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## NEWSLETTER N° 30

Case T-24/23,  
UF / Commission of  
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# Staff Matters

Legal News from Union Syndicale

Contract of indefinite duration –  
temporary staff – lack of establishment  
of facts – termination of contract –  
destruction of relationship of trust –  
disciplinary measures

**Court annuls termination of  
contract. Clear establishment  
of the facts is required both for  
dismissal and in disciplinary  
proceedings**

In this newsletter we look at **the termination of a contract of indefinite duration**. The institution is not obliged to start disciplinary proceedings instead of choosing an Art. 47 (c) (i) CEOS termination of contract. However, in the recently decided court case, the Commission was not able to clearly establish the facts underlying the claimed destruction of trust in the work relationship towards the applicant. The proper establishment of facts is important if the institution wants to base its termination decision on it, but also in any disciplinary proceeding. So, the choice of a dismissal instead of disciplinary measures does not lower the institution's duty to establish factual clarity.

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### Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

## Legal Background

According to Art. 47 (c) (i) CEOS (Conditions of Employment of Other Servants) the contract for an indefinite period of temporary staff shall cease “at the end of the period of notice stipulated in the contract; the length of the period of notice shall not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of 10 months [...]”.

Art. 49 (1) CEOS provides that “after the disciplinary procedure provided for in Annex IX to the Staff Regulations, which shall apply by analogy, has been followed, employment may be terminated without notice on disciplinary grounds in serious cases of intentional or negligent failure of temporary staff to comply with their obligations. (...) Before his employment is terminated, a member of temporary staff may be suspended [...]”.



## Facts of the Case

The applicant was engaged by the Commission under a contract for an indefinite period as a temporary agent. He was entrusted with the personal protection of members of the Commission and had to undergo regular virological (Covid-19) tests carried out by the medical service of the Commission. After one of these tests in October 2021, the medical service complained to the superior of the applicant by stating that the applicant had allegedly behaved inappropriately, and that he had shouted “enough” and slapped the hand of the nurse. Then, the applicant had allegedly left without the test being able to be completed. The applicant contested this and explained that the test was longer and more invasive than usual, but that he had not slapped the nurse. He had nevertheless apologised to him

in the event that he had offended him or his reaction had given rise to misunderstandings. After another test carried out in March 2022, the applicant complained to the medical service that the test was (again) longer and more invasive than usual. A few days later, the weapon of the applicant was confiscated by the Directorate for security and the Directorate’s internal investigation team took witness statements from the nursing staff. The nurse in charge of the second test stated that the applicant had kept moving his head when doing a PCR test and that it was not possible to do an antigen test. The Directorate informed the applicant that it intended to request from the appointing authority (here: the authority empowered to conclude contracts, AECCE) to terminate the contract of the applicant, due to the destruction of a relationship of trust, pointing to the complaints of the medical service regarding the applicant’s



conduct. This was followed by a written note of the same content, inviting the applicant to comment within five days. One week after that the AECCE terminated the contract of the applicant with a notice period of five months. In the course of the complaint procedure, the applicant presented a written affidavit issued by the member of the Commission (Vice President) who was with the applicant in the medical testing room; his affidavit stated that he did not consider the conduct of the applicant to be inappropriate.

## Arguments of the Parties and Decision of the Court

In his arguments, the applicant relied essentially on the following pleas in law: that the facts on which the decision was based were incorrect, on a manifest error of assessment, misuse of powers, failure to state reasons, breach of the duty of care, of the principle of proportionality and the rights of the defence. The Commission argued in its defence that the inappropriate behaviour of the applicant was “objectively” established, irrespective of the content of the witness statements of the nurses, and that the “details of the applicant’s behaviour” were not the decisive criterion for proving the destruction of the relationship of trust. In the Commission’s opinion, the applicant’s aggressive behaviour posed a risk to security, while the applicant must enjoy the trust not only of the member (of the Commission) which he is supposed to protect but also of the institution in its entirety.

The General Court (GC) annulled the Commission’s decision to terminate the applicant’s contract, because it found that the facts underlying the contested decision were not established. Due to its broad discretion, the AECCE is not obliged to initiate disciplinary proceedings in the event of an offence that may justify the dismissal of a member of temporary staff in accordance with Art. 47 (c) CEOS. Only if the AECCE intends to dismiss the staff member without giving notice for serious breach of his obligations, it is required under Art. 49 (1) CEOS to initiate the disciplinary proceedings laid down in Annex IX of the Staff Regulations (the Annex applies by analogy to temporary members of

staff). The AECCE was therefore, in principle, authorised to terminate the applicant’s contract on the basis of Art. 47 (c) CEOS by observing the notice periods stipulated, without having to initiate disciplinary proceedings. When doing so, the AECCE must first examine whether the absence or loss of a relationship of trust has actually been invoked, then it must check whether the facts actually happened in exactly the way described, and finally make sure whether, in view of the reasons given, the request for termination does not violate fundamental rights and does not represent an abuse of powers. The AECCE may, in particular, consider that the special circumstances justify taking measures other than a dismissal, such as entrusting the individual with other tasks in the Commission.

