Reports of Cases

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

13 December 2012*

(Civil service — ECB Staff — Disciplinary proceedings — Suspension of a staff member without reduction of his basic salary — Withdrawal of a decision — Rights of the defence — Access to the file — Statement of reasons — Reasons for a decision — Allegation of breach of professional duties — Serious misconduct)

In Joined Cases F-7/11 and F-60/11,

ACTIONS under Article 36.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the EU Treaty and the FEU Treaty,

AX, member of the staff of the European Central Bank, residing in Fredericia (Denmark), represented by L. Levi and M. Vandenbussche, lawyers,

applicant,

v

European Central Bank (ECB), represented,

in Case F-7/11, by P. Embley and E. Carlini, acting as Agents, assisted by B. Wägenbaur, lawyer,

and in Case F-60/11, by P. Embley and M. López Torres, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

composed of M.I. Rofes i Pujol, President, I. Boruta (Rapporteur) and K. Bradley, Judges,

Registrar: X. Lopez Bancalari,

having regard to the written procedure and further to the hearing on 26 April 2012,

gives the following

* Language of the case: English.

Judgment

1 By applications received at the registry of the Tribunal on 2 February and 25 May 2011, AX brought two actions, the first registered as Case F-7/11 and the second as Case F-60/11, seeking, principally, annulment of the decisions of the European Central Bank (ECB) of 4 August 2010 and 23 November 2010, respectively, suspending him.

Legal context

2 Article 6 TEU provides:

'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

…'

3 Under Article 41 of the Charter:

'1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

…'

4 Protocol 4 annexed to the EU Treaty and the FEU Treaty, entitled 'Protocol on the Statute of the European System of Central Banks and of the [ECB]' ('the Statute of the ESCB and of the ECB') establishes a European system of central banks bringing together the ECB and the national central banks of the Member States of the European Union.

5 On the basis of Article 36.1 of the Statute of the ESCB and of the ECB, the Governing Council of the ECB adopted, on 9 June 1998, the conditions of employment of the staff of the ECB, amended on several occasions ('the conditions of employment').

6 Article 8(c) of the conditions of employment, in their version applicable to the present disputes, as transmitted by the ECB and not contested by the applicant, provides:

'No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European [Union] law, and (iii) the rules contained in the [EU] regulations and directives concerning social policy which are addressed to Member States. Whenever necessary, these legal instruments [are] implemented by the ECB. [EU] recommendations in the area of social policy [are] given due consideration. In interpreting

the rights and obligations under the present Conditions of Employment, due regard [is] shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of the [EU] institutions.'

7 Article 43 of the conditions of employment is worded as follows:

'The Executive Board may suspend a member of staff against whom an allegation of serious breach of professional duties has been made immediately after they have been heard, save in exceptional circumstances.

The decision shall specify whether the ECB will continue to pay the full basic salary during the period of suspension or whether to withhold a part thereof. …'

8 On the basis of Article 12.3 of the Protocol on the Statute of the ESCB and of the ECB, the Governing Council adopted, on 19 February 2004, the version of its rules of procedure in force at the material time (OJ 2004 L 80, p. 33), which provides in Article 21.3 that the Executive Board is to adopt the Staff Rules that implement the Conditions of Employment.

9 On the basis of Article 21.3 of the rules of procedure, the Executive Board adopted the version of the ECB Staff Rules in force at the material time ('the Staff Rules') which provide in Article 8.1.6:

'Decisions taken by the Executive Board shall be subject to a special appeals procedure. A member of staff may initiate an appeal within two months from the date on which the Executive Board's decision was communicated to them.

The member of staff shall submit the appeal to the President [of the ECB] together with any relevant documents. The request shall clearly state the reasons for challenging the decision and the relief sought.

The President shall notify the Executive Board's decision to the member of staff within two months from the date on which the appeal was submitted.'

10 The rules governing ECB internal administrative inquiries are set out in Administrative Circular No 01/2006, adopted by the Executive Board on 21 March 2006 ('Circular No 1/2006'). Article 2(1) of that circular provides that the purpose of an administrative inquiry is to clarify the facts but that it is without prejudice to any disciplinary procedure.

11 Article 6, paragraph 14, of Circular 01/2006 states that at the end of the administrative inquiry, the person or the panel conducting that inquiry ('the panel') must submit a reasoned report to the Executive Board or to the person who is responsible for such matters.

12 Article 7, paragraph 3, of Circular 01/2006 provides:

'ECB employees who are the subject of the administrative inquiry shall be:

(a) informed by the person conducting the inquiry, or the panel, prior to the submission of the reasoned report, of the content of the alleged breach of professional duties and granted access to documents related to the allegations made against them which disclose facts important for the exercise of their rights of defence; and

(b) granted an opportunity to present their view and add their comments on the conclusions referring to them to ensure the completeness of the inquiry file; the latter shall be included in the reasoned report; and

(c) allowed to seek the assistance of a staff representative.

ECB employees or other individuals involved in the administrative inquiry shall also be granted access to all facts which refer to their person, as well as personal data in order to ensure their completeness and accuracy, and shall have the right to obtain from the lead inquirer acting as the controller the rectification without delay of any such inaccurate or incomplete personal references.'

13 On the basis of Article 12.3 of the Protocol on the Statute of the ESCB and of the ECB, the Governing Council adopted, on 4 March 2004, Decision ECB/2004/3 on public access to European Central Bank documents (OJ 2004 L 80, p. 42), which defines the conditions and limits according to which the ECB gives public access to its documents.

Factual background to the dispute

14 The applicant entered the employment of the ECB on 1 June 2003.

15 Following an internal recruitment procedure, on 1 June 2007 he was appointed to the post of Head of Division in the Office Services Division within the Administration Directorate General (DG), a division renamed, as from 19 February 2008, 'Administrative Services Division'. The tasks of that division were, according to a Functions Paper approved by the Executive Board on 17 February 2009 ('the Functions Paper') to 'provide the central mail, switchboard and copying services', to 'manage the out-tasking of cleaning, in-house catering, hotel block reservation, interpretation and business travel services and to provide meeting services', to provide 'a driving and transportation service', to 'receive deliveries, manage the storeroom, provide furniture and distribute goods internally'.

1. *The suspension decision of 6 April 2010*

16 On 26 February 2010 the Executive Board decided, on the basis of Circular No 1/2006, to open an administrative inquiry with the aim of clarifying 'all facts and circumstances related to the purchase of selected items and the use of selected ECB assets by the staff of [the Administrative Services Division]' and 'all facts and circumstances in relation to a possible breach of professional duties by members of staff in relation to such purchase/use'. The decision was also made not to inform the staff members concerned by the inquiry immediately, so as not to harm the investigation. For the purposes of this inquiry, the Director of the Directorate Internal Audit was appointed as the Lead Inquirer ('the decision of 26 February 2010').

17 On 26 March 2010 the applicant was interviewed by the panel regarding the purchase by the Administrative Services Division of three different categories of items, namely, (i) brand X laptop computers; (ii) other types of laptop computers and (iii) E-book readers. According to the ECB, the panel informed the applicant during that hearing that he was the subject of an administrative inquiry. However, according to the applicant, the panel only decided on 6 April 2010 that he was to be the subject of the internal administrative inquiry. Further, again according to the applicant, he asked during that hearing to be sent a copy of the decision of 26 February 2010 by which the Executive Board decided to open an inquiry. That decision was, according to the applicant, never sent to him.

18 Draft minutes of the interview of 26 March 2010 were sent to the applicant for comment, by e-mail on 1 April 2010 and by post on 22 April 2010.

19 From 28 March 2010 and at least until 25 May 2011, the date when the second action was brought before the Tribunal, the applicant was on sick leave.

20 By decision of 6 April 2010, taking effect on the following day, the Executive Board suspended the applicant on full basic salary for the duration of the internal administrative inquiry ('the decision of 6 April 2010'). That decision stated that it was based, in particular, on unrest within the Administrative Services Division and on the need to facilitate the proper conduct of the administrative inquiry and on the status update report on the panel's investigative work ('the investigation status report dated 6 April 2010', communicated on the same date to the Executive Board.

2. *The suspension decision of 4 August 2010*

21 By letter of 16 April 2010, the applicant requested the ECB to send him a copy of the decision of the Executive Board of 26 February 2010 and of the supporting documentation, together with any document that had been submitted to the Executive Board with a view to the adoption of the decision of 6 April 2010.

22 By letter of 28 April 2010, the Director-General of the Directorate-General 'Human Resources, Budget and Organisation' ('the Director-General of the DG HR') and the human resources expert ('the HR expert') informed the applicant, inter alia, that if the reasoned report, drawn up at the end of the administrative inquiry, concluded that he had breached his professional duties, he would be granted access to the inquiry documents relating to the relevant facts under Article 7(3) of Circular No 1/2006. However, the letter indicated that at that stage of the procedure, as the content of the reasoned report depended on the result of the administrative inquiry, access to those documents could not be granted to him.

