

Proposal of the European Ombudsman for a friendly solution in the inquiry into complaint 1770/2013/JF against the European Economic and Social Committee

Solution - 18/10/2013

Case 1770/2013/JF - **Opened on** 18/10/2013 - **Decision on** 18/11/2015 - **Institution concerned** European Economic and Social Committee (Critical remark) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant is a former Head of Unit (the 'HoU') for Relations with the Institutions and the National Economic and Social Committees (Grade AD 13) at the European Economic and Social Committee (the 'EESC').
2. On 19 December 2012, the President of the Various Interests Group of the EESC (the 'President of Group III') sent a 'Merry Christmas' e-mail to a number of undisclosed recipients, including the complainant and all other staff. The e-mail included a text of a religious nature [2] and two pictures: one depicting the birth of Christ, and the other of men mourning the death of a child. The e-mail included the President of Group III's "e-signature" clearly identifying his name, function and professional address.
3. On 20 December 2012, the complainant replied to the above e-mail, also by e-mail, which he copied to, among others, the President and the Secretary-General of the EESC and the Presidents of other political groups of the EESC; the President and a Vice-President of the Commission; the High Representative of the Union for Foreign Affairs and Security Policy; the President and the Secretary-General of the European Parliament; the Presidents of the Court of Justice of the European Union and of the General Court; and the European Ombudsman. The complainant reminded the President of Group III that he had sent similar wishes of a religious nature to staff also the previous year and that some EESC staff had expressly informed him by e-mail that they did not wish to receive any such communications. They had further expressed concern that such communications took place within an EU institution that should show discretion and neutrality in such matters and respect other faiths. The complainant took the view that the President of Group III's message to all staff was not only religious, but also political. He did not understand the association or the parallel between the two pictures accompanying the



wishes. Although he did not doubt the President of Group III's good intentions when choosing the pictures, the complainant and a number of other colleagues felt deeply hurt by the content of his e-mail. The complainant's e-mail included his "e-signature", clearly identifying him as the HoU for Relations with the Institutions and the National Economic and Social Committees and his professional address.

4. On 21 December 2012, the EESC's Director for Human Resources and Internal Services (the 'Director') issued a note to the complainant where he called his attention to the fact that, in accordance with Decision 451/06 A, when using e-mail, all EESC officials must comply with the Staff Regulations of the Officials of the European Union (the 'SR'), namely its Articles 11 and 12. They should therefore carry out their duties and conduct themselves solely with the interests of the European Union in mind and abstain from any behaviour that might reflect adversely upon their position. The Director took the view that sending messages containing attacks which were ethical, religious, political and racial in nature to a large number of recipients was abusive. The content and the tone of the complainant's reply to the President of Group III were not compatible with those expected from an EESC official in a high-profile post with management responsibilities and in the public view [3] . Thus, in the Director's view, the complainant had failed to comply with the applicable rules. He urged him to abstain from any such behaviour and informed him that sanctions could follow [4] .

5. On 23 January 2013, the complainant replied to the Director, by e-mail, that he had already had the opportunity to explain to him, in writing, that, when replying to the e-mail that had been addressed to him, he did not notice that "e-signature" function was activated. The complainant argued that he had acted in defence of the founding principles of the European Union, namely its secular values and respect for its citizens. He did not consider his behaviour to have reflected adversely upon his position and expressed the view that no other EU institution sent e-mails like the one sent by the President of Group III. After receiving the President of Group III's e-mail, the complainant met his Director, the Deputy Secretary-General and the Secretary-General of the EESC, and personally informed them about his views on it. His reply of 20 December 2012 was sent the next day following these contacts. The complainant disagreed that the tone or the content of his e-mail was inappropriate. In his view, he was polite, used appropriate language, and sent his e-mail to a limited number of recipients. Finally, the complainant said that when the President of Group III sent a similar e-mail the previous year, a number of EESC officials " *replied to all* " in terms similar to those used by the complainant. However, neither the Members nor the EESC administration raised any concerns on that occasion.

6. On 4 February 2013, the Secretary-General of the EESC issued Decision No 065/13 A ('Decision 65') reassigning the complainant, in the interest of the service and as from 1 March 2013, from his post of HoU for Relations with the Institutions and the National Economic and Social Committees to the post of administrator at the Secretariat of the Deputy Secretary-General for General Affairs and Consultative Work, " *Europe 2020 Steering Committee* " (the 'Steering Committee'). In Decision 65, the Secretary-General took into consideration: (i) the fact that there was a post of administrator vacant at the Steering Committee; (ii) the complainant's e-mail of 20 December, and the Director's note of 21 December 2012; and (iii) the



fact that the complainant's sending of the e-mail of 20 December 2012 was a flagrant failure to comply with the applicable rules which compromised the trust placed in him as HoU for Relations with the Institutions and the National Economic and Social Committees by, among others, the political stakeholders in the EESC [5] .

