

A — Proceedings of the Civil Service Tribunal in 2008

By Mr Paul Mahoney, President of the Civil Service Tribunal

1. The year 2008 saw the first triennial partial renewal of the Tribunal. By way of derogation from the first sentence of the second paragraph of Article 2 of the Annex to the Statute of the Court of Justice, the duties of three Judges of the Tribunal came to an end upon expiry of the first three years of their term of office, that is to say, on 30 September 2008. By decision of 27 June 2008 the Council of the European Union reappointed the three Judges concerned to their duties. On 24 September 2008, Mr P. Mahoney was re-elected President of the Tribunal and Mr H. Kanninen and Mr S. Gervasoni were appointed President of the Second and First Chambers respectively.

2. Since 1998, the number of actions brought each year in staff cases has grown constantly (apart from a levelling off in 2001 and 2002). In 2008, at 111 new applications, the number of actions brought dropped markedly compared with the previous year (157 in 2007), for the first time in 10 years. It would of course be premature to see in this a reversal of the trend of growth in Community staff case litigation seen in recent years, but the rule that the unsuccessful party is to pay the costs, which came into force with the Rules of Procedure of the Tribunal on 1 November 2007, might have played a part in the development observed.

In 2008, the Tribunal brought 129 cases to a close. The balance between completed cases and those brought was thus positive, with the result that, for the first time since the creation of the Tribunal, the number of pending cases has dropped slightly (217 in 2008 compared with 235 in 2007).

In 2008, 53 % of cases were brought to a close by judgment and 47 % by order. The average duration of proceedings was 19.7 months for judgments and 14 months for orders, which represents a slight increase in the average duration of a case compared with the previous year. Appeals to the Court of First Instance were brought against 37 decisions of the Tribunal, which represents 37 % of the decisions subject to appeal delivered by the Tribunal and 35 % of the total number of cases brought to a close, apart from those unilaterally discontinued by one of the parties. Seven decisions of the Tribunal were set aside by the Court of First Instance.

3. During this year the Tribunal has continued to endeavour to answer the legislature's appeal for the facilitation, at every stage of the procedure, of the amicable settlement of disputes. Thus, seven cases were able to be brought to a close following an amicable settlement at the instigation of the Tribunal, most often at an informal meeting organised by the judge-rapporteur or during a hearing ⁽¹⁾.

⁽¹⁾ For an example of an amicable settlement reached on the day of the hearing at the instigation of the Tribunal, see the order of 4 September 2008 in Case F-81/06 *Duyster v Commission*: in recognition of the inconvenience caused to the applicant by certain events which were the subject of the proceedings, the defendant undertook to pay her a lump sum of EUR 2 000 and to sign, place on her personal file and send to her a letter prepared for her.

4. Finally, in 2008, the Tribunal added to its array of procedural tools with the entry into force on 1 May 2008 of the practice directions to parties. These contain, inter alia, a compulsory form for the submission of any application for legal aid and a guide for legal aid applicants.

5. The account given below will describe the most interesting new case-law of the year, looking in turn at proceedings concerning the legality of measures and actions for damages (I), applications for interim relief (II), and applications for legal aid (III).

I. Proceedings concerning the legality of measures and actions for damages

This section will examine the most important decisions on procedural matters, on the merits and on costs.

Procedural aspects

1. Jurisdiction of the Tribunal

In Case F-88/07 *Domínguez González v Commission* (order of 12 November 2008), the Tribunal had to deal with a dispute arising from the performance of an employment contract subject to Belgian law containing a clause attributing jurisdiction to the courts of Brussels which was for the provision of technical assistance in the context of humanitarian aid to third countries. The Tribunal, having ascertained that the contract was made subject to national law rather than to the Conditions of Employment of Other Servants of the European Communities ('Conditions of Employment') for reasons relating to a legitimate interest of the defendant and did not constitute a misuse of procedure, held that it had no jurisdiction to hear the dispute arising from the performance of the contract.