23 By letter of 10 May 2010 the applicant requested the Director-General of the DG HR and the HR expert to grant him access to the decision of 26 February 2010 and any other decisions adopted by the Executive Board between that date and 6 April 2010. Further, in that letter the applicant complained that the circumstances of his interview by the panel were irregular on the ground that he did not in fact have the opportunity to be heard. Annexed to that letter were the applicant's comments on the minutes of the interview of 26 March 2010.

24 Also on 10 May 2010, the applicant wrote to the Director-General of the DG Internal Audit to inform him that he considered, first, that the Director General of the DG HR and the HR expert had no authority to receive his observations on the minutes of his interview of 26 March 2010 and, secondly, that the conduct of the panel did not comply with the requirements of Circular No 1/2006.

25 By letter of 22 May 2010, the Director General of the DG HR and the HR expert confirmed to the applicant the content of their letter of 28 April 2010.

26 On 3 June 2010 the applicant brought, on the basis, inter alia, of Article 8.1.6 of the Staff Rules, a special appeal against the decision of 6 April 2010.

27 By letter of 23 June 2010 the applicant requested, pursuant to Decision ECB/2004/3, the right of access, first, to the decision of 26 February 2010 to open an inquiry and the supporting documents; secondly, the investigation status report dated 6 April 2010, submitted to the Executive Board prior to the adoption of the decision of 6 April 2010, and all other documents submitted to the Executive Board with a view to the adoption of that decision; and, thirdly, the decision of 6 April 2010.

28 By letter dated 24 June 2010 the applicant was invited by the Director General of the DG HR and by the HR expert to attend a hearing on 14 July 2010 at 11.00 hrs. In that letter, it was stated that, should that date not be convenient for him, the applicant could propose a new date, which should not be later than 28 July 2010, or alternatively, present his comments in writing by 14 July 2010.

29 By letter dated 29 June 2010 the applicant indicated that he would not attend the hearing scheduled for 14 July 2010, in particular because he had not had access to the file, that the special appeal procedure could not be used to remedy the fact that he had not been heard prior to the adoption of the decision of 6 April 2010 and that he had not been in a position to understand the nature of the allegations and accusations brought against him.

30 By letter dated 1 July 2010, the Director General of the DG HR and the HR expert rejected the applicant's arguments, on the grounds, first, that the hearing of the applicant was part of a procedure which was separate from the special appeal brought by the applicant and, second, that the applicant had been fully informed of the allegations which were the subject of the hearing. Moreover, they again invited the applicant to attend a hearing and also informed him that if he persisted in refusing to attend a hearing, a decision would nonetheless be taken concerning his case.

31 By letter of 5 July 2010 the Director General of the DG Secretariat and Language Services and the Director General of the DG HR informed the applicant that he could not base his request for access to certain documents on Decision ECB/2004/3 on public access to ECB documents since he was an ECB employee. In their opinion, the request had to be regarded as being based on Article 7(3) of Circular No 1/2006. The two Directors General then rejected the applicant's request in so far as it related to 'the 26 February 2010 decision ... to open an administrative inquiry procedure [and] documentation submitted to the Executive Board in view of its decisions', '[the investigation status report dated 6 April 2010] submitted to the Executive Board on 6 April 2010 in view of the decision of 6 April 2010 ... [and] any additional documents submitted to the Executive Board in view of [that decision]'. As regards the applicant's request for access to the suspension decision of 6 April 2010, the two Directors General informed him that that decision had already been communicated to him.

32 By letter of 6 July 2010 the applicant again refused to attend a hearing, on the ground that the Executive Board had no power to take a new suspension decision while the suspension decision of 6 April 2010 remained in force.

33 By letter of 7 July 2010 the Director General of the DG HR and the HR expert confirmed to the applicant that, after his hearing, the Executive Board would take a new decision on his suspension. They also indicated that the suspension procedure was entirely separate from the special administrative review procedure he had initiated ('the first special appeal') and that, in those circumstances, the Executive Board could rule on the first special appeal and then take a separate decision on the suspension. Lastly, the applicant was again asked to confirm that he would attend the hearing scheduled for 14 July 2010 or on any other date at his convenience, but no later than 28 July 2010, or alternatively submit his comments in writing by 28 July 2010. Annexed to that letter was an excerpt from the minutes of the meeting of the Executive Board of 29 June 2010, appointing two persons as members of the panel responsible for hearing the applicant, and a secretary to the panel.

34 On 9 July 2010 the applicant again stated that he had no intention of attending a hearing.

35 On 12 July 2010 the Director General of the DG HR and the HR expert repeated their invitation to the applicant to attend a hearing.

36 By e-mail of 13 July 2010 the applicant repeated that it was impossible for him to attend a hearing while the decision of 6 April 2010 remained in force.

37 The applicant did not attend the hearing scheduled by the ECB for 14 July 2010. A meeting of the members of the panel responsible for hearing the applicant took place instead of the hearing.

38 By letter dated 21 July 2010, the Director General of the DG HR and the HR expert sent to the applicant for his comments a document entitled 'Draft summary of the hearing of [the applicant]' which comprised a record of the meeting which took place on 14 July 2010.

39 By letter dated 26 July 2010 the applicant informed the Director General of the DG HR and the HR expert that on 21 July he had received the document entitled 'Draft summary of the hearing of [the applicant]' but that he could not submit comments on it since no hearing had taken place. He reiterated that the ECB could not adopt a new suspension decision without first withdrawing the decision of 6 April 2010. Further, he stated that, in his opinion, the document entitled 'Draft summary of the hearing of [the applicant]' set out, for the first time, some of the allegations brought against him, namely (i) that he had initiated, authorised or permitted, in his capacity as Head of the Administrative Services Division, the purchase of brand X laptop computers, other laptop and desktop computers and E-book readers, (ii) that the business reasons underlying those purchases were questionable in the light of the role and responsibilities of the Administrative Services Division as outlined in the Functions Paper, and (iii) that, as the Head of the Administrative Services Division, the applicant had been unable to provide a reasonable explanation of the whereabouts of the majority of those articles.

40 Also on 26 July 2010, the European Anti-Fraud Office (OLAF) notified the ECB of its decision to open an investigation. The opening of that investigation brought to an end the administrative inquiry opened by the ECB on 26 February 2010.

41 By letter of 3 August 2010 the President of the ECB informed the applicant that the Executive Board had upheld his first special appeal and had annulled, as from 4 August 2010 at 23.59 hrs, the suspension decision of 6 April 2010. That letter informed the applicant that the administrative inquiry would continue and that the Executive Board would take a new decision on his suspension the following day. The decision of the Executive Board, annexed to that letter, stated that it was based on the fact that the applicant had not been heard in accordance with Article 43 of the conditions of employment, in respect of the suspension decision. Further, that decision made an award, as symbolic compensation for the non-material damage suffered by the applicant as a result of the suspension decision of 6 April 2010, of the sum of one euro.

42 By decision of 4 August 2010, notified on the same date, the Executive Board suspended the applicant as of 5 August 2010 on full basic pay ('the decision of 4 August 2010'). That decision stated that it was based on the existence of allegations which, if established, would constitute a serious breach by the applicant of his professional duties, in view of the damage to the reputation of the ECB which they could cause and the applicant's high-ranking position within the institution, and on the need to facilitate the proper conduct of the OLAF investigation.

43 In the letter of 4 August 2010 from the Director General of the DG HR and the HR expert accompanying that decision, it was pointed out in particular that the applicant had refused on several occasions to attend a hearing before the adoption of that decision. That letter, however, invited the applicant to attend a hearing on 11 August 2010 at 11.00 hrs or at any earlier date at his convenience or failing that, to present his comments in writing by 3 September 2010.

3. *The decision of 23 November 2010 taken after reconsideration*

44 By letter of 10 August 2010 the applicant stated that he was not able to attend the hearing scheduled for 11 August 2010 'for medical reasons' and that he was going to provide his comments in writing by 3 September. For that purpose, he asked to be informed of the allegations against him which, he said, were not contained either in the decision of 4 August 2010 or in the covering letter. The applicant also requested access to the investigation file and, in particular to the documents mentioned in the decision of 4 August, namely, the investigation status reports dated 6 April 2010 and 19 July 2010.

