

# **Case Law of the European Civil Service Tribunal: Re-starting or Continuation?**

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### **INTRODUCTION**

The first thing coming to mind when we try to evoke the Civil Service Tribunal's (CST) case law is that this case law is a recent one related to the also contemporary creation of the jurisdiction. The second element, which is obvious, is that although the CST's case law is recent, its relation to the Civil Service is in fact older. It actually goes back to the origin of the Union, at the time of the Communities (ECSC, EURATOM, and EEC). Indeed, the Court of Justice, and then the Tribunal of First Instance (General Court since the Treaty of Lisbon), had long been known to resolving disputes between the European Administration and its officials. An extensive case law had been developed on both the general principles of law and on the Staff Regulations. The CST is therefore the heir of that case law.

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Consequently, the analysis of the Tribunal's case law should not be confused with the analysis of the case law related to disputes involving public administration. On the contrary, it shall focus on the prominent features of this recent case law.

The first characteristic which has to be emphasized is the extremely technical nature related to the specialization of the CST. The European Civil Service law is indeed quite specific. The recourse to this Court is not foreseen, like in the "classical" Community law by the Treaty, but by the Staff Regulations. That characteristic demonstrates, if proved were needed, the central importance of these Regulations, cornerstone of the Civil Service law and of the related case law.

Thus, the major amendment of the Regulations which entered into force the 1st of May 2004 constitutes the first highlight of the Tribunal's case law and coincides, more or less, with the creation of the new Tribunal so that the latter is somehow invited to explore new horizons. Moreover, it is enlightening to look at the context of the adoption of those new Regulations. It stands as a counterpoint to the spirit of excellence that accompanied the EU Administration thus far. Its adoption is more of a response of the European Commission to the European Parliament's continuing criticism against irregularities due principally to the policy makers of that time, than a proper reform. So, an administration that had managed an unprecedented achievement, as giving substance to the community integration, was punished by the obligation to adopt an internal, heavy and discouraging management.

Instead of a competent technocracy, a centralized bureaucracy was set up in which the Directors General lost their independence in order to counterbalance a hypothetical « democracy deficit » and the said "collegiality garden" was replaced by the opacity of a core management at the highest level. Aside from the fact that this reform has not reached that goal since the "democracy deficit" is still felt - and will be as long as the Member States do not keep acting as a relay to the public by presenting the EU administration as an exogenous element out of control rather than as an instrument of integration desired by them - the main result of that reform will be the emergence of an unease among the staff of that administration. It is obvious that the new Tribunal felt that and tried, through its case law, to remedy it and thereby preserve the spirit of public service within the EU administration.

This is exactly that evolution of the case law which [rightly] allows Me. Lhoëst to qualify the previous « outdated » one and to distinguish between the judicial review, on one hand and on the other, the human dimension contained in most of the cases. It seems, however, that those changes in case law which have certainly benefitted from the interests of the officials and the EU agents, are rather a re-balancing of the legal review of an institution which has evolved namely with the adoption of new Regulations. The Tribunal had therefore the charge to proceed to this rebalancing by interpreting the new Regulations but also through a rationalization of the civil service law.

This rationalization also stems from the specialization. Indeed, the benefit of the specialization of the jurisdiction, apart from encouraging from a structural point of view

the creation of such a Tribunal - namely the decongestion of the general jurisdiction - is to allow the excellence in that specific field, without challenging the competences of both the Court and the Tribunal. The case law of the Civil Service Tribunal seems therefore to lead to a rationalization of that field, clearly objectifying the obligations, but also the rights of the administration. Those two aspects will be dealt with successively below.

## I. CASE-LAW RELATED TO THE AMENDMENT OF THE STAFF REGULATIONS

With Regulation (EC, Euratom) 723/2004 of the Council of the 22nd of March 2004 amending the Staff Regulations of the European Communities as well as the rules of employment of the other agents of the Communities, Staff Regulations have been deeply modified, namely by the implementation of a new career structure for the officials. Such a major change could lead to litigation. The first type of these legal proceedings concerns the chronological issues related to the entry into force of the new Regulations; the second relates to its interpretation; and finally, the third correlates to the legality of some of its provisions.

