A — Proceedings of the Civil Service Tribunal in 2010

By Mr Paul Mahoney, President of the Civil Service Tribunal

1. The judicial statistics of the Civil Service Tribunal reveal that the number of cases brought in 2010 (139) is significantly higher than the number of applications lodged in 2009 (113) and 2008 (111).

The number of cases brought to a close (129), on the other hand, is lower ([1]) than that for the previous year (155).

Thus, the number of pending cases ([2]) is slightly higher than the previous year (185 at 31 December 2010 compared with 175 at 31 December 2009). The average duration of proceedings is also increasing (18.1 months in 2010 compared with 15.1 months in 2009 ([3])([4]).

Appeals to the General Court of the European Union were brought against 24 decisions of the Civil Service Tribunal. Ten decisions of the Civil Service Tribunal were set aside or set aside in part by the General Court and six of those cases were referred back to the Civil Service Tribunal.

Twelve cases were brought to a close by amicable settlement, which is the highest figure since the creation of the Civil Service Tribunal ([5]). Thus, the statistics for 2010 seem to attest to a greater readiness to resolve conflicts in this way.

2. As regards procedural tools, it is of note that, in 2010, the Civil Service Tribunal made use for the first time of the option open to it under its Rules of Procedure ([6]) of sitting as a single Judge ([7]).

3. Finally, as 2010 was the fifth anniversary of the Civil Service Tribunal, a colloquium ([8]) was held to mark the occasion, bringing together judges, professors and lawyers specialising in the field of the

([1]) The increase in 2010 in the percentage of cases brought to a close by judgment compared with those brought to a close by the less onerous procedure of an order has doubtless been a factor in the reduction in the number of cases brought to a close. In addition, account must be taken of the fact that the Civil Service Tribunal did not have its full complement of judges because of the continued unavailability of one of its seven judges.

([2]) The cases still pending include 15 brought by 327 officials and other staff, seeking the annulment of their salary adjustment slips for the period from July to December 2009 and the salary slips issued since 1 January 2010 in so far as those salary slips apply a salary increase based on a rate of 1.85% rather than the rate of 3.7% which would have been the result of the application of Article 65 of the Staff Regulations of officials of the European Union ('the Staff Regulations') and Annex XI thereto. Those cases are closely linked to Case C-40/10 *Commission* v *Council* (judgment of 24 November 2010), by which the Court annulled 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]) That increase in the duration of proceedings must doubtless be seen as a parallel development to the increase in the percentage of cases brought to a close by judgment compared with those brought to a close by order.

([5]) Interestingly, for the first time, an amicable settlement was reached between parties in an application for interim measures, regarding the question of the implementation of the interim measures applied for (Case F-50/10 R *De Roos-Le Large* v *Commission*).

([6]) Article 14 of the Rules of Procedure.

([7]) That option was used in Case F-1/10 *Marcuccio* v *Commission* (judgment of 14 December 2010).

([8]) The proceedings of the colloquium will be published in 2011 in the *Revue universelle des droits de l'homme* (*RUDH*), Éditions N. P. Engel. The speeches given on the day are already available on the Curia website.

European and international civil service, officials of the European institutions and representatives of professional and trade union organisations. The views aired at that colloquium will certainly serve as a source of inspiration for the discussion within the Civil Service Tribunal, and in particular for its planned discussion with regard to the revision of its Rules of Procedure in the light of the experience it has gained since its creation. The events to mark the fifth anniversary of the Civil Service Tribunal included an 'open day' reserved for the staff of the institution.

4. The account given below will describe the most significant decisions of the Civil Service Tribunal as regards procedure and merits. As there are no significant new developments as regards proceedings for interim relief ([9]), costs and legal aid, the sections usually devoted to those questions will not appear in the 2010 report.

