Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

17 February 2017 [1]

(Seconded national expert — EFSA rules on SNEs — Decision not to extend the secondment — Access to documents — Regulation (EC) No 1049/2001 — Refusal to grant access — Exception relating to the protection of privacy and the integrity of the individual — Protection of personal data — Regulation (EC) No 45/2001 — Applications for a declaration and seeking the issue of directions — Written pleadings supplementing the originating application — Amendments to the heads of claim — Admissibility)

In Case T-493/14,

Ingrid Alice Mayer, residing in Ellwangen (Germany), represented by T. Mayer, lawyer,

applicant,

v

European Food Safety Authority (EFSA), represented by D. Detken, acting as Agent, R. Van der Hout and A. Köhler, lawyers,

defendant,

ACTION brought under Article 263 TFEU challenging the decisions of EFSA, first, dismissing the applicant's request to extend her secondment as a national expert at EFSA and, second, refusing her request for access to documents held by EFSA,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová and E. Buttigieg (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 6 July 2016,

gives the following

1 — Language of the case: German.

Judgment

Background to the dispute

1 The applicant, Ms Ingrid Alice Mayer, has been a civil servant with the Land Saxony (Germany) since 1 November 1992. Ms Mayer was seconded to the European Food Safety Authority (EFSA) from 1 July 2013 under a contract concluded on the same day between herself, EFSA and the Land Saxony ('the contract'). In accordance with Article 5 thereof, the contract was concluded for one year, until 30 June 2014. According to Article 4 of the decision of the Executive Directive of EFSA of 18 February 2013 laying down the rules on secondment for national experts and national experts in professional training at EFSA ('the SNE rules'), applicable to the contract, a secondment may be renewed one or several times, but the total period of the secondment may not, in principle, exceed four years.

2 On 4 September 2013, the applicant was elected representative for seconded national experts to the Staff Committee of EFSA ('the Staff Committee') for a period of three years. On 16 December 2013, as a result of a disagreement with the president of the Staff Committee concerning a case to be dealt with in the applicant's absence, the Staff Committee decided to suspend her from her Staff Committee duties for six months, with immediate effect, on the ground that she had breached her duty of confidentiality.

3 On 18 December 2013, the applicant lodged a written complaint against the suspension decision at issue with the Executive Director of EFSA, requesting him to impose a disciplinary sanction on the president of the Staff Committee. By email of 17 January 2014, the Staff Committee formally notified the applicant that it had decided to exclude her from participation in its meetings.

4 On 8 and 31 January 2014, the applicant had meetings with her immediate superior, Mr D., who informed her, during the second meeting, that EFSA did not intend to extend her contract as the operational needs of the unit in which she was working had changed, and her profile no longer corresponded to the necessary requirements. The applicant claims that during the second interview, Mr D. mentioned a request for access to documents from the network of non-governmental organisations, Pesticide Action Network Europe (PAN Europe), concerning the emails exchanged between a senior official of EFSA, Ms K., and International Life Sciences Institute ('ILSI'), a private organisation active in the nutrition sector. The EFSA challenges that assertion.

5 By letter of 16 April 2014, concerning the 'end of [her] contract of secondment', EFSA informed the applicant that that contract would expire on 30 June 2014, while indicating that she could lodge a complaint with the Director of EFSA under Article 23 of the SNE rules.

6 In the applicant's view, the incidents which took place within the Staff Committee, and the fact that, as a result of Mr D.'s revelations, she had become an involuntary witness to a conflict of interests concerning the relations between the EFSA and ILSI were the reasons for her 'expulsion'. Therefore, on 24 April 2014, the applicant lodged a complaint with the Director of the EFSA, based on Article 23 of the SNE rules, against the abovementioned letter of 16 April 2014. The complaint was supplemented by observations submitted on 5 and 10 June 2014.

7 On 12 May 2014, the applicant requested EFSA for access to all the emails exchanged between Ms K. and ILSI, a request which it refused on 5 June 2014, on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

8 On 8 June 2014, the applicant sent EFSA a confirmatory request for access to the documents concerned, supplemented by a letter of 15 June 2014.

9 By letter of 27 June 2014, EFSA, first, dismissed the complaint brought by the applicant under Article 23 of the SNE rules against the abovementioned letter of 16 April 2014, observing that Article 4(1) of the SNE rules provided that 'the initial period of secondment [could] not be less than six months or more than two years [and it could] be renewed once or more, up to a total period not exceeding four years'. Therefore, there was no right to renewal of the contract. Furthermore, EFSA relies on its discretion in the organisation of its services and sets out the reasons justifying its decision not to extend the contract, while, in that context, refuting certain allegations made by the applicant in various emails which had been previously sent to it by her.