### A. Litigation related to the entry into force of the Staff Regulations

The Tribunal considered that the Regulation, as amended, was applied immediately after its entry into force, unless a transitional provision affected the applicability of a provision. It was namely the situation in the *Dethomas/Commission* case,<sup>2</sup> where the Tribunal found that Article 32 (3) of the Staff Regulations, foreseeing that «*the temporary agent whose classification was determined according to the classification criteria adopted by the institution shall retain the seniority he has acquired as a temporary agent when appointed officer in the same grade immediately following*» applied immediately and has therefore logically cancelled the decision of M. Dethomas classification at a level below that at which he was entitled under that provision.

This case law was later confirmed in four cases<sup>3</sup> treating the same issue - the promotion of the Legal Service members in 2004. In those cases, the Commission, in order to establish their total points, used the old version of Article 45 of the Staff Regulations,<sup>4</sup>

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<sup>2</sup> CST, Judgment of the 5th of July 2007, *Dethomas/Commission*, F-93/06, the official version is in French

<sup>3</sup> CST, Judgments of the 31st of January 2008, *Buendía Sierra/Commission*, F-97/05; *Di Bucci/Commission*, F-98/05; *Wilms/Commission*, F-99/05; *Valero Jordana/Commission*, F-104/05, the official version is in French

<sup>4</sup> « 1. *Promotion shall be by decision of the Appointing Authority. It shall be effected by appointment of the official to the next higher grade in the function group to which he belong . Promotion shall be exclusively by selection from among officials who have a minimum of a seniority in their grade after consideration of the comparative merits of the officials eligible for promotion as well as of their reports.*

*This minimum seniority period for the officials appointed to the basic grade of their category or of their class, is six months from their appointment, and two years for other officials.*

*2. The transition of an official from a category or a class to another frame or to a higher category is possible only after a competition.*

although the new article<sup>5</sup> had already entered into force. The issue arose because the Commission considered that the implementation of the new Article 45 was not possible for the promotion of 2004, since although it entered into force only the 30<sup>th</sup> of April 2004, it was completed by promotions taking effect on the 1<sup>st</sup> of January 2004, i. e. before the entry into force of the new Staff Regulations.

The Tribunal observed that « according to a generally accepted principle, a new rule applies immediately, unless derogation, to situations that may arise as well as future situations which arose under the old law. Thus, Article 45 of the Staff Regulations took immediate effect, as from the 1st of May 2004, unless the Regulation of the 22<sup>nd</sup> of March 2004 has provided differently». The Tribunal rejected then the Commission's argument, noting that even though the old Article 45 could apply to some promotions taking effect at dates prior to the 1st of May 2004 – for what it doubts- this does not have any impact on the calculation of the points to be credited according to the new Article 45.

## **B. Litigation related to the interpretation of the Staff Regulations**

An amendment of the Staff Regulations usually requires an interpretation of the new provisions. The Tribunal had, therefore, to deal with cases characterized by difficulties in the interpretation of the new provisions. One technical yet interesting case was the *Deffa/Commission* case.<sup>6</sup> In this case, the question arose whether, as the Commission

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3 However, depending on the effective needs specific to an institution, there may be a derogation to paragraph 2, allowing the passage of officials from LA category to category A and vice versa, by transfer in accordance with paragraph 4.

4 In case that the Appointing Authority decides to use the derogation, it shall determine, taking in account the views of the Joint commission, the number of positions likely to be subject to this measure. The Appointing Authority shall determine through the same procedure the criteria and the conditions for the transfers envisaged, taking especially in account the merits, the training and the professional experience of the official concerned.

For the official who benefits from the derogation authorized by paragraph 3, the ancient - referred to in paragraph 1-in the grade of transfer is calculated from the date of effect of the transfer.,  
s In any case, the official receives in his new grade a basic salary lower than that he would have received in his former grade.

To the extent necessary, each institution shall adopt implementing provisions of paragraph 3 and 4, in accordance with Article 110 »

<sup>5</sup> « 1. Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be affected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them.

2. Officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language among those referred to in Article 314 of the EC Treaty. The institutions shall adopt common rules by agreement between them for implementing this paragraph. These rules shall require access to training for officials in a third language and lay down the detailed arrangements for the assessment of officials' ability to work in a third language, in accordance with Article 7(2)(d) of Annex III.