45 By letter of 17 August 2010 the Director General of the DG HR and the HR expert informed the applicant that the allegations made against him and communicated to the Executive Board were the following:

First, '[the a]llegations communicated to the Executive Board, as part of the [investigation status report] dated 6 April 2010, following an interview with [the applicant] on 26 March 2010, the minutes of which were sent [to the applicant] … and on which he provided written comments ... on 10 May 2010 [those allegations consisting of]:

(i) the purchase of [brand X] laptops, other laptops and E-book readers by the [Administrative Services Division];

(ii) the business reason, the use and the whereabouts of such items being uncertain;

[Second, the a]llegations communicated to the Executive Board, as part of the [investigation status report] dated 6 April 2010, which were again summarised and documented in the [minutes of the hearing held on] 14 July 2010, the draft of which was sent by to [the applicant] on 21 July 2010 [, namely:]

(i) a number of items such as [brand X] laptops, other types of laptop/desktops and E-book readers have been purchased from one of two centralised budget centres for which the [Administrative Services Division] carries responsibility and the current location of the majority of those items is unknown;

(ii) [the applicant] has initiated, authorised or permitted, in his capacity as Head of the [Administrative Services Division] the purchase of those items;

(iii) the business reasons underlying those purchases are questionable also with regard to the role and responsibilities of the [Administrative Services Division] as outlined in the Functions Paper;

(iv) [the applicant], as responsible Head of the [Administrative Services] Division cannot give a reasonable explanation of the whereabouts of the majority of the items.

[Third, the a]llegations communicated to the Executive Board, as part of the investigation status report dated 19 July 2010, and which, according to that document, were communicated to [the applicant] on 29 June 2010 [namely]:

(i) 127 purchases by the [Administrative Services Division] of items which may be subdivided into 13 different categories, the most prominent categories being: (i) [brand X] computers and related accessories; (ii) other computers and related accessories; (iii) other IT hard[ware] and software; (iv) navigation systems and (v) mobile phones. Thus far, the current location of only a limited number of the 127 items has been identified; and

(ii) [the u]ncertainties over the business purpose underlying the purchase of those items, and any project or task to which they related as well as the relationship between the respective project or task and the functional responsibilities of the [Administrative Services Division].

[The Functions Paper] defines the role and responsibilities of the [Administrative Services Division] as follows:

— Provides the central mail, switchboard and copying services;

— Manages the out-tasking of cleaning, in-house catering, hotel block reservation, interpretation and business travel services. Provides meeting services;

— Provides a driving and transportation service;

— Receives deliveries, manages storeroom, provides furniture and distributes goods internally.

Pursuant to the Executive Board approved procurement policy of the ECB, the "responsibility for provision and procurement is centralised, [inter alia, for all] centralised IT investments (including hardware and software)", and entrusted to [the Infrastructure and Operations division] of [the Directorate General IT Systems].'

46 By letter of 26 August 2010 the applicant requested access to 27 documents in order to be able to present his comments on the allegations brought against him before 3 September 2010.

47 By letter of 30 August 2010 the ECB provided full versions of 19 of the 27 documents requested, and two other documents. As regards the other eight documents requested, two were communicated only in their final version, excluding preparatory material, four were not communicated pending clarification from the applicant regarding the information he wished to obtain and the grounds of his request, while two were not sent for the reason that one concerned an administrative inquiry and the other was available from external suppliers.

48 By letter of 1 September 2010 the applicant requested access to the eight documents which had not yet been sent to him, on the ground that those documents constituted important elements in his defence. In that letter the applicant asked that the deadline fixed for the submission of written comments, due to expire on 3 September 2010, be extended by seven days.

49 On 3 September 2010, the applicant submitted a first set of comments on the decision of 4 August 2010 and stated that he reserved the right to add to them on the ground that he had just obtained access to some of the documents requested and had not yet had time to analyse them in detail.

50 By letter of 6 September 2010 the Director General of the DG HR and the HR expert agreed to extend the deadline, by which the applicant was to submit his written comments, to 10 September 2010. They also informed the applicant that they would not provide him with the eight documents requested on the ground that he was only entitled to the list of allegations brought against him, and that this had already been provided.

51 On 10 September 2010 the applicant submitted a second set of comments on the adoption of the decision of 4 August 2010.

52 By letter of 21 September 2010 the Director General of the DG HR and the HR expert informed the applicant that the comments submitted had been passed on to the Executive Board.

53 On 30 September 2010 the applicant brought, under Article 8.1.6. inter alia of the Staff Rules, a special appeal against the decision of 4 August 2010 ('the second special appeal').

54 By decision of 23 November 2010, the second special appeal against the decision of 4 August 2010 was dismissed by the Executive Board. In its decision the Executive Board stated that it considered that it was necessary and proportionate to maintain the applicant's suspension in view of the need to facilitate the investigation undertaken by OLAF. Accompanying that decision was a letter from the President of the ECB setting out in detail the grounds which had led the Executive Board to dismiss the second special appeal.

55 On the same date, the Executive Board adopted, after reconsideration of the applicant's situation, a new decision confirming the decision of 4 August 2010 ('the decision of 23 November 2010 taken after reconsideration'). That decision stated that it had been taken after the Executive Board had requested the members of the panel to prepare a report containing their observations on the comments made

by the applicant. As grounds for the applicant's suspension, it was stated, first, that the Executive Board had observed that a number of comments made by the applicant did not coincide with certain of the observations and findings of the panel, secondly, that the applicant had not provided explanations for the 127 items forming the subject of the allegations of serious breach by the applicant of his professional duties, and that the applicant's observations were not such as to render those allegations sufficiently improbable or manifestly unfounded and, thirdly, that the OLAF investigations were still ongoing in the context of its inquiry. The letter accompanying that decision contained excerpts of the findings of the panel on which the Executive Board stated that it had relied.

56 In January 2011 the ECB informed the applicant of its decision to initiate the disability procedure with regard to him.

57 On 21 January 2011, the applicant brought, under Article 8.1.6. of the Staff Rules in particular, a special appeal against the decision of 23 November 2010 taken after reconsideration ('the third special appeal').

58 On 2 February 2011 the applicant brought an action before the Tribunal against the decision of 4 August 2010. That action was registered as Case F-7/11.

59 On 15 February 2011 the applicant was examined by one of the ECB doctors. The doctor concluded that the applicant was temporarily unable to perform the tasks corresponding to his job description.

60 On 15 March 2011 the Executive Board dismissed the third special appeal on the ground that there were no new or additional elements which would render sufficiently improbable or manifestly unfounded the allegations of a serious breach of professional duties. That decision was accompanied by a letter from the President of the ECB explaining in more detail the reasons which had led the Executive Board to dismiss the applicant's third special appeal.

61 On 16 March 2011 the Director General of the DG HR and the HR expert informed the applicant that, from 28 March 2011, he would no longer receive his salary but would receive an equivalent disability allowance.

62 By letter of 22 March 2011 the applicant was invited by OLAF to attend a hearing scheduled for 12 and 13 May 2011.

63 On 6 June 2011 the applicant informed the Director General of the DG HR and the HR expert that he was not able to attend the hearing arranged by OLAF.

64 On 25 May 2011 the applicant brought an action against the decision of 23 November 2010 taken after reconsideration, and against the decision of 15 March 2011 dismissing the third special appeal. That action was registered as Case F-60/11.

Forms of order sought by the parties and procedure

65 In Case F-7/11, the applicant claims that the Tribunal should:

— annul the suspension decision dated 4 August 2010;

— as a consequence, fully reinstate the applicant in his duties with the appropriate publicity in order to restore his good name;

— in any case, award compensation for the non-material damage suffered by the applicant, evaluated *ex aequo et bono* at EUR 20 000;

— order the ECB to pay the costs.

66 The ECB contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

67 In Case F-60/11, the applicant claims that the Tribunal should:

— annul the decision of 23 November 2010 taken after reconsideration and, if necessary, the decision of 15 March 2011 dismissing the third special appeal;

— as a consequence, fully reinstate the applicant in his duties with the appropriate publicity in order to restore his good name;

— in any case, award compensation for the non-material damage suffered by the applicant, evaluated *ex aequo et bono* at EUR 20 000;

— order the ECB to pay the costs.

68 The ECB contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

69 By order of the President of the Second Chamber of the Tribunal of 23 March 2012, Cases F-7/11 and F-60/11 were joined for the purposes of the oral procedure and the final decision.

Law

1. *Admissibility of the actions*

Arguments of the parties

70 The ECB considers that the action registered as Case F-7/11 is inadmissible, since the decision of 4 August 2010, adopted on a preliminary basis only, was superseded by the decision of 23 November 2010 taken after reconsideration. Therefore, that decision no longer adversely affected the applicant who, therefore, does not have a legal interest in contesting it.

71 The applicant considers, for his part, that the decision of 4 August 2010 constitutes an act adversely affecting him, since, when the administration adopted the decision of 23 November 2010 taken after reconsideration, it did not withdraw or annul with retroactive effect the decision of 4 August 2010, but simply repealed and replaced it with another one. Therefore, the decision of 4 August 2010 produced legal effects from 5 August, the date when it took effect, to 23 November 2010, the date when it was repealed, and those effects were not removed by the decision of 23 November 2010, taken after reconsideration. According to the applicant, the decision of 4 August 2010 is also a challengeable act on the ground that it forms part of a set of decisions intended to maintain the suspension of the applicant.