I. Procedural aspects

Conditions for admissibility

1. Pre-contentious procedure: rule of concordance between complaint and action

In its judgment of 1 July 2010 in Case F-45/07* ([10]) *Mandt* v *Parliament,* the Civil Service Tribunal relaxed the rule of concordance between the pre-contentious complaint and the application, holding that the concordance rule is infringed only where the judicial action alters the relief sought in the complaint or its cause of action, and that the concept of 'cause of action' must be given a broad interpretation. As regards claims for annulment, the 'cause of action of the dispute' must be understood as the applicant's challenge to the substantive legality of the contested decision or, in the alternative, the challenge to its procedural legality. Consequently, and subject to pleas alleging illegality (which are intrinsically legal in nature and not easy for non-lawyers to understand), and to grounds raising a public-policy issue, the cause of action of the dispute will normally be altered, and the action therefore inadmissible on the ground that it fails to observe the concordance rule, only where the applicant, who criticises in his complaint solely the formal validity of the act adversely affecting him, raises substantive pleas in the application, or conversely where the applicant, having disputed in the complaint only the substantive legality of the act adversely affecting him, submits an application containing pleas relating to the formal validity of that act.

It must be observed that, in its judgment of 23 November 2010 in Case F-50/08* *Bartha* v *Commission*, the Civil Service Tribunal, for the first time, held a plea admissible in the light of the judgment in *Mandt* v *Parliament*.

2. Definition of act adversely affecting an official

In its judgment of 13 January 2010 in Joined Cases F-124/05 and F-96/06* *A and G* v *Commission*, the Civil Service Tribunal, following the judgment of the Court of First Instance (now the General Court) of 15 October 2008 in Case T-345/05 *Mote* v *Parliament*, which concerned the waiver of the

([9]) Four orders for interim measures were made in 2010 by the President of the Civil Service Tribunal (order of 23 February 2010 in Case F-99/09 R *Papathanasiou* v *OHIM*; order of 14 July 2010 in Case F-41/10 R *Bermejo Garde* v *EESC*; order of 10 September 2010 in Case F-62/10 R *Esders* v *Commission*, and order of 15 December 2010 in Joined Cases F-95/10 R and F-105/10 R *Böm-cke* v *EIB*). In those four cases, the applications for interim measures were dismissed.

([10]) The judgments marked with an asterisk have been translated into all the official languages of the European Union except Irish.

immunity from legal proceedings of a Member of the European Parliament, held that the waiver of the immunity from legal proceedings of an official was an act adversely affecting that official. In the case in question, however, the applicant's reliance, in the action for damages he brought, on the illegality of the decision waiving his immunity was no longer admissible as he had not contested that decision within the time-limits laid down by Articles 90 and 91 of the Staff Regulations.

By a judgment of 23 November 2010 in Case F-8/10* *Gheysens* v *Council*, the Civil Service Tribunal held that a decision not to renew a fixed-term contract was an act adversely affecting a person for which reasons had to be stated in accordance with Article 25 of the Staff Regulations, where it is distinct from the contract in question, which will be the case, in particular if it is based on new factors or if it constitutes an expression of the position of the administration adopted following a request from the member of staff concerned and dealing with the possibility, provided for in the contract, of renewing that contract.

3. Interest in bringing proceedings

In its judgment of 5 May 2010 in Case F-53/08* *Bouillez and Others* v *Council*, the Civil Service Tribunal held that officials eligible for promotion to a particular grade have, in principle, a personal interest in challenging not only the decision not to promote them but also the decisions promoting other officials to that grade.

