A – Proceedings of the Civil Service Tribunal in 2011

By Mr Sean Van Raepenbusch, President of the Civil Service Tribunal

1. The year 2011 saw the replacement of three Members who had reached the end of their term of office. This was the first substantial change in the composition of the Civil Service Tribunal since its creation. [1]

2. The judicial statistics of the Civil Service Tribunal reveal a further substantial increase in 2011 in the number of cases brought (159) compared with the previous year (139), which had already been marked by a clear increase in applications (111 in 2008 and 113 in 2009).

The number of cases brought to a close (166) is, for its part, very much higher than that in the previous year (129) and represents the best result achieved by the Civil Service Tribunal in terms of quantity since its creation. [2]

Thus, the number of pending cases is slightly lower than the previous year (178 at 31 December 2011, compared with 185 at 31 December 2010). The average duration of proceedings has also decreased markedly (14.2 months in 2011 compared with 18.1 months in 2010) [3] because of the increase in the number of cases brought to a close, particularly by means of orders (90 in 2011 compared with 40 in 2010).

During the course of 2011, 44 appeals were brought before the General Court of the European Union against decisions of the Civil Service Tribunal. During the same period, 23 appeals against its decisions were dismissed while seven of its decisions were set aside in full or in part, four of which cases were referred back to it.

Eight cases were brought to a close by amicable settlement, which represents a fall compared with the previous year (12) and a return to the level of 2007 and 2008 (7).

3. The account given below will describe the most significant decisions of the Civil Service Tribunal. As there are no significant new developments as regards proceedings for interim relief [4] and legal aid, the sections usually devoted to those questions will not appear in the 2011 report.

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[1] One judge was replaced in 2009 following his appointment to the Court of First Instance (now the General Court).

[2] Following the judgment of 24 November 2010 in Case C-40/10 *Commission* v *Council*, the Tribunal was able to bring to a close 15 cases brought against salary statements after the adoption of Council Regulation (EU, Euratom) No 1296/2009 of 23 December 2009 adjusting with effect from 1 July 2009 the remuneration and pensions of officials and other servants of the European Union and the correction coefficients applied thereto.

[3] Not including the duration of any stay of proceedings.

[4] Seven orders for interim measures were made in 2011 by the President of the Civil Service Tribunal. Three of them took the form of orders for removal from the register or orders that there is no need to adjudicate.

I. Procedural aspects

Jurisdiction of the Civil Service Tribunal

In its judgment of 20 January 2011 in Case F-121/07 *Strack* v *Commission* (under appeal to the General Court), the Civil Service Tribunal ruled that it had jurisdiction to rule on an action for annulment brought on the basis of Article 236 EC against the refusal of an institution of the European Union to grant a request for access to documents made by an official under Regulation No 1049/2001, [5] where that request originates in the employment relationship which links that official to the institution in question.

Conditions for admissibility

1. Time-limits

In the absence of clear indications in the EIB's own rules on procedural time-limits applicable to its staff, the Civil Service Tribunal, in several decisions, applied the time-limits laid down by the Staff Regulations by analogy (judgments of 28 June 2011 in Case F-49/10 *De Nicola* v *EIB* and of 28 September 2011 in Case F-13/10 *De Nicola* v *EIB*; order of 4 February 2011 in Case F-34/10 *Arango Jaramillo and Others* v *EIB*, under appeal to the General Court of the European Union).

2. Respect for the pre-contentious procedure

In its judgment of 12 May 2011 in Case F-50/09 *Missir Mamachi di Lusignano* v *Commission* (under appeal to the General Court of the European Union), the Civil Service Tribunal held that the admissibility of claims for compensation based on different heads of damage must be examined in the light of each of those heads of damage. Thus, in order for claims relating to a head of damage to be admissible, that head of damage must have been raised in an application to the administration for compensation and a complaint must then have been lodged against the rejection of that application.