7. On the same day, the Secretary-General of the EESC issued also Decision No 066/13 A ('Decision 66') providing that, in light of Decision 65, the complainant no longer fulfilled, as from 1 March 2013, the conditions for being granted the management allowance linked to his duties of HoU, which he had received since 2 December 2004 [6] .

8. On 13 May 2013, the complainant submitted to the EESC an Article 90(2) SR complaint against Decisions 65 and 66 (the 'Decisions'). The complainant, first, summarised all the arguments he had previously submitted to the EESC. He, second, added that, in 2011, also a number of Members disapproved of the President of Group III's message in a letter sent directly to him, a copy of which was with the EESC administration [7] . The EESC never raised the matter with the President of Group III and the latter's reaction to that disapproval, if any, remained unknown. The complainant, then, further argued that he did not " *reply to all* ", but rather copied his e-mail to a restricted number of persons. He further stated that he had acted in good faith and in the interest of the European Union, which, in his view, could not tolerate, in the year it received the Nobel Peace Prize, a President of a group of one of its consultative bodies sending to its staff " *des images de guerre* " in a religious greeting card. The complainant further pointed out that the above event took place at a time that he was being subjected to heavy pressure in his role as manager of his unit's human resources, a fact which was widely known by his superiors, including the Director. The complainant considered that he was being subjected to persecution and that his reassignment was, in fact, a covert sanction, which was both unjustified and disproportionate. In his view, the Decisions were the result of strained relations with his superiors arising from his handling of some sensitive human resources files and conflicts in his Unit [8] . In addition, he was sanctioned without having had the opportunity to defend himself. Moreover, the Decisions violated the EESC's internal rules because the complainant's Appointing Authority was the EESC's President and the Decisions were taken by the EESC's Secretary-General. Finally, the Decisions did not comply with the SR provisions relating to disciplinary measures or the applicable disciplinary proceedings. In light of all the above, and also of the material and non-material damage he suffered due to his reassignment to duties lower than those he had previously performed and the withdrawal of his management allowance, the complainant requested that the Decisions be annulled and that he receive EUR 10 000 in compensation.

9. On 10 September 2013, the EESC issued its decision on the above complaint (the 'Decision of 10 September 2013'). It, first, stated that the event at the origin of the Decisions was the complainant's e-mail of 20 December 2012. This, according to the EESC, resulted in both the political stakeholders and the complainant's superiors losing their trust in him as HoU for Relations with the Institutions and the National Economic and Social Committees. Consequently, the Appointing Authority was forced to reassign the complainant as soon as possible. In this regard, the EESC referred to the case-law of the Civil Service Tribunal (the 'CST') in the *Kerstens* case, which provides that EU institutions have a wide discretion in



deciding on the reassignment of staff, as long as that reassignment is carried out in the interest of the service and respects the principle of reassignment to an equivalent post [9] . As regards the interest of the service, the EESC stated that the Appointing Authority had to react quickly after the complainant's e-mail of 20 December 2012. That e-mail, which (as the complainant acknowledged) was signed " *Head of Unit for Institutional Relations and with National Economic and Social Committees* " and forwarded to a number of important persons in the EU, contained criticism of a president of one of the EESC Groups. Consequently, the EESC's political authority found that the complainant had compromised the trust placed in him as holder of a high-profile position [10] . The EESC stated that the principle of reassignment to a similar post provides for a comparison between the present duties of the official reassigned and his grade in the hierarchy. At the time of the complainant's reassignment, no post of HoU was available. The Steering Committee, to which the complainant was reassigned, had only two posts of administrator and one post of assistant. It had no post of HoU. However, the two administrators work directly under the Deputy Secretary-General of the EESC. Generally, any post immediately under a Deputy Secretary-General may be compared to that of an advisor, normally held by an official with a very high grade [11] . Consequently, the complainant's reassignment was carried out in accordance with the applicable rules as his new duties did not clearly fall short of those corresponding to his grade and post. In addition, according to the EESC's interpretation of *Kerstens* , if a decision changing an official's duties is not contrary to the interests of the service, there can be no question of misuse of power [12] . The complainant's new post corresponded to his grade. As regards the withdrawal of his management allowance, the EESC emphasised that that allowance is paid only to HoUs, Directors, and Secretaries-General. The Steering Committee, including its three posts, falls under the direct responsibility of the Deputy Secretary-General. Since the EESC is a small consultative body with a limited number of staff (and an even more limited number of management posts), there were no posts of HoU available on 1 March 2013. The Appointing Authority deliberately reassigned the complainant to a post without a direct HoU to avoid any perception of a loss of respect [13] . In June 2013, the EESC published three posts of HoU, namely two in its Department of Communications ("Visits and Publications" and "Press") and one in its Directorate for General Affairs ("Relations with organised and prospective civil society"). If the complainant had wished to fill a management post, he could have applied to any of the above vacancies. Since he did not, it appeared that he no longer wished to fill any such management post [14] . In the EESC's view, the above demonstrated that the withdrawal of the complainant's management allowance was made in accordance with the applicable rules. Finally, the EESC called the complainant's attention to another EESC decision delegating Appointing Authority powers for reassignments from the President to the Secretary-General of the EESC. Consequently, the latter was competent to adopt the Decisions. In light of all the foregoing, the EESC rejected the complaint and claim for compensation, and informed the complainant about the possibility of bringing an appeal against the Decision of 10 September 2013 to the CST or a complaint to the European Ombudsman.

