Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)

29 September 2011*

(Civil Service — Appointment — Successful candidate in a competition published before the entry into force of the new Staff Regulations but finalised afterwards — Grading under the new, less favourable rules)

In Case F-70/05,

ACTION under Articles 236 EC and 152 EA,

Harald Mische, official of the European Commission, residing in Brussels (Belgium), represented initially by G. Vandersanden, and L. Levi, lawyers, and subsequently by R. Holland, B Maluch and J. Mische, lawyers,

applicant,

v

European Commission, represented by J. Currall and H Krämer, acting as Agents,

defendant,

supported by

Council of the European Union, represented by M. Arpio Santacruz and M. Simm, acting as Agents,

intervener,

THE CIVIL SERVICE TRIBUNAL (Second Chamber),

composed of P. Mahoney, President, H. Tagaras and S. Van Raepenbusch (Rapporteur), Judges,

Registrar: J. Tomac, Administrator,

having regard to the written procedure and further to the hearing on 12 April 2011,

gives the following

* Language of the case: English.

Judgment

1 By application received at the Registry of the Court of First Instance (now 'the General Court') of the European Communities on 20 July 2005 by fax (the original being lodged on 26 July 2005), Mr Mische seeks, first, annulment of the decision of the Commission of the European Communities of 11 November 2004 in so far as it determines his grade to be A*6, step 2, secondly, reinstatement of all his rights deriving from a regular grading and, lastly, the award of damages.

Legal context

2 The Staff Regulations of Officials of the European Union, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 ('the Staff Regulations' or 'the new Staff Regulations'), and the Conditions of Employment of Other Servants of the Union, as amended by the same Regulation ('the Conditions of Employment'), entered into force, as provided in Article 2 of that regulation, on 1 May 2004.

3 Regulation No 723/2004 introduced a new careers system in the European civil service by substituting new function groups of administrators (AD) and assistants (AST) for the old categories of officials A, B, C and D.

4 Article 5(5) of the Staff Regulations provides:

'Identical conditions of recruitment and service career shall apply to all officials belonging to the same function group.'

5 Article 7(1) of the Staff Regulations provides:

'The appointing authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his function group which corresponds to his grade.

An official may apply for a transfer within his institution.'

6 Article 31 of the Staff Regulations provides:

'1. Candidates … shall be appointed to the grade of the function group set out in the notice of the competition they have passed.

2. Without prejudice to Article 29(2), officials shall be recruited only at grades AST 1 to AST 4 or AD 5 to AD 8. The grade of the competition notice shall be determined by the institution in accordance with the following criteria:

(a) the objective of recruiting officials of the highest standard as defined in Article 27;

(b) the quality of the professional experience required.

To address specific needs of the institutions, labour market conditions prevailing in the [European Union] may also be taken into account when recruiting officials.

3. Notwithstanding paragraph (2), the institution may, where appropriate, authorise the organisation of a competition at grade AD 9, AD 10, AD 11 or, on an exceptional basis, at grade AD 12. The total number of candidates appointed to vacant posts at these grades shall not exceed 20% of the total number of appointments to the function group AD made per year in accordance with the second paragraph of Article 30.'

7 Annex XIII to the Staff Regulations sets out the transitional measures applying following the entry into force of Regulation No 723/2004.

8 Article 1 of Annex XIII to the Staff Regulations provides:

'1. For the period from 1 May 2004 to 30 April 2006 Article 5(1) and (2) of the Staff Regulations are replaced by the following:

"1. The posts covered by the Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in four categories A*, B*, C* and D*, in descending order of rank.

2. Category A* shall comprise twelve grades, category B* shall comprise nine grades, category C* shall comprise seven grades and category D* shall contain five grades."

2. Any reference to the date of recruitment shall be taken to refer to the date of entry into service.'

9 Article 2(1) of Annex XIII to the Staff Regulations is worded as follows:

'On 1 May 2004, and subject to Article 8 of this Annex, the grades of officials having one of the administrative statuses set out in Article 35 of the Staff Regulations shall be renamed as follows:

Former grade	New (intermediate) grade	Former grade	New (intermediate) grade	Former grade	New (intermediate) grade	Former grade	New (intermediate) grade)
A 1	A*16						
A 2	A*15						
A 3/LA 3	A*14						
A 4/LA 4	A*12						
A 5/LA 5	A*11						
A 6/LA 6	A*10	B 1	B*10				
A 7/LA 7	A*8	B 2	B*8				
A 8/LA 8	A*7	B 3	B*7	C 1	C*6		
		B 4	B*6	C 2	C*5		
		B 5	B*5	C 3	C*4	D 1	D*4
				C 4	C*3	D 2	D*3
				C 5	C*2	D 3	D*2
						D 4	D*1

'

10 Article 5(4) of Annex XIII to the Staff Regulations is worded as follows:

‘Temporary servants whose names appear before 1 May 2006 on the list of candidates suitable for transfer from one category to another or on the list of successful candidates of an internal competition shall, if recruitment takes place as from 1 May 2004, be placed in the grade and step they occupied as a temporary servant in the former category, or failing this at the first step in the starting grade of the new category.’

11 Article 12 of Annex III to the Staff Regulations provides:

‘1. Between 1 May 2004 and 30 April 2006, reference to grades in function groups AST and AD in paragraph[s] 2 and 3 of Article 31 of the Staff Regulations shall be made as follows:

— AST 1 to AST 4: C*1 to C*2 and B*3 to B*4

— AD 5 to AD 8: A*5 to A*8

— AD 9, AD 10, AD 11, AD 12: AD*9, AD*10, AD*11, AD*12.

2. In the case of officials recruited from lists of suitable candidates resulting from competitions published before 1 May 2004 Article 5(3) of the Staff Regulations shall not apply.

3. Officials who have been included in a list of suitable candidates before 1 May 2006 and are recruited between 1 May 2004 and 30 April 2006 shall:

— if the list was drawn up for category A*, B* or C*, be graded in the grade published in the competition;

— if the list was drawn up for category A, LA, B or C, be graded in accordance with the following table:

Grade of the competition	Grade of recruitment
A 8/LA 8	A*5
A/LA 7 and A/LA 6	A*6
A/LA 5 and A/LA 4	A*9
A/LA 3	A*12
A 2	A*14
A 1	A*15
B 5 and B 4	B*3
B 3 and B 2	B*4
C 5 and C 4	C*1
C 3 and C 2	C*2

’

Background to the dispute

12 On 23 May 2002 the European Parliament published in the *Official Journal of the European Communities* (OJ 2002 C 120 A, p. 11) Notice of Open Competition PE/96/A to constitute a reserve of German-language administrators in career bracket A7/A6 ('Competition PE/96/A').

13 The applicant entered that competition and his name was included on the reserve list adopted on 27 May 2004. In the meantime, that is to say on 1 November 2002, he had been recruited to the Commission's Competition Directorate-General (DG) as a member of the temporary staff at grade A 7, step 2. From 1 May 2004, he worked as a member of the auxiliary staff within the same Directorate-General.

14 On 25 June 2004 DG Competition published a notice of vacancy for a category A post, for which the applicant applied. It is not disputed that the DG requested the recruitment of the applicant to the post in question on 22 July 2004 and that, by letter of 19 August 2004, the Commission asked the Parliament to appoint him as a probationary official and transfer him simultaneously. The Commission's DG Personnel and Administration and the applicant exchanged emails in September 2004 concerning the applicant's grading; the DG envisaged his recruitment at grade A*6, step 2, as of 16 November 2004.

15 By decision of 4 October 2004, which took effect on 16 November 2004, the Parliament appointed the applicant as a probationary official at grade A*6, step 1, and transferred him to the Commission.

16 By letter of 8 November 2004, the Commission informed the applicant that the Parliament had agreed to his recruitment and simultaneous transfer and, accordingly, officially offered him a post as a probationary official in DG Competition at grade A*6, step 2, on a basic salary of EUR 4 492.73. In the same letter, the Commission noted that the applicant, who was still working in that Directorate-General, was available to continue working under his new status from 16 November 2004 and confirmed that he would be considered to be an official of the Commission from that date.

17 By decision of 11 November 2004, which took effect on 16 November 2004, the Commission took the formal decision to assign the applicant to a post as an administrator (probationary official) at grade A* 6, step 2, in DG Competition.

18 The Commission notified the applicant of its decision of 11 November 2004 on 24 November 2004 and annexed to that decision a copy of the decision of the Parliament of 4 October 2004 appointing him as a probationary official and transferring him to the Commission.

19 On 18 February 2005 the applicant lodged a complaint with the Commission against its decision of 11 November 2004. The Commission rejected that complaint on 13 April 2005.

20 Furthermore, after lodging a complaint with the Parliament on 23 February 2005 against the latter's decision of 4 October 2004, which was rejected on 10 June 2005, the applicant brought an action against that decision, which was registered by the General Court as Case T-365/05, before being transferred to the Civil Service Tribunal, where it was registered as Case F-93/05.

Forms of order sought and procedure

21 The applicant claims that the Tribunal should:

— annul the decision of 11 November 2004 in so far as it determined his grading ('the contested decision') and therefore order 'the reinstatement of all his rights as deriving from … a legal and regular grading at … A7/3 … or its equivalent';

— order the Commission to pay damages with default interest to make good the damage caused to his career, and further damages in the form of 'legal pay' or, in the alternative, order a reduction in his pension contributions;

— order the Commission to pay the costs.

22 The Commission contends that the Tribunal should:

— dismiss the action;

— make an appropriate order as to costs.

23 By letter received at the Registry of the General Court on 11 August 2005, the Council of the European Union applied for leave to intervene in this case in support of the forms of order sought by the Commission. The President of the Fourth Chamber of that Court granted leave to intervene by order of 11 November 2005.

24 By order of 15 December 2005, the General Court, pursuant to Article 3(3) of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7), referred the present case to the Tribunal. The application was registered at the Registry of the Tribunal as Case F-70/05.