3. Complex operation originating in a contract

The Office for Harmonisation in the Internal Market (trade marks and designs) (OHIM) had offered its staff contracts for an indefinite period containing a termination clause applicable in the event that the persons concerned were not included on a reserve list drawn up following an open competition. In its judgment of 15 September 2011 in Case F-102/09 *Bennett and Others* v *OHIM*, the Civil Service Tribunal held that that arrangement was akin to a complex operation comprising a number of closely linked decisions, from the insertion of a termination clause in contracts to the adoption, after a reserve list had been drawn up, of decisions to terminate the contract. Consequently, it took the view that it was permissible to rely on a plea of the unlawfulness of the contested clause in support of the claims seeking annulment of decisions terminating contracts in the course of that operation.

[5] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

Court proceedings

1. Confidential documents

In its judgment in *Missir Mamachi di Lusignano* v *Commission*, the Civil Service Tribunal established the rule that only overriding considerations, based in particular on the protection of fundamental rights, can justify, as an exceptional measure, placing a classified document in the case file and communicating it to all the parties without the agreement of the administration. In the absence of such circumstances, and in the light of Article 44(1) of its Rules of Procedure, the Civil Service Tribunal asked the administration to draw up a non-confidential summary of that document. As it found, however, that that summary did not enable the applicant to exercise his right to effective judicial protection and that it had to rule out allowing access to that document even if only to the applicant's lawyer at the offices of the Registry, the Civil Service Tribunal derogated from the above provision in order to base its decision on the relevant extracts of the document in question so as to be in a position to decide in full knowledge of the facts, even though that document had not been communicated to the person concerned.

2. Intervention

In two orders of 19 July 2011 in Case F-105/10 and Case F-127/10 *Bömcke* v *EIB*, the Civil Service Tribunal held the college of staff representatives of the EIB to be equivalent to the Staff Committees in the institutions subject to the Staff Regulations and recalled that those committees were in the nature of internal bodies of their institution and therefore lack the capacity to be a party to judicial proceedings. Consequently, it dismissed as inadmissible an application for leave to intervene made by that college.

In its order in Case F-105/10 *Bömcke* v *EIB*, the Civil Service Tribunal inferred from the case-law to the effect that, in electoral disputes relating to the bodies representing staff, each member of staff derives from his status as an elector a sufficient interest to bring an action seeking to ensure that staff representatives are elected according to voting arrangements which comply with the provisions of the Staff Regulations that members of staff also derived from their status as electors a direct, existing interest in the solution of a dispute concerning the compulsory retirement of a staff representative who has already been elected. Consequently, their application for leave to intervene was held admissible.

3. Costs

Where an institution, organ or body of the European Union has instructed a lawyer, the question arises whether and under what conditions the fees paid to that lawyer constitute 'recoverable costs' under Article 91(b) of the Rules of Procedure.

The Civil Service Tribunal observed, in that connection, in its order in Case F-55/08 DEP *De Nicola* v *EIB*, that to refuse ever to regard such fees as essential, and thus recoverable, costs on the ground that the institution is not required to instruct a lawyer would be to deny a prerogative inherent in the exercise of the rights of the defence. None the less the Civil Service Tribunal also observed that all the servants of the European Union must be able to have access to justice in equivalent conditions and that the degree of effectiveness of their right to bring actions cannot vary according merely to the budgetary or organisational choices of their employer. It therefore held that it is for the institution which proposes to recover the fees paid to its lawyer to prove, on

the basis of objective evidence, that those fees were ‘essential costs’ for the purpose of the proceedings. It might do so by establishing, in particular, the existence of economic and temporary reasons connected, inter alia, with a specific increase in workload or unforeseen absences of the members of its legal service, or by establishing, where an applicant has brought actions which are substantial in volume or in number, that if it had not instructed a lawyer it would have been obliged to devote a disproportionate part of the resources of its services to dealing with those actions.