10 Second, by the same letter of 27 June 2014, EFSA refused the confirmatory request for access to the abovementioned documents based on the exception laid down in Article 4(1)(b) of Regulation No 1049/2001. EFSA states that, where a request based on that regulation seeks access to documents containing personal data, the provisions 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) become applicable in full. Article 8(b) of Regulation No 45/2001 requires the recipient of personal data to establish the necessity of having them transferred, by way of legitimate justifications or convincing arguments. EFSA argues that the applicant has not satisfied that requirement. Furthermore, its decision not to extend the secondment is based solely on the fact that the operational requirements of the unit to which the applicant was assigned had changed, so that her profile no longer met the necessary requirements at the time. Further, there was no connection between that decision and the emails to which the applicant wishes to have access. Finally, EFSA indicates to the applicant that she may bring an action for annulment against the two decisions contained in the letter of 27 June 2014 before the General Court pursuant to Article 263 TFEU or that she may lodge a complaint with the European Ombudsman.

Procedure and forms of order sought

11 By application lodged at the General Court Registry on 30 June 2014, the applicant brought the present action claiming that the Court should:

— extend her secondment until 30 June 2015;

— declare that the termination of her contract, more specifically the decision of EFSA entitled 'End of secondment' of 16 April 2014, is vitiated by illegality.

— order EFSA to refrain from electing a new 'observer' of seconded national experts to the Staff Committee;

— declare that her exclusion from the Staff Committee for a period of six months is vitiated by illegality;

— order EFSA to grant her access to all the emails exchanged between Ms K. and ILSI;

— alternatively, grant access to those documents to a third party appointed by the General Court;

— order EFSA to pay the costs.

12 By separate document lodged at the Registry of the General Court on 1 July 2014, the applicant submitted an application for interim measures.

13 By order of 7 July 2014, *Mayer* v *EFSA* (T-493/14 R, not published, EU:T:2014:617), the application for interim measure was dismissed, in particular, on the ground that the action for annulment in support of which the interim measures had been applied did not contain any application for a declaration of invalidity and that the heads of claim seeking provisional disclosure of the documents at issue were the same as those in the main proceedings, so that those heads of claim were contrary to the settled case-law, according to which the decision of the Court dealing with the application for interim proceedings could not prejudge the decision in the main proceedings or render it illusory by depriving it of its effectiveness.

14 By separate document, lodged at the Court Registry on 5 September 2014, the applicant submitted written pleadings seeking, in particular, to 'replace' the original heads of claim by that set out in those pleadings ('the supplementary pleadings').

15 In the supplementary pleadings to the originating application, the contents of which were subsequently repeated in their entirety in the reply, lodged at the Registry of the General Court on 7 January 2015, the applicant stated that she withdrew the third and fourth heads of claim in the originating application, relating to the dispute between her and the Staff Committee, and the initial heads of claim were 'replaced' by the following heads of claim, asking the General Court to:

— extend her secondment as a national expert with EFSA until 30 June 2017, and to annul the decision not to extend her secondment;

— in the alternative, order EFSA to adopt a new decision concerning her secondment without committing any error of assessment and taking account of the interpretation of law by the General Court;

— annul the decision of 16 April 2014 terminating her contract;

— grant the applicant access to all the emails exchanged between Ms K. and ILSI during the contract;

— in the alternative grant the applicant access to the abovementioned emails, redacting information falling with the scope of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms which seriously prejudice the privacy of Ms K. or would have serious consequences for her;

— annul the decision of 27 June 2014 refusing the request for access to the abovementioned documents;

— order EFSA to pay the costs, including those relating to the heads of claim which have been withdrawn.

16 By letter of 10 November 2014, lodged at the Court Registry on 20 November 2014, the applicant sent the General Court a number of documents and supplementary written observations.

17 In the reply, the applicant repeated the various heads of claim set out in the supplementary pleadings to the originating application, and observed that, with the exception of the third and fourth heads of claim in the originating application relating to the dispute between her and the Staff Committee, which she was withdrawing, those set out in the originating application were not 'replaced' as is incorrectly stated in the supplementary pleadings to the originating application, but were 'to be interpreted'. She also asked the Court to rule that EFSA's decision of 27 June 2014 '[was] null and void'.

18 After the rejoinder was lodged, on 13 May 2015, the applicant lodged a document dated 6 May 2015 at the Court Registry, in which she commented on the 'written observations just received', that is an email of 16 May 2014 sent to her by the Staff Committee, an email from EFSA of 19 November 2014 sent to the Ministry of the Interior of the Land Saxony, and the original request for access to the emails between Ms K. and ILSI, submitted by PAN Europe, of 25 September 2013.