<sup>6</sup>CST, Judgment of the 8th of November 2007, *Deffaa/Commission*, F-125/06, the official version is in French

argued, Article 44, paragraph 2 of the Staff Regulations – foreseeing that « *an official appointed as Head of unit, Director or Director general within the same level, benefits under the condition he performed his new duties satisfactorily during the first nine months, of a progress within this level taking effect at the date of his appointment* »- could not be applied to officials who on the 30<sup>th</sup> of April 2004 already exercised supervisory functions and were, due to the constraints inherent to their functions, entitled to benefit, according to Article 7, paragraph 4 of Annex XIII of the Staff Regulations of « *an increase of their basic monthly salary* » of which the amount corresponded precisely to the financial benefit provided in Article 44, paragraph 2.

The Tribunal observed that « *even if the advantages considered are different because of the different grant procedure, they are quite similar as regards their object and their purpose, namely to compensate the constraints inherent to the supervision functions of middle or high management* ». Accept then that both provisions apply to officials recruited before the entry into force of the amendments of the Staff Regulations « would have the effect to create, *without any objective justification an unequal treatment between officials in the implementation of the new provisions introduced at the time of the administrative reform, according to that they were recruited before or after its entry into force* ». The Tribunal can therefore conclude that the simultaneous application of both provisions is not possible and that the Commission was right to refuse the application of Article 44 to the concerned official.

In the *Borbély/Commission* case,<sup>7</sup> the Tribunal had to rule on the effects of the amendment of Article 5, paragraph 1 of Annex VII of the Staff Regulations, in order to know if the installation allowance had to be allocated according to the effective place of residence or, as stated in the previous case law, according to the center of interests of the person concerned. The Tribunal stated that although this provision has been amended, it does not appear that the aim of it was to reverse that case law and therefore confirmed the concept of residence as the center of interest of the appointed officer.

Finally, *Andreasen/Commission* case,<sup>8</sup> is the epitome of the complication to which the Tribunal was faced with the entry into force of the new Staff Regulations. In this specific case - a dismissal following a disciplinary procedure - an official contested the implementation of the former Staff Regulations for the composition of the disciplinary Board, as well as the non-respect of some provisions of the new Regulations. The Tribunal, having found that the composition of the disciplinary Board had definitively been established before the entry into force of the new Staff Regulations, considered that the rules governing the composition of the Disciplinary Board were those of the former Staff Regulations. As regards the disciplinary procedure itself, having occurred after the entry into force of the new Staff Regulations, it is the latter which was applied. The Tribunal therefore applied the new Article 10 of Annex IX of the Staff Regulations related to the proportionality of the sanction under the fault imputed to an official and

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<sup>7</sup> CST, Judgment of the 16th of January 2007, *Borbély/Commission*, F-126/05, the official version is in French

<sup>8</sup> CST, Judgment of the 8th of November 2007, *Andreasen/Commission*, F-40/05, the official version is in French

which is drafted as follows: « *the disciplinary sanction imposed is proportionate to the seriousness of the misconduct. To determine the seriousness of the misconduct/fault and decide the disciplinary sanction to be imposed, the following elements should namely be taken into account:*

- a) *the nature of the fault and the circumstances in which it was committed;*
- b) *the extent of damage to the integrity, reputation or interests of the institutions because of the misconduct;*
- c) *the degree of intent or negligence in the misconduct;*
- d) *the motives for the official's misconduct;;*
- e) *the grade and seniority of the official ;*
- f) *the level of personal responsibility of the official;*
- g) *the level of duties and responsibilities of the official;*
- h) *the repetition of the action or misconduct ;*
- i) *the conduct of the employee throughout his career».*

The Tribunal first noted that « *in the contested decision, the Appointing Authority invoked several aggravating circumstances listed among the criteria set out in Article 10 of Annex IX of the new Staff Regulations. First of all, the Appointing Authority notes that the applicant was an officer whose function included significant responsibilities. Then, the Appointing Authority highlighted that the applicant repeatedly violated the instructions of her superiors as well as the internal procedures of the Commission. Moreover, according to the Appointing Authority the public statements of the applicant damaged the reputation of the Commission and of several of its members, including some senior officials. In addition, the Appointing Authority considered that, as regards the grade-level of the applicant and the repeated action of her actions, they must be considered as intentional ».* From what preceded, the Tribunal rightly stated, «*It follows from the foregoing that, firstly, the actions of the applicant constitute a breach of the statutory obligations to which she was held. Secondly, given the seriousness of the allegations against the applicant, without being established that the Commission failed to take into consideration the criteria listed in article 10 of the Annex IX of the new Staff Regulation, the sanction could not be considered as disproportionate. In this regard, it should be noted that the sanction was not accompanied by a reduction of pension rights »*, and that therefore the sanction is proportional to the committed fault.