25 By its statement in intervention on the substance of the case, received at the Registry of the Tribunal on 9 February 2006, the Council contends that the Tribunal should dismiss the action.

26 By order of 14 March 2006, the President of the Second Chamber of the Tribunal decided to stay the proceedings pending the General Court's decision disposing of Case T-58/05 *Centeno Mediavilla and Others* v *Commission*.

27 The General Court delivered its judgment in Case T-58/05 *Centeno Mediavilla and Others* v *Commission* ('Case T-58/05 *Centeno Mediavilla*') on 11 July 2007, and that judgment was the subject of an appeal to the Court of Justice of the European Communities. The appeal was dismissed by the Court in its judgment of 22 December 2008 in Case C-443/07 P *Centeno Mediavilla and Others* v *Commission* ('Case C-443/07 P *Centeno Mediavilla*').

28 After judgment was delivered in Case C-443/07 P *Centeno Mediavilla*, and at the request of the Tribunal, the parties were invited, in a letter of 18 March 2009 from the Registry of the Tribunal, to submit their observations on the consequences of that judgment in relation to further steps in the proceedings. The Commission, the Council and the applicant complied with that request on 26 March, 14 April and 29 April 2009, respectively.

29 On 20 January 2010, the applicant also submitted to the Tribunal his observations on the Council's statement in intervention.

30 By order of 31 March 2011 of the President of the Second Chamber of the Tribunal, the present case and Case F-93/05 *Mische* v *Parliament* were joined for the purposes of the oral procedure.

31 In the preparatory report for the hearing, the attention of the parties was drawn to the judgments of 8 July 2010 in Cases F-64/06 *Bergström* v *Commission* ('*Bergström*') and F-67/06 *Lesniak* v *Commission* ('*Lesniak'*); of 30 September 2010 in Cases F-36/05 *Schulze* v *Commission* ('*Schulze*'); F-76/05 *Torijano Montero* v *Council* ('*Torijano Montero*'); and F-20/06 *De Luca* v *Commission* ('*De Luca*'), which is the subject of an appeal before the General Court of the European Union (Case T-563/10 P); of 28 October 2010 in Cases F-85/05 *Sørensen* v *Commission* ('*Sørensen*') and F-113/05 *Kay* v *Commission* ('*Kay*'); and of 14 December 2010 in Case F-25/07 *Bleser* v *Court of Justice* ('*Bleser*').

Law

A – *Possibility of lis pendens*

32 Since the applicant also brought an action, registered as Case F-93/05, against the Parliament's decision of 4 October 2004 appointing him as a probationary official and transferring him to the Commission, in so far as that decision graded him at A*6, step 1, the Commission contends that the Tribunal is faced with a question of lis pendens.

33 It should be observed, however, that the parties to the present action and to the action in Case F-93/05 are not the same, nor do the actions seek annulment of the same measure.

34 Moreover, by judgment delivered today by the Tribunal, the action registered as Case F-93/05 is dismissed on grounds of inadmissibility.

35 In consequence, the plea of *lis pendens* raised by the Commission must be rejected.

B – *The first head of claim: annulment of the contested decision and reinstatement of all the applicant's rights as they derive from a legal grading*

1. *Preliminary observations*

a) Admissibility of the first head of claim in so far as it seeks reinstatement of the applicant's rights

36 The Commission contends that the Tribunal cannot address injunctions to the administration and that the first head of claim is inadmissible in so far as the applicant seeks thereby the reinstatement of all his rights as they derive from a legal and regular grading.

37 It should be noted in that regard that, although the wording of the grounds of a judgment annulling a measure may provide the defendant with information regarding its enforcement, the Tribunal cannot, without encroaching on the prerogatives of the administrative authority, formally address injunctions to an institution, by ordering that institution to adopt the measures required in order to enforce a judgment annulling a decision (judgment of 23 March 2000 in Case T-197/98 *Rudolph* v *Commission*, paragraph 32).

38 It follows that the first head of claim is inadmissible in so far as is described in paragraph 36 above.

b) The pleas put forward by the applicant

39 In his application, the applicant puts forward six pleas in law.

40 The first four pleas involve arguments that Article 12(3) of Annex XIII to the Staff Regulations, the basis in law for the contested decision, is vitiated by illegality; those pleas allege:

— infringement of the principle of equal treatment and non-discrimination, this plea itself being made up of several complaints;

— infringement of Article 31 of the Staff Regulations;

— non-compliance with the principle of equality, with the principle of equivalence of posts and grades, and with Articles 5 and 7 of the Staff Regulations and Annex I to the Staff Regulations;

— infringement of the principles of legal certainty, non-retroactivity and protection of legitimate expectations, and infringement of acquired rights.

41 The fifth plea alleges that Regulation No 723/2004 is vitiated by illegality in that it contravenes Article 10 of the Staff Regulations.

42 The sixth plea is directed against the contested decision itself and alleges infringement of the principles of good administration, due care, transparency, good faith and equal treatment.

43 In his observations of 20 January 2010 on the Council's statement in intervention, the applicant withdrew the fifth plea, which there is therefore no longer any need to examine.

44 In his observations of 29 April 2009 and 20 January 2010, the applicant supplemented his arguments in support of the pleas put forward in the application, claiming in particular:

— infringement of Article 5(5) of the Staff Regulations, which in his submission is to be distinguished from the principle of equal treatment;

— that the legislature is not competent to identify service needs as regards staffing or to organise recruitment competitions.

45 It is therefore appropriate to examine in turn the allegations of illegality contained in the first four pleas listed in paragraph 40 above, the sixth plea set out in paragraph 42 above and the complaints set out in paragraph 44 above.

2. *The allegations that Article 12(3) of Annex XIII to the Staff Regulations is vitiated by illegality*

a) The first plea: infringement of the principle of equal treatment and non-discrimination

Arguments of the parties

46 The applicant contends that Article 12(3) of Annex XIII to the Staff Regulations takes the date of recruitment as the factor determining whether or not its provisions apply; in his submission, that choice is discriminatory.

47 The applicant observes in that regard that both Article 5(3) of the Staff Regulations in its version prior to Regulation No 723/2004 ('the old Staff Regulations') and Article 5(5) of the new Staff Regulations prohibit any discrimination between officials belonging to the same category or, now, the same function group by providing that they are subject to identical conditions of recruitment and service career. Those provisions prohibit different rules of recruitment from being applied on the basis of a particular date.

48 According to the applicant, the date of recruitment adopted by Article 12(3) of Annex XIII to the Staff Regulations in order to determine which grading system applies is not, however, an objective criterion capable of justifying differences in treatment, because it depends on varying factors, in particular the availability of the administrative services.

49 In his submission, the only objective criterion is the publication of the notice of competition in the Official Journal. It follows from Article 31 of the Staff Regulations that the notice of competition should specify the grade at which successful candidates will be recruited. Therefore, that published notice itself has the effect of creating, with regard to his or her service career, acquired rights for any candidate placed on a reserve list at the close of the selection procedure. In its judgment of 9 July

1997 in Case T-92/96 *Monaco* v *Parliament*, so the applicant argued, the General Court held that candidates taking part in the same competition must be considered in principle to be in the same situation.

50 More specifically, the applicant claims in the first place that, since the qualifications required and the timetable for the tests were identical and only the languages were different, he has suffered discrimination compared with successful candidates in competitions similar to the competition which he entered who were recruited between June 2003 and April 2004, that is to say, before the entry into force of the reform of the Staff Regulations. The applicant criticises in that regard the unjustifiable priority given by the Parliament to those other competitions to the detriment of Competition PE/96/A, the results of which were expected in June 2003 although the reserve list was not drawn up until 27 May 2004.

51 The applicant submits, in the second place, that he has suffered discrimination compared with temporary staff who were recruited as officials before 1 May 2004 after passing competitions for access to the grades which they already occupied and who retained their grading. The applicant points out in that connection that as a temporary staff member he had been in grade A 7, step 3, and states that it is clear from the third paragraph of Article 32 of the Staff Regulations, from Articles 9 and 12 of the General Implementing Provisions concerning classification in step, adopted by the Parliament on 15 May 2004 ('the GIP') and from the judgment of 5 July 2007 in Case F-93/06 *Dethomas* v *Commission*, that temporary staff members are to retain their grading when they are recruited on the basis of a competition held in order to fill a post in a grade corresponding to the grade which they have already acquired.

52 The applicant is therefore of the view that the legislature was required to respect the grading of temporary staff members who had entered a competition where the notice of competition for recruitment to the grade corresponding to the grade which those staff members held as temporary staff was drawn up solely on the basis of the old Staff Regulations, without any reference to the possibility of their being appointed as officials under new provisions, and where the reserve list was drawn up on the basis of a grading under the old Staff Regulations.

53 The applicant points out in that regard that, by decision of 13 February 2006, the Parliament decided to regrade temporary agents who had been successful in internal or open competitions and who, like him, had been appointed as officials in a lower grade than that to which they would have been appointed prior to 1 May 2004.

54 Article 5(4) of Annex XIII to the Staff Regulations, the applicant argues, introduced discrimination between temporary staff members who passed an internal competition and those who, like the applicant, passed an open competition. There was even less reason to treat candidates who were successful in open competitions differently from those who were successful in internal competitions because the reform of the Staff Regulations was intended to reward the merits of officials, and internal competitions are often easier than open ones.

55 The applicant adds that there is no call to take into account the fact that from 1 May until 15 November 2004 he worked as an auxiliary staff member. The Commission assured him that his grading would not be affected by his auxiliary contract, which was necessary only because of the excessive length of the process for Competition PE/96/A. Also, according to the applicant, it is apparent from Article 12 of the GIP that seniority in grade and in step acquired as a temporary staff member is retained despite a period of service as a member of contract staff assigned to auxiliary duties provided this does not exceed eight months.