72 With regard to its legal interest in bringing proceedings, the applicant states that he has an interest in seeking annulment of the decision of 4 August 2010, as that annulment is liable to produce legal consequences, in particular by preventing the alleged illegality from recurring in the future or from being applied to other members of staff. Furthermore, that annulment could serve as the basis for a possible action in damages. Finally, the applicant considers that he has a legal interest in bringing proceedings against the decision of 4 August 2010 in order to have the issue of the legality of his suspension resolved as quickly as possible.

Findings of the Tribunal

73 First, it should be noted that the forms of order sought by the applicant in Cases F-7/11 and F-60/11, asking the Court to fully reinstate him in his duties, with the appropriate publicity in order to restore his good name, are inadmissible. It is not for the European Union Courts to issue injunctions to the administration or to make declaratory rulings (see, by analogy, judgment of 12 June 2002 in Case T-187/01 *Mellone* v *Commission*, paragraph 16).

74 Secondly, it should be recalled, with regard to the decision of 23 November 2010 taken after reconsideration, that, according to the case-law, an action for annulment brought against a decision which merely confirms an earlier decision not challenged in due time is inadmissible (see, to that effect, judgment of 15 December 1988 in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission*, paragraph 16).

75 However, it should be noted that although the decision of 23 November 2010 taken after reconsideration mentions having confirmed the decision of 4 August 2010, it nevertheless reconsidered the situation of the applicant in accordance with new evidence that could have an effect on his situation, namely its observations on the allegations made against him and the remarks of the panel in relation to those observations. Therefore, the decision of 23 November 2010 taken after reconsideration must be considered not merely to confirm the decision of 4 August 2010, but to constitute an independent act (see, by analogy, with regard to the rejection of a complaint, judgment of 21 September 2011 in Case T-325/09 P *Adjemian and Others* v *Commission*, paragraph 32) which, since it did not expressly withdraw the decision of 4 August 2010 or expressly have retroactive effect, must be regarded as having produced its effects from the date when it was adopted and therefore replaced the decision of 4 August 2010 and did not, as the ECB claims, withdraw it.

76 Moreover, during the hearing, the ECB expressly stated that it considered that the decision of 23 November 2010 taken after reconsideration had only produced effects for the future, thus confirming that the adoption of that decision had not had the effect of withdrawing the decision of 4 August 2010.

77 Accordingly, and given that, according to the case-law, an applicant retains a legal interest in bringing proceedings against an act which has been repealed since, unlike a withdrawal, a repeal allows, for the addressees of the act concerned, the effects produced by that act to continue for the period during which that act has been in force (see, to that effect, judgment of 12 February 1960 in Joined Cases 16/59, 17/59 and 18/59 *Geitling and Others* v *High Authority*; judgment of 13 December 1995 in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission*, paragraphs 46 to 48), it must be held that the claims directed against the decision of 4 August 2010 are admissible.

78 With regard to the action registered as Case F-60/11, it should be noted, with regard to the claims directed against the decision of 15 March 2011 rejecting the third special appeal, that a special appeal forms an integral part of a complex procedure and is only a precondition for bringing an action. In those circumstances, claims formally directed against the dismissal of the special appeal must be regarded as having the effect of bringing before the court the act with adverse effect against which the

appeal was submitted (see, by analogy, with regard to decisions of the ECB rejecting requests for pre-litigation reviews and complaints, order of 18 May 2006 in Case F-13/05 *Corvoisier and Others* v *ECB*, paragraph 25), except where the scope of the dismissal of the special appeal is different from that of the act against which that special appeal has been brought (see, by analogy, judgement of 25 October 2006 in Case T-281/04 *Staboli* v *Commission*, paragraph 26; *Adjemian and Others* v *Commission*, paragraph 32). Given that, in the present case, it is clear from the decision of 15 March 2011, rejecting the third special appeal brought against the decision of 23 November 2010 taken after reconsideration, that that appeal did not refer to any new element of law or fact, the decision of 15 March 2011 must be regarded as lacking any independent content. Consequently, the claim for annulment of that decision must be regarded as overlapping with the claim for annulment directed against the decision of 23 November 2010 taken after reconsideration.

79 It follows from all of the above that it is appropriate to examine the claim for annulment directed, in the context of the action registered as Case F-7/11, against the decision of 4 August 2010 and, in the context of the action registered as Case F-60/11, against the decision of 23 November 2011 taken after reconsideration, and the claim for compensation made in connection with those actions.

2. *The claims for annulment*

80 In support of his claims for the annulment of the decision of 4 August 2010 and the decision of 23 November 2011 taken after reconsideration, the applicant submits three pleas alleging, essentially:

— infringement of the rights of the defence and of Article 41 of the Charter;

— infringement of Article 43 of the conditions of employment, manifest error of assessment and breach of the obligation to state reasons;

— breach of the duty to have regard to the interests of officials, breach of the principle of proportionality, and misuse of powers and abuse of process.

81 In that regard, it should be noted that, whereas the applicant puts forward arguments concerning the obligation to state reasons in the context of the first plea and arguments concerning proportionality between the measure adopted and the allegations made against him in the context of the second plea, those arguments will be examined, respectively, in the context of the second and third pleas, since the breach of the obligation to state reasons and the breach of the principle of proportionality are specifically referred to in the heading of those pleas.

Infringement of the rights of the defence and of Article 41 of the Charter

82 The first plea must be understood as consisting of three parts alleging, respectively: first, that the applicant had not been heard by the Executive Board before the adoption of the decision of 4 August 2010; secondly, that he did not have access to the file before the adoption of that decision and of the decision of 23 November 2010 taken after reconsideration; and, thirdly, that the allegations made against him were not communicated to him before the adoption of the abovementioned decision of 4 August 2010.

The first part of the first plea

– Arguments of the parties

83 The applicant claims, in essence, that the decision of 4 August 2010 was adopted in breach of his right to be heard before the adoption of any decision that adversely affects him. Although the ECB invited him to participate in a hearing before the adoption of that decision, the applicant considers that there was no reason for him to attend as he had already been suspended since 6 April 2010, nor even to submit subsequent written comments on the document entitled 'Draft summary of the hearing [of the applicant]', as the meeting which took place had no valid legal basis and he had not attended it. According to the applicant, his participation in a hearing could have been justified only if the ECB had first withdrawn the decision of 6 April 2010.

84 With regard to the fact that he was invited to take part in a hearing after the adoption of the decision of 6 April 2010, the applicant claims that, according to the case-law, it is only possible to remedy a breach of the right to be heard by having a hearing after the adoption of a decision adversely affecting a member of staff where it was impossible to hear the member of staff concerned beforehand. In the present case, the administration, if it had wanted to, could have withdrawn the decision of 6 April 2010 and subsequently summoned the applicant to a hearing.

85 The applicant also states that the ECB adopted the decision of 4 August 2010 in such a way that he would, in any event, remain suspended from his duties. Even though it accepted that the decision of 6 April 2010 was illegal, the ECB did not withdraw it, but simply replaced it with another identical decision so that he would remain suspended from his duties. That fact, along with the facts that, according to the applicant, the decisions to withdraw and to adopt a new suspension decision were taken consecutively and, in any event, notified on the same date, and that he had already been permanently replaced by a colleague, demonstrate that the administration did not want to reinstate him in his duties, in breach of the presumption of innocence.

86 In its defence, the ECB considers that it has respected the applicant's right to be heard. First, the applicant attended an interview organised by the panel on 26 March 2010. Second, that panel forwarded to the applicant the draft minutes of that interview and the latter submitted his observations on that document. Moreover, the ECB argues that the applicant made numerous observations throughout the procedure and that on those occasions he had the opportunity to put forward his point of view. In any event, the ECB notes that the case-law concerning the rights of the defence only require that the official should be given the opportunity to make his point of view known on the evidence against him and on which the appointing authority proposes to rely, but not that he should necessarily be heard. In the present case, the applicant was invited on four occasions to attend an interview, invitations which he declined, requesting the administration, in particular, to first withdraw its decision of 6 April 2010, even though no provision obliges the administration to withdraw a decision before being able to initiate a procedure seeking to replace that decision with another.

87 For the sake of completeness, the ECB adds that, in exceptional circumstances, a member of staff may be heard after the adoption of a suspension measure. In the present case, the fact that it was not possible to conduct a hearing of the applicant because he refused to comply, constitutes an exceptional circumstance enabling the Executive Board to take the decision of 4 August 2010 without having heard the interested party.

88 The ECB contests the allegations that it carried out the procedure in such a way as to ensure that the applicant would remain, in any event, suspended from his duties. In particular, the fact that he was replaced in his duties is not, it contends, relevant, because it is common practice to replace a person in the event of prolonged absence.