4. Time-limits

In its judgment of 30 September 2010 in Case F-29/09* *Lebedef and Jones* v *Commission* (in a dispute concerning the legality of the provision in the first subparagraph of Article 3(5) of Annex XI to the Staff Regulations, according to which no correction coefficient is to be applicable not only in Belgium (the country of reference for the determination of the cost of living) but also in Luxembourg), the Civil Service Tribunal first recalled the case-law according to which an official who fails to contest, within the time-limits for lodging a complaint and bringing an action, the salary slip documenting, for the first time, the implementation of a measure of general application establishing financial entitlements, may not, once those time-limits have passed, contest the salary slips for subsequent months, relying on the illegality allegedly vitiating the first salary slip. However, in this case, the Civil Service Tribunal found that the applicants were essentially criticising the Commission for continuing to apply the first subparagraph of Article 3(5) of Annex XI to the Staff Regulations without having undertaken a study into the possible difference in purchasing power between Brussels and Luxembourg, whereas they claim that new economic circumstances have arisen which they allege no longer justify the application of that provision, in the light, inter alia, of the principle of equal treatment. Moreover, the Civil Service Tribunal pointed to the difficulties of a procedural nature which an individual would encounter in bringing an action under Article 265 TFEU against an institution for failure to act in order to have a rule adopted by the Union legislature repealed. Against that background, the Civil Service Tribunal held that to exclude, in accordance with the case-law set out above, the possibility open to an official of contesting his salary slip on the ground of a change in circumstances, such as a change in economic conditions, and raising in that connection a plea of illegality against a provision of the Staff Regulations which, while it appeared valid at the time it was adopted, has, according to the official concerned, become illegal because of that change of circumstances would render it impossible in practice to bring an action to ensure respect for the principle of equal treatment recognised by European Union law and would thus have a disproportionate effect on the right to effective judicial protection.

In its order of 16 December 2010 in Case F-25/10 *AG* v *Parliament*, the Civil Service Tribunal held, with regard to the notification of a decision by registered letter, that, if the addressee of a registered

letter who is not at home when the postman calls does not take any action whatsoever or does not collect the letter within the period for which the postal services usually retain letters, it must be found that the addressee was duly notified of the decision at issue on the date that period ends. If such conduct on the part of the addressee were allowed to prevent the proper notification of a decision by registered letter, the guarantees offered by this method of notification would be considerably weakened, whereas it is a particularly safe and objective method of notification of administrative measures. Moreover, the addressee would thereby be allowed a certain amount of latitude in the establishment of the starting point for the time-limit for bringing an action, whilst that time-limit may not be at the discretion of the parties and must meet the requirements of legal certainty and the sound administration of justice. Nonetheless, the presumption that the addressee has been notified of the decision on expiry of the usual period for retention of a registered letter by the postal services is not absolute in nature. Application of that presumption is subject to proof, by the administration, of proper notification by registered letter, in particular by the fact that a delivery advice note was left at the last address given by the addressee. Furthermore, that presumption is not irrebuttable. The addressee may, for example, seek to establish that he was prevented, inter alia, by illness or an act of force majeure outside his control, from taking proper cognisance of the delivery advice note.

Confidential documents

In Case F-2/07 *Matos Martins* v *Commission* (judgment of 15 April 2010), the Civil Service Tribunal found that certain documents, whose production it had requested by way of measure of organisation of the procedure, were confidential vis-à-vis the applicant, limited access to those documents to the lawyer of the person concerned, excluding the applicant himself, and ordered that they be consulted at the premises of the Registry without giving authorisation for any copies of those documents to be made.

By two orders of 17 March 2010 and 20 May 2010 given in Case F-50/09 *Missir Mamachi di Lusignano* v *Commission* ([11]), the Civil Service Tribunal ordered the defendant to produce certain documents classified as 'restricted EU', specifying the security measures to which access to those documents would be subject, and pointing out inter alia that neither the applicant nor his lawyer would be authorised to consult those documents. It made clear, in particular, that, although it planned to base its decision on the dispute on the documents in question, it was appropriate to discuss the rules for applying in this case the principle that both parties should be heard in the proceedings and the provisions of Article 44(1) of the Rules of Procedure, as that principle and those provisions could imply that the applicant should have at least partial access to those documents ([12]).

Raising a plea of the Tribunal's own motion

By 11 judgments of 29 June 2010 ([13]), the Civil Service Tribunal recalled that respect for the rights of the defence is an essential procedural requirement breach of which may be raised of the Tribunal's own motion, and in this case annulled decisions of the European Police Office (Europol) refusing to grant contracts of indefinite duration to the applicants for breach of that principle.

([11]) The decision closing the proceedings in this case has not yet been delivered.

([12]) Order of 17 March 2010.

([13]) Judgments in Cases F-27/09, F-28/09, F-34/09, F-35/09, F-36/09, F-37/09, F-38/09, F-39/09, F-41/09, F-42/09 and F-44/09.