10. On 16 September 2013, the complainant contacted the European Ombudsman.

The inquiry



11. The Ombudsman opened an inquiry into the allegation that the decision of the Secretary General of the EESC reassigning the complainant to another post was unfair, and into the claim that the EESC should annul the complainant's reassignment and compensate him for the material and non-material damage he has suffered, including loss of the management allowance. The Ombudsman's inquiry is not concerned with the propriety or otherwise of the actions of the President of Group III.

12. In the course of the inquiry, the Ombudsman received the opinion of the EESC on the complaint and, subsequently, the observations of the complainant in response to the EESC's opinion. Her services also took into account further information submitted by the complainant prior to the EESC's opinion. The Ombudsman's friendly solution proposal takes into account the arguments and opinions put forward by the parties.

Allegation of unfairness

Arguments presented to the Ombudsman

13. In support of his allegation, the complainant argued that the Secretary-General's decision was explicitly based on the complainant supposedly having committed a disciplinary offence. It thus constituted a disciplinary sanction. It follows that the EESC failed to follow the disciplinary procedure laid down by the SR before imposing that sanction and, as a reaction to the complainant's reply of 20 December 2012 to the President of the Various Interests Group's e-mail of 19 December 2012, the decision to reassign him was unjustified and disproportionate.

14. In its opinion, the EESC stated that, following its decision on the complainant's Article 90(2) SR complaint, it offered him, first, on 11 December 2013, and, later, again, on 13 January 2014, a post of Advisor at the Department for Communication and Information, which the complainant refused.

15. After reiterating the explanations provided to the complainant in its reply to the Article 90(2) SR complaint, the EESC referred also to other case-law of the CST. In the case of Z , according to the EESC, two e-mails sent by the claimant were found to be sufficient to seriously compromise the working relations within his unit and justified his reassignment in the interest of the service. This, was found to be case irrespective of the claimant's intentions, of the knowledge other members of the unit had about the conflict between him and his superiors, or the truth of his accusations [15] . Likewise, in the present case, the complainant's intentions in respect of the content and the form of his e-mail of 20 December 2012, his approaches prior to sending that e-mail, and the similar positions that may have been expressed by other EESC staff members, could not prevail over the interest of the service, which justified the adoption of Decision 65. The complainant compromised the legitimate trust of his superiors and, thus, infringed Article 12 of the SR [16] . Because the reassignment took place in the interest of the service, that decision could not be considered to be a disguised sanction or a misuse of power [17] . The complainant's managing of sensitive files and of problems relating to human



resources did not have any influence on that decision [18] . Nor had his rights of defence been infringed because there was no reasonable option for the EESC other than reassigning him [19] . The complainant's new post was of an equivalent grade and involved tasks which were not significantly lower than those corresponding to that grade and employment [20] . While the management allowance had been withdrawn, nothing prevented the complainant from applying for HoU posts which became vacant and recovering that allowance. Finally, the EESC said that the Secretary-General had the power to adopt decisions concerning reassignment of staff in accordance with Decision n° 659/12 of 27 September 2012 [21] .

