Case-Law of the European Civil Service Tribunal: Re-Starting or Continuation?

by **Spyros A. Pappas,** Brussels

I. Case-law related to the amendment of the Staff Regulations . . . 47
A. Litigation related to the entry into force of the Staff Regulations . . . 48
B. Litigation related to the interpretation of the Staff Regulations . . . 48
C. Litigation related to the legality of the Staff Regulations . . . 49
II. Case-law regarding the rationalization of the law . . . 50
A. Defining legal concepts . . . 50
B. A strict framework for the exercise of discretionary power . . . 50
C. Greater procedural transparency . . . 50
D. Implicit recognition of the ineffectiveness of the precontentious administrative complaint procedure . . . 51
III. Conclusion . . . 52

The first thing that comes to mind when evoking the Civil Service Tribunal's (CST) case-law is that this case-law is a recent one, inseparable from the recent establishment of the Tribunal itself. The second element, which is self-evident, is that although the CST's case-law is recent, civil-service case-law as such is in fact older. It actually goes back to the origins 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 for long been responsible for adjudicating on the disputes between the European administration and its officials. An extensive case-law had been built up based on both the applicable general principles of law and the Staff Regulations. The CST is therefore the heir of that case-law.

Consequently, the analysis of the Tribunal's case-law should not be confused with analysis of the case-law on European civil service law in general, but should rather seek to identify the prominent features of recent jurisprudential developments.

The first characteristic which has to be emphasized is the extremely technical nature of the rulings, evidently linked to the nature of the CST as a specialized court. European civil service law is indeed quite specific. Access to the CST is not foreseen, as in "classical" community law by the Treaty, but by the Staff Regulations. That characteristic demonstrates, if proof were needed, the central importance of the Staff Regulations, cornerstone of civil service law and of the related case-law.

Thus, the major reform of the Staff Regulations, which entered into force 1 May 2004, constitutes the first factor influencing the Tribunal's case-law and coincides, more or less, with the creation of the Tribunal, which was thereby invited to explore new horizons. Moreover, it is enlightening to look at the context in which the amended Staff Regulations were adopted. The background stands as a counterpoint to the spirit of excellence that had accompanied the EU administration thus far. The amended Staff Regulations represent more of a response by the European Commission to the European Parliament's continuing criticism of irregularities attributable principally to the political decision-makers in power at that time, than a proper reform. As a result, an administration that had managed an unprecedented achievement, giving substance to European integration, was sanctioned by the obligation to adopt a cumbersome and demotivating system of internal 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 so-called "collegiality garden" was replaced by the opacity of a core management at the highest level. Aside from the fact that the reform undertaken has not achieved its stated goal since the "democracy deficit" is still felt – and will be as long as the Member States do not keep acting as a simple relay to the public opinion 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 a malaise among the staff. It is obvious that the new Tribunal has sensed this and tried, through its case-law, to remedy it and thereby preserve the spirit of public service within the EU administration.

Obviously, this is exactly the evolution of the case-law which, rightly, allows Nicolas Lhoëst to describe much of the previous case-law as "outdated" and to distinguish between judicial review of legality, on one hand, and the human dimension present in most of the cases, on the other. It seems, however, that those changes in case-law, which have certainly benefited the interests of EU staff members, rather represent a re-setting of the fair balance to be struck when judicially controlling the legality of the administrative action of the EU institutions, which have themselves had to evolve following the adoption of new Staff Regulations. The Tribunal was therefore called on to carry out this re-setting of the fair balance not only by means of interpreting the new Staff Regulations but also through a rationalization of civil service law.

The second characteristic also stems from specialization. The benefit accruing from the specialization of the Tribunal, apart from the benefit which was the organizational motive prompting the establishment of the Tribunal, namely in order to relieve the General Court of part of its case overload, is to promote excellence in that specific field – without, of course, that being taken as putting in question the competence of either the Court of Justice or the General Court. The case-law of the Civil Service Tribunal seems therefore to tend towards a rationalization of the subject-matter, clearly objectifying the obligations, as well as 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 22 March 2004 amending the Staff Regulations of the European Communities as well as the Conditions of Employment of the Other Servants of the Communities, the Staff Regulations were deeply modified, primarily by

* Spyros A. Pappas, Lawyer. With the invaluable support of Damien Thavard, legal assistant with Pappas & Associates and Panayota Boussis, advocate.