II. Merits

General principles

1. Non-contractual liability of the institutions

In its judgment of 11 May 2010 in Case F-30/08* *Nanopoulos* v *Commission* (under appeal to the General Court), the Civil Service Tribunal recalled that where it is put in issue under the provisions of Article 236 EC (now, after amendment by the Treaty of Lisbon, Article 270 TFEU), the non-contractual liability of the institutions may be incurred on the ground solely of the illegality of an act adversely affecting an official (or of non-decision-making conduct), without there being any need to consider whether it is a sufficiently serious breach of a rule of law intended to confer rights on individuals. The Civil Service Tribunal stressed that that case-law does not preclude the Tribunal from determining the extent of the administration's discretion in the field concerned; on the contrary, that criterion is an essential parameter in the examination of the legality of the decision or conduct at issue, since the judicial review carried out and its intensity depend on the degree of latitude available to the administration on the basis of the relevant law and of the requirements of proper functioning to which that administration is subject.

In its judgment of 9 March 2010 in Case F-26/09 *N* v *Parliament*, the Civil Service Tribunal, having recalled that annulment of a measure contested by an official will in itself constitute appropriate and, generally, sufficient reparation for any non-material harm suffered by the applicant, specified the situations in which the Courts of the European Union had allowed certain exceptions to that rule. For instance, it pointed out that the annulment of an unlawful act of the administration cannot constitute full reparation for the non-material harm suffered, first, if that act entails an explicitly negative appraisal of the abilities of the applicant such as to injure him, second where the unlawful act committed is particularly serious and, third, where annulment of an act has no useful effect.

2. Fundamental rights and general principles of civil service law

(a) Fundamental right to the inviolability of the home

In its judgment of 9 June 2010 in Case F-56/09 *Marcuccio* v *Commission*, the Civil Service Tribunal recalled that the fundamental right to the inviolability of the home must be recognised in the Community legal order as a general principle common to the laws of the Member States in regard to the private dwellings of natural persons, and that, in addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which Article 6(2) of the EU Treaty refers, provides in Article 8(1) that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. In this case it was held that, by entering the service accommodation of the applicant without observing any formalities, the administration had breached the right of the person concerned to respect for his property, his home and his private life, and that wrongful maladministration of that sort is such as to give rise to the liability of the defendant.

(b) Presumption of innocence

In Case F-75/09 *Wenig* v *Commission* (judgment of 23 November 2010), the Civil Service Tribunal had to consider a plea by which the applicant argued that, by refusing to grant his requests for assistance, the Commission had breached the principle of the presumption of innocence, since that refusal implied that, in the eyes of the Commission, he had actually committed certain acts which were reported in a newspaper article. The Civil Service Tribunal first recalled that the principle of

the presumption of innocence enshrined in Article 6(2) of the ECHR is not limited to a procedural guarantee in criminal matters, but that its scope is wider and requires that no representative of the State declare that a person is guilty of an offence before his guilt has been established by a court. It went on to hold, in this case, that, as the Commission had made no statement which implied that, in its view, the applicant had committed or could have committed an offence, the applicant was not justified in claiming that the Commission had breached the principle of the presumption of innocence merely by refusing to give him assistance.

(c) Duty to have regard for the welfare of officials

In its judgment of 28 October 2010 in Case F-92/09* *U* v *Parliament*, the Civil Service Tribunal made the point that the duty to have regard for the welfare of officials requires the administration, where there is doubt as to the medical origin of the difficulties encountered by an official in performing the tasks falling to him or her, to take all necessary steps to dispel that doubt before a decision dismissing that official is adopted. Moreover, the obligations imposed on the administration by the duty to have regard for the welfare of officials are substantially reinforced when what is at issue is the particular situation of an official in respect of whom there are doubts regarding his or her mental health, and, consequently, regarding his or her capacity to defend his or her own interests adequately.