Although these cases are different both in content and in the solutions offered by the Tribunal, the approach of the Tribunal may nevertheless be qualified as teleological, oriented to each respective target, even if that analysis may either be distanced from a literal interpretation of the Staff Regulations (*Borbely* and *Deffa* cases), or stick to it (*Andreasen* case), but always respecting the spirit of the text.

### **C. Litigation related to the legality of the Staff Regulations**

The third point that is necessary to review is the litigation related to the legality of the Staff Regulations. The previous cases only challenged the applicability *ratione temporis* of the new Staff Regulations or pointed out its misinterpretation by the Commission.

However, its own legality has at many occasions been challenged through the plea of illegality raised against some of its provisions.

In that sense, two cases should be mentioned: *Chassagne/Commission*<sup>9</sup> and *Davis e.a./Council*.<sup>10</sup> In the *Chassagne* case, the Tribunal had to examine the application of an official against Article 8, Annex VII of the new Staff Regulations, foreseeing a package reimbursement of his expenses instead of the reimbursement of his actual expenses incurred during the travel between the place of service/work to the place of origin (in the specific case the island of Reunion).

At the occasion of the review for the legality of the reimbursement system, the Tribunal reminded, firstly, that this reimbursement right « *is an expression of the exercise of discretion power of the community legislator, given that [...], no higher rule of community law or of the international order forced to recognize such a right to the officials and to the members of their family* ». The Tribunal may therefore refer to the established case law which states, « *It is settled that in the areas where the community legislator has a wide discretion power, the legality review of the community judge shall be limited in verifying whether the measure is not vitiated by a manifest error or an abuse of power or whether the authority concerned has manifestly exceed the limits of its discretion power* ». The Tribunal circumstantiated the case law by different grounds raised by the applicant, such as the principles of non-discrimination and of proportionality. In that framework, « *the judge is limited to verifying, as regards the principle of legality, as well as that of non-discrimination, that the concerned institution did not make any arbitrary or manifestly inadequate distinction and, as regard the principle of proportionality, whether the adopted measure is not manifestly inappropriate in comparison with the scope of the regulation* ». The Tribunal had to determine the scope of the said rule and stated that « *the scope of Article 8 of the Annex VII of the Staff Regulations is to enable the officials and the members of his family to return, at least once per year to his place of origin, in order to keep there family, social and cultural ties* ». The Tribunal may therefore conclude that the fixed nature of the package reimbursement does not ignore that scope and reject the plea of illegality against Article 8 of Annex VII.

In the *Davis e.a.* case, the Tribunal had to consider the delicate problem related to the pension of the officials concerned. The reform of 2004 has indeed suppressed – for the pension rights acquired after its entry into force, the correction coefficients (CC), the scope of it being to adapt the pension amounts according to the place of residence of the pensioners. Then the Tribunal observed again that the legislator has in the matter a wide discretionary power and that if there was a difference of treatment between the civil servants pensioned before or after the entry into force of the new Staff Regulations, «*This difference is justified on the basis of objective and reasonable criteria, i.e. the retirement of the civil servants before or after the reform. In addition, as regards the scope of the said reform, this difference of treatment complies with the requirement of proportionality,*

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<sup>9</sup> CST, Judgment of the 23rd of January 2007, *Chassagne/Commission*, F-43/05, the official version is in French

<sup>10</sup> CST, Judgment of the 19<sup>th</sup> of June 2007, *Davis e.a./Council*, F-54/06, the official version is in French

*since - notwithstanding the fact that the applicants retired after the entry into force of the Staff Regulation reform, the entirety of their rights acquired before that date continues to be affected by the CC, moreover by the same CC of those applicable to the civil servants who retired before that date- their loss because of the non-application of the CC to the pension rights they have acquired since the 1<sup>st</sup> of May 2004 is minimal ».*

It can clearly be deduced from what preceded that the Tribunal recognizes, as regards the amendments of the Staff Regulations, a wide discretionary power to the community legislator. However, although the Tribunal rejects the vast majority of the requests concerning the plea of illegality for a provision of the Regulations, it does not preclude the possibility of the legality review, the control of manifest error of assessment, of misuse or excess of power, control well known in the French administrative law as the minimum control.