the introduction of a new career structure for officials. Such a major change is evidently liable to lead to litigation. The first type of litigation relates to the chronological issues regarding the entry into force of the new Regulations; the second relates to its interpretation; and finally, the third relates 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 Staff Regulations, as amended, were to apply immediately after their entry into force, unless a transitional provision affected the applicability of a provision. This was precisely the situation in the *Dethomas v. Commission* case,[1] where the Tribunal found that Article 32 (3) of the Staff Regulations – which provides: "*Members of the temporary staff graded in accordance with the grading criteria adopted by the institution shall retain the seniority in the step acquired in that capacity if they are appointed officials in the same grade immediately following the period of temporary service.*" – applied immediately. The Tribunal therefore logically annulled the decision classifying M. Dethomas at a salary step below that to which he was entitled under that provision.

This case-law was subsequently confirmed in four cases[2] dealing with the same issue – the promotion of members of the Commission's Legal Service in 2004. In those cases, the Commission, in order to establish the applicants' total promotion points, relied on the old version of the relevant Article of the Staff Regulations (Article 45 – governing promotion of established officials), although the new version of the Article had already entered into force. The dispute arose because the Commission considered that the implementation of the new Article 45 was not possible in relation to the promotion exercise of 2004, since although that exercise was set in motion only on 30 April 2004, it was concluded by awarding promotions taking effect on 1 January 2004, that is before the entry into force of the new Staff Regulations.

The Tribunal noted that according to a generally accepted principle, a new rule applies immediately, in the absence of any derogation, not only to new situations but also to the future effects of a situation that arose under the old rule. Thus, Article 45 of the Staff Regulations took immediate effect, as from 1 May 2004, save where otherwise provided. The Tribunal therefore rejected the Commission's argument, noting that even though the former Article 45 could conceivably have been able to apply to some promotions taking effect at dates prior to 1 May 2004 – an occurrence which it doubted –, this did not have any impact on the calculation of the promotion points to be credited under the new Article 45.

B. Litigation related to the interpretation of the Staff Regulations

Any amendment to the Staff Regulations will usually entail some need for interpretation of the new provisions. The Tribunal has, therefore, had to deal with cases raising problems of interpretation of the new provisions. One technical yet interesting illustration of this was the *Deffaa v. Commission* case.[3] The issue that arose was whether, as the Commission argued, Article 44 (2) of the Staff Regulations – which provides: "*If an official is appointed head of unit, director or director-general in the same grade, and provided that he has performed his new duties satisfactorily during the first nine months, he shall retroactively benefit from advancement by one step in that grade at the time the appointment comes into effect ...*" – had no application in regard to officials who on 30 April 2004 already performed managerial duties and who were, by reason of the constraints inherent to their duties, entitled to benefit, by virtue of Article 7 (4) of Annex XIII of the Staff Regulations, from "*an increase in [their] basic monthly salary"* the amount of which corresponded precisely to the financial benefit provided in Article 44 (2).

The Tribunal observed that even if the benefits concerned differed as regards the procedures for granting them, they displayed marked similarities as regards their object and their purpose, namely to compensate the constraints inherent in the duties of middle and top management. That being so, to accept that both provisions applied to officials recruited before the entry into force of the amendment of the Staff Regulations would have the effect of creating, 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 whether they were recruited before or after its entry into force. The Tribunal therefore concluded that the simultaneous application of both provisions was not possible and that the Commission had acted correctly in refusing to apply Article 44 to the official concerned.

In the *Borbély v. Commission* case,[4] 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 determine whether 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 centre of interests of the person concerned. The Tribunal stated that although this provision has been amended, it does not appear that the aim of the amendment was to reverse that case-law. It therefore confirmed the concept of residence as the centre of interest of the appointed official.

Finally, the case of *Andreasen v. Commission*[5] is the epitome of the complications with which the Tribunal was faced with the entry into force of the new Staff Regulations. In this specific case – concerning dismissal following disciplinary proceedings – an official contested the implementation of the former Staff Regulations as regards the composition of the Disciplinary Board, as well as the non-observance of some provisions of the new Staff 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 proceedings themselves, which had taken place after the entry into force of the new Staff Regulations, it was the latter which were applicable. The Tribunal therefore applied the relevant Article of the new Staff Regulations

[1] CST, judgment of 5 July 2007, *Dethomas v. Commission*, F-93/06 – the official version is in French.