16. In his observations, the complainant repeated his previous arguments and enclosed a copy of another Christmas message of a similar religious nature from the President of Group III dated 16 December 2013, and the complainant's further letter dated 3 January 2014 to the Director asking him about the measures the EESC was going to take against what the complainant considered, in light of his requests not to receive any such messages, as harassment. The complainant further took the view that his handling of sensitive files did have an influence on the decision to adopt Decision 65 [22] . He said also that the Steering Committee was a temporary body created *ad hoc* and that his new duties could not be reasonably compared to his previous tasks as HoU for Relations with the Institutions and the National Economic and Social Committees. The complainant further expressed the view that if no post of HoU was available at the Steering Committee, the EESC should have offered him an alternative post and that the EESC's argument that he could apply for other HoU posts was unreasonable in view of its opinion that he had lost his superiors' trust. He also argued that the EESC's Rules of Procedure did not allow the Secretary-General to adopt decisions such as Decision 65 and informed the Ombudsman that the EESC's assessment of his performance in his most recent staff report was lowered by 0.5 points. Finally, the complainant enclosed a copy of the *CU* case, in which the CST annulled the decisions by the EESC terminating a temporary agent employment contract and ordered it to pay compensation of EUR 25 000 to the claimant [23] .

The Ombudsman's preliminary assessment leading to the friendly solution proposal

17. In his note of 21 December 2012, the Director informed the complainant that the administration could sanction him for having sent the e-mail of 20 December 2012 [24] . It is clear that the reason for the complainant's reassignment to the Steering Committee was his alleged failure to respect the applicable rules, namely those of the SR [25] .

18. In this respect, the Ombudsman emphasises that failures to respect the SR make officials liable to disciplinary action [26] . The Ombudsman therefore shares the complainant's view that the Secretary-General's decision reassigning the complainant to the Steering Committee was a measure intended to sanction him for his behaviour [27] . It was thus clearly a measure similar to a disciplinary measure. It is therefore necessary to carefully assess whether that measure was fair and justified.

19. The EESC argued that the reassignment was compatible with the CST's judgment in the



Kerstens case. The Ombudsman, however, cannot agree with the EESC's analysis for two reasons. First, the *Kerstens* case concerns a situation in which an HoU was reassigned to another post of HoU [28] . The complainant was an HoU who was reassigned to a post of administrator. Consequently, he is not in a position similar to that of the claimant in the *Kerstens* case. As HoU, the complainant performed management duties (and therefore received a management allowance). He performs no such duties in his new position of administrator. Second, it does not follow from the *Kerstens* judgment that the complainant should have applied for HoU posts if he wished to perform, as in the past, management duties. As the EESC correctly noted, according to the *Kerstens* judgment, it is only when a reassignment, in addition to having been made in the interest of the service, also respects the principle of the equivalence of posts that there can be no case of covert disciplinary sanction or of misuse of powers [29] .

20. In the complainant's case, the EESC has clearly failed to respect the principle of the equivalence of posts. Indeed, by reassigning the complainant to a position of administrator and not to one of HoU, the EESC failed to comply with the case-law in the *Kerstens* case and thus showed that the reassignment, which necessarily implied also the loss of the management allowance, was indeed, contrary to the applicable rules and case-law, a covert disciplinary sanction. Because no disciplinary proceedings were initiated against the complainant, that disciplinary sanction was also a misuse of power.

21. The complainant's situation differs from that of the claimant in the *Z* case, in which the Court of Justice of the European Union (the 'CJEU') had opened disciplinary proceedings and granted the claimant the possibility of defending himself [30] . In the complainant's case, no such proceedings took place, and he could not defend himself before Decision 65 was adopted. Because the complainant's reassignment was to a post different from that of HoU (and thus incompatible with the *Kerstens* case) and because the reassignment resulted in the complainant's losing his management allowance, the fact that no opportunity to defend himself was ever given to the complainant before his reassignment becomes particularly important. Indeed, as clearly set out in the *Z* case, failing to hear a person before taking any individual measure that would affect that person adversely constitutes a violation of the right to good administration enshrined in the Charter of Fundamental Rights of the European Union (the 'Charter') [31] . The EESC failed to respect the complainant's right to be heard before taking Decision 65 and thus violated the Charter.

22. Finally, the EESC argued that it reassigned the complainant because it had lost trust in him as HoU for Relations with the Institutions and the National Economic and Social Committees. The Ombudsman agrees that loss of trust may be a valid ground for, for example, dismissal from certain posts in certain circumstances (namely, as set out in the *Bonnet* case, those pertaining to the relationship between the President of the CJEU and a *référéndaire* (in that particular case, a reader of judgments)) [32] . Even more so, loss of trust in someone holding a position of trust could indeed justify reassigning the official or the member of staff concerned to another post.

23. However, while the Ombudsman may or may not agree with the EESC that the complainant should not have copied his e-mail to the heads of EU institutions with which the EESC has



institutional relations and which fell within the scope of his responsibilities, this act was not such that it could have reasonably justified a loss of trust in him. Breach of trust is a very serious allegation which may be established only after serious and formal disciplinary proceedings in which the rights of the defence of the person charged are respected. It is absolutely unacceptable for a breach of trust to be invoked in order to reassign officials in circumstances where the proper procedures have not been followed. In the *Z* case, referred to by the EESC, the reason for the re-assignment was the conflict which was compromising the proper functioning of the service and, in that case, the CJEU opened disciplinary proceedings and heard the parties concerned.