## **II. CASE LAW REGARDING THE RATIONALIZATION OF THE LITIGATION**

This rationalization of litigation is reflected in the case law of the Tribunal in three main ways. The first of these developments in case law takes an important step in defining the legal concepts of the civil service European public administration. The second corresponds to a more formal framework of the discretionary power allowed to the administration in order to guarantee a better protection of the rights of the civil servants and finally, the third element which seems important in the Tribunal case law is that relating to the establishment of a greater transparency within the procedures applied by the administration. Finally, a mention should be done of the *Mandt* case, which highlights the inefficiency of the system of prior complaint, and drawing the necessary conclusions, relieves the civil servants of an important responsibility, enabling a real professional of law, his Council, to better defend his interests. This is another element of rationalization which relies on the lawyer, the auxiliary of justice, to support the judge in the establishment of legality.

### **A. A defining work**

The most striking example of that defining work made by the Tribunal is undoubtedly that developed by Me Lhoëst on the moral harassment. The *Q/Commission*<sup>11</sup> case is indeed a model in that field. First, the intentional element of the author of the harassment is not taken into consideration anymore: we have therefore moved from a subjective concept to an objective one, which supposes the union of two distinct conditions: the existence of a behaviour which might be considered as harassment and the fact that this behaviour undermines the victim's personality. We can only welcome such an objectification of this litigation, since the intentional character is difficult to prove or may sometimes be simply inexistent, but nevertheless generates an important emotional distress to the victim.

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<sup>11</sup> CST, Judgment of the 9th of December 2008, *Q/Commission*, (F-52/05), the official version is in French

## B. A strict framework for the discretionary power

In that case again, we can only agree with the analysis of Me Lhoëst, who recognizes in the *Langdren*<sup>12</sup> judgment an important element of the Tribunal case law. Regardless of the question on a eventual change in jurisprudence rather an evolution<sup>13</sup> after the judgments *Mangold*<sup>14</sup> and *Adeneler*<sup>15</sup> of the Court of Justice, through the recognition of the obligation of motivation for the dismissal of contract agents engaged for an undetermined period even at the stage of the complaint, the Tribunal without ignoring the discretionary power of the appointing authority, it frameworks the latter (except in the case that the Tribunal unfortunately agrees that the reasons of the dismissal might be announced at the individual during the meeting with his hierarchy), which is exactly the basis of the obligation of motivation: note that the administrative authority has not done a manifest error of assessment, an abuse of authority or an abuse of power, which was the case here, since the decision of dismissal was vitiated by a manifest error of assessment.

In that context of minimum control, the Tribunal also had the opportunity to censor at many occasions, decisions vitiated by a manifest error of assessment, *inter alia*, in the judgment *Bernard/Europol*,<sup>16</sup> refusing to the applicant a renewal of her fixed-term contract although the institution had established an internal directive relating to the renewal of this kind of contracts, and that the applicant met all the criteria for such a renewal unlike what claimed the appointing authority. A reference can also be made to the judgment *Stols/Conseil*<sup>17</sup> on the comparative assessment of the merits of a candidate to be promoted, also vitiated by such an error.

To conclude, the decision power of the administration is in any case limited by the respect of the general principles of law. As an example, the breach of the principle of equal treatment established by the Tribunal in the judgment *Schönberger/Parlement*,<sup>18</sup> where the general secretary refused to award merit points to the applicant because « the applicant merits are not superior to those of his awarded colleagues », without considering that « the merits of the applicant and of the other awarded civil servants were at a comparable level ». The Tribunal may thus state that there is an infringement of the principle of equal treatment since « according to a constant case-law, there is an

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<sup>12</sup> CST, Judgment of the 26th of October 2006, *Langdren / ETF*, (F-1/05), the official version is in French

<sup>13</sup> Spyros PAPPAS, The status and future of indefinite contracts within the EU, in [www.pappaslaw.eu](http://www.pappaslaw.eu), 2007

<sup>14</sup> ECJC,, judgment of the 22nd November 2005, *Mangold*, C-144/04, rec. p. I-9981, point 64, the official version is in French

<sup>15</sup> ECJC, Judgment of the 4th of July 2006, *Adeneler*, C-212/04, points 61-64, the official version is in French

<sup>16</sup> CST, Judgment of the 7th of July 2009, *Bernard/Europol*, (F-54/08), the official version is in French

<sup>17</sup> CST, Judgment of the 17<sup>th</sup> of February 2009, *Stols/Council*, (F-51/08), the official version is in French

<sup>18</sup> CST, Judgment of the 11th of February 2009, *Schönberger/Parliament*, (F-7/08), the official version is in French

infringement of the principle of equal treatment when two categories of persons *whose factual and legal situation is similar are treated differently* ».