Finally, the Civil Service Tribunal stated that the total number of hours of work that can be deemed to be objectively essential must be evaluated, in principle, at one third of the hours that the lawyer would have needed to spend had he not been able to rely on the work previously done by the legal services of the institution.

5. Revision

In 2011, for the first time, the Civil Service Tribunal ruled on applications for revision made on the basis of Article 44 of the Statute of the Court of Justice of the European Union and Article 119 of the Rules of Procedure.

In one of the cases in question, the judgment whose revision was applied for had been partially annulled on appeal before the General Court. However, the applicant sought the revision of the whole of the judgment given by the Civil Service Tribunal. The Civil Service Tribunal held that the claims made in support of revision were inadmissible as regards that part of those claims regarding which the judgment given on appeal replaced the judgment at first instance. Moreover, as the applicant for revision did not contest the judgment given on appeal, his application did not give rise to referral of the case to the General Court pursuant to Article 8(2) of Annex I to the Statute of the Court of Justice (judgment of 15 June 2011 in Case F-17/05 REV *de Brito Sequeira Carvalho* v *Commission*).

In addition, in several judgments of 20 September 2011 (Case F-45/06 REV *De Buggenoms and Others* v *Commission,* Cases F-8/05 REV and F-10/05 REV *Fouwels and Others* v *Commission* and Case F-103/06 REV *Saintraint* v *Commission*) the Civil Service Tribunal held that an order removing a case from the register under Article 74 of the Rules of Procedure merely takes note of the wish of the applicant to discontinue proceedings and of the absence of any observations from the defendant, so that, in the absence of any view taken by the European Union judicature on the questions raised by the case, there is no decision which can be the subject of revision within the meaning of Article 119 of the Rules of Procedure.

Moreover, in light of the fact that that the lawyer representing a party does not, as a rule, have to produce an authority to act, the Civil Service Tribunal held that it could not, in revision proceedings, decide that a discontinuance was not valid vis-à-vis certain applicants on the ground that their counsel acted without their consent.

II. Merits

General principles

1. Possibility of reliance on directives

Following the path set by earlier case-law according to which directives adopted by the institutions with regard to the Member States could to some extent be relied on against those institutions, the Civil Service Tribunal, in its judgment of 15 March 2011 in Case F-120/07 *Strack* v *Commission* (under appeal to the General Court), observed that Directive 2003/88 [6] seeks to lay down minimum safety and health requirements for the organisation of working time, so that, by virtue of Article 1e(2) of the Staff Regulations, the Commission had to ensure compliance with those requirements in the application and interpretation of the rules of the Staff Regulations relating, in particular, to annual leave.

2. Rights of defence

Taking the view that requiring the administration to hear every member of staff concerned before adopting any measure would constitute an unreasonable burden, the Civil Service Tribunal held, in its judgment of 28 September 2011 in Case F-26/10 *AZ* v *Commission*, that a plea of infringement of the rights of defence could validly be relied on only in so far as, first, the contested decision was adopted on conclusion of a procedure opened against a person and, second, the seriousness of the consequences which that decision was liable to entail for the position of that person was proven. As a promotion procedure is not opened against an official, the Civil Service Tribunal therefore concluded that there was no obligation on the administration to hear the official before excluding him from a promotion exercise.

3. Discrimination

In the case leading to the judgment of 15 February 2011 in Case F-68/09 *Barbin* v *Parliament* (under appeal to the General Court), the Civil Service Tribunal applied, for the first time, the mechanism for reversal of the burden of proof provided for by Article 1d of the Staff Regulations, according to which, where persons covered by the Staff Regulations, who consider themselves wronged because the principle of equal treatment has not been applied to them, establish facts from which it may be presumed that there has been discrimination, the onus is on the institution to prove that there has been no breach of that principle.