24. Moreover, the Ombudsman notes the arguments repeatedly made by the complainant, and not contested by the EESC in its opinion, that he and a number of other members of the EESC staff had expressly informed the EESC administration that they found the President of Group III's repetitive messages of a religious nature inappropriate; that they did not wish to receive any such messages; and that the EESC did not act on their requests to do something about the situation. In such circumstances, where the EESC was sufficiently aware of the complainant's (and other members of staff's) feelings about the contents of the President of Group III's yearly messages and did not act upon its staff's concerns, its arguing breach of trust to justify the complainant's reassignment is clearly unfair.

25. Having regard to the fact that the reassignment was based on an unfair use of breach of trust, the fact that the reassignment resulted in the complainant losing his management allowance rendered his reassignment disproportionate.

26. The Ombudsman concludes, therefore, that Decisions 65 and 66, reassigning the complainant to a post of administrator at the Steering Committee, and stripping him of his management allowance, were adopted, without respecting the procedural rights safeguarded by the Charter. These Decisions, quite clearly, amounted to a sanction imposed on the complainant for his e-mail of 20 December 2012. That being so, the Ombudsman finds that these Decisions were taken in a manner which was unfair and unlawful, and their adoption amounted to maladministration. The Ombudsman will make a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman, below.

The proposal for a friendly solution

The Ombudsman proposes that the EESC:

- (i) annul the complainant's reassignment;**
- (ii) reinstate the complainant in his former post, or agree with him on another HoU post, and reinstate his management allowance;**
- (iii) pay to the complainant compensation equivalent to the management allowance lost because of the reassignment; and**
- (iv) apologise to the complainant.**



Emily O'Reilly European Ombudsman

Done in Strasbourg, 01/09/2014

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] " Dear Colleagues, dear friends, "... They were terrified, but the angel said, 'Do not be afraid. Look, I bring you news of great joy, a joy to be shared by the whole people. Today in the town of David a Saviour has been born to you; he is Christ the Lord'... . Glory to God in the highest heaven, and on earth peace for those he favours" Luke, 2,9-11,14 "Peace is not a dream or something utopian; it is possible. Our gaze needs to go deeper, beneath superficial appearances and phenomena, to discern a positive reality which exists in human hearts, since every man and woman has been created in the image of God and is called to grow and contribute to the building of a new world. God himself, through the incarnation of his Son and his work of redemption, has entered into history and has brought about a new creation and a new covenant between God and man (cf. Jer 31:31-34), thus enabling us to have a "new heart" and a "new spirit" (cf. EZ 36:36)" Pope Benedict XVI, Message for the celebration of the world day of peace, 1st January 2013, "Blessed are the peacemakers"... Merry Christmas and Happy New Year ... "

[3] In the original French: "[I] a transmission des messages contenant des attaques sur le plan éthique, religieux, politique et racial est aussi considéré comme abusive tout comme la diffusion à large échelle de ces messages... [J] e me dois de vous signaler que le contenu et le ton de votre réponse ne sont pas conformes à ce que l'on est en droit d'attendre d'un fonctionnaire de surcroît appartenant au management du Comité et au profil externe si marqué. "

[4] In the original French: "[d] ès lors, je vous demande de vous abstenir dorénavant de ce type de comportement et ceci, sans préjudice d'autres actions que l'administration pourra entreprendre pour sanctionner votre comportement. "

[5] In the original French: "[I] 'envoi de ce courriel constitue une violation flagrante des règles en vigueur, qui entraîne une perte de confiance entre autres des interlocuteurs politiques à l'intérieur de CESE, en raison de la position occupée par l'intéressé en tant que Chef de l'unité "Relations interinstitutionnelles et avec les CES nationaux" ".

[6] In the original French: " Indemnité de Management Garantie associée à la fonction de chef d'unité n'a plus lieu d'être accordée [to the complainant]".