56 The applicant maintains, in the third place, that he was not treated in the same way as candidates who took part in competitions, the notices for which published conditions of employment based solely on the old Staff Regulations, with no restriction as a result of the possible amendment of those Regulations, and who, unlike him, were recruited before the entry into force of the reform of the Staff Regulations.

57 In the fourth place, in view of the consequences of grading for remuneration, the applicant infers from the foregoing considerations that Article 12(3) of Annex XIII to the Staff Regulations infringes the principle of 'equal pay for equal work'. He states that the European Court of Auditors had pointed out the anomalies in that regard resulting from the reform of the Staff Regulations.

58 In the fifth place, the applicant claims that he has suffered discrimination on grounds of age because, by grading all the successful competition candidates in the same way, Article 12(3) of Annex XIII to the Staff Regulations does not take into account the age and professional experience of those concerned.

59 The applicant, moreover, argues that it is apparent from Article 2(1) of Annex XIII to the Staff Regulations that grade A 7, at which he was formerly graded as a temporary staff member and which Notice of Competition PE/96/A stated was the recruitment grade, continued to exist after 1 May 2004 as grade A*8, and that grade A*6, the grade at which he was appointed, was a totally different and lower grade.

60 The Commission and the Council contend in essence that the *Centeno Mediavilla* judgments of the Court of Justice and the General Court provided an answer to the various arguments raised by the applicant in his plea, which must therefore be rejected. The fact that the applicant is a former temporary staff member does not undermine that conclusion, and the contention that Article 5(4) of Annex XIII to the Staff Regulations is itself discriminatory is inadmissible since the applicant was not graded under that provision.

Findings of the Tribunal

61 In the light of the applicant's arguments, it will be for the Tribunal, first, to examine whether the legislature's choice of the date of recruitment as the criterion for applying Article 12(3) of Annex XIII to the Staff Regulations is objectively justified in the light of the principle of equal treatment. Secondly, the Tribunal will need to determine whether that provision constitutes a source of discrimination against the applicant compared with successful candidates in competitions similar to the competition in which he was a successful candidate who were appointed before 1 May 2004. Thirdly, the Tribunal will consider whether Article 12(3) of Annex XIII to the Staff Regulations led to discrimination against the applicant compared with temporary staff members who retained the grading they acquired as temporary staff when they were recruited as officials before 1 May 2004. Fourthly, the Tribunal will examine whether Article 12(3) prevented the applicant from being treated in the same way as candidates who took part in competitions the notices for which published conditions of employment based solely on the old Staff Regulations and who were recruited before 1 May 2004. Fifthly, the Tribunal will determine whether Article 12(3) of Annex XIII to the Staff Regulations infringes the principle of 'equal pay for equal work'. Lastly, the Tribunal will consider whether Article 12(3) of Annex XIII to the Staff Regulations contravenes the prohibition on discrimination on grounds of age.

– Whether it was open to the legislature to take the date of recruitment as the criterion for applying Article 12(3) of Annex XIII to the Staff Regulations

62 It should be noted that a breach of the principle of equal treatment occurs when two categories of person whose factual and legal circumstances disclose no essential difference are treated differently at the time of their recruitment and that difference in treatment is not objectively justified (Case C-443/07 P *Centeno Mediavilla*, paragraph 76).

63 It should also be noted that, in order not to render impossible changes to legislation, the principle of equal treatment cannot impede the freedom of the legislature to make at any time such amendments to the Staff Regulations as it considers to be consistent with the interests of the service, even if the amended provisions are less favourable for officials than the former provisions (see, to that effect, judgment of 29 November 2006 in Case T-135/05 *Campoli* v *Commission*, paragraph 105; Case T-58/05 *Centeno Mediavilla*, paragraphs 86 and 113; judgment of 19 June 2007 in Case F-54/06 *Davis and Others* v *Council*, paragraph 81; *Lesniak*, paragraph 105; and *Sørensen*, paragraph 91).

64 Moreover, it is well established that amending legislation, such as the regulations amending the Staff Regulations, applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation (Case C-443/07 P *Centeno Mediavilla*, paragraph 61) and that is so except for situations originating and becoming definitive under the previous legislation which create acquired rights (judgment of 4 March 2010 in Case C-496/08 P *Angé Serrano and Others* v *Parliament*, paragraph 84).

65 In that regard, it should also be noted that, as is made clear by Article 3 of the Staff Regulations, the appointment of an official necessarily has its origin in a unilateral instrument of the appointing authority and that it is only after being the subject of such a decision that a successful candidate in a competition can claim the status of official and therefore demand the application to him of provisions of the Staff Regulations (Case T-58/05 *Centeno Mediavilla*, paragraphs 54 and 55; *Lesniak*, paragraph 106; and *Sørensen*, paragraph 92).

66 Consequently, since successful competition candidates included in lists of suitable candidates do not, as candidates, have any acquired right to be appointed, but are merely eligible to be so, their right to classification in a particular grade cannot a fortiori be regarded as acquired so long as they have not been the subject of an appointment decision in proper form (Case T-58/05 *Centeno Mediavilla*, paragraph 53, upheld in Case C-443/07 P *Centeno Mediavilla*, paragraphs 64 and 65).

67 It follows that the applicant has no ground for claiming that in Article 12(3) of Annex XIII to the Staff Regulations the legislature should have had regard to the published notice of competition when settling the grading rules applied on appointment, on the ground that publication of that notice created in itself acquired rights for the candidates in respect of their service career. It also follows that it was open to the legislature, without infringing the principle of equal treatment, to take the date of recruitment decided by the appointing authority, which is an objective factor independent of the will of the legislature (Case C-443/07 P *Centeno Mediavilla*, paragraph 81), as the criterion determining, in each case, whether it is the grading rules of the old Staff Regulations or those introduced by the reform of the Staff Regulations which apply. The same conclusion must be drawn in relation to Article 5(5) of the Staff Regulations, which embodies an expression of the principle of equal treatment (judgments of 17 December 1981 in Case 178/80 *Bellardi-Ricci and Others* v *Commission*, paragraph 19; of 6 October 1982 in Case 9/81 *Williams* v *Court of Auditors*, paragraph 21; of 5 November 2003 in Case T-240/01 *Cougnon* v *Court of Justice*, paragraph 70; of 11 July 2007 in Case T-93/03 *Konidaris* v *Commission*, paragraph 110; and Case T-58/05 *Centeno Mediavilla*, paragraph 124).

68 That finding is not undermined by the judgment in *Monaco* v *Parliament* (paragraph 49 above), from which the applicant infers that successful candidates in the same competition are in a comparable situation and must receive the same treatment irrespective of the date of their recruitment.

69 As the Tribunal held in *Lesniak* (see also *Sørensen*, paragraph 96 et seq.):

> '110 ... It is clear from Case C-443/07 P *Centeno Mediavilla* and Case T-58/05 *Centeno Mediavilla* that successful candidates in a competition may be treated differently according to whether or not the date of their appointment is after the entry into force of a reform of the Staff Regulations introduced by the European Union legislature, because such differentiation is objectively justified by the need, noted above [see paragraph 63 above], to preserve the freedom of the legislature to make at any time such amendments to the Staff Regulations as it considers to be consistent with the interests of the service (Case C-443/07 P *Centeno Mediavilla*, paragraph 79, and Case T-58/05 *Centeno Mediavilla*, paragraph 86).
>
> 111 The Court of Justice has moreover held that two officials who are reclassified in a higher grade under different rules of the Staff Regulations are, accordingly, in different situations (... *Angé Serrano* v *Parliament*, [paragraph 64 above], paragraph 108).
>
> 112 Moreover, the idea that all the officials recruited by an institution from the same competition are in comparable situations was advanced in paragraph 55 of the judgment in *Monaco* v *Parliament* [(paragraph 49 above)] only for the purpose of establishing the illegality of applying to a successful candidate in an open competition stricter internal directives on classification in grade adopted by the employer institution itself after the inclusion of the person concerned on the list of suitable candidates, with a view to applying classification criteria under the Staff Regulations which had remained unchanged. In this instance, and in any event, it was, on the contrary, the European Union legislature which ... chose to amend the criteria in the Staff Regulations for the classification in grade (Case T-58/05 *Centeno Mediavilla*, paragraphs 84 and 85).'

70 Lastly, it is apparent from the above considerations and from the principle that the legality of an individual measure is to be assessed on the basis of the facts and the law as they stood at the time of the measure's adoption (Case T-58/05 *Centeno Mediavilla*, paragraph 151) that the applicant's contested grading, which took place on 11 November 2004, could be determined lawfully only in accordance with the new criteria in force on that date. Those new criteria were laid down during the transitional period from 1 May 2004 to 30 April 2006, by Article 12(3) of Annex XIII to the Staff Regulations.

71 In that regard, the applicant cannot claim that the grades prior to the reform of the Staff Regulations, and in particular grade A 7 which he held as a temporary staff member, continued to exist during the transitional period under the new name provided for by Article 2(1) of Annex XIII to the Staff Regulations. In fact, the sole purpose of that provision, read in the light of Article 1(1) of the Conditions of Employment, was to rename during that period the grades of officials who, on 30 April 2004, already had the status of official or temporary staff member and who retained it after that date, and its purpose was not to retain the old grades, under that new name, for those who, like the applicant, an auxiliary staff member on 1 May 2004 subsequently appointed as a probationary official, were not in that situation.

– Whether Article 12(3) of Annex XIII to the Staff Regulations constitutes a source of discrimination against the applicant compared with successful candidates in competitions similar to the competition in which he was successful who were appointed before 1 May 2004

72 It follows from the above considerations that the applicant cannot claim he suffered discrimination compared with successful candidates in competitions similar to the one in which he was successful who were recruited before 1 May 2004, since those candidates cannot be regarded as being in the same legal situation as he is.