The Court limits itself to checking whether the facts presented by the institution and on which the decision is based are correct. As the applicant cast doubts on the facts as described by the nurses, denied that he was aggressive and could present the declaration by the member of Commission, there remained contradictions in the description of the facts by the Commission. According to the Commission’s submission, it is not clear where the Vice President was during the PCR tests in question, namely whether he was in a different booth than the plaintiff or in the area around these booths. Yet, the Commission concluded from this that the Vice President cannot directly testify to the facts. The Court criticized further that the Commission could not explain how the applicant’s conduct could be established “objectively (...) regardless of the specific content” of the witness statements, although the only other evidence available was the written affidavit by the Vice President.

In result, the AECCE was not able to substantiate the reproached conduct of the applicant, which underlies the contested decision based on the alleged loss of trust between the Commission and the applicant. The dismissal decision was unlawful, because the Commission considered itself sufficiently informed on the basis of the nurses’ statements while it failed to carry out a further examination of the facts.



## COMMENTS:

1. In general, the concept of the stability of unlimited contracts and the nature of this type of employment prohibit their termination without due reason and justification. As an exception, in the case of staff employed by a person holding an elected office (Art. 2 (c) CEOS), the mere breakdown in the relationship of trust can be a sufficient reason for dismissal. This was the ground that the Commission invoked in the case at hands.

2. There are essentially two ways of terminating a contract of an indefinite period:

(a) under Art. 47 (c) (i) CEOS: dismissal with period of notice (notice period depending on length of service) and

(b) under Art. 49 (1) CEOS: dismissal without notice. In the first case (dismissal with notice), no prior disciplinary proceedings are required. In the second case (dismissal without notice), disciplinary proceedings have to be carried out first, while the staff member may be suspended before his/her employment is terminated.

*N.B.: this does not apply to Officials, because their status is not determined by the CEOS (temporary staff), but by the Staff Regulations.*

3. For members of temporary staff, the AECCE is free in its discretion to either terminate an unlimited contract while observing the notice periods stipulated (Art. 47 (c) CEOS), without having to initiate disciplinary proceedings, or to initiate disciplinary proceedings. The difference is in the resulting option to terminate a contract without having to give a notice period (Art. 49 CEOS).

4. The control by the judge of the AECCE's decision to terminate a contract under Art. 47 (c) CEOS is limited to the verification of the absence of a manifest error of assessment and abuse of powers. Where the administration refers to specific facts, the judge must verify that these reasons are materially correct. In the case at hands, the Court applies a three steps test, examining whether:

- the absence or loss of a relationship of trust has indeed been invoked,
- the facts have been accurately stated,
- the request for termination is not vitiated by a breach of fundamental rights or by an abuse of powers.

5. Finally, the General Court adds that the AECCE may consider that the "special circumstances" justify taking measures other than dismissal, such as the assignment of the person concerned to another post in the Commission. This was also the line of the Court in the earlier Case T-160/17, RY / Commission, and could be interpreted as a fourth criterion, namely similar to a "test of proportionality" even when terminating Art. 2 (c) CEOS contracts. The future case-law will have to confirm if such a test to consider other alternatives than dismissal is indeed a duty of the AECCE. This duty would introduce an element of balance vis-à-vis the broad discretion to either dismiss right away or to initiate disciplinary proceedings: in that case, the discretion to dismiss a member of contract staff – even for reasons of loss of trust – would be guided by an obligation to consider first his/her assignment to another post within the institution.

6. An institution cannot spare to clearly establish the facts when resorting to a dismissal instead of choosing to initiate disciplinary proceedings: in any case, the facts on which the decision is based have to be enquired and accurately stated. Also where the AECCE chooses to initiate disciplinary proceedings (which was not the case here), it has to clearly establish the facts of the situation, to state the reasons for a disciplinary measure and to hear the person concerned before inflicting a sanction. This has been re-confirmed by two other recently decided cases (T-49/23, Angelidis / Parliament and T-766/22, Canel Ferreiro / Council).

7. On the required establishment of facts and the hearing of witnesses: there is an interesting analogy to a logic applied by national courts in witness hearings: where a court refuses to hear a witness for confirmation of certain facts, it can never assume that these facts are **refuted**. Rather whenever refusing to hear a witness, the court can only assume that the facts to be confirmed by the witness are considered to be established. Otherwise, such a court would (incorrectly) assume that it can anyway not trust the witness. This is the logic that the General Court seems to have demanded in this present case from the AECCE when it had the duty to establish the facts underlying the dismissal decision. In order to get out of this, the AECCE would have had to hear the witness (the Vice President).