[2] CST, judgments of 31 January 2008, *Buendía Sierra v. Commission*, F-97/05; *Di Bucci v. Commission*, F-98/05; *Wilms v. Commission*, F-99/05; *Valero Jordana v. Commission*, F-104/05 – the official version is in French.

[3] CST, Judgment of 8 November 2007, *Deffaa v. Commission*, F-125/06 – the official version is in French.

[4] CST, Judgment of 16 January 2007, *Borbély v. Commission*, F-126/05 – the official version is in French.

[5] CST, Judgment of 8 November 2007, *Andreasen v. Commission*, F-40/05 – the official version is in French.

© N.P. Engel, Publisher · HRLJ 1/11 · 5. 5. 2011 · Proofs

on the severity of disciplinary penalties[6] when assessing the proportionality of the sanction in relation to the misconduct held against the applicant staff member.

The Tribunal first noted that in the contested decision the Appointing Authority had invoked several aggravating circumstances listed among the criteria set out in the relevant Article. First of all, the Appointing Authority had relied on the fact that the applicant was an official whose duties involved high-level responsibility. It had then stressed that the applicant had repeatedly contravened the instructions of her superiors as well as the internal procedures of the Commission. Moreover, her public statements had damaged the reputation of the Commission and of several of its members and senior officials. In addition, the Appointing Authority had considered that, having regard to the level of the applicant's grade and the repeated nature of her actions, her conduct had to be considered as intentional. That being so, the Tribunal found, it followed that, firstly, the actions of the applicant constituted a breach of the statutory obligations by which she was bound; and secondly, that, given the seriousness of the allegations against her, without it having been established that the Commission had failed to pay due regard to the criteria listed in the new Staff Regulations, the sanction could not be considered as disproportionate, especially since the sanction had not been accompanied by any reduction of pension rights. The Tribunal therefore found the sanction to be proportional to the misconduct committed.

Although the foregoing cases differ both in subject-matter and in the solutions conceived by the Tribunal, they all have as common denominator the teleological interpretative approach used by the Tribunal, i.e. the approach that is guided by the aim pursued, irrespective of the fact that this teleological approach may sometimes let the Tribunal take distance from a literal reading of the Staff Regulations (*Borbély* and *Deffaa* cases) or stick to such reading (*Andreasen* case), provided that the spirit of the text is respected.

C. Litigation related to the legality of the Staff Regulations

The third area calling for discussion is the litigation related to the very legality of some provisions of the Staff Regulations. What was in issue in the previous cases was only the applicability *ratione temporis* of the new Staff Regulations or an alleged misinterpretation of the text by the defendant institution. However, the very legality of the Staff Regulations has on many occasions been the subject of challenge in pleas of illegality directed against a number of its provisions.

In that connection, two cases merit mention: *Chassagne v. Commission*[7] and *Davis and Others v. Council.*[8] In the *Chassagne* case, the Tribunal had to examine the application directed against Article 8, Annex VII of the new Staff Regulations, which provided for a lump-sum reimbursement of an official's 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 Réunion).

In reviewing the legality of the new reimbursement system, the Tribunal recalled, firstly, that this entitlement to reimbursement was an expression of the exercise of discretionary power by the Union legislature, given that no higher rule of Union law or of the international order obliged it to recognize such an entitlement to the officials and the members of their family. The Tribunal referred to settled case-law holding that, in the areas where the Union legislature was vested with a wide discretionary power, the judicial review of legality carried out by the Union courts was limited to verifying whether or not the contested measure was vitiated by manifest error or an abuse of power and whether or not the authority concerned had manifestly exceeded the limits of its discretionary power. Thus, as concerns the applicant's main grounds of complaint deriving from the principles of non-discrimination and of proportionality, the Tribunal was limited to reviewing, as regards the issue of discrimination, that the institution had not made any arbitrary or manifestly inadequate distinction and, as regards the principle of proportionality, whether the adopted measure was not manifestly inappropriate in relation to the objective pursued by the applicable regulation. That objective, so the Tribunal found, was to enable officials and the members of their family to return, at least once a year, to the official's place of origin, in order to be able to maintain family, social and cultural ties there. The Tribunal therefore concluded that the lump-sum character of the reimbursement did not run counter to the legitimate objective pursued and rejected the plea of illegality directed against Article 8 of Annex VII.