73 Moreover, it is to no purpose that the applicant submits that the Parliament deliberately gave priority to other competitions to the detriment of Competition PE/96/A in order to favour candidates sitting selection tests in other languages. First of all, the applicant does not provide any evidence to show that the Parliament did not act in the interests of the service and that, rather, the conduct of the competitions was manipulated in order to place candidates entered for Competition PE/96/A in an unfavourable position. Furthermore, that fact, were it to be established, would not on its own lead to the conclusion that the legislature, which was unconnected with the alleged manipulations by the Parliament, contravened the principle of equal treatment by adopting Article 12(3) of Annex XIII to the Staff Regulations. The argument is therefore ineffective. Lastly, the fact that the Parliament may, in breach of the principle of non-discrimination, have delayed the conduct of Competition PE/96/A in order to give priority to the recruitment of successful candidates from other competitions on a date prior to 1 May 2004 does not affect the legality of the contested decision. Even if some competitions and recruitment procedures had been given priority in order to favour candidates with certain languages, respect for the principle of equal treatment of officials must be reconciled with respect for the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another (see, to that effect, Case T-58/05 *Centeno Mediavilla*, paragraphs 154 and 155).

– Whether Article 12(3) of Annex XIII to the Staff Regulations led to discrimination against the applicant compared with temporary staff members who retained the grading they acquired as temporary staff when they were recruited as officials before 1 May 2004

74 The applicant claims he suffered discrimination compared with temporary staff members recruited as officials before 1 May 2004 at the same grade as the one they had been assigned in their old status.

75 It should be observed in that regard, as a preliminary point, that it is apparent from a reading of Article 1(2) of Annex XIII to the Staff Regulations in conjunction with Article 12(3) of the same annex, on the basis of which the applicant was graded, that the word 'recruited' appearing in the latter provision has a precise meaning and that it must be interpreted as covering officials who entered into service with that status between 1 May 2004 and 30 April 2006 in a post that was open to them following their inclusion, before 1 May 2006, in a list of successful candidates resulting from a competition published under the old Staff Regulations (see, to that effect, *Kay*, paragraph 60).

76 It follows that, for purposes of grading a new official, the fact that the person concerned was formerly a temporary or an auxiliary staff member, is not a relevant consideration for the purposes of Article 12(3) of Annex XIII to the Staff Regulations.

77 It should also be observed that no provision of the Staff Regulations confers on temporary or auxiliary staff members the right to a career within the institutions as officials. In addition, it cannot be inferred from the Staff Regulations that periods worked as a temporary or auxiliary staff member and those worked as an official should generally be regarded as forming a single service career (see, to that effect, *Lesniak*, paragraph 87). In particular, the status of temporary or auxiliary staff member does not afford the persons concerned any right to be assigned a particular grading when they are recruited as officials (*Schulze*, paragraph 64). Contrary to what the applicant maintains, *Dethomas* v

Commission (paragraph 51 above) cannot be read as establishing in that regard that, when appointing officials, the administration is generally required to respect the grading the latter have acquired previously as temporary staff members.

78 It follows that, in the absence of a special provision concerning a particular aspect of the Staff Regulations, temporary or auxiliary staff members who are successful in open competitions do not have an acquired right to special treatment and that they must therefore be treated in the same way as external candidates who have passed such competitions.

79 The third paragraph of Article 32 of the Staff Regulations is a provision which forms a link between a new recruit's former duties as a temporary staff member and his status as an official. It provides that a temporary staff member who is appointed as an official is to retain the seniority in step acquired as a temporary staff member provided he is appointed as an official in the same grade immediately following the period worked as a temporary staff member. However, it is not possible to infer from that special measure concerning classification in step a principle capable of preventing application of Article 12(3) of Annex XIII to the Staff Regulations, concerning classification in a grade. In addition, the third paragraph of Article 32 of the Staff Regulations was not applicable to classification of the applicant in step, since he had been an auxiliary staff member since 1 May 2004 at the time he was appointed and he did not therefore become an official immediately after being a temporary staff member. As regards Article 12 of the GIP, which provides that an official retains the seniority in grade and step acquired as a temporary staff member despite a period of service as an auxiliary staff member, provided this does not exceed eight months, the binding force of that provision is less than that of the third paragraph of Article 32 of the Staff Regulations and that of Article 12(3) of Annex XIII to the Staff Regulations, and consequently it cannot either alter their scope or affect their legality.

80 In those circumstances, it should be noted that the principle of equal treatment cannot prevent the legislature from making amendments to the Staff Regulations at any time, amendments which, in the absence of acquired rights, are applicable to the future consequences of situations which arose under the previous legislation, and that successful candidates in a competition may thus be treated differently according to whether or not the date of their recruitment is after the entry into force of a reform of the Staff Regulations (paragraphs 63, 64 and 69 above). It cannot therefore be regarded as discriminatory to assign to an official, under Article 12(3) of Annex XIII to the Staff Regulations, a lower grade than the one he had as a non-established staff member although he remains in the same post as that which he held before 1 May 2004 and is performing duties identical to, or even more important than, those he performed in the past (see, to that effect, Case T-58/05 *Centeno Mediavilla*, paragraph 87).

81 Also, in the absence of acquired rights, the fact that Notice of Competition PE/96/A had failed to mention the possibility that the grades shown in it might be affected by the future reform of the Staff Regulations was not capable of limiting the power of the legislature to establish a new grading structure and attach to that reform the transitional conversion rules contained in Article 12(3) of Annex XIII to the Staff Regulations.

82 Furthermore, the applicant must also fail in his submission that Article 5(4) of Annex XIII to the Staff Regulations introduced discrimination between temporary staff members who had passed an internal competition and those, like him, who passed an open competition.

83 That argument is ineffective for two reasons. First, even if it were valid, the plea of illegality made against Article 5(4) of Annex XIII to the Staff Regulations could only lead to that provision being disapplied, without thereby affecting the legality of Article 12(3) of that Annex, which was the basis in law for the contested decision.

84 Secondly, even if the distinction between internal and open competitions underlying Article 5(4) of Annex XIII to the Staff Regulations were not to be taken into consideration, that article would not thereby become applicable to the applicant. In order for it to apply, a temporary staff member must also transfer from a 'former category' to a 'new category' (see, to that effect, *Lesniak*, paragraphs 51 and 54; see also to that effect, *Bergström*, paragraphs 44, 45 and 47; *Sørensen*, paragraph 57; and *Kay*, paragraph 53). In the present case, it should be noted, first of all, that the applicant, who had been an auxiliary staff member from 1 May 2004, was no longer a temporary staff member when he was included in the list of successful candidates for Competition PE/96/A on 27 May 2004 and, a fortiori, when he was later recruited as a probationary official. In the light of the wording of the abovementioned Article 5(4) and of the obligation to interpret the transitional provisions restrictively, the fact that the applicant's contract as a member of the auxiliary staff was signed in the context of the extension of his employment as a temporary staff member is irrelevant in that regard. In addition, it should be observed that as a temporary staff member, the applicant had been graded at A 7, so that his recruitment at grade A*6 with effect from 16 November 2004 as a probationary official did not have the effect of moving him from one category to another.

85 In any event, even if the applicant's arguments were to be interpreted as meaning that, in order to ensure equal treatment between temporary staff members, Article 5(4) of Annex XIII to the Staff Regulations should be interpreted broadly without taking into account the circumstance that between his contract as a member of the temporary staff and his appointment as a probationary official there was a period of working as an auxiliary staff member, the fact remains that temporary staff members who are successful candidates in a competition held in order to fill posts in the category to which they already belong are not in the same situation as successful candidates in a competition the purpose or effect of which is to enable them to move to a higher category and thus to make decisive progress in their career. That the legislature, in adopting Article 5(4) of Annex XIII to the Staff Regulations, acted so as to ensure that such temporary staff may, as an exception, be appointed as probationary officials in the grade they held in their former category does not have the effect of applying an arbitrary or manifestly inappropriate distinction in their favour as compared with temporary staff who have been successful in an open competition and have been recruited as officials in the category to which they previously belonged. Moreover, the broad interpretation of Article 5(4) at issue which the applicant urges would be liable to deny equal treatment between successful candidates in one and the same open competition, who are in a comparable factual and legal situation and must be given the same treatment, particularly as regards grading, without prejudice to the freedom of the European Union's legislature to make at any time such amendments to the rules of the Staff Regulations as it considers consistent with the interests of the service (*Lesniak*, paragraphs 60 and 61 and the case-law cited; see, to the same effect, *Bergström*, paragraphs 53 and 54).

86 Lastly, the applicant has no grounds for inferring that there was a breach of the principle of equal treatment in the Parliament's decision of 13 February 2006, by which the Parliament decided to regrade temporary staff who were successful in internal or open competitions and who, like him, were appointed as officials at a lower grade than the one they had occupied before 1 May 2004. Given, as held at the end of this judgment, that examination of all the applicant's pleas leads the Tribunal to find that Article 12(3) of Annex XIII to the Staff Regulations and the contested decision are not vitiated by the illegality alleged by him, it can only be pointed out that measures adopted by an institution in favour of a specific group of persons, in the absence of any legal obligation laid down by the Staff Regulations, constitute measures which cannot be relied on in support of an allegation of violation of the principle of equal treatment with regard to another institution (order of 21 April 2008 in Case F-78/07 *Boudova and Others* v *Commission*, paragraph 37 and case-law cited), and even that according to the principle of legality a person may not rely, in support of his or her claim, on an unlawful act committed in favour of a third party (judgments of 20 March 2002 in Case T-23/99 *LR AF 1998* v *Commission*, paragraph 367, and of 22 December 2005 in Case T-146/04 *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 141; and *Sørensen*, paragraph 100).

– Whether Article 12(3) of Annex XIII to the Staff Regulations prevented the applicant from being treated in the same way as candidates who took part in a competition the notice for which published conditions of recruitment based solely on the old Staff Regulations and who were recruited before 1 May 2004

87 In claiming that Article 12(3) of Annex XIII to the Staff Regulations does not treat in the same way successful candidates from competitions the notices for which published conditions of recruitment based solely on the old Staff Regulations, some of whom were recruited before 1 May 2004 and others after that date, the applicant raises a plea of illegality which requires the same response as that given to the plea of illegality based on his allegation that he suffered discrimination compared with successful candidates in competitions similar to the competition in which he was a successful candidate who were appointed before that date.