2. Conditions for admissibility

In Case F-4/07 *Skoulidi v Commission* (judgment of 21 February 2008) the Tribunal made clear, first, that, where there is an act adversely affecting an official, the conduct of the institution in connection with that act cannot give rise to a claim for damages, the pre-litigation procedure for which starts with a request under Article 90(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') unless the conduct in question can be dissociated from the act adversely affecting the official, and second, and most importantly, that an official may, in an action which is purely for damages, seek reparation for the damage caused by an act adversely affecting him without seeking the annulment of that act, provided that the pre-litigation procedure is initiated by a complaint, as provided for by Article 90(2) of the Staff Regulations, against that act, and the three-month time limit set by that provision must be respected whether the applicant seeks reparation of material or, as here, non-material damage.

In its judgments of 23 April 2008 in Case F-103/05 *Pickering v Commission* and Case F-112/05 *Bain and Others v Commission*, the Tribunal made clear that, although salary statements are generally considered to be acts adversely affecting officials in so far as they demonstrate that the pecuniary rights of an official have been adversely affected, in fact the real act adversely affecting the official is the decision taken by the appointing authority to reduce or cancel a payment which the official had hitherto received and which appeared in his salary statements.

In its judgment of 11 December 2008 in Case F-58/07 *Collote v Commission*, the Tribunal held that, in a case where two successive complaints lodged within the time limit for complaints are the subject of two successive decisions by the appointing authority, if the second complaint includes matters not covered in the first complaint, the decision rejecting the second complaint should be considered to be a new decision, adopted after reconsideration of the decision to reject the first complaint in the light of the second complaint. Accordingly, the time allowed for bringing an action starts to run from the date of service of the reply to the second complaint.

3. Procedural issues

(a) Objection of inadmissibility

In *Domínguez González v Commission*, following objections of inadmissibility and lack of competence raised by the defendant, the Tribunal, for the first time, ruled on its competence by order following a hearing, on the basis of the second subparagraph of Article 78(2) of the Rules of Procedure, which provides that, unless the Tribunal decides otherwise, the remainder of the proceedings is to be oral.

(b) Request for removal of documents

In its judgment of 8 May 2008 in Case F-6/07 *Suvikas v Council*, the Tribunal ordered documents drawn up by a member of an advisory selection committee, outside of the selection procedure, to be removed from the case-file, as those documents were obtained by the applicant through the intermediary of a third party who had himself obtained them unlawfully.

4. Actions for annulment: plea of breach of the scope of the law raised by the Tribunal of its own motion

In its judgment of 21 February 2008 in Case F-31/07* *Putterie-De-Beukelaer v Commission* (under appeal to the Court of First Instance), the Tribunal classified a plea of breach of the scope of the law as a public policy plea. The Tribunal held that it would be neglecting its function as the arbiter of legality if, even in the absence of a challenge by the parties in this regard, it failed to make a finding that the contested decision before the Tribunal had been adopted on the basis of a rule that was not applicable to the case in point and if, as a consequence, it was led to adjudicate on the dispute before it by itself applying such a rule.

* The judgments marked with an asterisk have been translated into all the official languages of the European Union.

Merits

An analysis will be made here of the year's most significant new developments in the case-law, as regards general principles and, then, in the order of the headings of the Staff Regulations, as regards the rights and obligations of officials, the career of officials and the emoluments and social security benefits of officials and, finally, the interpretation of the Conditions of Employment.

1. General principles

(a) Withdrawal of an unlawful administrative measure

In its judgment of 11 September 2008 in Case F-51/07* *Bui Van v Commission* (under appeal to the Court of First Instance), the Tribunal, addressing the question of the lawfulness of the withdrawal of an unlawful administrative measure, held that the withdrawal of such a measure must take place within a reasonable period and that the reasonableness of that period is to be appraised in the light of the circumstances specific to each case such as the importance of the case for the person concerned, its complexity and the conduct of the parties involved, whether the measure in question confers subjective rights and the balance of interests. It must be considered, as a general rule, that a period for withdrawal corresponding to the three-month period for bringing proceedings laid down in Article 91(3) of the Staff Regulations is reasonable. Since that period applies to the administration itself, it is appropriate to take, as the starting point, the date on which the administration adopted the measure which it intends to withdraw.