In the *Davis* case, the Tribunal had to consider a difficult problem related to the applicants' pensions. The reform of 2004 had suppressed – for pension rights acquired after its entry into force – the correction coefficients (CC), the purpose of which had been to adapt the pension amounts according to the place of residence of the pensioners. The Tribunal again observed that the legislature is vested with a wide discretionary power in this regard; and that, while there had indeed been a difference of treatment between civil servants pensioned before or after the entry into force of the new Staff Regulations, this difference was justified on the basis of an objective and reasonable criterion, namely the retirement of the civil servants concerned before or after the reform. In addition, as regards the objectives pursued by the reform of the Staff Regulations, the difference of treatment complied with the requirement of proportionality, since, notwithstanding the fact that the applicants had retired after the entry into force of the reform, the entirety of their entitlements acquired before that date continued to be affected by the CC and, what is more, by the same CC

---

[6] Article 10 of Annex IX, which reads as follows:
"The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account shall be taken in particular of:
(a) the nature of the misconduct and the circumstances in which it occurred,
(b) the extent to which the misconduct adversely affects the integrity, reputation or interests of the institutions,
(c) the extent to which the misconduct involves intentional actions or negligence,
(d) the motives for the official's misconduct,
(e) the official's grade and seniority,
(f) the degree of the official's personal responsibility,
(g) the level of the official's duties and responsibilities,
(h) whether the misconduct involves repeated action or behaviour,
(i) the conduct of the official throughout the course of his career."

[7] CST, Judgment of 23 January 2007, *Chassagne v. Commission*, F-43/05 – the official version is in French.

[8] CST, Judgment of 19 June 2007, *Davis and Others v. Council*, F-54/06 – the official version is in French.

as those applicable to civil servants who retired before that date – their loss because of the non-application of the CC to the pension rights they acquired since 1 May 2004 being minimal.

It can clearly be deduced from the preceding that the Tribunal acknowledges, as regards amendment of the Staff Regulations, the existence of a wide discretionary power vested in the Union legislature. However, although the Tribunal dismisses the vast majority of actions raising plea of illegality against a provision of the Staff Regulations, it does not preclude the possibility of judicial control covering legality, manifest error of assessment and misuse or excess of power, a power of judicial review well known in French administrative law under the title of "minimum control".

II. Case-law regarding the rationalization of the law

Four main initiatives in favour of a rationalization of law can be found in the case-law so far of the Tribunal. The first of these jurisprudential developments marks an important step towards better defining the legal concepts of the European civil service. The second corresponds to imposing a more formal framework for the exercise of the discretionary power enjoyed by the administration so as to guarantee a better legal protection of the rights of staff members. The third significant element in the Tribunal case-law is that relating to the requiring of greater transparency within the procedures operated by the administration. Finally, a mention should be made of the *Mandt* case, which draws attention to the ineffectiveness of the system of prior administrative complaint and which, drawing the necessary conclusions from that ineffectiveness, relieves staff members of a hitherto significant procedural burden, so as to enable qualified legal practitioners, namely the advocates representing applicants, to better defend the latter's interests. This is a rationalization of the law which relies on the practising lawyer, as an auxiliary of the justice system, to support the judges in their role of judicial control of legality.

A. Defining legal concepts

The most striking example of the "definitional" activity of the Tribunal is undoubtly that recounted by Nicolas Lhoëst in his paper in regard to moral harassment. The *Q v. Commission*[9] case, cited by him, is indeed a model in that respect. First, the intention to harm on the part of the author of the harassment is no longer taken into consideration. We have moved from a subjective concept to an objective one, which supposes the union of two distinct conditions: the existence of deliberate conduct which can be regarded as harassment and the fact that this conduct undermines the victim's personality. We can only welcome such an objectification of legal requirements, since the intention to harm is difficult to prove or may sometimes be simply inexistent, although the intentional conduct itself nevertheless generates an important emotional distress for the victim.