[7] In the original French: "[i] l est également connu que des "Membres" du CESE ont eux aussi désapprouvé l'initiative du Président du Groupe III et l'ont manifesté, y compris par lettre



archivée par l'administration. "

[8] According to the complainant, the Decisions are (in the original French): "[l] es indignes conséquences de relations tendues avec la hiérarchie en raison de ma gestion, conforme au Statut, de certains dossiers délicats et de problèmes conflictuels au niveau des ressources humaines au sein de l'unité "Relations interinstitutionnelles et avec les CES nationaux. "

[9] Judgment of the Civil Service Tribunal (Second Chamber) of 8 May 2008 in Case F-119/06 *Kerstens v Commission* [2008] ECR-SC-I-A-1-147 and II-A-1-787, paragraphs 82, 84, 96 and 97 (in the original French): "[l] es institutions disposent d'un large pouvoir d'appréciation dans l'organisation de leurs services en fonction des missions qui leur sont confiées et dans l'affectation, en vue de celles-ci, du personnel qui se trouve à leur disposition, à la condition cependant, d'une part, que cette affectation se fasse dans l'intérêt du service et, d'autre part, qu'elle respecte l'équivalence des emplois... Compte tenu de l'étendue du pouvoir d'appréciation des institutions dans l'évaluation de l'intérêt du service, le contrôle du Tribunal doit se limiter à la question de savoir si l'AIPN s'est tenue dans des limites raisonnables, non critiquables, et n'a pas usé de son pouvoir d'appréciation de manière manifestement erronée... En cas de modification des fonctions attribuées à un fonctionnaire, la règle de correspondance entre le grade et l'emploi, énoncée en particulier par l'article 7 du statut, implique une comparaison non pas entre les fonctions actuelles et antérieures de l'intéressé, mais entre ses fonctions actuelles et son grade dans la hiérarchie... Dès lors, rien ne s'oppose à ce qu'une décision entraîne l'attribution de nouvelles fonctions qui, si elles diffèrent de celles précédemment exercées et sont perçues par l'intéressé comme comportant une réduction de ses attributions, sont néanmoins conformes à l'emploi correspondant à son grade. Ainsi une diminution effective des attributions d'un fonctionnaire n'enfreint la règle de correspondance entre le grade et l'emploi que si ses fonctions sont, dans leur ensemble, nettement en deçà de celles correspondant à son grade et son emploi, compte tenu de leur nature, de leur importance et de leur ampleur... ".

[10] In the original French: "[l] 'autorité politique du CESE a constaté que vous aviez rompu la confiance légitime qu'elle doit pouvoir placer dans le détenteur d'une fonction particulièrement exposée vers l'extérieur. "

[11] In the original French: "[g] énéralement, un tel poste placé directement sous le Secrétaire général adjoint peut être comparé à un poste de conseiller, qui est d'habitude exercé par un fonctionnaire de très haut grade. "

[12] F-119/06 *Kerstens v Commission*, cited above, paragraph 103, (in the original French): "[d] ès lors que la décision du 8 décembre 2005 [modifiant les fonctions attribuées à un fonctionnaire] n'a pas été jugée contraire à l'intérêt du service ou à l'équivalence des emplois, il ne saurait être question de sanction disciplinaire déguisée... ou de détournement de pouvoir... Il s'ensuit que le requérant ne saurait reprocher à la Commission de ne pas avoir ouvert une procédure disciplinaire à son égard, laquelle lui aurait permis de bénéficier des garanties procédurales prévues à l'annexe IX du statut. "

[13] In the original French: "[l] 'AIPN fait pourtant valoir qu'elle vous ait délibérément placé à un



poste sans chef d'unité direct pour éviter toute sorte d'éventuelle perception de dégradation en estime. "

[14] In the original French: "*[e] n cas d'un intérêt manifeste à occuper un poste de management, vous auriez pu présenter votre candidature. Comme vous n'avez pas postulé à aucun des trois postes, il semble que vous ne souhaitez plus occuper un poste de management. "*

[15] Joint Cases F-88/09 and F-48/10 *Z v Court of Justice of the European Union* , judgment of the Civil Service Tribunal (Third Chamber) of 5 December 2012, not yet published in the ECR, paragraph 126 (in the original French): "*[i] l est constant qu'un conflit opposait depuis plus de deux ans la partie requérante à son chef d'unité, conflit dont la partie requérante impute la responsabilité audit chef d'unité. Dans ses écrits, la partie requérante elle-même reconnaît l'existence d'un « climat défavorable » au sein de son unité. Dans un tel contexte, l'envoi, le 9 décembre 2008, à l'ensemble des membres de son unité, d'un courrier électronique destiné à prendre à partie le personnel, au sujet de la prétendue incapacité du chef d'unité à séparer les relations sociales et professionnelles et du traitement de faveur qu'il aurait accordé à Mme X, n'a pu qu'envenimer une situation déjà tendue. Par ce seul motif, sans même qu'il soit besoin de prendre en compte le courrier électronique du même jour, adressé au directeur nouvellement en charge de l'unité de la partie requérante, et celui du 10 décembre 2008, adressé à tout le personnel de l'unité, y compris à son chef d'unité, M. Y, il y a lieu de considérer que la Cour de justice a démontré à suffisance que le bon fonctionnement du service avait été objectivement compromis, et ce, quelles qu'aient pu être les intentions de la partie requérante, la connaissance qu'avaient les autres membres de l'unité du différend opposant la partie requérante à ses supérieurs ou la véracité des accusations portées par la partie requérante. "*