### C. A greater procedural transparency

Another important point regarding the rationalization of the litigation of the civil servant administration, the promotion by the Tribunal for a greater transparency in the procedures established by the administration is a constant which can only be welcomed.

The first judgment which seems important to be mentioned here is the judgment *Economidis/Commission*.<sup>19</sup> In that case, the Tribunal was aware of the existence of an application against the decision rejecting the applicant's candidature for the position of head of unit. According to the decision relating to the middle management staff (MMS) in effect at that time, « *The selected candidate is appointed to the rank that was his at that day* ». However, the published vacancy note relating to the position of head of unit foresaw « *that the level of that job has been fixed at grades A\*9 to A\*12* ». The consequence was that the level was only fixed after the selection of the civil servant. The Tribunal considered that such proceedings did not respect the community legality. According to it, « *the interest of the service, within the meaning of art.7, par.1 of the Staff Regulations requires that the decision concerning the level of the offered position is taken prior to the examination of the candidatures since the appointing authority has to fix the level of the position according to its importance, regardless of the qualifications of the candidates. By allowing the level of the offered position being fixed after the selection committee and the appointing Authority learned the identity and the personal file of the candidate, the administration may lack the necessary objectivity to take, under the sole interest of the service, a decision on that and to use its discretionary power manifestly erroneously* ».

The Tribunal can therefore only conclude that « *the decision MMS, by allowing the level of the offered position being fixed after the comparative examination of the candidatures and thus affecting the necessarily objective character of the procedure is illegal* ».

Furthermore, in the recruitment process, three judgments<sup>20</sup> on the appointment of the head of Delegation in Athens have to be mentioned. In these cases, the applicants had presented their candidature for the position without being selected. They therefore challenged the appointment of the head of the delegation and more particularly the appointing procedure used. He had indeed been appointed by the Commissioner in charge after a secondment for the interest of the service (likewise the procedure that is followed for the appointment of the Cabinet members). The Applicants challenged this competence to proceed to such an appointment. The Commission considered that this procedure was justified by « *the very nature of the duties carried out by a head of representation, which*

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<sup>19</sup> CST, Judgment of the 14th of December 2006, *Economidis / Commission*, (F-122/05), the official version have been published in French, the official version is in French

<sup>20</sup> CST, Judgment of the 2<sup>nd</sup> of April 2009, *Menidiatis/Commission*, (F-128/07) ; *Yannoussis/Commission*, (F-143/07) and *Kremlis/Commission*, (F-129/07), the official version is in French

*provides a relay point between the Commission and the national, regional or local authorities of the host Member State». However, for the Tribunal, « That justification cannot be accepted. The ‘sensitive political nature’, as the Commission puts it, of the duties carried out by the heads of representation, however genuine it may be, is not in itself such as to justify recourse to secondment of an official...A secondment in the interests of the service ‘to assist a person holding an office provided for in the Treaties’ assumes the existence of a relationship of trust intuitu personae between the latter and the official on secondment, and that relationship implies that close direct links may be permanently forged between the persons concerned, based on the particular working methods of the Member concerned and those of the Member’s Cabinet as a whole ».*

In that case, such a link was not established and the recourse to the secondment was not justified. The appointing decision has therefore been cancelled because of the incompetence of the author of the decision.

Another interesting case relating to the greater procedures transparency requested by the Tribunal is the *Kuchta/ECB*<sup>21</sup> judgment, concerning the modification of the salary of the applicant. Normally, it is the Director of the ECB who fixes the salary increase, however he could delegate that power. The delegation of power, however, cannot be done automatically since as the Tribunal stated that « *the authority delegating, even if it has the right to delegate its powers shall take a formal decision transferring them and the delegation of powers can only concern execution powers, strictly defined* ». However, the Tribunal has stated that in the specific case, « *it is not clear from the file that the Executive Board delegated his competence to determine the individual salary increase by such a decision*». The Tribunal can therefore conclude that « *the contested decision, taken by another authority than the Executive Board of the ECB, without any delegation to that effect, shall therefore be considered as being adopted by an incompetent authority*». However the Tribunal goes one step further, observing a deficiency much more important than the « mere » absence of formal delegation since « *The Tribunal observes that it has not been possible for it to identify who was the author of the contested decision. Indeed, on one hand, although the ECB has argued during the hearing that the said decision was issued by the Director General of Human Resources, Budget and Organization, this document contains neither the name nor the signature of its author, but the only mention of the General Direction of Human Resources, Budget and Organization*». Therefore the Tribunal « *is not able to determine neither the author of the contested decision nor the supposed authority empowered by delegation of the Executive Board to make this decision. However, such a situation breaches the rules of good administration in staff management, which implies in particular that the distribution of powers within the institution is clearly defined and duly published* ».