In the same judgment the Civil Service Tribunal held that, in order to assess the merits of a plea alleging discrimination account must be taken of the relevant factual background as a whole, including the assessments contained in earlier decisions which have become final. According to the Civil Service Tribunal, the principle that a final decision may not be re-examined by the judicature does not deny the judicature the possibility of taking account of such a decision as an indication which may, together with other evidence, establish discriminatory conduct on the part of the administration, as discrimination may be revealed only after the time-limits for bringing an action against a decision which is merely a manifestation of such discrimination.

Moreover, once again in *Barbin* v *Parliament*, the Civil Service Tribunal held that, where an official exercises a right granted to him by the Staff Regulations, such as the right to parental leave, the administration may not, without prejudicing the effectiveness of that right, take the view that the position of that official is different from that of an official who has not exercised that right. Consequently it may not treat him differently on that ground, unless that difference in treatment is both objectively justified, inter alia in that it is confined to drawing the appropriate

[6] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

inferences, for the period under consideration, from the fact that the member of staff concerned has not performed any work, and also strictly proportionate to the justification given.

In a judgment of 27 September 2011 in Case F-98/09 *Whitehead* v *ECB*, the Civil Service Tribunal recalled that a person on sick leave is not in the same position as a person in active employment, so that no general principle requires the authority to ensure that the period of sick leave is neutral in effect when assessing the contribution of that person to the tasks of the administration for the purposes of the payment of a bonus, because that person had had less time to contribute to the work of the department.

Finally, the Civil Service Tribunal held, in its judgment of 29 June 2011 in Case F-7/07, that an administration faced with a choice between two approaches, both giving rise to a difference in treatment as between two groups of persons, is justified in opting for the approach involving the lesser difference in treatment.

4. Manifest error of assessment

In its judgments of 24 March 2011 in Case F-104/09 *Canga Fano* v *Council* (under appeal to the General Court) and of 29 September 2011 in Case F-80/10 *AJ* v *Commission*, regarding promotion, and of 29 September 2011 in Case F-74/10 *Kimman* v *Commission*, regarding an assessment report, the Civil Service Tribunal held that an error of assessment may only be considered manifest where it is easily recognisable and can be readily detected, in the light of the criteria to which the legislature intended decisions on promotion to be subject.

The Civil Service Tribunal held, further, in its judgments in *Kimman* v *Commission* and *AJ* v *Commission*, that, in order to establish whether the administration has made a manifest error in the assessment of the facts which is such as to justify the annulment of a decision on promotion or an assessment report, the evidence, which it is for the applicant to adduce, must be sufficient to destroy the plausibility of the assessments made by the administration. Thus, a plea of manifest error must be rejected if, despite the evidence put forward by the applicant, the assessment which is called into question can be accepted as correct or valid.

In its judgment of 28 September 2011 in Case F-9/10 *AC* v *Council*, the Civil Service Tribunal held that, in order to safeguard the effectiveness of the discretion which the legislature intended to give to the appointing authority as regards promotion, the judicature may not annul a decision on the sole ground that it considers that there are facts which give rise to plausible doubts regarding the assessment made by the appointing authority. In this case, it therefore held that, in view of the obvious merits of the applicant, the appointing authority would not have made a manifest error of assessment if it had decided to include him in the group of officials who were promoted, but that, nevertheless, that finding did not mean that the decision not to promote him was vitiated by a manifest error of assessment.

It follows from the foregoing observations that, where the scrutiny of the judicature is limited to manifest errors of assessment, the administration has the benefit of the doubt.

5. Legitimate expectations

In its judgment of 15 March 2011 in Case F-28/10 *Mioni* v *Commission* (under appeal to the General Court), the Civil Service Tribunal recalled that the fact that an official was paid financial benefits by the administration, even for several years, cannot in itself be considered a precise, unconditional and consistent assurance, since, if it were, any decision by the administration

refusing for the future, and, possibly, for the past, to pay such benefits which had been unduly paid to the person concerned would always amount to a breach of the principle of legitimate expectations and would therefore deprive Article 85 of the Staff Regulations concerning recovery of sums overpaid of its effectiveness.

