physiological disorders were automatically to justify a refusal of recruitment by the employer, then many people having suffered from such disorders, even for short periods, in the past would have serious difficulties in gaining access to employment.

166 The Tribunal holds, in those circumstances, that the applicant was deprived of a genuine chance of being recruited for a fixed term, and that that loss of opportunity can be assessed *ex aequo et bono*, on the basis of all the evidence available to the Tribunal, at 50% (see, by analogy, judgment of 6 June 2006 in Case T-10/02 *Girardot* v *Commission*, paragraphs 118 and 119). Taking into account the remuneration which the applicant might have received for the period of her engagement as a member of the contract staff, assessed by the Parliament at EUR 15 600.60, and the income received by the her during the period in question, during which the applicant was in receipt of unemployment benefits of approximately EUR 960 per month, and in the absence of any evidence showing that the engagement of the applicant might have been extended beyond six months, the Parliament must, *ex aequo et bono*, be ordered to pay the applicant the sum of EUR 5 000 for the material damage.

167 As regards the non-material damage, it must be recalled that the annulment of an act which has been challenged may in itself constitute appropriate and, in principle, sufficient reparation for that damage (judgments of 26 January 1995 in Case T-60/94 *Pierrat* v *Court of Justice*, paragraph 62, of 21 January 2004 in Case T-328/01 *Robinson* v *Parliament*, paragraph 79; and of 13 December 2007 in Case F-42/06 *Sundholm* v *Commission*, paragraph 44).

168 However, the Courts of the Union have allowed certain exceptions to that rule.

169 In the first place, the annulment of the administration's unlawful act cannot constitute full reparation for the non-material damage if that act contains an assessment of the abilities and conduct of the person concerned which is capable of offending him (see judgment of 7 February 1990 in Case C-343/87 *Culin* v *Commission*, paragraphs 25 to 29, and in *Pierrat* v *Court de Justice*, paragraph 62).

170 In this case, the Parliament's assessments concerning the applicant's attitude, made in the decision at issue and in the reply to the complaint, can, to a certain extent, be regarded as offensive to her. Indeed, the Parliament expressly alleges that she intentionally omitted to tell it that she had already undergone a pre-recruitment medical examination at the Commission and, by that very fact, failed to comply with her obligations. By stating its view in those terms, the Parliament openly called into question the applicant's good faith, even though, on the one hand, she had informed the Parliament of her professional experience at the Commission, and, on the other, she could, on the occasion of a medical examination, have communicated that information and its context. In that way, the Parliament's assessments, set out in a decision already characterised as unlawful above, directly caused non-material damage to the applicant (judgment of 23 March 2000 in Case T-197/98 *Rudolph* v *Commission*, paragraph 98).

171 In the second place, the annulment of the administration's unlawful act cannot constitute full reparation for the non-material damage suffered where the illegality committed is particularly serious (judgments of 30 September 2004 in Case T-16/03 *Ferrer de Moncada* v *Commission*, paragraph 68, and of 7 July 2009 in Joined Cases F-99/07 and F-45/08 *Bernard* v *Europol*, paragraph 106).

172 In this case, the various illegalities committed by the Parliament, in particular the infringement of the right to respect for private life and of Regulation No 45/2001, are particularly serious, justifying the award of compensation for the non-material damage.

173 In the third place, it has been held that, where the annulment of an act has no practical effect, it cannot in itself constitute appropriate and sufficient reparation for any non-material damage caused by the act annulled (*Tzirani* v *Commission*, paragraph 223).

174 In this case, even though it is still possible to adopt measures by which the illegalities committed could be rectified, by, for example, carrying out a new medical examination of the applicant, the annulment of the decision at issue might be completely negated. The information relating to the applicant's health, which was unlawfully brought to the Parliament's attention, could give rise to doubts, making an objective analysis of her state of health by that institution's medical service difficult, and it is, in any event, unlikely that the Parliament would contemplate recruiting the applicant, with whom it has never had an employment relationship, as a member of its contract staff.

175 Thus, the non-material damage to the applicant is not entirely compensated for by the annulment of the decision at issue. A fair assessment of the amount of compensation which the Parliament must pay to the applicant for that damage, in the light, in particular, of the illegalities established and of their consequences, is EUR 20 000.

176 It follows from all the foregoing that the Parliament must be ordered to pay to the applicant the sum of EUR 25 000, including any interest, for the material and non-material damage suffered.

Costs

177 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

178 Under Article 89(2) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Tribunal may order that the costs be shared or that each party bear its own costs.

179 In this instance, since the action has in all essential respects been upheld, a fair assessment of the circumstances of the case dictates that the Parliament should be ordered to bear its own costs and to pay those incurred by the applicant.

180 Pursuant to Article 89(4) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE TRIBUNAL (First Chamber)

hereby:

1. Annuls the decision of 19 December 2008 by which the European Parliament withdrew the offer of employment which it had made to V;

2. Orders the European Parliament to pay to V the sum of EUR 25 000;

3. Dismisses the action as to the remainder;

4. Orders the European Parliament to bear its own costs and to pay the costs of the applicant;

5. Orders the European Data Processing Supervisor, intervener, to bear his own costs.

Gervasoni Kreppel Rofes i Pujol

Delivered in open court in Luxembourg on 5 July 2011.

Registrar
W. Hakenberg

President
S. Gervasoni