– Findings of the Tribunal

89 Article 43 of the conditions of employment provides that, save in exceptional circumstances, the Executive Board must hear the person concerned before it can suspend him.

90 In the present case, it is apparent from the file that, prior to the adoption of the decision of 4 August 2010, the applicant was invited to a hearing on four occasions, by letters dated 24 June and 1, 7 and 12 July 2010, respectively, all of which invitations he declined. The fact that an invitation to attend a hearing has been declined may be considered to be an exceptional circumstance justifying the adoption of a suspension decision without the interested person having been heard. Accordingly, it has been held that where the administration must hear a person before adopting a decision, it is not required to postpone that hearing indefinitely until the person concerned is able to attend (see, to that effect and by analogy, judgment of 5 December 2002 in Case T-277/01 *Stevens* v *Commission*, paragraph 41). It is true that, in the present case, on the dates when the administration made those invitations, the decision of 6 April 2010 had not been revoked, but in the absence of a rule requiring the administration to revoke a decision before commencing a new procedure to replace it, the applicant could not refuse, in breach of the duty to cooperate in good faith that binds all members of staff in the service of the European Union with regard to its administration (see, to that effect, judgment of 16 March 2004 in Case T-11/03 *Afari* v *ECB*, paragraph 192) to take part in the hearing organised by the ECB.

91 It follows that the ECB, when it adopted the decision of 4 August 2010, did not infringe Article 43 of the conditions of employment nor, therefore, the rights of the defence according to which any person against whom proceedings have been initiated which are liable to culminate in a measure adversely affecting that person, must be given the opportunity to put their case properly.

92 The applicant's allegation that the ECB adopted the decision of 4 August 2010 in such a manner as to ensure that he would remain, in any event, suspended from his duties, which demonstrates that the administration did not want him to be able to return to his post, must also be rejected. Until such time as the decision to suspend a member of staff has been annulled by the European Union Courts, the administration has no obligation to reinstate him. It follows that, unless the applicant establishes an abuse of process, a question that will be examined in the context of the third plea, the administration cannot be accused of illegality on the basis that it acted in such a way that the applicant remained suspended from his duties.

93 The same applies to the applicant's argument alleging a breach of the presumption of innocence. A breach of the presumption of innocence can only be found if there is evidence that demonstrates that the administration had decided, from the beginning of a disciplinary procedure, to impose, in any event, a penalty on the person concerned (see, to that effect and by analogy, judgment of 9 July 2002 in Case T-21/01 *Zavvos* v *Commission*, paragraph 341). In the present case, it must be emphasised that the possibility offered by Article 43 of the conditions of employment to suspend a person is not intended to impose a sanction on that person (see, to that effect, judgment of 18 October 2001 in Case T-333/99 *X* v *ECB*, paragraph 151), but to allow the administration to adopt a precautionary measure to ensure that that person does not interfere with the ongoing inquiry.

94 Finally, if, by his argument, the applicant intends to claim that the ECB has deprived the second special appeal of all useful effect by implementing a new suspension procedure without waiting for the result of that special appeal procedure, it must be observed that that procedure seeks to provide the administration with the possibility of reviewing a decision that it has adopted, before it is referred to the European Union Courts, in order to remedy any error vitiating it. In the present case, as the administration took the initiative to commence a new procedure in order to remedy any defects affecting the decision of 6 April 2010, the applicant cannot take issue with the administration for not having awaited the outcome of the second special appeal.

95 In so far as the applicant complained of the excessive length of his suspension and such a claim is admissible, it must be noted that, at the same time as the applicant was suspended, an administrative inquiry took place, followed by an OLAF investigation which was still pending on the date when the applicant brought the second appeal before the Tribunal. Therefore, the applicant cannot criticise the ECB for having suspended him for an excessive period since, as noted above, the aim of a suspension measure is to ensure that the person concerned will not interfere with an ongoing inquiry.

96 It follows from all of the foregoing that the first part of the first plea must be rejected.

The second part of the first plea

– Arguments of the parties

97 The applicant claims that the adoption of the decision of 4 August 2010, and then of the decision of 23 November 2010 taken after reconsideration, breached his rights of defence as well as Article 41 of the Charter, as he was not allowed access to the inquiry file. In that regard, he states that his request of 23 June 2010 seeking access to a series of documents, including the decision to carry out an administrative inquiry of 26 February 2010 and the inquiry status report of 6 August 2010, communicated to the Executive Board on that date, was rejected. He also states that the ECB never followed up the request that he had made to the panel to forward a certain number of documents to him. When he subsequently made another request for access to documents, on 26 August 2010, to the Director-General of the DG HR and to the HR expert, emphasising that such access was necessary to enable him to exercise his rights of defence effectively, he was again refused, or partially refused, access to certain documents. He later repeated that request but it was systematically refused.

98 In its defence, the ECB contends, in essence, that that plea is ineffective, since a breach of the rights of the defence can only be assessed with regard to the decision taken at the end of the disciplinary procedure. Furthermore, as the ECB was not obliged to state the reasons that required the immediate suspension of the applicant, the fact that the applicant did or did not have access to his file cannot have had any effect on the decision of 23 November 2010 taken after reconsideration. In any event, the ECB contends that the applicant had access to all of the documents that relate to the allegations made against him.

– Findings of the Tribunal

99 It is apparent from the file that, neither at the time when the decision of 4 August 2010 was taken, nor when the decision of 23 November 2010 taken after reconsideration was adopted, was the applicant able to have access to eight documents relating to the inquiry and regarding which he had made a request.

100 In that regard, it must be noted that Article 41(2)(b) of the Charter provides that every person has a right to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. However, in the present case, and independently of the question whether a plea alleging a breach of Article 41(2)(b) of the Charter is effective when challenging the legality of a decision other than a refusal of access to the personal file, the Tribunal finds that the Executive Board did not breach Article 41(2)(b) of the Charter by refusing the applicant access to the eight abovementioned documents.

101 According to Article 43 of the conditions of employment, to suspend a member of staff it suffices that ‘allegations of serious breach of professional duties’ have been made against him. It is true that, having regard to the provisions of Article 41(2)(b) of the Charter, a member of staff is entitled to have access to information held by the ECB that enables him to understand the substance of those allegations, so that he can demonstrate, inter alia, that the conduct referred to does not fall within the scope of his

responsibility, that it is not sufficiently serious to justify a suspension decision, that it is not sufficiently probable or that the allegations are manifestly unfounded, so that the suspension of the member of staff in question is unlawful. Moreover, such an interpretation of Article 43 of the conditions of employment is also consistent with the principle of the presumption of innocence enshrined, with regard to accused persons, in Article 48(1) of the Charter.

102 However, the Tribunal notes that under Article 41(2)(b) of the Charter, the right of every person to have access to his or her file can only be exercised 'while respecting the legitimate interests of confidentiality and of professional and business secrecy'. The legitimate interests which justify confidentiality include the need to protect the effectiveness of investigations. As has already been held, the effectiveness of an investigation may be diminished if access to all the documents connected with it could be given to the persons concerned while it is still ongoing (judgments of 12 September 2007 in Case T-259/03 *Nikolaou* v *Commission*, paragraph 242, and in Case T-48/05 *Franchet and Byk* v *Commission*, paragraph 255).

103 In the present case, it should be noted that on 26 July 2010, OLAF opened an investigation, which took over the administrative inquiry initiated by the ECB and that, consequently, the file documents of the administrative inquiry carried out by the ECB must be considered to belong to the file of the OLAF investigation. On the dates when the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration were adopted, OLAF had not completed its investigations. Having regard to the fact that to provide the applicant with the documents from his file before those decisions were adopted could have undermined the effectiveness of the OLAF investigation, the administration could legitimately consider that it was appropriate to maintain the confidentiality of certain documents relating to the investigation. Therefore, the administration did not breach Article 41(2)(b) of the Charter, nor the applicant's rights of defence, when it refused him access to eight documents relating to the investigation before the adoption of the decision of 4 August 2010 and of the decision of 23 November 2010 taken after reconsideration.

104 That approach is not called into question by Article 7(3) of Circular No 1/2006, according to which ECB employees who are the subject of an administrative inquiry must be granted access to documents related to the allegations made against them which disclose facts important for the exercise of their rights of defence, since that provision does not state that such access must be granted before the adoption of any suspension measure, but only before the person or panel conducting that inquiry submits the reasoned report referred to in Article 6(14) of that circular.