B. A strict framework for the exercise of discretionary power

Once again, we can only agree with the analysis of Nicolas Lhoëst, who identifies in the *Langdren*[10] judgment an important component of the Tribunal's case-law. Though its insistence on the obligation to give reasons for the dismissal of temporary staff employed for an indeterminate period, the Tribunal, without ignoring the discretionary power of the appointing authority, sets a regulatory framework for the exercise of that power (save that the Tribunal unfortunately accepts that the reasons for the dismissal might be conveyed to the individual during a meeting with his or her hierarchy). This need for regulation is precisely the basis of the obligation to give reasons: so as to be able to verify whether the administrative authority has not committed a manifest error of assessment and has not exceeded or abused its powers – which was what occurred in the particular case, since the decision of dismissal was vitiated by a manifest error of assessment.

In this context of minimum control, the Tribunal has also had the opportunity to censure on many occasions decisions vitiated by a manifest error of assessment, for example in the judgment in the case of *Bernard v. Europol,*[11] where the applicant was refused 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 the applicant met all the criteria for such a renewal, contrary to the claims of the appointing authority. Reference can also be made to the judgment in *Stols v. Council*[12] on the comparative assessment of the merits of a candidate for promotion, likewise vitiated by such an error.

Finally, the decision-making power of the administration is always subject to respect of general principles of law. Under this head the example can be cited of the breach of the principle of equal treatment established by the Tribunal in the judgment in *Schönberger v. Parliament,*[13] where the Secretary General of the Parliament had refused to award merit points to the applicant because "the applicant's merits [were] not superior to those of his promoted colleagues", without taking into account that the merits of the applicant and of the promoted officials were of a comparable level. The Tribunal was thus able to hold that there had been an infringement of the principle of equal treatment since, according to established case-law, there is an infringement of the principle of equal treatment when two categories of persons whose factual and legal situation is similar are treated differently.

C. Greater procedural transparency

A further significant, and welcome, development in the rationalization of staff law is to be found in the promotion by the Tribunal of greater transparency in the procedures established by the administration.

Three judgments[14] concerned with the appointment of the Head of the Commission's Delegation in Athens merit mention in this connection. The applicants, who had unsuccessfully applied for the position, challenged the appointment and more particularly the appointment procedure followed. The successful candidate had been appointed by the relevant Commissioner on the basis of a procedure for secondment in the interest of the service

[9] CST, Judgment of 9 December 2008, *Q v. Commission*, F-52/05 – the official version is in French.

[10] CST, Judgment of 26 October 2006, *Landgren v. ETF*, F-1/05 – the official version is in French.

[11] CST, Judgment of 7 July 2009, *Bernard v. Europol*, F-54/08 – the official version is in French.

[12] CST, Judgment of 17 February 2009, *Stols v. Council*, F-51/08 – the official version is in French.

[13] CST, Judgment of 11 February 2009, *Schönberger v. Parliament*, F-7/08 – the official version is in French.

[14] CST, Judgments of 2 April 2009, *Menidiatis v. Commission*, F-128/07, *Yannoussis v. Commission*, F-143/07, and *Kremlis v. Commission*, F-129/07 – the official version is in French.

(the same procedure that is followed for the appointment of the private-office members). The applicants challenged the competence of the Commissioner to make an appointment in this manner. The Commission considered that the procedure was justified by the very nature of the duties carried out by a head of representation, who 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.*
>
> *... [S]econdment 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 the particular case, no such a link was established, such that the recourse to secondment was not justified. The appointment decision was therefore annulled because of the lack of competence of the author of the decision.

Another interesting case illustrating the greater procedural transparency now being required by the Tribunal is *Kuchta v. European Central Bank ("ECB")*,[15] concerning the variation of the salary paid to the applicant. Within the ECB it is in principle the Executive Board which fixes salary increases, although it may delegate that power. The delegation of power is not, however, automatic since, as the Tribunal stated, the delegating authority, even if it has the right to delegate its powers, must take a formal decision transferring them and the delegation may only concern powers of execution, strictly defined. Yet, in the specific case, it was not clear from the case-file that the Executive Board had delegated its competence to determine individual salary increases by any such a decision. The Tribunal therefore held that the contested decision, taken by another authority than the Executive Board of the ECB, without any delegation to that effect, was to be considered as being adopted by an authority lacking the proper competence. The Tribunal went one step further, finding a procedural vice more serious than the "mere" absence of formal delegation. The Tribunal observed that it had not been possible for it to identify who was the author of the contested decision. On one hand, although the ECB had argued that the decision was issued by the Director General of Human Resources, Budget and Organization, the document in question contained neither the name nor the signature of its author, but only the mention of the General Directorate of Human Resources, Budget and Organization. As a result, the Tribunal was not able to determine either the author of the contested decision or the supposed authority empowered by delegation of the Executive Board to make the decision. Such a situation, so the Tribunal held, breached the rules of good administration in staff management, which require in particular that the distribution of powers within the institution be clearly defined and duly published.