19 Finally, by letter of 29 June 2016, lodged at the Registry of the General Court the same day, the applicant sent the latter several 'pieces of newly received evidence'.

20 First, EFSA submitted a defence, lodged at the Court Registry on 11 September 2014, then, observations on the supplementary pleadings to the originating application lodged at the Court Registry on 22 October 2014, a rejoinder, lodged at the Court Registry on 26 February 2015 and, finally, observations lodged at the Court Registry on 12 June 2015 on the applicant's abovementioned submissions of 6 May 2015.

21 EFSA contends that the Court should:

— declare the supplementary pleadings to the originating application to be inadmissible;

— declare the applicant's submissions of 6 May 2015 to be inadmissible;

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as inadmissible, taking account of the supplementary pleadings to the originating application;

— in the further alternative, dismiss the action as unfounded;

— order the applicant to pay the costs, including those incurred in relation to the third and fourth head of claim which have been withdrawn.

Law

Admissibility of the supplementary pleadings to the originating application

22 EFSA challenges the admissibility of the supplementary pleadings to the originating application on the ground that the option to lodge such submissions is not provided for in Article 47(1) of the Rules of Procedure of the General Court of 2 May 1991. In the alternative, EFSA argues that, in any event, those pleadings contain a number of new elements which are inadmissible, namely new heads of claim, the extension of the original forms of order sought and new pleas of fact or law.

23 It must be observed that the General Court held, in its judgment of 29 February 1996, *Lopes* v *Court of Justice* (T-547/93, EU:T:1996:27, paragraph 39), that the lodging of a version of the application which was modified as to its substance was not provided for by the Rules of Procedure of 2 May 1991 and that, therefore, such a document could not be added to the file.

24 Although, in the present case, it is not disputed that the supplementary pleadings to the originating application were lodged before the expiry of the time limit for bringing an action, on 8 September 2014, as far as concerns EFSA's decision of 27 June 2014, those pleadings modify the subject matter of the dispute by setting out for the first time in its new heads of claim, not only a request to extend the contract until 30 June 2017, but also requests for annulment of the alleged decision of 16 April

2014 and the decision of 27 June 2014, the latter not being covered by the various heads of claim in the originating application. The supplementary pleadings to the originating application must, therefore, be dismissed as inadmissible.

25 Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) and (d) of the Rules of Procedure of 2 May 1991 cannot be interpreted as authorising the applicant in the present case to bring new heads of claim before the General Court in order to transform an action which is manifestly inadmissible, in that, as is clear from paragraphs 32 to 50 below, it contained only requests to issue directions and declarations, into an admissible action by modifying the subject matter of the dispute, as set out in the originating application, whether that is before or after the expiry of the period within which to bring proceedings.

26 It is true that Article 48(2) of the Rules of Procedure of 2 May 1991, which allows new pleas in law to be introduced in the course of proceedings if those pleas are based on facts and law which come to light in the course of the procedure, may be applied in certain cases to changes to the forms of order sought (see, to that effect, judgment of 1 April 2009, *Valero Jordana* v *Commission*, T-385/04, EU:T:2009:97, paragraphs 76 and 77). Such is the case, in particular where the contested decision is replaced in the course of proceedings by a decision with the same subject matter, which must then be regarded as a new factor allowing the applicant to adapt its pleas in law and claims for relief (order of 21 September 2011, *Internationaler Hilfsfonds* v *Commission*, T-141/05 RENV, EU:T:2011:503, paragraph 34).

27 However, in the absence of matters of law or of fact which came to light in the course of the written procedure, only the order sought in the originating application may be taken into consideration, so as not to modify the subject matter of the dispute, as it has been exhaustively set out in that application, so that the merits of the action must be examined solely with regard to the forms of order contained in the originating application (see judgment of 26 October 2010, *Germany* v *Commission*, T-236/07, EU:T:2010:451, paragraphs 27 and 28 and the case-law cited).

28 In the present case, it is common ground that the applicant does not base her new forms of order on elements of law and fact which came to light during the procedure, more specifically, between the date of lodging the application on 30 June 2014 and the date on which the supplementary pleadings to the originating application were lodged on 4 September 2014.

29 Therefore, the applicant's supplementary pleadings to the originating application must be dismissed as inadmissible.

Admissibility of the action

30 EFSA claims that the forms of order set out in the originating application are manifestly inadmissible as they ask the General Court to make declarations and issue directions to EFSA.