6. Duty to have regard for the welfare of officials

The Civil Service Tribunal held, in its judgments of 17 February 2011 in Case F-119/07 *Strack* v *Commission* and of 15 September 2011 in Case F-62/10 *Esders* v *Commission*, that the obligations of the administration inherent in the duty to have regard for the welfare of staff are significantly greater in the case of an official whose physical or mental health is affected. In such a case, the administration must consider the claims of the official with a particularly open mind.

Career of officials and other staff

1. Competitions

In the judgment in *Angioi and Others* v *Commission*, the Civil Service Tribunal held that, where the needs of the service or of the job require, an administration may legitimately specify, in a recruitment procedure, the language or languages of which thorough or satisfactory knowledge is required. Although such a condition at first sight constitutes discrimination based on language which is in principle prohibited by the Staff Regulations, it may be objectively and reasonably justified by a legitimate objective in the general interest in the framework of staff policy. The need to to ensure that staff have a knowledge of languages matching the languages of internal communication of the institution constitutes such an objective. Moreover, there is a reasonable relationship of proportionality between those requirements and the objective envisaged, since a knowledge of more than one of those languages is not required.

2. Notices of vacancy

In the judgment of 28 June 2011 in Case F-55/10 *AS* v *Commission* (under appeal to the General Court) the Civil Service Tribunal held that the transitional provisions of Annex XIII to the Staff Regulations which impose limitations on the career of certain officials in the former Categories C and D do not authorise the Commission to reserve certain posts for them on that basis alone and, consequently, to prohibit access to those posts for other officials who have the same grade as them. The Commission's maintenance of a distinction in principle between officials who are in the same grade and belong to the same function group for the purposes of access to certain posts is not compatible with one of the objectives of the reform of the Staff Regulations in 2004, which was to merge the former categories B, C and D into a single AST function group.

3. Promotions

(a) Comparison of merits

Having noted that Article 43 of the Staff Regulations requires the preparation of a staff report only every two years and that the Staff Regulations do not require that the promotions exercise cover the same period, the Civil Service Tribunal held, in its judgment of 10 November 2011 in

Case F-18/09 *Merhzaoui* v *Council*, that the Staff Regulations do not preclude a decision being made on promotion where the appointing authority does not have a recent staff report at its disposal.

Moreover, the Civil Service Tribunal held, in its judgment in *AC* v *Council*, that, although Article 45(1) of the Staff Regulations mentions reports on officials, knowledge of languages and the level of responsibilities exercised as the three main criteria to be taken into account in the consideration of comparative merits, it does not thereby preclude the consideration of other factors if those factors are likely to give some indication of the merits of the officials eligible for promotion.

In the same judgment, the Civil Service Tribunal held that the administration has a certain margin for manoeuvre regarding the relative significance it attaches to each of those three criteria, since Article 45(1) of the Staff Regulations does not preclude weighting those criteria differently, where justified.

Finally, still in the same judgment, the Civil Service Tribunal held that it is not contrary to Article 45 of the Staff Regulations to include in the assessment of merits the languages whose use, in the light of the actual requirements of the service, brings added value of such significance as to appear necessary for the smooth running of that service.

(b) Inter-institutional transfer during the promotion exercise

In the judgment of 28 June 2011 in Case F-128/10 *Mora Carrasco and Others* v *Parliament* and the order of 5 July 2011 in Case F-38/11 *Alari* v *Parliament*, the Civil Service Tribunal held that where an official is eligible for promotion during the year in which he is transferred from one institution of the European Union to another, the competent authority for taking a decision on his promotion is the authority of his institution of origin. Article 45 of the Staff Regulations provides that promotion happens 'after consideration of the comparative merits of the officials eligible for promotion' and the appointing authority can, in practice, compare only the past merits of officials, so that it is necessary to compare the merits of transferred officials with those of officials who were still their colleagues during the year preceding the transfer, which is an assessment that can only be made by the institution of origin.