88 As stated in paragraphs 65 and 66 above, it is only after being the subject of a decision to appoint him that a successful candidate in a competition can claim the status of official and therefore demand the application to him of provisions of the Staff Regulations; and, since successful competition candidates do not have any acquired right to be appointed, but are merely eligible for appointment, their right to classification in a particular grade cannot a fortiori be regarded as acquired so long as they have not been the subject of an appointment decision in good and due form. Consequently, the fact that Notice of Competition PE/96/A failed to mention the future reform of the Staff Regulations is not constitutive of any right and could not therefore limit the power of the Council to amend the Staff Regulations in the future as it considered appropriate.

89 The answer to the complaint must therefore be that, as explained in paragraph 72 et seq. above, the principle of equal treatment cannot hinder the legislature from making amendments to the Staff Regulations at any time, amendments which, in the absence of acquired rights, are applicable to the future consequences of situations which arose under the previous legislation, and from treating successful candidates in a competition differently according to whether or not the date of their recruitment is after the entry into force of a reform of the Staff Regulations.

– Whether Article 12(3) of Annex XIII to the Staff Regulations infringes the principle of 'equal pay for equal work'

90 In essence, the applicant derives the argument that Article 12(3) of Annex XIII to the Staff Regulations infringes the principle of 'equal pay for equal work' by inference from the preceding complaints. Since the Tribunal has found that there are no grounds for upholding those complaints, that argument must be rejected.

91 As for the argument that the Court of Auditors had pointed out the discriminatory nature of the reform of the Staff Regulations, that is an opinion which cannot bind the Tribunal and one which, in the light of all the above considerations, the Tribunal does not share.

92 Moreover, the Tribunal held as follows in *Torijano Montero*:

'70 ... Officials in the applicant's situation who were recruited as such after the entry into force of the reform of the Staff Regulations cannot be regarded as being in the same legal situation as those recruited before 1 May 2004 whose appointment was governed by the old Staff Regulations (Case C-443/07 P *Centeno Mediavilla*, paragraphs 77 to 79, and Case T-58/05 *Centeno Mediavilla*, paragraphs 75 to 80).

71 Thus, in view of the reform of the grading structure, the legislature did not infringe the principle of equal pay for work of equal value by granting officials recruited after that reform pay linked to the grade at which they were graded under Article 12(3) of Annex XIII to the Staff Regulations, which is less favourable than that relating to the former grades at which officials recruited before 1 May 2004 had been graded.'

– Whether Article 12(3) of Annex XIII to the Staff Regulations infringes the prohibition on discrimination on grounds of age

93 The Tribunal observed as follows in *Torijano Montero* (see also *Schulze*, paragraph 58 et seq., and *Bleser*, paragraph 94 et seq.):

'55 It should be noted that, in order not to render impossible changes to legislation, the principle of equal treatment cannot impede the freedom of the legislature to make at any time such amendments to the Staff Regulations as it considers to be consistent with the interests of the service, even if the amended provisions are less favourable for officials than the former provisions (see, to that effect, judgment of 30 September 1998 in Case T-121/97 *Ryan* v *Court of Auditors* …, paragraphs 98 and 104; … *Campoli* v *Commission* …, paragraph 105; Case T-58/05 *Centeno Mediavilla*, paragraphs 86 and 113; and … *Davis and Others* v *Council*, paragraph 81).

56 Consequently, it was open to the legislature, in the context of the reform of the Staff Regulations, both to provide that successful candidates in competitions for which recruitment at grade A 7 had been specified before 1 May 2004 now to be engaged at grade A*6 and, on that occasion, to reduce the pay relating to those grades.

57 By acting in this way, the legislature did not infringe the principle of equal treatment and, in particular, the prohibition of any discrimination on grounds of age, since the table of corresponding grades appearing in Article 12(3) of Annex XIII to the Staff Regulations and the table of basic monthly salaries are manifestly unconnected with any direct or indirect taking into account of the age of the persons concerned (see, to that effect, Case C-443/07 P *Centeno Mediavilla*, paragraph 83, and Case T-58/05 *Centeno Mediavilla*, paragraph 89).

58 Moreover, according to the rule which derives from Article 7(1), from the first paragraph of Article 27 and from Article 29(1) of the Staff Regulations, that the level of posts is fixed according to their nature, importance and scope, irrespective of the qualifications of the persons concerned, the table of corresponding grades given in Article 12(3) of Annex XIII to the Staff Regulations distinguishes the basic grade A*5 from the higher grade A*6, at which the applicant was, moreover, appointed, in order to take into account the experience required for posts at that level.

59 It cannot therefore be argued that Article 12(3) of Annex XIII to the Staff Regulations precludes professional experience being taken into consideration; on the contrary, it requires the appointing authority to take it into account in the interests of the service when determining objectively the level of posts to be filled.'

94 Moreover, it should be observed that the applicant, who asserted that he was entitled to claim seven years' experience on 1 November 2003, should have expected to be graded in the same way as successful candidates who were younger and less experienced than he was, without added credit for all his experience, since he had freely chosen to apply for Competition PE/96/A, which was open to persons with only two years' professional experience (see, to that effect, *Torijano Montero*, paragraph 60).

– Conclusion with regard to the first plea

95 It follows from all the foregoing that the first plea in law must be rejected.

b) Second plea: infringement of Article 31 of the Staff Regulations

Arguments of the parties

96 In the applicant's submission, Article 12(3) of Annex XIII to the Staff Regulations does not specify that it derogates from Article 31(1) of the Staff Regulations, which provides that candidates are to be appointed to the grade of the function group set out in the notice of the competition they have passed. Nor did Notice of Competition PE/96/A state that Annex XIII to the Staff Regulations would apply. In those circumstances, Article 31(1) of the Staff Regulations should have taken precedence over Article 12(3) of Annex XIII, a provision which could at best apply only to competitions for which the notices had stated that the service career mentioned in it might be amended. That is indeed the intendment of the rule *contra proferentum*, according to which when the meaning of a term of an agreement is ambiguous that ambiguity must be resolved to the detriment of the party seeking to rely upon it, that is to say, in the present case to the detriment of the Commission. In consequence, the applicant considers that he should at least have been graded at A*8.

97 The Commission and the Council contend that Article 12(3) of Annex XIII to the Staff Regulations is a transitional provision and that, as such, it is a 'lex specialis' which by nature derogates from Article 31 of the Staff Regulations.

Findings of the Tribunal

98 In *De Luca* (see also *Lesniak*, paragraph 86), the Tribunal held:

'84 It is apparent from Case T-58/05 *Centeno Mediavilla* (paragraph 109) that the determination of the level of the posts to be filled, carried out by the Commission under the provisions of the old Staff Regulations when drawing up the competition notices at issue in that case, could not extend its effects beyond the date of 1 May 2004. On appeal, the Court confirmed that the right of successful competition candidates, deriving from Article 31(1) of the Staff Regulations, to be given the grade stated in the notice of competition can apply only where the law is unchanging, because the legality of a decision is assessed on the basis of the elements of law in force at the time it is adopted and that provision cannot therefore compel the administration to take a decision which is incompatible with the Staff Regulations as amended by the legislature and therefore unlawful (Case C-443/07 P *Centeno Mediavilla*, paragraph 100).

85 In that context, in which the abolition as from 1 May 2004, under the new careers system, of the grades set out in the notices of competitions which had been published before that date, it was open to the legislature to adopt Article 12(3) of Annex XIII to the Staff Regulations in order to resolve the difficulties inherent in that situation and determine the classification in grade of successful candidates in competitions … who were appointed probationary officials on the basis of those competitions after [1 May 2004] (Case T-58/05 *Centeno Mediavilla*, point 110).

86 It is true that the gradings determined by Article 12(3) of Annex XIII to the Staff Regulations do not correspond to the grades published in notices of competition prior to 1 May 2004 and that that provision conflicts with the rule laid down in Article 31 of the Staff Regulations and taken from Article 31 of the old Staff Regulations. However, having regard to its purpose, Article 12(3) of Annex XIII to the Staff Regulations constitutes a transitional provision of a special kind which may, as such, derogate, for a given category of officials, from the general rule provided for by Article 31 of the Staff Regulations (Case C-443/07 P *Centeno Mediavilla*, paragraph 101). It

should be noted that the constraints inherent in changing from one method of management to another, in respect of officials' careers, may require the administration to depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to the situations at issue (judgments of 11 February 2003 in Case T-30/02 *Leonhardt* v *Parliament* …, paragraph 51, and of 19 October 2006 in Case T-311/04 *Buendía Sierra* v *Commission* …, paragraph 213).

87 In the present case, it was open to the legislature to consider that the disadvantages resulting from maintaining the old grades for the successful candidates in competitions published before 1 May 2004 would be too great, since maintaining those grades would delay application of the new rules of the Staff Regulations concerning the grading structure for too long. Moreover, it was also open to it to take account of the fact that it was not appropriate to halt the selection process already completed in connection with the competitions in question by abandoning procedures that were under way and starting new ones, which would have deprived the successful candidates of the chance of being recruited ...'

99 In the light of the foregoing and, especially, the transitional nature of Article 12(3) of Annex XIII to the Staff Regulations, which necessarily entails derogating from the provisions permanently applying, the applicant cannot rely on the *contra proferentum* rule, assuming it to be applicable in the present case.

100 It follows that the second plea in law is unfounded.

c) Third plea: non-compliance with the principle of equal treatment, with the principle of equivalence of posts and grades, and with Articles 5 and 7 of the Staff Regulations and Annex I to the Staff Regulations

Arguments of the parties

101 According to the applicant, by virtue of Article 5(1) of the Staff Regulations posts are to be classified according to the nature and level of the duties to which they relate; and under Article 5(4) of the Staff Regulations each institution is to define the duties and powers attaching to each type of post.