3. Application of private international law by an institution of the European Union

In its judgment in *Mandt* v *Parliament*, the Civil Service Tribunal made clear, as regards the application by an institution of a provision concerning the marital status of individuals, that the administration was not obliged to determine the applicable law and/or the relevant legal order by means of reasoning based purely on private international law but was entitled simply to select as a connecting factor the existence of 'very close' links with the dispute.

In this case, two people claimed a survivor's pension under Article 79 of the Staff Regulations as the surviving spouse of the same official. Faced with that situation the Parliament had decided to apportion the pension between the two claimants. Having dismissed an action brought by one of those two claimants as inadmissible (order of 23 May 2008 in Case F-79/07 *Braun-Neumann* v *Parliament*) the Civil Service Tribunal dismissed the action brought by the other claimant on its merits, rejecting both the plea in law seeking to deny the first claimant the status of surviving spouse (the Civil Service Tribunal having found in that connection that that person was considered to be the surviving spouse by the law and the legal order of a country with very close links both with that person and with the dispute as a whole) and the plea that, where there were two surviving spouses, each of them was entitled to a full survivor's pension. Thus, the Civil Service Tribunal held that the Parliament, faced with a legislative lacuna, did not err in law by adopting the solution described.

Rights and obligations of officials

1. Obligation to provide assistance

In its judgment in *Wenig* v *Commission*, the Tribunal held that the administration could not be obliged to provide assistance, in the context of criminal proceedings, to an official suspected, in the light of clear and relevant evidence, of having seriously breached his professional obligations and subject, on that ground, to disciplinary proceedings, despite the fact that that breach is alleged to have arisen as a result of the unlawful conduct of third parties.

2. Access for an official to documents concerning him

In its judgment in *A and G* v *Commission*, the Civil Service Tribunal clarified the relationship between the provisions of Article 26 of the Staff Regulations regarding the right of access of an official to his personal file, the provisions concerning access to documents of a medical nature relating to him such as those provided for by the common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, and the provisions of 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).

Careers of officials

1. Competitions

In its judgment of 15 June 2010 in Case F-35/08* *Pachtitis* v *Commission* (under appeal to the General Court), the Civil Service Tribunal annulled the decision of the European Personnel Selection Office (EPSO) excluding the applicant from the list of the candidates who had obtained the best marks in the admission tests for an open competition, on the ground that EPSO did not have the authority to make such a decision. It held that without an amendment to the Staff Regulations expressly conferring on EPSO the tasks previously assigned to the selection board, EPSO does not have the authority to carry out such tasks, and in particular tasks which, in the case of recruitment of officials, affect the determination of the content of the tests and their correction, including tests comprising multiple-choice questions to assess verbal and numerical reasoning ability and/or general knowledge and knowledge of the European Union, even if those tests are presented as tests for 'admission' of candidates to the competition's written and oral tests.

In its judgment in *Bartha* v *Commission*, the Civil Service Tribunal clarified certain points relating to the provision in the fifth paragraph of Article 3 of Annex III to the Staff Regulations, according to which if a selection board consists of more than four members, it is to comprise at least two members of each gender. It specified inter alia that compliance with that rule had to be verified at the time of the constitution of the selection board as recorded in the list published by the institution or institutions organising the competition, and that only the full members of the selection board should be taken into account.

2. Promotion procedures

In *Bouillez and Others* v *Council*, it was held that it follows from Article 45(1) of the Staff Regulations that the level of responsibilities exercised by the officials eligible for promotion is one of the three relevant elements that the administration must take into account in the analysis of the comparative merits of those officials. The expression 'where appropriate' in the fourth subparagraph of Article 45(1) of the Staff Regulations simply means that while, in principle, servants in the same grade are supposed to hold posts involving equivalent responsibilities, where that is not in fact the case that circumstance must be taken into consideration in the promotion procedure.