Moreover, the Tribunal has held that the decision to withdraw the unlawful measure must observe the rights of the defence of the official concerned. In this case, the Tribunal considered that the fact that the applicant was not afforded the opportunity to submit his observations before the adoption of the contested decision was not such as to influence the content of that decision, inasmuch as the observations submitted by the applicant to the Tribunal contain no information over and above that already available to the Commission. The Tribunal held, on the other hand, that in disregarding the applicant's right to be heard the Commission committed a wrongful act in the performance of public duties which gave rise to its liability.

(b) Compliance with a judgment of the Community court

In its judgment of 24 June 2008 in Case F-15/05* *Andres and Others v ECB*, the Tribunal, sitting as a full court, held that when compliance with a judgment annulling a measure poses special difficulties, the institution concerned may take any decision which is such as to compensate fairly for the disadvantage resulting for the persons concerned from the annulled decision. In that context, the administration may establish a dialogue with those persons with a view to seeking to reach an agreement offering them fair compensation for the illegality of which they were victims. As regards compliance with a judgment declaring unlawful the procedure for adjusting the salaries of staff of the European Central Bank for a given year by reason of the failure to consult the Staff Committee in a regular and appro-

priate manner, a reasonable and fair solution is achieved by the adoption of a compromise consisting in, first, the widening of the consultation to include subsequent years in which it had also not taken place and the taking into account of certain corrected data where it benefited staff, and, second, extending the benefit of the salary increases resulting from the consultation to all the staff, and not merely to the applicants, even if specific difficulties prevented retroactive effect being given to the increases.

(c) Principle of proportionality

In its judgment of 9 September 2008 in Case F-135/07 *Smadja v Commission* (under appeal to the Court of First Instance), the Tribunal recalled that the retroactive effect of an administrative measure may be a necessary means of guaranteeing respect for a fundamental principle such as the principle of proportionality. In this case, by failing, without good reason, to backdate the decision appointing the applicant, adopted after the entry into force of the new Staff Regulations, to the date of the adoption of the initial decision to appoint, adopted under the old Staff Regulations and annulled by judgment of the Court of First Instance, so as to guarantee the applicant the higher grading she held at the date of delivery of that judgment, or by refusing to attach to the contested decision any other measure which would have been liable to reconcile the interest of the service with the legitimate interests of the applicant, the Commission failed to respect the interest of the service and its duty to have regard for the welfare of its servants.

(d) Principle of good administration

In its judgment of 11 July 2008 in Case F-89/07 *Kuchta v ECB* concerning the lawfulness of an individual decision adjusting the salary of a member of the staff of the ECB, the Tribunal recalled that the rules of good administration in staff management require, inter alia, that the distribution of powers within any Community body or institution should be clearly defined and properly publicised. The Tribunal annulled the contested decision, having found that it had not been able to determine its author or the authority which had been empowered by the Executive Board of the ECB to take such a decision.

2. Rights and obligations of officials

In its judgment of 9 December 2008 in Case F-52/05* *Q v Commission*, the Tribunal interpreted for the first time Article 12a(3) of the Staff Regulations which defines psychological harassment as any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person. The Tribunal held that it is not a requirement, for a finding of psychological harassment within the meaning of that provision, that such physical behaviour, spoken or written language, gestures or other acts were committed with the intention of undermining the personality, dignity or physical or psychological integrity of the person concerned. It is sufficient that such reprehensible conduct led objectively to such consequences.

3. Careers of officials

(a) Recruitment

The Tribunal had occasion to clarify the scope of several rules applicable to competitions.

In its judgment of 22 May 2008 in Case F-145/06* *Pascual-García v Commission*, the Tribunal made clear that the fact that research work might have further developed the applicant's training and subsequently enabled him to obtain the qualification of doctor does not, as such, prevent it from being classified as professional experience within the meaning of the notice of competition.