102 The applicant points out in this connection that the post to which he was recruited was graded as A4/A7, renamed A*12/A*8 after 1 May 2004. He infers from this that Article 12(3) of Annex XIII to the Staff Regulations contravenes Article 5(1) and (4) of the Staff Regulations since it classifies that post as grade A*6. The applicant adds that the contested decision itself contravenes those provisions if Article 12(3) at issue is not the basis for that change in classification.

103 The applicant also contends that Article 5(5) of the Staff Regulations was infringed either by Article 12(3) of Annex XIII to the Staff Regulations or by the contested decision itself, in so far as, although he occupied a post with the same description as the posts occupied by several of his colleagues, the latter benefited from a higher grading before 1 May 2004.

104 The applicant claims, lastly, that Article 12(3) of Annex XIII to the Staff Regulations is inconsistent with the principle of equivalence of posts and grades, with Article 7(1) of the Staff Regulations, which sets out that principle, and with Annex I.A to the Staff Regulations, in that he was graded at A*6 although he had been assigned to a post which was formerly in career bracket A4/A7, requiring qualifications higher than those of a junior administrator.

105 The Commission and the Council contend that the complaint based on Article 5(1) and (4) of the Staff Regulations is irrelevant in so far as it relates to Article 12(3) of Annex XIII to the Staff Regulations, since those provisions are addressed solely to the institutions responsible for applying the Staff

Regulations and not to the legislature, giving them the task of laying down the descriptions of the duties for each type of post and of respecting the equivalence of posts when assigning staff members to particular posts.

106 Moreover, the Commission points out, in the light of Case T-58/05 *Centeno Mediavilla* and Case C-443/07 P *Centeno Mediavilla*, that Article 12(3) of Annex XIII does not infringe Article 5 of the Staff Regulations, since it merely lays down special rules applying in a transitional situation.

Findings of the Tribunal

107 It follows from the reply given above to the first claim alleging breach of the principle of equal treatment that it cannot validly be maintained that Article 5(5) of the Staff Regulations was infringed because officials recruited before 1 May 2004 were classified in the grades stated in the notices of competition, whilst the applicant, who occupied a similar post, was classified according to the criteria laid down in Article 12(3) of Annex XIII to the Staff Regulations after that date.

108 The Tribunal notes in that regard that the provisions of the old Staff Regulations and the gradings stated in the notices of competition were applicable when officials were appointed before 1 May 2004, whereas the applicant's grading, which was assigned after that date, was covered by the new provisions in force, including the transitional provisions of Article 12(3) of Annex XIII to the Staff Regulations.

109 The applicant is also wrong in maintaining that Article 12(3) of Annex XIII to the Staff Regulations conflicts with Article 5(1) and (4) of the Staff Regulations. In enacting the first of those provisions, the legislature defined the gradings of officials recruited during the transitional period from 1 May 2004 to 20 April 2006, in the exercise of its power to amend the provisions of the Staff Regulations.

110 Moreover, Article 12(2) of Annex XIII to the Staff Regulations specifies that the provisions of Article 5(3) of the Staff Regulations, which define the level of qualifications required for appointments to the posts covered by the new career structure, do not apply to officials recruited, as the applicant was, from lists of suitable candidates resulting from competitions published before 1 May 2004.

111 In that regard, Article 4(n) of Annex XIII to the Staff Regulations stipulates that Annex I, point A, entitled 'Types of posts in each function group, as provided for in Article 5(3)' and containing the table showing the new types of posts to which Article 5(4) of the Staff Regulations refers, is replaced by Annex XIII, section 1, to the Staff Regulations, setting out the types of post during the transitional period.

112 Article 12(3) and Article 4(n) of Annex XIII to the Staff Regulations thus take precedence over the general provisions of Article 5 of the Staff Regulations by derogating from them as a *lex specialis*.

113 Nor can the applicant plead violation of Article 7(1) of the Staff Regulations, which provides that each official must be appointed to a post in his function group which corresponds to his grade.

114 That provision also must likewise be understood as meaning that it is without prejudice to the application on a transitional basis, from 1 May 2004 to 30 April 2006, of Article 12(3) of Annex XIII to the Staff Regulations and its accompanying provisions. In other words, Article 12 and its accompanying provisions lay down criteria for applying the principle of equivalence of posts and grades for officials recruited during the transitional period from 1 May 2004 to 30 April 2006 (Case C-443/07 P *Centeno Mediavilla*, paragraph 105).

115 Lastly, in the light of the foregoing, it cannot be argued that the contested decision itself infringes Article 5 of the Staff Regulations, since Article 12(3) of Annex XIII to the Staff Regulations constitutes its legal basis and that provision left the appointing authority no discretion with regard to grading since Notice of Competition PE/96/A concerned only recruitment in career bracket A 7/A 6, to which only grade A*6 corresponded during the abovementioned transitional period.

116 In those circumstances, the third plea cannot succeed.

d) Fourth plea: infringement of the principles of legal certainty, non-retroactivity and protection of legitimate expectations, and infringement of acquired rights

Arguments of the parties

117 The applicant accepts that the Staff Regulations may be amended unilaterally by the legislature, but contends that the new provisions can neither have retroactive effect nor alter rights already acquired.

118 The applicant claims he acquired legitimate expectations and rights at the time he took up his duties as a temporary staff member, by reason of the extensions of his contracts, by reason of the date of publication of Notice of Competition PE/96/A and by reason of the date on which he was informed of his inclusion in the reserve list.

119 More precisely, the applicant contends that although successful competition candidates have no right to be recruited as officials, even if they are already temporary staff members, they have none the less, in the event of recruitment, the right to be graded according to the conditions of the notice of competition. Under Article 2(b) of the Conditions of Employment, temporary staff members do acquire rights as regards conditions of employment as future officials so far as their grading, seniority and pension rights are concerned.

120 In particular, it would be unlawful not to take into account a person's situation as a former member of the temporary staff at the time of his recruitment as an official when the competition enabling recruitment provided for the person to be appointed at a grade corresponding to that acquired as a temporary staff member. The unlawfulness is all the more evident in the present case since application of Article 12(3) of Annex XIII to the Staff Regulations led to downgrading by two grades and the total loss of seniority acquired because there had occurred a delay of a year in the conduct of Competition PE/96/A.

121 The applicant contends, moreover, that Notice of Competition PE/96/A, which set out a timetable that was not followed, was exclusively based on the old Staff Regulations, did not envisage the possibility of amendment of the career bracket for which it was held and was thus binding for as long as the reserve list remained valid.

122 Moreover, the applicant claims that inclusion in a reserve list means a successful candidate is eligible for appointment at least in accordance with the conditions published with the competition.

123 In addition, the fact that some candidates in competitions linked to Competition PE/96/A were informed that they had been included in the relevant reserve lists before 1 May 2004 should have prevented the legislature from amending unfavourably the conditions of recruitment of successful candidates in Competition PE/96/A, and in particular those of the applicant, at least until the reserve list for that competition ceased to be valid.

124 In sum, according to the applicant, the new Staff Regulations imposed recruitment criteria retroactively.

125 Referring to the *Centeno Mediavilla* judgments of the Court of Justice and the General Court, the Commission denies that Article 12(3) of Annex XIII to the Staff Regulations is inconsistent with the principles of legal certainty, non-retroactivity and protection of legitimate expectations, or with acquired rights.

Findings of the Tribunal

126 With regard to the complaints alleging infringement of the principles of legal certainty and non-retroactivity, and also infringement of acquired rights, it must be held, in the light of the judgment in *Bleser* (paragraphs 126 to 128), that Article 12(3) of Annex XIII to the Staff Regulations is the result of Regulation No 723/2004, which entered into force on 1 May 2004, that is to say following its publication in the Official Journal on 27 April 2004. It cannot therefore be regarded as being retroactive.

127 Furthermore, in so far as it lays down new grading criteria applicable at the time of the recruitment of successful candidates from competitions published before 1 May 2004, included in lists of suitable candidates prior to 1 May 2006 and recruited between those two dates, Article 12(3) of Annex XIII to the Staff Regulations complies with the principle that in the event of amendment of provisions of general application and, in particular, of provisions of the Staff Regulations, a new rule applies immediately to the future effects of legal situations which arose, but were not fully constituted, under the previous rule (Case T-58/05 *Centeno Mediavilla*, paragraph 51, upheld by Case C-443/07 P *Centeno Mediavilla*, paragraphs 61 and 62).

128 A right is considered to be acquired only when the event giving rise to it occurred before the legislative amendment (Case C-443/07 P *Centeno Mediavilla*, paragraph 63). As regards the classification in grade of a successful candidate in an open competition, it should be noted that that classification cannot be regarded as acquired so long as the person concerned has not been the subject of an appointment decision in proper form (Case T-58/05 *Centeno Mediavilla*, paragraph 53, upheld by Case C-443/07 P *Centeno Mediavilla*, paragraph 64). In the instant case, at the date on which the reform of the Staff Regulations entered into force, the applicant had not yet even been included in the list of suitable candidates for Competition PE/96/A and therefore, being merely a candidate, he had not even acquired the simple eligibility to be appointed as a probationary official.

129 The preceding reasoning is not altered by the fact that the applicant had the status of temporary staff member from 1 November 2002 until 30 April 2004 and that he held at that time one of the grades to which Competition PE/96/A was intended to give access. It should be noted in that regard that the status of temporary or auxiliary staff member does not afford the persons concerned any right to be assigned a particular grading when they are recruited as officials (see paragraph 77 above). Moreover, Article 2(b) of the Conditions of Employment, which the applicant relies upon, merely states that temporary staff members recruited under that provision are staff who fill a permanent post included in the list of posts appended to the section of the budget relating to each institution, without making any provision with regard to the conditions in the event of recruitment as an official.