Emoluments and social security benefits of officials

1. Annual leave

Under the first paragraph of Article 4 of Annex V to the Staff Regulations, the right to leave acquired in respect of a calendar year must, as a rule, be used during that year. It also follows from that provision that an official has the right to carry over all days of annual leave not taken in one calendar year to the following calendar year, where he was unable to use his annual leave for reasons attributable to the requirements of the service.

On the basis of Article 7(1) of Directive 2003/88, [7] which is applicable to the institutions pursuant to Article 1e(2) of the Staff Regulations, the Civil Service Tribunal held that other reasons, which

[7] See footnote 6.

may not be attributable to the requirements of the service, may also justify the carrying over of all the days of leave not taken. It took the view that this is so, in particular, where an official who has been absent because of sickness for all or part of a calendar year, has been deprived on that ground of the possibility of exercising his right to leave (judgment of 25 May 2011 in Case F-22/10 *Bombín Bombín* v *Commission*).

To the same effect, the Civil Service Tribunal held that an official whose incapacity for work had prevented him from taking the annual leave to which he was entitled could not be deprived, when his employment ceased, of the possibility of receiving financial compensation for annual leave not taken (judgment of 15 March 2011 in *Strack* v *Commission*).

2. Social security

In its judgment of 28 September 2011 in Case F-23/10 *Allen* v *Commission*, the Civil Service Tribunal recalled that, according to the general implementing provisions for the reimbursement of medical expenses, recognition of the existence of a serious illness requires the fulfilment of four cumulative criteria. However, since those provisions provide for a relationship of interdependence between those criteria, the assessment made of one of them in a medical examination is liable to influence the assessment of the others. Accordingly, although one of the criteria may appear not to be satisfied when considered in isolation, examination of it in the light of the assessment made of the other criteria may lead to the opposite conclusion, namely that that criterion is in fact satisfied. Consequently, the medical officer or the medical council may not confine itself to consideration of merely one criterion taken on its own, but must undertake a specific and thorough examination of the state of health of the person concerned, taking into account in a comprehensive manner the four interdependent criteria mentioned above. Such consideration is all the more necessary as the procedure laid down for recognition of a serious illness does not provide the same level of safeguard with regard to the balance between the parties as the procedures provided for by Articles 73 (concerning occupational diseases and accidents) and Article 78 (concerning invalidity) of the Staff Regulations.

Rights and obligations of officials

In its judgment in *AS* v *Commission*, the Civil Service Tribunal held that the use of documents covered by medical confidentiality in support of a plea of inadmissibility based on the absence of an interest in bringing proceedings constituted an interference by a public authority in the right to respect for private life and that such interference was not in pursuit of any of the objectives listed exhaustively in Article 8(2) of the European Convention for Human Rights and Fundamental Freedoms ('ECHR') in so far as, inter alia, the dispute did not concern the lawfulness of a decision of a medical nature.

Moreover, in its judgment of 5 July 2011 in Case F-46/09 *V* v *Parliament* the Civil Service Tribunal held that the transfer to a third party, including to another institution, of personal data relating to a person's state of health collected by an institution constitutes in itself an interference with the private life of the person concerned, whatever the subsequent use of the information thus communicated. However, the Civil Service Tribunal recalled that restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected. In that regard, the Civil Service Tribunal considered that reference should be made to the conditions laid down by Article 8(2) of the ECHR.

The Civil Service Tribunal weighed the interest of the Parliament in satisfying itself that it is recruiting a person fit to perform the duties which are going to be entrusted to him against the seriousness of the infringement of the right of the person concerned to respect for his private life and took the view that although the pre-recruitment examination serves the legitimate interest of the European Union institutions, which must be in a position to fulfil the tasks required of them, that interest does not justify carrying out a transfer of particularly sensitive data such as medical data from one institution to another without the consent of the person concerned.