105 In so far as the applicant submits, more specifically, that the documents which the administration did not supply to him included those expressly referred to in the decision of 4 August 2010, namely the investigation status report dated 6 April 2010 and the investigation status report dated 19 July 2010, it should be noted that whereas the administration has an obligation to provide the person concerned with the documents on which it expressly relies to adopt a decision that adversely affects him, the failure to disclose those documents may only result in the annulment of the decision in question if the charges against him can be proved only by reference to those documents (judgment of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission*, paragraphs 73 to 75; judgment of 3 July 2001 in Joined Cases T-24/98 and T-241/99 *E* v *Commission*, paragraph 92). In the present case, Article 43 of the conditions of employment, which provides the basis for the ECB's power to adopt a suspension measure, makes the application of that provision conditional only on the existence, with regard to the member of staff concerned, of allegations of a serious breach of his professional duties that, according to the case-law, must be sufficiently probable (judgment of 30 November 2009 in Case F-80/08, *Wenig* v *Commission*, paragraph 67). Given that the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration, are based on the allegations that the applicant had authorised or permitted, in his capacity as Head of the Administrative Services Division, the purchase of items of dubious professional usefulness, the whereabouts of which could not be clearly established, and that those allegations appeared in some of the documents that were communicated to the

applicant, such as the one entitled 'Draft summary of the hearing of [the applicant]', mentioned in paragraph 38 of this judgment, or the draft minutes of the interview of the applicant of 26 March 2010, mentioned in paragraph 18 of this judgment, the applicant cannot claim that the administration did not communicate to him the documents summarising the progress of the investigation on 6 April 2010 and 19 July 2010 respectively.

106 It follows from the foregoing that the second part of the first plea must be rejected.

The third part of the first plea

– Arguments of the parties

107 The applicant claims that as the allegations made against him served as the basis of the decision of 4 August 2010, according to the letter of 17 August 2010, mentioned at paragraph 45 of this judgment, they were not communicated to him in good time, that is to say, prior to the adoption of the decision of 4 August 2010.

108 The applicant states that, according to the letter of 17 August 2010, allegations of three types were taken into account.

109 The first are the allegations appearing in the investigation status report dated 6 April 2010 which, in essence, concerned the purchase of brand X laptop computers, other laptop computers and E-book readers by the Administrative Services Division and the fact that the professional reasons for the purchase and use of those items and their whereabouts were uncertain. Whereas the letter of 17 August 2010 indicates that the applicant had an interview with the panel conducting that inquiry with regard to those allegations, the applicant claims that the information that was given to him on that occasion was not exactly the same as that given in the letter. During that interview, he was only informed that the inquiry was intended to clarify all of the facts and circumstances relating to the purchase of certain items and to the use of certain items belonging to the ECB by staff members of the Administrative Services Division and to investigate potential breaches of professional duties by SCB staff in relation to those purchases or that use.

110 Second, the letter of 17 August 2010 mentions allegations that were summarised and substantiated in the document entitled 'Draft summary of the hearing of [the applicant]'. However, the applicant asserts that the allegations contained in that document cannot be considered to have been validly communicated to him, as that document has no legal effect since no hearing took place on 14 July 2010.

111 Third, the letter of 17 August 2010 refers to allegations appearing in the investigation status report dated 19 July 2010 as having been communicated to the applicant on 29 June 2010. However, according to the applicant, those allegations are not valid since, on the one hand, he was not invited to submit his observations on them and, on the other, they originate from the panel conducting the administrative inquiry, whereas such an inquiry should be a neutral exercise in establishing the facts.

112 In its defence, the ECB states that the alleged facts that justified the adoption of the decision of 4 August 2010 were, first, that the applicant had initiated, authorised or permitted, in his capacity as Head of the Administrative Services Division, the purchase of brand X laptop computers, other types of laptop and desktop computers and E-book readers; secondly, that the business reasons underlying those purchases were inconsistent with the role and responsibilities of the Administrative Services Division as outlined in the Functions Paper; thirdly, that the applicant, as Head of the Administrative Services Division could not give a reasonable explanation of the whereabouts of the majority of those items. The ECB contends that the applicant was informed of those allegations before the adoption of the decision of 4 August 2010, first, during the meeting of 26 March 2010, by the panel, then by letter

of 24 June 2010 inviting him to the hearing of 14 July 2010 and, finally, by letter of 21 July 2010 providing the applicant with the document entitled 'Draft summary of the hearing of [the applicant]'. According to the ECB, the applicant acknowledged that he was aware of those allegations in his observations on the abovementioned draft summary.

– Findings of the Tribunal

113 It should be noted that, whereas the letter of 17 August 2010, mentioned in paragraph 45 of this judgment, refers to the allegations contained in the investigation status report dated 6 April 2010, to the document entitled 'Draft summary of the hearing of [the applicant]', and to the investigation status report dated 19 July 2010 in order to identify the allegations made against the applicant which served as the basis for the decision of 4 August 2010, it is apparent from that letter that those allegations relate, in essence, to the fact that items such as laptop computers and E-book readers were purchased by the Administrative Services Division at the initiative or with the consent of the applicant, who was responsible for that division, without clearly established reasons and even though their professional use does not seem to correspond to the tasks undertaken by that division, and that those items could not be located. It must be noted that those allegations already appeared in the document entitled 'Draft summary of the hearing of [the applicant]'. Consequently, the applicant has no grounds to claim that the allegations made against him, that served as the basis for the decision of 4 August 2010, were not communicated to him in due time.

114 That finding is not called into question by the fact that that document was erroneously entitled 'Draft summary of the hearing of [the applicant]' whereas no hearing took place, or by the contention, if regarded as established, that the allegations made against the applicant in the investigation status reports dated 6 April and 19 July 2010, and in the document entitled 'Draft summary of the hearing of [the applicant]' had altered slightly, so that it was necessary for those three documents to be communicated to him. First, the name of a document has no effect on the fact that it was brought to the attention of the applicant. Secondly, the allegations made against the applicant in the two abovementioned investigation status reports were taken up again, in essence, in the document entitled 'Draft summary of the hearing of [the applicant]', which was communicated to the applicant.

115 It follows from the above that the third part of the first plea must be rejected and, with it, the first plea in its entirety.

Infringement of Article 43 of the conditions of employment, manifest error of assessment and breach of the obligation to state reasons

Arguments of the parties

116 The applicant states that under the terms of Article 43 of the conditions of employment, a suspension measure must be based on 'allegations of serious breach of professional duties'. The decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration, it is argued, do not identify the allegations of serious breach of professional duties that could justify the suspension of the applicant, nor do they explain the reason why the Executive Board could not grant him a hearing before adopting those decisions, but are worded in general terms, with the use of generic phrases such as 'the need to facilitate the proper conduct of the internal administrative inquiry' or 'the interests of the service'.

117 Furthermore, the applicant alleges that the ECB breached the obligation to state reasons, as it did not inform him of the allegations on which the Executive Board relied to suspend him, when it sent the decision of 23 November 2010 taken after reconsideration, but only after he had been notified of this.

118 Moreover, the applicant states that the justifications put forward for his suspension clearly changed between, first, the decision of 6 April 2010, based on the unrest caused in the Administrative Services Division and the need to facilitate the proper conduct of the administrative inquiry, secondly, the decision of 4 August 2010, which is based, on the one hand, on the fact that the allegations made against him, if established, would constitute a serious breach of his professional duties that could, moreover, cause major damage to the reputation of the ECB and, on the other hand, on the senior position he held within the ECB, thirdly, the decision of 23 November 2010 rejecting the second special appeal, which is based on the need to ensure the proper conduct of the OLAF investigation and, fourthly, the decision of 23 November 2010 taken after reconsideration.

119 Finally, the applicant claims that none of the evidence put forward on the occasion of the successive suspension decisions justified that measure.

120 First, the reference to general wording, such as the need to facilitate the proper conduct of the internal administrative inquiry or the interests of the service, is not a valid justification.

121 Second, the so-called unrest caused in the Administrative Services Division mentioned in the suspension decision of 6 April 2010 is not attributable to the applicant, but is due to the use of an aggressive tone by the panel conducting the inquiry during the interviews that it had with the staff.

122 Third, the existence of allegations of serious breach of duties is not sufficient to justify a suspension measure: there has to be evidence demonstrating that the truth of those allegations is sufficiently probable, which is not the case here.

123 Fourth, contrary to what is indicated in the decision of 4 August 2010, the allegations in question could not cause damage to the reputation of the ECB, as no publicity had been given to the alleged facts.

124 Fifth, the need to facilitate the proper conduct of the administrative inquiry could not be invoked by the ECB, as it allowed a period of more than one month to pass, from the date of the opening of the administrative inquiry, before envisaging the suspension of the applicant. Furthermore, the mere existence of an inquiry could not suffice to justify the adoption of a suspension measure, since any member of staff can be reassigned rather than suspended. In the specific case of the applicant, moreover, the proper conduct of the inquiry would not have been affected if he had remained in his post. As the administrative inquiry was carried out confidentially, the applicant could not know the names of the members of staff who were interviewed.