[16] Article 12 of the SR provides that "*[a] n official shall refrain from any action or behaviour which might reflect adversely upon his position. "*

[17] See footnote 12, above, and Joint Cases F-88/09 and F-48/10 *Z v Court of Justice of the European Union* , cited above, paragraph 156 (in the original French): "*[d] ans le cas d'une mesure de réaffectation, lorsque celle-ci n'a pas été jugée comme étant contraire à l'intérêt du service, il ne saurait être question de détournement de pouvoir... "*

[18] In this respect, the EESC noted paragraph 153 of the *Z* case, which provides that (in the original French): "*[p] our démontrer l'existence d'un détournement de pouvoir, la partie requérante réaffirme que la décision du 18 décembre 2008 ne peut être motivée par l'intérêt du service, car les circonstances factuelles de l'espèce démontrent que les courriers électroniques des 9 et 10 décembre 2008 n'auraient été qu'un prétexte pour sanctionner son franc-parler habituel. En effet, elle relève, premièrement, que, lorsque le chef d'unité, M. Y, a pris la décision de l'affecter à une autre équipe à compter du 14 juillet 2008, il s'était fondé, pour ce faire, sur de prétendues relations conflictuelles avec son chef d'équipe. Or, ce dernier n'aurait pas pu expliquer de quel conflit il était question, ce qui permettrait de douter de l'objectivité de M. Y. Deuxièmement, M. Y aurait tenté d'isoler et de dénigrer la partie requérante en lui imposant une circulation électronique, et non plus physique, de ses documents de travail, ce qui aurait eu pour effet de la traiter comme si elle n'était pas présente sur son lieu de travail. Troisièmement, la*



réaffectation de la partie requérante à la direction de la bibliothèque a eu lieu alors qu'elle s'apprêtait à introduire une procédure formelle pour harcèlement moral. Quatrièmement, la proximité dans le temps de la décision du 18 décembre 2008 et de la décision de l'AIPN d'entendre la partie requérante, en vue de l'ouverture d'une procédure disciplinaire, révélerait une « unité d'intention » qui permettrait de présumer la nature de sanction déguisée de la décision du 18 décembre 2008. "

[19] The EESC referred to paragraph 149 of the Z case (in the original French): "[d] ans le cas où il y a eu une violation du droit d'être entendu, comme d'ailleurs de façon plus large, des droits de la défense, il faut, pour que le moyen puisse aboutir à l'annulation de la décision attaquée, que, en l'absence de cette irrégularité, la procédure ait pu aboutir à un résultat différent... Or, en l'espèce, la décision du 18 décembre 2008 a été adoptée afin de mettre fin à une situation devenue intenable de tension relationnelle, considérée objectivement, et non en raison du comportement de la partie requérante. Par conséquent, les éventuelles explications que cette dernière, qui n'a d'ailleurs jamais contesté avoir adressé les courriers électroniques litigieux, aurait pu fournir préalablement à l'adoption de la décision du 18 décembre 2008 quant aux circonstances de l'espèce n'auraient pas pu avoir pour effet de modifier la décision de l'administration... D'ailleurs, dans le courrier électronique du 9 décembre 2008 adressé à tous les membres de son unité, la partie requérante reconnaît elle-même qu'elle était en situation de conflit ouvert avec son chef d'unité, de sorte que l'administration aurait, en tout état de cause, pu légitimement considérer qu'il n'y avait pas lieu de l'entendre sur l'existence même de ce conflit avant de prendre toute mesure de réaffectation qu'elle était en droit de prendre, dans l'intérêt du service, en raison dudit conflit. "

[20] In this respect, the EESC referred to paragraph 131 of the Z case, according to which (in the original French): "[l] a règle de la correspondance entre le grade et l'emploi implique uniquement, en cas de modification des fonctions attribuées à un fonctionnaire, une comparaison entre ses fonctions actuelles et son grade dans la hiérarchie... Par conséquent, une diminution effective des attributions d'un fonctionnaire n'enfreint la règle de correspondance entre le grade et l'emploi que si ses nouvelles fonctions sont, dans leur ensemble, nettement en deçà de celles correspondant à ses grade et emploi, compte tenu de leur nature, de leur importance et de leur ampleur, et ce, indépendamment de la manière dont les nouvelles fonctions sont perçues par l'intéressé... "

[21] The EESC did not provide a copy of this decision.