In its judgment of 11 September 2008 in Case F-127/07* *Coto Moreno v Commission*, the Tribunal held that a selection board's assessment of candidates' knowledge and ability is not open to review by the Tribunal. This does not apply as regards consistency between the numerical mark and the selection board's assessments expressed in words. Such consistency, which furnishes a guarantee of equal treatment of candidates, is one of the rules governing the proceedings of the selection board, compliance with which must be verified as part of judicial review. Moreover, consistency between the numerical mark and the assessment expressed in words may be reviewed by the Community judicature independently of review of the selection board's assessment of the candidates' performance, the latter being a review which the Tribunal declines to exercise, provided the review of consistency is limited to verifying the absence of manifest inconsistency.

In its judgment of 14 October 2008 in Case F-74/07* *Meierhofer v Commission*, the Tribunal made clear, as regards the obligation to state reasons for a decision of a selection board relating to an oral test, that the communication to the candidate of only a single individual eliminatory mark does not always constitute a sufficient statement of reasons, irrespective of the particular circumstances of the case in question. In this case, the Tribunal observed that the defendant's refusal to comply with certain measures of organisation of the procedure meant that the Tribunal could not exercise fully its power of review.

(b) Reports

In its judgment of 6 March 2008 in Case F-46/06 *Skareby v Commission* (under appeal to the Court of First Instance), the Tribunal recalled that it is clear from the fourth subparagraph of Article 8(5) of the general provisions for implementing Article 43 of the Staff Regulations adopted by the Commission that the administration is required to establish objectives and appraisal criteria for a jobholder. According to that provision, the formal dialogue held between the reporting officer and the jobholder at the start of each appraisal exercise must cover not only the appraisal of that jobholder's performance during the reference period but also the setting of objectives for the year following the reporting period. Those objectives constitute the reference basis for the appraisal of performance.

(c) Promotion

By four judgments of 31 January 2008 in Case F-97/05 *Buendía Sierra v Commission*, Case F-98/05 *Di Bucci v Commission*, Case F-99/05 *Wilms v Commission* and Case F-104/05 *Valero Jordana v Commission*, the Tribunal held that, in the absence of provisions derogating from the principle of the immediate applicability of the new rules in Regulation No 723/2004 of 22 March 2004 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, Article 45(1) of the Staff Regulations, as amended by that regulation, was immediately applicable on the entry into force of that regulation. Consequently, the Commission could not lawfully apply, in November 2004, the provisions of Article 45(1) of the old Staff Regulations which were repealed by that regulation, to adopt the decision fixing the total number of merit points of an official on conclusion of the 2004 promotion exercise and the decision not to promote him in that exercise.

By four judgments of 11 December 2008 in Case F-58/07 *Collotte v Commission*, Case F-66/07 *Dubus and Leveque v Commission*, Case F-92/07 *Evraets v Commission* and Case F-93/07 *Acosta Iborra and Others v Commission*, the Tribunal held that Article 45(2) of the Staff Regulations, concerning the obligation on an official to demonstrate his ability to work in a third language before his first promotion, could not be applied before the entry into force of the common rules for implementation laid down by Article 45(2).

(d) New career structure

(i) Multiplication factor

The judgment of 4 September 2008 in Case F-22/07 *Lafili v Commission* (under appeal to the Court of First Instance), concerned, inter alia, the interpretation of the fourth sentence of Article 7(7) of Annex XIII to the Staff Regulations concerning the possible effects on the remuneration of officials recruited before 1 May 2004 of the change in the designation of grades. This, fairly technical, judgment favours an interpretation consistent with the principle of the immediate application of new rules, in this case the reform of the Staff Regulations. It was held, in particular, that 'transitional measures should, by their very nature, be intended to facilitate the transition from old rules to new rules, while safeguarding acquired rights, without at the same time maintaining for the benefit of one category of officials the effects of the old rules in situations arising in the future, such as advancement in step under the new career structure'. Moreover, 'in the case of provisions which are ambiguously expressed and susceptible of more than one interpretation, such as those applicable here, preference must be given to the interpretation which allows such difference in treatment of officials to be avoided'.