130 Furthermore, neither the failure of Notice of Competition PE/96/A to mention the possibility that the grades shown in it might be affected by the future reform of the Staff Regulations, nor the asserted delay by the Parliament in conducting that competition, nor yet the asserted fact that candidates in similar competitions were informed that they had been included in the relevant reserve lists before 1 May 2004 were such as to prevent the legislature from establishing a new grading structure and attaching to that reform the transitional rules contained in Article 12(3) of Annex XIII to the Staff Regulations (see paragraphs 73 and 81 above).

131 Lastly, it should be noted that the principle of legal certainty, also invoked by the applicant, applies to circumstances such as those at issue here only where a legislative measure takes effect from a point in time before its publication and where the rules it contains govern situations which have become definitive before their entry into force, assumptions which are not relevant to this case (Case T-58/05 *Centeno Mediavilla*, paragraph 60, and *Bleser*, paragraph 129).

132 As regards the complaint alleging infringement of the principle of protection of legitimate expectations, it is a fact that the applicant was appointed at grade A*6 following the reform of the Staff Regulations, whereas Notice of Competition PE/96/A had stated that recruitment would be at grades A 7 or A 6.

133 However, as the Tribunal held in *De Luca* (paragraphs 98 to 103) and *Bleser* (paragraph 135 et seq.), an official cannot rely on the principle of the protection of legitimate expectations in order to challenge the lawfulness of a new regulation, particularly in a field in which the legislature has, as in this case, a wide discretion (Case C-443/07 P *Centeno Mediavilla*, paragraph 91, and Case T-58/05 *Centeno Mediavilla*, paragraph 95).

134 Moreover, one of the conditions to be satisfied in order to claim entitlement to the protection of legitimate expectations is that the assurances given must be in conformity with the applicable rules (judgments of 11 July 2002 in Case T-381/00 *Wasmeier* v *Commission*, paragraph 106; of 4 May 2005 in Case T-398/03 *Castets* v *Commission*, paragraph 34; of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie* v *Commission*, paragraph 77; and of 4 February 2009 in Case T-145/06 *Omya* v *Commission*, paragraph 117).

135 It is clear from the case-law that the appointing authority would have taken a decision that was unlawful if, after 1 May 2004, it had graded the applicant according to the provisions relating to grades and career brackets of the old Staff Regulations, which were no longer in force (see, to that effect, Case C-443/07 P *Centeno Mediavilla*, paragraph 100).

136 Lastly, the General Court also noted in Case T-58/05 *Centeno Mediavilla* (paragraphs 96 and 97) that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the administration has led him to entertain justified expectations by giving him specific assurances in the form of precise, unconditional and consistent information coming from authorised and reliable sources. Therefore, a person may not plead breach of that principle unless he has been given specific assurances by the administration.

137 Although Notice of Competition PE/96/A failed to mention the reform of the Staff Regulations, in order for there to be a legitimate expectation, an express assurance required, silence not being sufficient. Moreover, as the applicant himself stated in his written submissions, the timetable given in that notice was 'indicative', so that it could not constitute a precise and unconditional assurance that the competition in question would be completed in June 2003, that is to say, before that reform. More generally, it is not apparent from any of the documents in the case-file that the Commission gave the applicant any assurances likely to lead him to entertain legitimate expectations that the former grading criteria of the Staff Regulations would be maintained for officials upon their recruitment. On the contrary, it is apparent from emails of 21 and 27 September 2004, pre-dating his appointment as a result of the abovementioned competition (see paragraph 14 above), that the Commission informed the applicant that he would be recruited at grade A*6, step 2. Similarly, the formal offer of employment contained in the letter from DG Personnel and Administration of 8 November 2004 expressly stipulated that he would be graded at A*6, step 2, in pursuance of Article 12 of Annex XIII to the Staff Regulations.

138 Thus, the circumstances relied upon by the applicant and, in particular, the conditions of the Staff Regulations in force at the time of his appointment as a temporary staff member and of the extension of his contracts, at the date of publication of Notice of Competition PE/96/A and at the date on which the successful candidates in that competition were informed of their inclusion in the reserve lists, were

not such as to lead him to entertain legitimate expectations, and in any event such expectations could not have prevented the enactment and application of Article 12(3) of Annex XIII to the Staff Regulations.

139 The fourth plea is therefore unfounded.

3. *The sixth plea, directed against the contested decision itself and alleging infringement of the principles of good administration, due care, transparency, good faith and equal treatment*

a) Arguments of the parties

140 The applicant submits that the contested decision infringes the principles of good administration, due care, transparency, good faith and equal treatment in as much as the appointing authority did not give the candidates in Competition PE/96/A sufficient information concerning the serious implications of the reform of the Staff Regulations for their recruitment and subsequent career progression.

141 The applicant stresses in that regard that Notice of Competition PE/96/A made no mention of the possible amendment of the Staff Regulations. He notes that that competition was conducted at a much slower pace than other similar competitions. He also points out that the Parliament and the Commission omitted to mention the amendment of the Staff Regulations until the time of his recruitment, although the initial period of validity of the list of suitable candidates had not expired and he had obtained a post as a temporary staff member on condition that he take part in a competition enabling him to be recruited as an official. Moreover, the decision to recruit him referred to the notice of competition and not to Article 12(3) of Annex XIII to the Staff Regulations. Lastly, the applicant considers that publication of Regulation No 723/2004 in the Official Journal three days before its entry into force did not make up for the lack of information attributable to the Commission, since the text is a complicated one with regard to which DG Personnel and Administration was not itself able to provide precise explanations devoid of errors.

142 The applicant therefore submits that, although he was working as a lawyer in a top law firm, he opted for a career in the European civil service in view of the grade and remuneration he could obtain upon recruitment, and in view of his career prospects, but that his expectations were disappointed.

143 The Commission replies that, on the applicant's argument, it was the appointing authority of the Parliament which failed to inform him adequately of the amendments to the Staff Regulations, so that that criticism cannot be made of the Commission. Moreover, the institutions are not required, by virtue of a general obligation, to draw the attention of their future officials, prior to their appointment, to all aspects of their legal position. Besides which, the Commission denies that the applicant was unaware of the planned reforms due to the internal publicity given to them and points out that he was informed of the amendment of the Staff Regulations in the letter of 8 November 2004 accompanying the offer of recruitment. Lastly, the Commission observes that the General Court rejected a similar plea in Case T-58/05 *Centeno Mediavilla*.

b) Findings of the Tribunal

144 With regard to the principle of good administration, it should be noted at the outset that the Tribunal held as follows in *Schulze* (see also, to that effect, *Torijano Montero*, paragraphs 94 and 95, and *Bleser*, paragraphs 119 and 121):

> '86 ... [T]he principle of good administration does not have a binding effect greater than that of a regulation (see, to that effect, judgment of 22 June 1994 in Joined Cases T-97/92 and T-111/92 *Rijnoudt and Hocken* v *Commission* ..., paragraph 104, and ... *Campoli* v *Commission*, paragraph 149; judgment of 23 January 2007 in Case F-43/05 *Chassagne* v *Commission* ..., paragraph 111) ....
>
> 87 Accordingly, given the position thus occupied by the principle of good administration ... within the hierarchy of norms, the applicant cannot seek to obtain on the basis of [it] a different result from that obtainable under Article 12(3) of Annex XIII to the Staff Regulations, since the Commission's powers are circumscribed by the latter provision ...'

145 As regards the alleged infringement of the principle of transparency, it should be noted that that principle cannot prevent the legislature from amending the grading structure and the salaries relating to it when the Staff Regulations are reformed, provided such legislative amendment meets requirements as to its qualities, including requirements of accessibility and predictability (*Bleser*, paragraph 149).

146 As regards infringement of the principles of due care and good faith, it should be observed, first, that the applicant draws no clear distinction between the respective inferences he draws from those principles and, secondly, that the principle of good faith may appear to be the corollary of the principle of protection of legitimate expectations (see judgment of 25 May 2000 in Case C-82/98 P *Kögler* v *Court of Justice*, paragraph 41, and *Bleser*, paragraph 143). In the present case, the complaints put forward by the applicant cover precisely the same ground as those he bases on infringement of the principles of legal certainty, non-retroactivity and protection of legitimate expectations, which have already been rejected (see paragraph 126 et seq. above, and especially paragraph 137).

147 The applicant, however, takes particular issue with the fact that he was given insufficient information. However, as the General Court held in Case T-58/05 *Centeno Mediavilla* (paragraphs 150 to 152), a shortage of prior information is not in itself such as to render the contested decision illegal, because the legality of an individual measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and the contested decision here was adopted with effect after 1 May 2004, so that the Commission had no choice but to classify the applicant in accordance with the new mandatory provisions of Article 12(3) of Annex XIII to the Staff Regulations, the illegality of which has not been demonstrated.

148 At the hearing, the applicant particularly criticised the bad faith of the Commission, which he alleged had been guilty of withholding information at the time of his appointment as a temporary staff member, concealing the unfavourable consequences which the draft reform of the Staff Regulations it was preparing might have on his career as an official in the event that he passed a competition.

149 In that regard, assuming that that complaint was not put forward strictly with a view to obtaining damages (see paragraphs 174 et seq. below), the Tribunal must observe that, as the applicant argues, the conduct of an authority, in administrative as in contractual matters, is at all times subject to observance of the principle of good faith (see judgment of 15 July 1960 in Joined Cases 43/59, 45/59 and 48/59 *Von Lachmüller and Others* v *Commission*). However, the applicant's assertions that he was given incorrect information regarding his career prospects are not substantiated. Nor has the applicant adduced a shred of evidence that any such information was deliberately intended to deceive.