D. Implicit recognition of the ineffectiveness of the precontentious administrative complaint procedure

As rightly noted by Sybille Seyr (supra at p. 42), the Tribunal has effected, if not a reversal of precedent, at least a significant inflection of it on the issue of the "concordance" rule between the content of the originating application before the Tribunal and that of the administrative complaint. In the *Mandt*[16] case, the Parliament had pleaded the inadmissibility of one of the applicant's pleas on the ground of non-compliance with the rule of concordance between the complaint and the application.

The previous case-law had been evolved so as to embody the principle whereby compliance with the rule required a correlation between the relief sought (*l'objet* in French) and the cause of action (in other words, the basis for the claim made – *la cause* in French) of the application and those of the complaint; the notion of cause of action referring to the "heads of challenge". The rule derives its justification from the very purpose of the procedure, namely to allow the administration to reconsider its decision and thus to enable an extrajudicial settlement.

The first question that arises is: does the system really fulfil that role? From the perspective of the practising advocate – necessarily biased by the fact that the advocate often intervenes only after the rejection of the administrative complaint – the pre-contentious procedure is precisely that, namely a solely administrative procedure preceding any institution of legal proceedings and leads too rarely (or never?) to an extra-judicial solution. The Tribunal makes the same point at point 118 of its judgment where it queried whether the pre-contentious procedure still provides the opportunity for actively and concretely seeking a settlement.

Moreover, as rightly noted by the Tribunal, the pre-contentious procedure is informal, that is to say, it is often conducted without the assistance of an advocate and without requiring the complainant to formulate his or her administrative complaint in legal terms. Even though the previous case-law did not require absolute "concordance" – it was to the following effect: whilst the forms of order applied for in the legal proceedings had to seek the same relief as in the administrative complaint and might only contain heads of claim grounded on the same cause of action, that is the same legal basis, as that grounding the heads of claim in the administrative complaint, those heads of claim could nevertheless be developed before the Union court by submission of pleas and arguments which had not necessarily appeared in the administrative complaint but were closely related thereto –, the advocate representing the applicant often found himself limited in pleading the staff member's case before the Tribunal. This constituted an obstacle in terms of effective judicial protection, as pointed out by the Tribunal.

It most certainly also posed the problem of equality of arms. As observed by the Tribunal at paragraph 114 of the judgment, the costs incurred by the applicant before the institution of legal proceedings are not recoverable, unlike the costs incurred in the litigation itself, the aim of this distinction evidently deriving from the legitimate will of the legislature to discourage staff members from instructing an advocate during the pre-contentious administrative procedure. That leads to a situation where an unadvised staff member, not necessarily familiar with the intricacies of the law, is faced with an administration supported by specialist lawyers, an administration which moreover is not really minded to seek a settlement, but which is driven by the more limited objectives of

[15] CST, Judgment of 11 July 2008, *Kuchta v. ECB*, F-89/07 – the official version is in French.

[16] CST, Judgment of 1 July 2010, *Mandt v Parliament*, F-45/07 – the official version is in French.

correcting any unlawfulness and/or defending the legality of its decisions, more often than not by giving reasons, *a posteriori*, for a non-reasoned decision.[17]

The Tribunal therefore concluded that a change of direction in case-law, with a more flexible interpretation of the procedural requirement related to the correlation between the administrative complaint and the originating application, was called for.

The Tribunal relied first on the principle of effective judicial protection, a principle which is becoming more and more important in Union law reasoning. It pointed out that this principle would be deprived of much of its substance if the advocate representing an applicant were to be precluded from submitting pleas that could be decisive for the outcome of case, merely because the applicant himself/herself had not thought to argue that point during the administrative complaint procedure.