#### **D. An implicit recognition of the inefficiency of the pre-litigation procedure**

As rightly noted by Ms. Seyr, the Tribunal has made, if not a turnaround of jurisprudence, at least a significant inflection of it on the issue of the concordance rule between the object and the cause of the original application and those of the

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<sup>21</sup> CST, Judgment of the 11<sup>th</sup> of July 2008, *Kuchta/BCE*, (F-89/07), the official version is in French

administrative complaint. In the *Mandt*<sup>22</sup> case indeed, the Parliament pleaded the inadmissibility of an applicant's plea for violating the rule of concordance between the complaint and the application.

In this regard, the case law has been developed on the consideration that the compliance with this rule involved a correlation between the object and the cause of the application and those of the complaint; the notion of cause referring to the “heads of challenges”. This rule is based on the very purpose of the pre-litigation procedure, namely to allow the administration to reconsider its decision and thus to obtain an extra-judiciary settlement.

At this point raises the first question: does this system really fill that role? From the perspective of the attorney – necessarily biased, the fact that the attorney often intervenes only after the rejection of the complaint- that pre-litigation procedure is only that a pre-litigation and leads too rarely (or never?) to an extra-judiciary. The Tribunal raises the same question at point 118 of its judgment since it questions about « *whether the pre-litigation procedure is still the opportunity to actively and concretely seek a settlement* ».

Moreover, as rightly pointed by the Tribunal, the pre-litigation procedure is informal, i.e. it is often conducted without the assistance of an attorney and without demanding from the complainant to formulate his complaint in legal terms. Therefore, even if in the previous case law it was stated that « *if the conclusions presented to the judge of the Union may have only the same purpose of those presented in the complaint and may contain only the claims based on the same cause that the claims invoked in the complaint, these claims may however be developed, before the judge of the Union, by the submission of pleas and arguments which do not necessarily in the complaint but closely connected therewith*», the attorney representing the applicant founded himself often limited in the application to the Tribunal. This constitutes a problem in terms of effective judicial protection as considered by the Tribunal.

However, it most certainly poses the issue of the equality of arms. As observed by the Tribunal, at point 114, « *the costs faced by the applicant before the introduction of the application are not recoverable, contrary to the costs which occur in the litigation itself, i.e. the procedure triggered by the introduction of an application. The purpose of this distinction lies namely in the will of the legislator to rightly discourage the civil servant to use an attorney during the pre-litigation procedure* ». That leads to a situation where a civil servant alone, and not necessarily familiar with the fine art of law, is facing an administration having lawyers specialized in that field, which moreover does not really seek a settlement, but which only has as an objective to « *correct any irregularity or to defend the legality of [...] decision(s)* » of the institution, namely by motivating a *posteriori* a non-reasoned decision.<sup>23</sup>

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<sup>22</sup> CST, Judgment of the 1st of July 2010, *Mandt* / Parliament (F-45/07), the official version is in French

<sup>23</sup> TUE, Judgment of the 12th of February 1992, *Volger* / Parliament, T-52/90, Rec. p. II-121 (cf. al. 36, 40), the official version is in French

The Tribunal considers therefore that an inflexion in case-law, by a « *flexible interpretation of the exigency related to the correlation between the complaint and the application* », is needed.

The Tribunal relies first on the principle of the right of an effective judicial protection, principle of which the « *the importance is becoming more and more assertive* ». It rightly considers that « *this principle could lose much of its consistence if the attorney representing the applicant would be precluded from presenting pleas that may be decisive for the outcome of litigation, because the applicant himself had not thought to report the said means at the pre-litigation procedure*».