125 Sixth, the applicant considers that the risk that he would impede the OLAF investigation cannot have been the reason for his suspension since he was only informed of the existence of that investigation subsequently, on 16 August 2010. Furthermore, the existence of that investigation could not justify the suspension measure, as there was no evidence to establish that OLAF considered it necessary to suspend the applicant. According to him, once OLAF opens an investigation, the ECB relinquishes the case, so that it is for OLAF to decide if the person concerned by the investigation should be suspended.

126 Seventh, the fact that the applicant occupies a high-ranking position within the institution has no effect on the adoption of a suspension measure.

127 Eighth, the elements of the panel's report, cited in support of the decision of 23 November 2010 taken after reconsideration, are not relevant, as the purpose of an administrative inquiry is to discover whether the accusations made are founded and not whether it is appropriate to adopt a suspension measure.

128 Ninth and finally, a suspension measure could not be justified by the fact that the applicant did not respond correctly with regard to the 127 items identified in the course of the inquiry and in respect of which he was accused of having seriously breached his professional duties, given that he did not have any access to the file, that some of those items had a low value and had been purchased several years previously and, finally, that his responses had been useful and detailed.

129 In its defence, the ECB considers that the justifications put forward are not vague and even if they were, that is of no consequence since it need only make a finding of the existence of allegations of serious fault by the applicant in order to be entitled to suspend him. In any event, the ECB notes that the decision of 23 November 2010 taken after reconsideration was made in a context known to the applicant which allowed him to understand its scope. For that reason, the ECB contends that the reasoning of the decision of 23 November 2010 taken after reconsideration could not have been communicated to the applicant too late. Finally, with regard to the fact that the grounds for the suspension of the applicant changed, the ECB contends that that does not constitute an illegality. As the legality of an individual act must be assessed in accordance with the factual circumstances on the date when the act was adopted, it was permissible for the ECB to refer to new facts that had arisen since the adoption of the decision of 4 August 2010 as a basis for the decision of 23 November 2010 taken after reconsideration.

130 With regard to the grounds of the decision, the ECB notes that the contested decision is that of 23 November 2010 taken after reconsideration. The grounds of that decision related to the existence of factual allegations that could constitute, if proven, a serious breach by the applicant of his professional duties, and to the fact that the applicant was unable to justify some of the purchases made by the division that he was responsible for or to indicate the whereabouts of the items thus purchased.

Findings of the Tribunal

131 First, it should be pointed out that the obligation to state reasons implies that the addressee of any decision adversely affecting him should be enabled to understand, clearly and unequivocally, the reasoning of the administration. Thus the administration is required, in the light of the circumstances of the case, to provide the person concerned with information which is specific to his case, and may not merely state general considerations or simply refer to the regularity of the procedure followed. In any event, merely formal clauses or abstract statements which have no direct link with the details of the case do not constitute an adequate statement of reasons (judgment of 1 March 2005 in Case T-143/03 *Smit* v *Europol*, paragraph 38).

132 Furthermore, it must be pointed out that the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him (judgment of 26 November 1981 in Case 195/80 *Michel* v *Parliament*, paragraph 22). However, a statement of reasons for a decision is adequate if the decision was taken in a context which is known to the official concerned and which enables him to understand the scope of the measure which has been adopted in regard to him (see, in particular, judgment of 23 November 2010 in Case F-8/10, *Gheysens* v *Council*, paragraph 63).

133 In the present case, in relation, first, to the submission that the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration did not specify how the allegations made against the applicant were such as to justify his suspension, it should be noted that, in order to adopt that decision of 23 November 2010, the Executive Board relied, in essence, on the allegations that justified the suspension of the applicant on 4 August 2010, consisting of the criticism of the applicant for having authorised or permitted, in his capacity as head of the Administrative Services Division, the purchase of items of dubious professional usefulness, having regard, in particular, to the tasks carried out by that division, items whose whereabouts could not be clearly established by the applicant. Such

facts, if they were established, would be capable of demonstrating that the applicant had misappropriated or participated in the misappropriation of ECB assets, and would undeniably constitute, on the part of the applicant, a serious breach of his professional obligations. As those allegations were brought to the attention of the applicant in the document entitled 'Draft summary of the hearing of [the applicant]', which the applicant stated he had received on 21 July 2010 (see paragraph 39 of the present judgment), and by letter of 17 August 2010, the applicant has no grounds to assert that the reasoning of the decision of 23 November 2010 taken after reconsideration did not enable him to understand how the allegations made against him were of such a nature as to justify his suspension.

134 Secondly, the applicant's submission that the reasoning of the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration had been communicated to him too late, as he had not received notification at the same time of the allegations upon which the Executive Board had relied in order to adopt those two decisions, has no basis in fact. As noted in the previous paragraph, the decision of 23 November 2010 taken after reconsideration clearly states that it was adopted on the basis of the same allegations as those that served as the basis for the decision of 4 August 2010. Those allegations were communicated to the applicant in the document entitled 'Draft summary of the hearing of [the applicant]', regarding which the applicant submitted his observations by letters of 3 and 10 September 2010. Consequently, the applicant cannot claim that the decision of 4 August 2010 and that of 23 November 2010 taken after reconsideration did not state reasons on the basis that he had not been informed of the allegations on which the Executive Board relied to suspend him.

135 With regard to the applicant's submission that the justifications put forward for his suspension clearly altered between the decision of 6 April 2010, that of 4 August 2010 and that of 23 November 2010 taken after reconsideration, it must be emphasised that, contrary to what is suggested in the appellant's argument, those various decisions do not form a single act for which the grounds have altered, but a succession of independent decisions. Therefore, the fact that the grounds put forward by the administration to justify the suspension of the applicant have not remained strictly identical between the decision of 6 April 2010, that of 4 August 2010 and that of 23 November 2010 taken after reconsideration, has no effect on the legality of the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration.

136 In any event, it should also be noted that the administration can replace or add grounds to a decision until such time as an action is brought against it (see, to that effect, judgment of 15 December 2010 in Case F-67/09 *Angulo Sánchez* v *Council*, paragraph 71).

137 Finally, with regard to the applicant's submission that none of the evidence put forward as a basis for his suspension justified the adoption of that measure, it must be noted that although Article 43 of the conditions of employment make the application of that provision subject only to the existence, on the part of the member of staff concerned, of allegations of a serious breach of his professional obligations, it has been held in case-law that it was nevertheless necessary, in order to suspend a member of staff, that the conduct alleged against him be sufficiently probable (see, to that effect, *Wenig* v *Commission*, paragraph 67).

138 In the present case, it should be observed that both the decision of 4 August 2010 and that of 23 November 2010 taken after reconsideration are based on the allegations that the applicant had authorised or permitted, in his capacity as head of the Administrative Services Division, the contested purchase of items whose whereabouts could not be clearly established. It is apparent from the documents in the file and, in particular, the draft minutes of the interview of the applicant of 26 March 2010, that the conduct alleged against him was sufficiently probable to justify his suspension.

139 As the existence of allegations of a sufficiently probable serious breach by the applicant of his professional duties constitutes grounds justifying, with regard to the provisions of Article 43 of the conditions of employment, the application of that provision, there is no need to consider the arguments of the applicant presented at paragraphs 120 to 128 of the present judgment, as those arguments must be deemed, in this context, as being directed against grounds included in the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration purely for the sake of completeness and whose possible irregularity cannot, therefore, result in the annulment of that decision (Case T-406/04 *Bonnet* v *Court of Justice* [2006] ECR-SC I-A-2-213 and II-A-2-1097, paragraph 104).

140 That finding is not affected by the argument that the elements of the panel's report cited in support of the decision of 23 November 2010 taken after reconsideration are not relevant, as the purpose of an inquiry is to discover whether the accusations made against a staff member are substantiated and not whether it is appropriate to adopt a suspension measure, since, contrary to what the applicant claims, the Executive Board did not merely find that the panel was favourable to his suspension, a finding which, moreover, is not apparent from the file, but relied on the comments made by the panel regarding the observations of the applicant in relation to the allegations made against him.

141 It follows that as none of the submissions relied on by the applicant in the context of the second plea is well founded, it must be rejected.

Breach of the duty to have regard to the interests of officials, breach of the principle of proportionality, and misuse of powers and abuse of process

Arguments of the parties

142 First, the applicant claims that the suspension measure is not proportionate to the alleged facts. The fact that he occupied a senior position within the institution and that OLAF carried out an investigation did not justify the adoption of a suspension measure, which has had a particularly negative impact on his career. In any event, the applicant claims that the administration should have considered the possibility of adopting a measure other than his suspension, such as reassignment to another unit.

143 Secondly, the applicant claims that the ECB breached its duty to have regard to the interests of officials, as it did not take account of his situation and, in particular, of the fact that his reputation would be damaged as a result of his suspension.