(ii) Attestation procedure

In its judgment in *Putterie-De-Beukelaer v Commission*, the Tribunal held that the appraisal and attestation procedures, defined by the general provisions for implementing Article 43 of the Staff Regulations adopted by the Commission and the Decision of 7 April 2004 laying down the rules for implementing the attestation procedure respectively, are separate

and are based on entirely different rules. In that regard, although the countersigning officer is competent to adopt the career development report, subject to the report not being amended by the appeal assessor, it is for the appointing authority to rule, at each stage in the attestation procedure, on the candidatures for attestation. In particular, it is the responsibility of that authority, hence an authority other than the countersigning officer of the appraisal procedure, to assess, on the basis of the available career development reports, the experience and merit of candidates for attestation.

In its judgment of 21 February 2008 in Case F-19/06 *Semeraro v Commission*, the Tribunal made clear that point 1.1 of the Commission decision of 11 May 2005 on the criteria for the 2005 attestation procedure, according to which, in order to be included on the list of officials admitted to the attestation procedure, those officials had to have had their potential recognised in their annual career development report, exceeds the limits of the authority by virtue of which, for the purposes of drawing up the list of officials admitted to the attestation procedure, the appointing authority is to decide the value of the criteria and the weighting applied to them after consulting the joint attestation committee.

4. Emoluments and social security benefits of officials

In its judgment of 2 December 2008 in Case F-131/07 *Baniel-Kubinova and Others v Parliament*, the Tribunal held that members of the temporary and/or auxiliary staff who had received the daily subsistence allowance and, subsequently, the installation allowance in part or in full (on the basis of declarations of the transfer of their habitual residence to their place of employment) cannot then, at the time of their engagement as probationary officials in that same place of employment, claim the daily subsistence allowance again. The daily subsistence allowance is reserved for officials and other staff who are obliged to change their place of residence in order to comply with Article 20 of the Staff Regulations, a condition which the applicants did not fulfil as they had already changed their place of residence, as they had declared in order to receive the installation allowance.

5. Conditions of Employment of Other Servants of the European Communities

(a) Classification in grade of a member of the contract staff

In its judgment of 11 December 2008 in Case F-136/06 *Realì v Commission*, the Tribunal made clear that Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration does not have the effect of limiting the discretion which an institution enjoys when comparing the respective value of diplomas or the level of qualification attested by the authorisation to practise a profession within the framework of its recruitment policy. Under the system established by that directive, diplomas are compared for the purposes of access to certain regulated activities in the various Member States. Such an assessment cannot be confused with the assessment of the respective academic value of the qualifications obtained in different Member States for the purpose of determining the grade attaching to a post in an institution of the European Communities.

(b) Commission decision of 28 April 2004 on the maximum duration for the recourse to non-permanent staff in the Commission services

In its judgment of 26 June 2008 in Case F-54/07 *Joseph v Commission*, the Tribunal made clear, as regards the Commission decision of 28 April 2004 on the maximum duration for the recourse to non-permanent staff in the Commission services, that, by imposing, in Article 85(1) of the Conditions of Employment, a maximum period of five years both for the conclusion and the renewal of the contracts of contract staff, the legislature did not prohibit the institutions from concluding or renewing that type of contract under Article 3 of those conditions for a shorter period, provided that the minimum duration laid down in Article 85(1) of those conditions (six or nine months as the case may be) is respected. However, an institution cannot, without breaching that provision, restrict generally and impersonally, as here by means of general implementing provisions or an internal decision of general application, the maximum possible period of employment of contract staff as determined by the legislature itself.

Costs

1. Cases brought before the entry into force of the Rules of Procedure of the Tribunal

The Tribunal has on several occasions applied Article 87(3) of the Rules of Procedure of the Court of First Instance, applicable *mutatis mutandis* to the Civil Service Tribunal pursuant to Article 3(4) of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ L 333, p. 7), until the entry into force of its Rules of Procedure. For instance, in its judgment of 24 June 2008 in Case F-84/07 *Islamaj v Commission*, the Tribunal decided to order that the costs be shared between the parties as the circumstances were exceptional, whereas in its judgments in *Bui Van v Commission* and *Lafili v Commission*, the Tribunal ordered that the costs be shared between the parties who were unsuccessful on one or more heads.