The second argument used by the Tribunal is the monetary risk taken by an official by introducing a dispute. Indeed, before the entry into force of the decision establishing the European Civil Servant Tribunal,<sup>24</sup> an official could not be ordered to pay the costs incurred by the institution. However, such an alignment to the common law procedure, while keeping a binding rule limiting the remedies, except/outside the common law, seems quite unfair. The Tribunal considers therefore that « *in order to compensate the new financial risk that the decision establishing the Tribunal put to officials wishing to address to the Tribunal, it is reasonable and proper to an administration of justice to ease the constraints on them, allowing namely their counsel not to be limited to the criticisms expressed by the civil servant, who usually is not a lawyer and in any event does not act as a lawyer and even less as an attorney* ».

The Tribunal used also the already mentioned argument of the insufficiencies of the pre-litigation procedure for the settlement of disputes. The Tribunal noted those insufficiencies since they « *have confirmed, in the decision establishing the Tribunal, special emphasis was put on exploring the possibilities for settlement of the disputes- at any stage of the proceedings before the judge of the public administration of the Union* ». The Tribunal finally nuanced the scope of this procedure, which unlike the right to an effective judicial protection, is not a fundamental right and therefore may not be « *too closely subordinated to the purposes of the procedure prior to referral to the judge without an excessive interference being brought to it* ».

The Tribunal stated therefore that the concept of cause of dispute needs to be widely interpreted and « *according to such an interpretation, and as regards the conclusion taken in the decision of the Appointing Authority of the 8th of December 2006, by “cause of dispute” it should be meant the challenge by the applicant of the internal legality of the challenged act or alternatively, the challenge of its external legality- distinction repeatedly recognized in case-law* ». Consequently, it seems that the Tribunal considers that there is no correlation between the complaint and the application only in the case where « *the applicant who criticises in its complaint only the formal validity of the adversely affecting act, including its procedural aspects, raised in the application substantive grounds or in the opposite case where the applicant, after having only challenged in his complaint the substantive legality of the adversely affecting act,*

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<sup>24</sup> Decision 2004/752/EC, Euratom of the Council, of the 2<sup>nd</sup> of November 2004, establishing the Civil Servant Tribunal of the European Union (OJ L 333, p. 7)

*introduce an application containing pleas related to the formal validity of it, including its procedural aspects ».*

The Tribunal goes even one step further by establishing the possibility to invoke the plea of inadmissibility without having invoked it in the complaint and even if it refers to another legal ground of that appearing in the complaint. The Tribunal bases that possibility on the fact that it cannot be expected from a non-lawyer to be able to identify such an exception. Moreover, the Court clearly demonstrates that such an exception could not be useful at the stage of the complaint since « *it is unlikely that the administration chooses not to apply a provision in force which could hypothetically disregard a superior rule in the sole purpose of allowing the extrajudicial settlement of the dispute* ».

The Tribunal, thus, recognizes that the prior complaint is a mechanism that does not easily reach its goal – the extrajudicial settlement of a dispute – and which limits the right of effective judicial protection of the civil servants - limitation wished by the legislator who wishes to discourage the civil servant to use an attorney at the pre-litigation stage. It is fortunate that the Tribunal decided to relax the concept of cause by reducing it to two types of illegality, internal and external. The attorneys will, therefore, be able to do their job, the administration will reply with substance rather than by pleas of inadmissibility, and the judge will decide. It seems like a proper administration of justice. However, while warmly welcoming this significant inflection compared with the established, until now, case law, and without diminishing its priceless importance, I consider it as the first step toward a decisive turnaround of case law: in fact the same arguments as those raised by the Tribunal are in favor of a complete dissociation between the complaint and the application.

## CONCLUSION

It appears that the CST has overcome its first aim resulting from the almost simultaneous with the time of its creation adoption of a major modification of the Staff Regulations - aim based both on the previous case law of the Court of Justice and the General Court related to that matter, but also through innovations based on a sharp, from a legal point of view, teleological analysis. However, the Tribunal did not only react to the reform, but also acted through cases taking sometimes clear turns compared with the previous case law, but always with the view of rationalization and of clarification of the issues related to the public civil servant law.

With this in mind, opposing a fresh start and a simple development of the previous case law does not make sense. This is not the one or the other, but both at the same time. The Tribunal's case law is mainly the adaptation of the previous case law to the important evolution of the Civil Service law in recent years, with the ambition to make the principle of good administration more than a vague principle.

Given that impressive “take off”, I only can dream that in a future not so distant, the EU management gap, identified more than 20 years ago, will be filled by an integrated

European Administration so that the Tribunal becomes the High Court of the European Civil Service as a whole.