The second ground relied on by the Tribunal is the financial risk run by an official who brings legal proceedings. Before the entry into force of the Decision establishing the Tribunal,[18] a "losing" official could not be ordered to pay the costs incurred by the successful defendant institution. Although the new rule merely represents an alignment with the normal rule on costs prevailing in the Union courts, it does seem quite unfair in the specific context of staff cases. The Tribunal therefore considered that in order to alleviate the new financial risk run by officials wishing to have access to court, it was in the interests of the proper administration of justice to ease the constraints on them, by not limiting an applicant's counsel to the grievances as previously formulated by the staff member, who usually is not a lawyer.

The Tribunal referred also to the already mentioned inadequacies of the pre-contentious procedure in terms of settlement of disputes. For the Tribunal, it was doubtless precisely those inadequacies that prompted the Decision establishing the Tribunal to place special emphasis on exploring the possibilities for friendly settlement of the dispute at any stage of the legal proceedings. In the final place, the Tribunal thus nuanced the import of the objectives of the administrative complaint procedure, holding that the guarantee of effective legal protection, given its fundamental character, could not be too closely subordinated to such purposes, which, though desirable, did not embody any fundamental right.

The Tribunal therefore held that the concept of the "cause of action" of the dispute needs to be broadly interpreted as referring to the distinction, frequently made in the case-law, between procedural and substantive challenges to the legality of the contested act. Consequently, according to Tribunal, there is a lack of correlation between the administrative complaint and the originating application only where an applicant who has objected in the administrative complaint solely to the formal (procedural) validity of the act, pleads substantive grounds of illegality in the originating application, or vice versa.

The Tribunal went one step further by recognising the possibility to invoke a plea of illegality of a legislative or regulatory text without having invoked it in the administrative complaint even if it refers to another cause of action than that appearing in the complaint. The Tribunal justified this holding by the fact that it cannot be expected of a non-lawyer to be able to identify such a legal defect. Moreover, the Tribunal clearly demonstrated that such an argument would be devoid of any practical utility at the stage of the administrative complaint, since it was unlikely that the administration would choose to disapply a legal provision in force on the ground of non-compliance with a superior rule of law for the sole purpose of allowing an extrajudicial resolution of the dispute.

The Tribunal, thus, recognized that the prior administrative complaint is a mechanism which does not easily achieve its goal – the extrajudicial settlement of disputes – but which, rather, limits the right of staff members to an effective remedy before a court. It represents a progress that the Tribunal so decided to relax the concept of "cause of action" by reducing it to two types of illegality, procedural and substantive. Practising advocates will, in consequence, be able to do their job, the administration will reply on the merits, rather than by pleas of inadmissibility, and the judge will decide. This more resembles a proper administration of justice. However, while warmly welcoming this significant attenuation of the rule of concordance compared with the until now established case-law, and without diminishing its importance, I consider it as the first step toward a decisive reversal of the case-law: the same arguments as those relied on by the Tribunal militate in favour of a complete dissociation between the administrative complaint and the application originating legal proceedings.

III. Conclusion

It appears that the Civil Service Tribunal has successfully met its first challenge thrown up by a circumstance almost simultaneous with its own creation, namely the adoption of a major modification of the Staff Regulations. It has achieved this success not only by relying on the previous case-law of the Court of Justice and the General Court, but also through jurisprudential innovations based on well considered teleological interpretation. The Tribunal has not only reacted to the reform, but also adjudicated proactively, on occasions operating radical changes in direction in comparison with the previous precedents, while always retaining a vision of rationalization and clarification of the law.

With this in mind, attempting to analyse the Tribunal's debut as being either a fresh start or mere development of the previous case-law makes no sense. What we can see is neither one nor the other, but both at the same time. The Tribunal's case-law is mainly the adaptation of the previous case-law to the significant evolutions undergone by civil service law in recent years, with the ambition to make the principle of sound 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 may become the High Court of the European Civil Service as a whole.

---

[17] TUE, Judgment of 12 February 1992, *Volger v. Parliament*, T-52/90, Rec. p. II-121 (cf. al. 36, 40) – the official version is in French.

[18] Decision 2004/752/EC, Euratom of the Council, of 2 November 2004, establishing the Civil Service Tribunal of the European Union (OJ L 333, p. 7).

© N.P. Engel, Publisher · HRLJ 1/11 · 5. 5. 2011 · Proofs