31 As a preliminary point, it must be held that the applicant stated in the reply that she withdrew the third and fourth heads of claim from the application, relating to the dispute between her and the Staff Committee, so that it is only necessary to give a ruling on the first and second heads of claim, relating to the failure to extend the secondment contract and the fifth and sixth heads of claim relating to the request for access to documents.

Admissibility of the claim relating to the extension of the contract

– Admissibility of the first head of claim in the originating application

32 By the first head of claim, as set out in the originating application, the applicant asks the General Court to extend her contract until 30 June 2015. In the reply, the applicant claims that the General Court should order her contract to be extended until 30 June 2017 and, in the alternative, that it should order EFSA to take a new decision relating to her secondment, taking account of the General Court's interpretation.

33 EFSA asserts that the General Court cannot issue directions to it, including those which result, in the event of the annulment of a legal act, in the present case the annulment of the alleged decision of 16 April 2014, which would require the extension of the applicant's secondment.

34 It must be observed that, by that head of claim, the applicant asks the General Court to replace EFSA or to issue instructions to it, which manifestly exceeds its powers in the context of the judicial review based on Article 263 TFEU. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before the Court (see, to that effect, judgment of 8 October 2008, *Agrar-Invest-Tatschl* v *Commission*, T-51/07, EU:T:2008:420, paragraphs 27 and 28 and the case-law cited) and, therefore, also applies in relation to the secondment of national experts.

35 Therefore, it must be held that the applicant is not entitled to ask the General Court to extend her contract until 30 June 2015 and even less so until 30 June 2017, as she requested in the forms of order in the reply, nor to order EFSA to agree to such an extension.

– Admissibility of the second head of claim in the originating application

36 By the second head of claim, the applicant asks the General Court to declare that the termination of her contract, 'more precisely the decision of EFSA … of 16 April 2014' is vitiated by illegality. In the reply, the applicant asks the General Court, for the first time, to 'annul' that 'decision' and to hold that the decision of 27 June 2014 is 'void'.

37 From the outset, it must be recalled that the Court has consistently held, as EFSA rightly observed, that in the context of judicial review based on Article 263 TFEU, claims which only seek declarations in respect of matters of fact or matters of law cannot, of themselves, be considered valid (see, to that effect, judgment of 11 July 1996, *Bernardi* v *Parliament*, T-146/95, EU:T:1996:105, paragraph 23).

38 Referring to Article 2 TEU, which provides that the Union is founded on the values of respect for the rule of law, the applicant submits that a right of action must exist where there is a right. The applicant claims to be entitled to the renewal of her contract, based on the 'prohibition of arbitrary actions and agreements contrary to public order in German law', and the principles of equal treatment and the rule of law guaranteed by the EU Treaty and the case-law of the Bundesverfassungsgericht (German Constitutional Court). On the basis of the alleged subjective right to the renewal of the secondment arises *ipso jure* the right for the applicant to bring proceedings before the General Court.

39 According to the applicant, the General Court must therefore, on account of the existence of the alleged right to the renewal of her contract, either uphold her 'request for a judgment' or interpret and reformulate the second head of claim in the application so that it is admissible in an action for annulment, as provided for by Article 263 TFEU.

40 EFSA asserts, to the contrary, that the absence of legal remedies cannot justify an amendment in the procedural system laid down by the Treaty, contrary to what the applicant infers when she states that a right of action must exist where there is a right.

41 It must be recalled that the possible absence of remedies cannot justify an amendment, by way of judicial interpretation, of the system of remedies and procedures laid down in the FEU Treaty (see, to that effect, order of 29 April 2002, *Bactria* v *Commission*, T-339/00, EU:T:2002:107, paragraph 54) Furthermore, in the present case nothing prevents the applicant from seeking the annulment of the contested decisions under Article 263, fourth paragraph, TFEU.

42 Furthermore, although it is true that the EU Courts must interpret the applicant's pleas having regard to their substance rather than their legal classification, irrespective of any question of terminology, that is on condition that the pleas in law relied on are set out in the application with sufficient clarity, unambiguity and precision, to enable the defendant to prepare its defence and to enable the Court to give judgment in the action without having to seek further information (see, to that effect, judgment of 24 February 2000, *ADT Projekt* v *Commission*, T-145/98, EU:T:2000:54, paragraphs 66 and 67).

43 The elements of fact and of law on which a case is based are to be indicated coherently and intelligibly in the application itself and the heads of claim in the application must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (judgment of 10 January 2008, *Commission* v *Finland*, C-387/06, not published, EU:C:2008:5, paragraph 14).