[22] The complainant also referred to a legal advisor in the EESC that had been removed from his tasks after, according to the complainant, having dealt with some sensitive files.

[23] Case F-42/13 *CU v European Economic and Social Committee*, judgment of the Civil Service Tribunal (First Chamber) of 22 May 2014, not yet published in the ECR.

[24] In the original French: "[j] e vous rappelle que conformément aux règles en vigueur (Décision 451/06 A), dans l'utilisation du courrier électronique, tout fonctionnaire est tenu de respecter les règles statutaires (notamment articles 11 et 12) ... Votre message constitue une



violation flagrante de ces règles . Dès lors, je vous demande de vous abstenir dorénavant de ce type de comportement et ceci, sans préjudice d'autres actions que l'administration pourra entreprendre pour sanctionner votre comportement . " (emphasis added)

[25] The Decision 65 provides (in the original French) that: "[I] 'envoi de ce courriel constitue une violation flagrante des règles en vigueur , qui entraîne une perte de confiance entre autres des interlocuteurs politiques à l'intérieur de CESE, en raison de la position occupée par l'intéressé en tant que Chef de l'unité "Relations interinstitutionnelles et avec les CES nationaux" . (emphasis added)

[26] Article 86 of the SR: " 1. Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action. [...] 3. Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX. "

[27] The Ombudsman notes that, according to Rule 72 of the EESC Rules of Procedure: "[2]. The powers which the Staff Regulations of Officials of the Communities confer on the appointing authority shall be exercised as follows: [...] - with respect to: [...] heads of unit (in grades AD 9 to AD 13) [...] by the president, acting on the proposal from the secretary-general [...] 5. The bureau, the president and the secretary-general may delegate the powers vested in them by this Rule... ". The EESC Rules of Procedure are available on the EESC's website (<http://www.eesc.europa.eu/?i=portal.en.rules.8053> [Link]).

[28] See Case F-119/06 *Kerstens v Commission* , cited above, paragraph 99 (in the original French): "[e] n l'espèce, il est constant que le requérant a été affecté à l'unité « Études et prospective » dans l'emploi qu'il occupait (chef d'unité) et qu'il a conservé son grade AD 12. Il ressort également de l'acte de changement d'affectation que le numéro de son emploi est resté inchangé. L'équivalence du grade et de l'emploi a donc, par hypothèse, été respectée... ". (emphasis added)

[29] See Case F-119/06 *Kerstens v Commission*, cited above , paragraph 103 (in the original French): "[d] ès lors que la décision du 8 décembre 2005 [modifiant les fonctions attribuées à un fonctionnaire] n'a pas été jugée contraire à l'intérêt du service ou à l'équivalence des emplois, il ne saurait être question de sanction disciplinaire déguisée... ou de détournement de pouvoir... Il s'ensuit que le requérant ne saurait reprocher à la Commission de ne pas avoir ouvert une procédure disciplinaire à son égard, laquelle lui aurait permis de bénéficier des garanties procédurales prévues à l'annexe IX du statut. "

Case F-119/06 *Kerstens* was subject to an appeal to the General Court; the Appeals Chamber of that Court rejected the appeal on 2 July 2010 (Case T-266/08 P, *Kerstens v Commission* , judgment of 2 July 2010, not yet published in the ECR) in its entirety.

[30] See Joint Cases F-88/09 and F-48/10 *Z v Court of Justice of the European Union* , cited above, paragraphs 43 to 66 (available on the following link:



<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131386&pageIndex=0&doclang=FR&mode=lst&dir>
[Link])

[31] See Paragraph 146 of the Z case (in the original French): "*[I] es droits de la défense recouvrent assurément, tout en étant plus étendus, le droit procédural pour toute personne d'être entendue avant qu'une mesure individuelle qui l'affecterait défavorablement ne soit prise à son égard, tel qu'il est énoncé à l'article 41, paragraphe 2, sous a), de la Charte...*".

[32] See Judgment of the General Court (Second Chamber) of 17 October 2006 in Case T-406/04, *Bonnet v Court of Justice*, [2006] ECR-SC-I-A-2-213 and II-A-2-1097, paragraphs 74 and 79 (in the original French): "*[c] 'est le silence gardé sur ses activités extrajudiciaires qui a compromis la confiance du président de la Cour... Cependant, la Cour a jugé que, lorsque la confiance mutuelle est rompue pour quelque raison que ce soit, il est de bonne administration de mettre fin à la relation de travail fondée sur cette confiance mutuelle...*".