144 Thirdly, the applicant claims that the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration are vitiated by a misuse of powers and abuse of process, as the ECB intended to suspend him regardless of the accuracy of the facts alleged against him.

145 In its defence, with regard to the duty to have regard to the interests of officials, the ECB claims that the requirements of the duty to have regard to the interests of officials cannot be interpreted as preventing the administration adopting a suspension measure. Moreover, the ECB contends that the inquiry constituted a measure taken in the interests of the applicant, as it sought to verify whether the allegations made against him were substantiated. Furthermore, the ECB states that, in order to limit any damage to the applicant's reputation, it took pains to ensure that the allegations made against him were not made public, beyond what was strictly necessary. However, the ECB cannot see what other measure it could reasonably have taken in order to protect the reputation of the applicant without contravening its obligation to combat fraud and other illegal activities detrimental to the financial interests of the European Union.

146 With regard to the principle of proportionality, the ECB states that it enjoys broad discretion with regard to its organisation. Therefore, it contends that it was entitled to consider, given the seriousness of the allegations in question, that it did not have to reassign the applicant to another service where, moreover, he could have further undermined the institution if those allegations proved to be founded.

147 Finally, with regard to the alleged abuse of process and misuse of powers, the ECB suggests that that argument is inadmissible, as it was not raised on the occasion of the special appeal. On the merits, it contends that there is nothing to suggest that it acted maliciously or even simply for reasons other than in the interests of the service.

Findings of the Tribunal

148 With regard, first, to whether the suspension measure was not proportionate to the alleged facts, it should be noted that the allegations made against the applicant, which are referred to in paragraph 138 of this judgment, are particularly serious as they concern facts which, if proven, could demonstrate that the applicant had misappropriated or participated in the misappropriation of items purchased by the Administrative Services division. In those circumstances, and having regard to the fact that the applicant occupied a head of division position, his suspension to prevent him from interfering with the inquiries carried out, first by the panel and then by OLAF, does not seem to be a disproportionate measure.

149 With regard to the argument that the ECB had failed to consider whether solutions other than suspension could have guaranteed the proper conduct of the internal inquiry and then of the OLAF investigation, it suffices to note, in order to refute that argument, that, having regard to the broad discretion enjoyed by the ECB to adopt a suspension measure under the terms of Article 43 of the employment conditions, where a member of staff is the subject of allegations of a sufficiently probable serious breach of his duties, it is not for the Tribunal to determine whether other measures would have been more appropriate.

150 With regard, secondly, to the submission that, by failing to take account of the situation of the applicant, the ECB has breached its duty to have regard to the interests of officials it should be noted that, whereas the duty of the administration to have regard to the interests of its members of staff reflects a balance between reciprocal rights and obligations created by the provisions applicable to ECB staff for relations between the public authority and public service employees, the requirements of that duty cannot prevent the administration from adopting the suspension measures it believes necessary (see, to that effect, *Wenig* v *Commission*, paragraph 78). Consequently, the applicant is not justified in relying on the duty have regard to the interests of officials to contest the decisions to suspend him.

151 In relation, thirdly, to the submission that the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration are vitiated by a misuse of powers and abuse of process on the ground that the ECB intended to suspend him regardless of the accuracy of the facts alleged against him, it should be noted that, where the reason provided to justify a decision has not been found to be incapable of serving as a basis for that decision, there can be no question of any misuse of powers (see, to that effect, judgment of 14 July 1983 in Case 176/82 *Nebe* v *Commission*, paragraph 25; judgment of 17 November 1998 in Case T-131/97 *Gómez de Enterría y Sanchez* v *Parliament*, paragraph 62). Given that, in the present case, the applicant was the subject of allegations of a sufficiently probable serious breach of his duties, the ECB cannot be held to have misused its powers.

152 Since none of the submissions relied on by the applicant in support of the third plea is well founded, that plea must be dismissed.

153 Consequently, all the claims for annulment must be rejected.

3. *The claim for compensation*

Arguments of the parties

154 The applicant claims to have suffered significant non-material damage as a result of the adoption of the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration, which he quantifies in the amount of EUR 20 000 per decision. He bases this claim for compensation on the fact that, first, his honour and his professional reputation have been damaged as a result of his suspension; secondly, that he has been persecuted by his employer; and finally, that his current medical condition, that is, his incapacity for work, is the consequence of the decision-making behaviour of the ECB.

155 In its defence, the ECB contends that the claim for compensation should be rejected as the decision of 23 November 2010 taken after reconsideration is not vitiated by illegality. In any event, it contends that it has endeavoured not to damage the good reputation of the applicant, as demonstrated by the fact that the allegations made against him were not the subject of any publicity beyond what was strictly necessary. The applicant's claim that he has been the victim of persecution is contradicted by his refusal to take part in the hearings and by the fact he could have put forward his argument by submitting his written observations. Finally, the ECB states that the applicant does not provide any evidence regarding the existence of a connection between his state of health and the behaviour of the administration and affirms that it continued to pay his salary until March 2011, the date from which he received a temporary invalidity allowance.

Findings of the Tribunal

156 It should be pointed out that, where the loss that an applicant alleges is caused by the adoption of decisions that are the subject of a claim for annulment, the rejection of that claim for annulment entails the rejection of the compensation claim, as they are closely linked.

157 In the present case, it should be noted that the non-material damage that the applicant claims is caused by the decision-making behaviour of the ECB and that the claims for annulment were rejected.

158 By way of exception, where the claim for annulment has been rejected, a compensation claim that is closely linked to it may nevertheless succeed if the alleged loss is caused by an illegality of the contested decision which, although not capable of serving as the basis for annulment of that decision, has caused damage to the applicant (see, to that effect, with regard to failure to comply with a time-limit, judgment of 11 April 2006 in Case T-394/03 *Angeletti* v *Commission*, paragraph 164).

159 However, in the present case, whereas the applicant has requested compensation for the non-material damage that he allegedly suffered, even in the event of annulment of the decision of 23 November 2010 taken after reconsideration, the Tribunal has found no irregularity in the decision-making behaviour of the ECB.

160 Consequently, the claim seeking compensation for the applicant for non-material damage that he allegedly suffered as a result of the adoption of the decision of 4 August 2010 and the decision of 23 November 2010 taken after reconsideration must be rejected.

161 It follows from all the foregoing that the actions registered as Cases F-7/11 and F-60/11 must be dismissed in their entirety.

Costs

162 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. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he or she is not to be ordered to pay any.

163 In the present case, the applicant claims that, in view of its attitude, the ECB should be ordered to pay the costs, even if the action is dismissed, on the ground that it refused to take into consideration the observations of the applicant regarding the need to annul the decision of 6 April 2010 before preparing, where appropriate, a new decision. In any event, the applicant states that he should not pay the fees of the ECB lawyer because the ECB, instead of being represented by its legal service, uses lawyers in order to dissuade its staff from bringing actions.

164 However, the Tribunal finds that no consideration of equity justifies the application of Article 87(2) of the Rules of Procedure. First, the fact that the ECB refused to take into account the observations of the applicant regarding the need to annul the decision of 6 April 2010 before initiating a procedure to adopt a new decision, if considered to be established, is a consideration relating to the legality of the suspension measure and not to equity, so that the applicant should have relied on it in order to obtain a favourable decision and consequently an order for the ECB to pay the costs under Article 87(1) of the Rules of Procedure. For the sake of completeness, it must be pointed out that that argument concerns the legality of the decision of 4 August 2010, which was replaced. Secondly, to accept that the applicant should not pay the fees and expenses of the ECB's lawyer on the ground that it could have been represented by its legal service, would have had the effect of reducing the effectiveness for the ECB of Article 19 of the Statute of the Court of Justice of the European Union according to which the institutions – a term that must be understood as referring, more broadly, to the other organs and bodies of the European Union (see, to that effect, order of 27 September 2011 in Case F-55/08 DEP *De Nicola* v *EIB*, paragraph 26) – can be represented by an adviser or a lawyer. In any event, it must be noted that such an argument relates to whether the costs incurred by the ECB were essential, an issue which may, if appropriate, be raised during a taxation of costs procedure, but which is not relevant to the question whether an unsuccessful party must be ordered to pay all or some of the costs.

165 It follows from the reasoning set out above that the applicant has failed in his action. Furthermore, in its pleadings the ECB has expressly requested that the applicant be ordered to pay the costs. As the circumstances of the present case do not justify the application of the provisions of Article 87(2) of the Rules of Procedure, the applicant must bear his own costs and pay the costs incurred by the ECB.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. Dismisses the actions in Cases F-7/11 and F-60/11.

2. Declares that AX must bear his own costs and orders him to pay the costs incurred by the European Central Bank.

Rofes i Pujol Boruta Bradley

Delivered in open court in Luxembourg on 13 December 2012.

W. Hakenberg
Registrar

M. I. Rofes i Pujol
President