44 In other words, the applicant cannot reduce the Court to speculating about the reasoning and precise observations, both in fact and law, that could lie behind its claims. It is precisely such a situation, creating legal uncertainty and anathema to a sound administration of justice, that Article 44(1) of the Rules of Procedure of 2 May 1991 is designed to avoid, by requiring that the originating application should indicate the subject matter of the proceedings, the forms of order sought and a summary of the pleas in law on which the application is based (see, to that effect, order of 19 May 2008, *TF1* v *Commission*, T-144/04, EU:T:2008:155, paragraphs 56 and 57).

45 In the present case, as EFSA rightly submitted, the applicant's arguments appear to be confused. The applicant expresses her position in terms which are, to say the least, imprecise, referring to Article 263 TFEU and the decision of 27 June 2014 without, however, as the President of the General Court also observed in the order of 7 July 2014, *Mayer* v *EFSA* (T-493/14 R, not published, EU:T:2014:617, paragraph 29), formulating any application for annulment of the alleged decision of 16 April 2014 or the decision of 27 June 2014 in her heads of claim, even though their subject matter can no longer be modified at the stage of the reply in the absence of elements of law and fact which came to light during the procedure.

46 On those grounds alone, the heads of claim relating to the failure to extend the contract must be dismissed as inadmissible.

Admissibility of the claims relating to the access to documents

47 By the fifth and sixth heads of claim in the originating application, the applicant explicitly asks the General Court to order EFSA to grant her access to all the emails exchanged between Ms K. and ILSI or, in the alternative, to grant access to those emails to a third party nominated by the General Court. By the 5th, 6th and 10th heads of claim in the reply, the applicant also requests, in the alternative, partial access to the abovementioned emails, the annulment of the decision of 27 June 2014 in so far as it concerns the refusal of access to the documents and to grant the General Court, as the third party nominated by the latter, access to those emails.

48 EFSA argues that those heads of claim are inadmissible, because the General Court has no jurisdiction to issue directions to it in an action for annulment.

49 As set out in paragraph 34 above, when exercising judicial review of legality, the General Court is not entitled to issue directions to the institutions or to assume the role assigned to them. Therefore, the heads of claim seeking to obtain access to the abovementioned documents must, on those grounds, be dismissed as inadmissible, while, furthermore, the heads of claim in the reply in so far as they seek, for the first time, annulment of the decision of 27 June 2014 refusing access to the abovementioned documents, must also be dismissed, since the heads of claim set out in the originating application can no longer be modified at the stage of the reply in the absence of elements of law or fact which come to light during the procedure.

50 In the light of all those considerations, the action must be dismissed as inadmissible in its entirety and, therefore, it is unnecessary to rule on the admissibility of the applicant's observations, in particular those of 6 May 2015 and 29 June 2016, which are intended to expand upon and substantiate the pleas relied on in support of the various heads of claim declared inadmissible.

Costs

51 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

52 As regards the third and fourth heads of claim in the originating application, relating to the Staff Committee of EFSA which were withdrawn, it must be recalled that Article 136(1) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance. Under Article 136(2), at the request of the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party.

53 The applicant takes the view that EFSA must pay the costs relating to the heads of claim she withdrew, by reason of the 'reprehensible conduct' of EFSA in her regard.

54 However, the General Court considers that the third and fourth heads of claim in the originating application were, in any event, manifestly inadmissible, in that they do not contain any application for annulment, but consist of requests for the issue of directions and declarations, so that it cannot be held that EFSA's attitude justifies that it must pay the costs relating to those heads of claim, in accordance with Article 136(2) of the Rules of Procedure.

55 The applicant also asks the General Court to apply, directly or by analogy, Article 88 of the Rules of Procedure of 2 May 1991, according to which, in proceedings between the Union and its servants the institutions shall bear their own costs. The applicant submits that that provision also applies with respect to seconded national experts.

56 In that connection, it must be recalled that according to settled case-law, national experts on secondment with an institution or body of the EU are not 'servants' within the meaning of Article 270 TFEU (see, to that effect, order of 9 October 2006, *Gualtieri* v *Commission*, F-53/06, EU:F:2006:100, paragraphs 21 and 22) and it was held that the specific regime in Article 88 of the Rules of Procedure of 2 May 1991 was not applicable to them (see, to that effect, judgment of 10 September 2008, *Gualtieri* v *Commission*, T-284/06, not published, EU:T:2008:335, paragraph 47).

57 Since EFSA has applied for costs and the applicant has been unsuccessful, the applicant must be ordered to pay the costs incurred in the present appeal proceedings and in the interim proceedings.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders Ingrid Alice Mayer to pay the costs, including those relating to the proceedings for interim measures.**

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 17 February 2017.

[Signatures]

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