The Civil Service Tribunal, having held that the plea alleging breach of Article 45(1) of the Staff Regulations was well founded, first recalled that the Courts of the European Union have acknowledged that where the act that should be annulled benefits a third party, which is the case of an entry on a reserve list, a promotion decision or a decision making an appointment to a vacant post, it must first determine whether annulment would constitute an excessive penalty for the irregularity committed. The Civil Service Tribunal went on to observe that, where promotion is concerned, the Courts of the European Union undertake a case-by-case examination. In the first place, they take

into consideration the nature of the irregularity. In the second place, they balance the interests involved. When balancing the interests, they take into consideration, first of all, the interest which the officials concerned have in being reinstated in law and in full in their rights, second, the interests of the illegally promoted officials and, finally, the interests of the service.

In its judgment of 15 December 2010 in Case F-14/09 *Almeida Campos and Others* v *Council*, the Civil Service Tribunal held that the appointing authority could not lawfully examine the merits of officials in the same grade separately according to whether they belonged, under the old Staff Regulations, to category A or to the language grades LA, given that the legislature had decided that, under the new Staff Regulations, both groups would belong to the single function group of administrators.

Working conditions of officials

In the judgment of 30 November 2010 in Case F-97/09 *Taillard* v *Parliament*, it was held that, given that diseases may evolve, it cannot be maintained that the results of an arbitration which found that an official was fit for work remain valid when that official produces a new medical certificate. As regards the risk of circumvention of the procedure for medical checks by the production of successive medical certificates relating to the same disease, the Civil Service Tribunal held that, where it proves necessary, in particular where there is evidence of abuse by the applicant, the institution concerned can have recourse to the relevant disciplinary procedures.

Emoluments and social security benefits of officials

1. Pay

In its judgment of 14 October 2010 in Case F-86/09* *W* v *Commission*, the Civil Service Tribunal was called upon to rule on a claim for annulment of a Commission decision refusing to pay the household allowance to a member of staff on the ground that the couple formed by that member of staff and his non-marital same-sex partner did not fulfil the condition laid down by Article 1(2)(c)(iv) of Annex VII to the Staff Regulations, since he had access to legal marriage in Belgium. The applicant, who has dual Belgian and Moroccan nationality, put the argument to the administration that, given his Moroccan nationality, such a marriage was impossible, since, in entering into a marriage with a person of the same sex, he ran the risk of a criminal prosecution in Morocco under Article 489 of the Moroccan penal code, which outlaws homosexuality. The Civil Service Tribunal held, on the basis of the case-law of the European Court of Human Rights, that the rules of the Staff Regulations extending the right to the household allowance to officials registered as stable non-marital partners should be interpreted in such a way as to ensure that that right is not merely theoretical but is real and effective. In this case, the Civil Service Tribunal held that a national law such as Article 489 of the Moroccan penal code, which criminalises homosexual acts regardless of the place where such acts are committed, is likely to make access to marriage and thus to the right to a household allowance theoretical. It therefore annulled the decision of the defendant refusing to pay the applicant that allowance.

2. Social security

In its judgment of 1 July 2010 in Case F-97/08 *Füller-Tomlinson* v *Parliament* (under appeal to the General Court), the Civil Service Tribunal rejected a plea raised by the applicant of the illegality of the European physical and mental disability rating scale which is an integral part of the common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, which entered into force on 1 January 2006.

In its judgment of 14 September 2010 in Case F-79/09 *AE* v *Commission*, the Civil Service Tribunal, ruling in an action to establish liability pleading the unreasonable duration of the procedure for the recognition of an occupational disease, observed that it is the responsibility of the Commission as an institution to remind the members of the medical committees of their duty to act with due diligence.

In its judgment of 23 November 2010 in Case F-65/09 *Marcuccio* v *Commission*, the Civil Service Tribunal rejected a plea of illegality directed against the criteria for the definition of a serious illness within the meaning of Article 72 of the Staff Regulations, namely, a poor prognosis, chronic progression, the need for extreme diagnostic or therapeutic measures and the presence or the risk of serious handicap. By that judgment, it was also made clear that the term 'mental illness' within the meaning of Article 72 of the Staff Regulations can only refer to an illness objectively presenting a degree of seriousness and not to any psychological and psychiatric problem whatever its degree of seriousness.