It should also be observed that, in a case in which the Tribunal held that there was no need to adjudicate on the dispute, a situation in which costs are at the discretion of the Court pursuant to Article 87(6) of the Rules of Procedure of the Court of First Instance, applicable *mutatis mutandis*, the defendant was ordered to pay all the costs incurred by the applicant (order of 1 February 2008 in Case F-77/07 *Labate v Commission*). The Tribunal took into account, first, the fact that the Commission did not reply to the complaint lodged by the applicant and, second, the fact that, by withdrawing the contested decision, the Commission had implicitly acknowledged that the procedure for the adoption of that decision was open to criticism, which led directly to the case being brought before the Community court.

2. Cases brought after the entry into force of the Rules of Procedure of the Tribunal

One of the significant innovations brought about by the entry into force of the Rules of Procedure of the Tribunal on 1 November 2007 concerns the arrangements relating to costs. Under Article 87(1) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2) of those rules, if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.

In its judgment of 4 December 2008 in Case F-6/08 *Blais v ECB*, the Tribunal applied for the first time the provision concerning equity laid down by Article 87(2) of the Rules of Procedure, deciding that it was appropriate, although the applicant was unsuccessful, to order her to pay, in addition to her own costs, only half of the costs incurred by the defendant. The Tribunal took the view that it would be unfair to order the applicant to pay all the costs of the defendant having regard, first, to the fact that the proceedings may be considered to have been occasioned in part by the conduct of the defendant, second, to the financial importance of the proceedings for the applicant, third, to the fact that the arguments of the applicant were not without merit, fourth, to the personal situation of the applicant and, finally, to the fact that the amount of the costs that the applicant might be ordered to bear was higher than in most disputes before the Tribunal, because the defendant had chosen to be represented not only by its own agents but also by a lawyer.

In the order of 10 July 2008 in Case F-141/07 *Maniscalco v Commission*, it was determined that an application for an appropriate order as to costs cannot be regarded as a request that the unsuccessful party be ordered to pay the costs.

Finally, it is of note that, in its order of 25 November 2008 in Case F-53/07 *Iordanova v Commission*, the Tribunal applied Article 98(4) of the Rules of Procedure under which, where the recipient of the aid is unsuccessful, the Tribunal may, in ruling as to costs in the decision closing the proceedings, if equity so requires, order that one or more parties should bear their own costs or that those costs should be borne, in whole or in part, by the cashier of the Tribunal by way of legal aid.

II. Applications for interim measures

Four applications for interim measures were brought in 2007, which were rejected because of the lack of urgency of the measures sought, which are required by settled case-law to be taken and produce their effects before a decision is reached in the main action in order to avoid serious and irreparable harm to the applicant's interests (orders of the President of the Tribunal of 30 January 2008 in Case F-64/07 *R S v Parliament*, of 25 April 2008 in Case F-19/08 *R Bennett and Others v OHIM*, of 3 July 2008 in Case F-52/08 *R Plasa v Commission* and of 17 December 2008 in Case F-80/08 *R Wenig v Commission*).

In the order in *Wenig v Commission*, it was recalled, in particular, that the measures applied for must be provisional, in that they must not prejudice the decision on the substance. Account must be taken, when weighing up the competing interests, of the irreversible nature of any suspension of operation of the contested decision, and the application must be granted only if the urgency of the measure sought appears undeniable

III. Applications for legal aid

Since the entry into force on 1 May 2008 of the practice directions to parties, any application for legal aid must be made on the compulsory form which contains a guide for applicants.

Seven orders ruling on applications for legal aid were made in 2008. With the exception of the application in Case F-142/07 AJ *Kaminska v Committee of the Regions*, in which the application for legal aid was granted, the applications were rejected because the applicant was not or did not prove that he was, because of his financial situation, wholly or partly unable to meet the costs involved in legal assistance and representation by a lawyer in proceedings.

In the orders rejecting the applications for legal aid, it was recalled, inter alia, that the second subparagraph of Article 95(2) of the Rules of Procedure specifies that the financial situation of the applicant is to be assessed, taking into account objective factors such as income, capital and the family situation. It was also recalled that, according to the first subparagraph of Article 96(2) of those rules, the application for legal aid must be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by the competent national authority attesting to his financial situation.