In the same judgment, the Civil Service Tribunal then held that Regulation No 45/2001 [8] had been breached. It took the view that the personal data at issue had been processed for purposes other than those for which they had been collected without that change of purpose having been expressly permitted by the internal rules of the Commission or Parliament. It also found that it was not established that that transfer was necessary for the purposes of complying with the obligations and specific rights of the Parliament in the field of employment law, as the latter could have invited the applicant to provide certain information on her medical history or had the necessary medical examinations performed by its own staff.

Contractual disputes

1. Conclusion of a second amendment to a fixed-term contract under Article 2 of the Conditions of Employment of Other Servants of the European Union ('the CEOS')

In the case leading to the judgment of the Civil Service Tribunal of 13 April 2011 in Case F-105/09 *Scheefer* v *Parliament*, the applicant was employed as a member of the temporary staff under Article 2(a) of the CEOS. That employment was extended by a first amendment of 26 February 2007, and then by a second amendment of 26 March 2008 which 'cancel[led] and replace[d]' the first in order to extend the applicant's employment for a further fixed period. However, under the first paragraph of Article 8 of the CEOS, the employment of a member of the temporary staff under Article 2(a) of the CEOS may be renewed not more than once for a fixed period, '(a)ny further renewal … be[ing] for an indefinite period'.

The Civil Service Tribunal held, first, in the light of Directive 1999/70 [9] and the terms of the framework agreement annexed to it, that the first paragraph of Article 8, mentioned above, must be interpreted in a manner which ensures that it has a broad scope, and must be applied strictly. On that basis, the Civil Service Tribunal took the view that the applicant's contract had to be considered to have been renewed twice, whatever the form of words used in the second amendment. It therefore concluded that that amendment should be automatically converted into an engagement for an indefinite period in accordance with the intention of the legislature, and that the expiry of the period set in that amendment could not lead to the end of the applicant's employment.

Finally, the Civil Service Tribunal held that the decision 'confirm[ing]' that her contract would end on 31 March 2009 necessarily brought about a distinct change in her legal position under the

[8] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

[9] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

first paragraph of Article 8 of the CEOS and constituted an act adversely affecting her, adopted in breach of that provision.

2. Conclusion of a contract of indefinite duration containing a cancellation clause in the event of failure to pass a competition

In its judgment in *Bennett and Others* v *OHIM*, the Civil Service Tribunal found that a clause allowing the cancellation of a contract if the member of staff in question was not included on a reserve list drawn up following an open competition did not enable that contract to be classified as a contract of indefinite duration, as the duration of the contract – as is apparent from Clause 381 of the framework agreement implemented by Directive 1999/70 – could be determined not only by 'reaching a specific date', but also by 'completing a specific task, or the occurrence of a specific event', such as the drawing up of a competition reserve list.

3. Non-renewal of a contract

In its judgment of 15 April 2011 in Joined Cases F-72/09 and F-17/10 *Daake* v *OHIM* the Civil Service Tribunal held that, although a letter which merely recalls the terms of a contract relating to its expiry date and which contains no new factor as compared with the terms of the contract does not constitute an act adversely affecting a member of staff, a decision not to renew a contract capable of renewal constitutes an act adversely affecting a member of staff distinct from the contract in question and against which an action could be brought. Such a decision, which is made following re-examination of the interest of the service and the situation of the person concerned contains a new factor as compared with the initial contract and cannot be regarded as merely confirming that contract.

Non-contractual liability of the institutions

The Civil Service Tribunal extended the case-law according to which liability for damage must be shared where that damage is caused both by the fault of an institution and the fault of the victim to cover cases where the fault is shared between an institution and a third party (*Missir Mamachi di Lusignano* v *Commission*).