In the judgment of 1 December 2010 in Case F-89/09 *Gagalis* v *Council*, it was made clear that both Article 73(3) of the Staff Regulations and the third subparagraph of Article 9(1) of the common rules on the risk of accident must be interpreted as meaning that they only provide for a supplementary reimbursement of the costs of benefits covered by Article 72 of the Staff Regulations after reimbursement of the part of the cost falling on the sickness insurance scheme. The accident insurance scheme is a supplementary scheme and thus does not provide for any reimbursement of the costs of benefits, apart from those provided for by Article 9(2), which are not covered by the sickness insurance scheme and which were thus not defrayed by the sickness insurance scheme.

Disciplinary rules

In the judgment in *A and G* v *Commission*, the point was made that the fact that the disciplinary proceedings have been terminated without a disciplinary measure being taken against the official in question cannot prevent the Courts of the European Union from carrying out a review of the legality of the decision to bring disciplinary proceedings against the person concerned. In order to protect the rights of the official concerned, the appointing authority must be considered to have exercised its powers unlawfully not only if a misuse of powers is proven but also in the absence of sufficiently precise and relevant evidence suggesting that the person concerned has committed a disciplinary offence. Moreover, in that judgment, the principle that disciplinary proceedings must be held within a reasonable time was upheld. The duty to act with due diligence falling on the disciplinary authority concerns both the opening of the disciplinary procedure and its conduct.

Conditions of employment of other servants

1. Dismissal of a member of staff under a contract of indefinite duration

In its judgments of 9 December 2010 in Case F-87/08 *Schuerings* v *ETF* and Case F-88/08 *Vandeuren* v *ETF*, the Civil Service Tribunal, after pointing out that to allow an employer to end an employment relationship of indefinite duration without a valid reason would be contrary to the principle of stable employment which characterises contracts of indefinite duration and would run counter to the very nature of this type of contract, held that the reduction of the scale of the activities of an agency may be considered liable to constitute a valid reason for dismissal, provided, however, that that agency has no post available to which the member of staff concerned could be transferred. When it considers whether a member of staff can be transferred to another post, whether already in existence or to be created, the administration must weigh the interest of the service, which demands the recruitment of the most suitable person for the post, against the interest of the member

of staff whose dismissal is proposed. In doing so, it must take account, in the exercise of its discretion, various criteria, which include the requirements of the post in terms of the qualifications and potential of the member of staff, whether or not the employment contract of the member of staff concerned specifies that he is engaged to occupy a particular post, his appraisals and his age, his seniority and the number of years of pensionable service remaining before he can claim his retirement pension.

2. Dismissal of a member of staff at the end of his probation period

In its judgment of 24 February 2010 in Case F-2/09 *Menghi* v *ENISA*, the Civil Service Tribunal clarified several points regarding dismissals in connection with the dismissal of a member of the temporary staff at the end of his probation period. It stated, first, that the fact it has been established that a member of staff has suffered psychological harassment does not make every decision adversely affecting that member of staff arising in the context of that harassment illegal. There still has to be a link between the harassment at issue and the grounds of the contested decision. It stated, second, that breach of the provisions of Article 24 of the Staff Regulations concerning the obligation to provide assistance cannot be relied on against a decision to dismiss. Only administrative decisions connected with the duty to provide assistance, that is to say, decisions rejecting a request for assistance or, in certain exceptional circumstances, failure to provide assistance spontaneously to a member of staff, are liable to breach that obligation. The subject of a decision to dismiss does not fall within the scope of Article 24 of the Staff Regulations and is, consequently, not connected with the obligation to provide assistance laid down by that article. Finally, it held that the provisions laid down in Article 22a(3) of the Staff Regulations, according to which an official who has provided information concerning facts which give rise to a presumption of the existence of possible illegal activity or conduct which may constitute a serious failure to comply with the obligations of officials of the Union 'shall not suffer any prejudicial effects on the part of the institution … provided that he acted reasonably and honestly', do not offer an official who, under Article 222a(1) of the Staff Regulations has provided information concerning facts which give rise to a presumption of the existence of possible illegal activity protection against any decision liable to affect him adversely but only against decisions adopted because of that provision of information.