150 In any event, the withholding of information of which the applicant alleges he was victim does not alter the finding of the General Court in Case T-58/05 *Centeno Mediavilla* recalled in paragraph 147 above. Such a complaint is ineffective in support of the action for annulment. As a temporary or auxiliary staff member, the applicant could not claim that he was entitled to a career as an official within the institutions. Consequently, the fact that incomplete information regarding his career prospects as an official was given to him, as he claims, at the time of his appointment as a temporary staff member does not affect the legality, as such, of his grading following his subsequent appointment as an official, since that grading is in accordance with the mandatory provisions of the Staff Regulations published and in force at the date of that appointment. That is all the more true since the applicant had been informed, before his recruitment as an official, of the grade he would be awarded following the reform of the Staff Regulations and he could have refused to accept it in full knowledge of the facts.

151 Lastly, in his sixth plea, the applicant does not expand specifically upon his complaint alleging infringement of the principle of equal treatment, with the result that that complaint is inadmissible. In any event, the complaint to that effect was rejected above following the examination of the first and third pleas.

152 The sixth plea is therefore unfounded.

4. *The complaints raised by the applicant in his observations of 29 April 2009 and 20 January 2010*

a) The complaint alleging infringement of Article 5(5) of the Staff Regulations, which is to be distinguished from the principle of equal treatment

Arguments of the parties

153 In his observations of 29 April 2009 and 20 January 2010, the applicant argues that Article 5(5) of the Staff Regulations should be distinguished from the principle of equal treatment, since the requirement contained in that article that officials belonging to the same function group must be treated identically is stricter and since it cannot, contrary to what the principle allows, be limited on a general-interest ground that is objectively and reasonably justified.

154 The applicant infers therefore from Article 5(5) of the Staff Regulations, which he argues is binding on the legislature, that no special treatment compared with other successful competition candidates appointed to the same function group could on any grounds be given on the basis of Article 12(3) of Annex XIII to the Staff Regulations, in particular to successful candidates in competitions entirely based on the old Staff Regulations, as was Competition PE/96/A, or to successful candidates in competitions which, as in the present case, were excessively delayed, or lastly to those who were former temporary staff members, as he was.

155 At the hearing, the Commission argued that the complaints which the applicant bases on Article 5(5) of the Staff Regulations to the effect that that provision should be distinguished from the principle of equal treatment in reality constitute a new plea which should be held to be inadmissible. It adds that those complaints are moreover unfounded since the provision in question merely reflects that principle.

Findings of the Tribunal

156 In the document instituting the proceedings, the applicant relied on Article 5(5) of the Staff Regulations in the context of his plea alleging infringement of the principle of equal treatment without claiming that it differed in scope from that provision. Moreover, in his reply, the applicant

expressly stated that 'Article 5(5) of the new Staff Regulations makes clear that the general principle of non-discrimination applies' to the circumstances of the case, which amounts to saying that Article 5(5) of the Staff Regulations gives specific expression to that principle.

157 Since the applicant now claims that Article 5(5) of the Staff Regulations must be distinguished in substance from the principle of equal treatment, the arguments he derives from that provision in his observations of 29 April 2009 and 20 January 2010 must be held to be different from the arguments raised in the application in support of the plea alleging infringement of that principle. Those arguments must therefore be regarded as new pleas. Consequently, they are out of time and inadmissible.

158 In any event, the arguments which the applicant puts forward regarding the alleged infringement of Article 5(5) of the Staff Regulations, which he claims is different from the principle of equal treatment, and regarding the impossibility of derogating from the obligation to treat officials belonging to the same function group identically on objectively and reasonably justified public-interest grounds, are unfounded precisely because, according to settled case-law, Article 5(5) of the Staff Regulations is, in reality, a reflection of that principle of equal treatment (see paragraph 67 above).

159 It is clear from the foregoing that the complaint alleging infringement of Article 5(5) of the Staff Regulations, which should be distinguished from the principle of equal treatment, is inadmissible and in any event unfounded.

b) The complaint that the legislature is not competent to identify a service's staffing needs or to organise competitions

Arguments of the parties

160 In his observations of 20 January 2010, the applicant submits that the appointing authority alone is empowered to identify its staffing needs and specify in notices of competition the qualifications, diplomas and experience required for the posts to be filled. On the other hand, he considers that the legislature is not competent to identify service needs and to organise competitions. The applicant concludes from this that the legislature could not, without infringing Article 5(5) of the Staff Regulations, vary the substance of Competition PE/96/A whilst it was under way, such that the contested decision is vitiated by illegality.

Findings of the Tribunal

161 The question arises whether, because it raises the lack of competence of the legislature, the applicant's complaint should be distinguished from the earlier complaint based on Article 5(5) of the Staff Regulations.

162 In any event, however, the argument must be rejected since the legislature did not intend to determine in abstracto the staffing needs of the institutions in adopting Article 12(3) of Annex XIII to the Staff Regulations.

5. *Conclusion*

163 It follows from the foregoing that, none of the pleas being well founded, the first head of claim in the application must be rejected.

C – *The second head of claim: the award of damages or the lowering of the applicant's contributions to the pension scheme*

1. *Arguments of the parties*

164 In the part of his application concerning the 'consequence of legal and regular employment with respect to the payment', the applicant maintains that the Commission has 'an obligation to duly implement the Court's judgment in order to ensure the effect of [that] judgment' and therefore claims that the Commission should be ordered to pay, first, damages to make good the prejudice caused to his career as a result of his incorrect grading and, secondly, 'legal pay'.

165 Also in his application but in the alternative, the applicant claims that the Tribunal should order a reduction in his contributions to the pension scheme. He argues in that regard that, like all officials, he contributes 9.25% of his salary to that scheme, but that officials recruited before 1 May 2004 build up pension rights of 2% per annum, whilst officials who, like him, were recruited after that date build up such rights at the rate of only 1.9% per annum. The applicant considers, in essence, that this situation is discriminatory.

166 The Commission contends that the applicant's claims are unfounded since Article 12(3) of Annex XIII to the Staff Regulations is lawful and the contested decision constitutes a correct application of that provision.

2. *Findings of the Tribunal*

a) The claim for damages and payment of 'legal pay'

167 As regards the claim for damages to make good the prejudice caused to his career as a result of the contested decision, according to settled case-law, the Union can only be held liable for damages if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered, and the existence of a causal link between the act and the prejudice alleged to have been suffered (judgment of 16 December 1987 in Case 111/86 *Delauche* v *Commission*, paragraph 30, and judgment of 30 April 2009 in Case F-65/07 *Aayhan and Others* v *Parliament*, paragraph 142).

168 The finding arrived at after examination of the action for annulment is that the Commission committed no irregularity likely to incur its liability vis-à-vis the applicant.

169 In consequence, since the condition concerning the existence of unlawful conduct on the part of the Commission has not been satisfied, the applicant's claim for damages must be rejected (see, to that effect, *Bleser*, paragraph 158 et seq.).

170 The claim for payment of 'legal pay' must also be rejected since that claim is also based on the incorrect premiss that the pleas raised in support of the claims for annulment are well founded.

b) The claim for a reduction in the contribution to the pension scheme

171 The claim, in the alternative, for a reduction in the applicant's contribution to the pension scheme must also be rejected since it too is based on the unlawfulness of the contested decision. Moreover, although in disputes of a financial character the Tribunal has unlimited jurisdiction pursuant to the second sentence of Article 91(1) of the Staff Regulations, which empowers it to order the defendant institution to pay the sum claimed by the applicant as being due to him under the Staff Regulations or other measure governing their working relations (judgment of 18 December 2007 in Case

C-135/06 P *Weißenfels* v *Parliament*, paragraphs 65 to 68), it cannot direct that institution to disregard the general provisions of the Staff Regulations by requiring it to derogate from them in an individual case.

172 Lastly, even taking the applicant's claim for a reduction in his contribution to the pension scheme to be based neither on the pleas of unlawfulness raised against Article 12(3) of Annex XIII to the Staff Regulations nor on the plea directed against the contested decision itself, but on the discriminatory nature of the pension scheme per se, as pointed out above, in order not to render impossible changes to legislation, the principle of equal treatment cannot impede the freedom of the legislature to make at any time such amendments to the Staff Regulations as it considers to be consistent with the interests of the service, even if those provisions are less favourable for officials than the former provisions (see paragraph 63 above).

c) Conclusion

173 It follows that the applicant's second head of claim must be rejected.

D – *The claim for damages to be awarded because of the inaccurate information given concerning the consequences of the reform of the Staff Regulations*

1. *Arguments of the parties*

174 In his reply and in his observations of 29 April 2009 and of 20 January 2010, the applicant sought compensation for damage resulting from the fact that he was misled by the publication of Notice of Competition PE/96/A in so far as that notice provided an incorrect timetable for the tests and in so far as the candidates were not informed of the consequences of the reform of the Staff Regulations as regards the grading they would be given in the event of their passing the competition. In his observations of 20 January 2010, the applicant explained that he was submitting that claim for damages in the event that his action for annulment should not succeed. At the hearing the applicant stated that his claim for damages was based on the fact that at the time of his appointment as a temporary staff member, the Commission had been guilty of withholding information or at least had given him incorrect information with regard to his career prospects in the event of his recruitment as an official if he passed the competition. The applicant also specified that that claim was made in the alternative in case his claim for annulment were rejected.

175 At the hearing, the Commission disputed that the claim for damages referred to in the preceding paragraph could be detached from the action for annulment since the applicant had clearly linked the two in his application.

2. *Findings of the Tribunal*

176 The General Court held in Case T-58/05 *Centeno Mediavilla* (paragraph 150) that a lack of prior information is capable of grounding an effective argument for the purpose of rendering the Union non-contractually liable towards the persons concerned.

177 It is necessary, however, to distinguish, as the General Court did, such liability, based on an alleged omission, or even unwillingness, by the administration to disclose information, from that resulting from the alleged unlawfulness of Article 12(3) of Annex XIII to the Staff Regulations or of the contested decision.

178 Although, in his application originating the proceedings, the applicant sought compensation for damage resulting from the unlawfulness of the contested decision (paragraph 164 above), it was only in his reply and in his observations of 29 April 2009 and 20 January 2010 and at the hearing that he pleaded extra-contractual liability on the part of the institutions on grounds of the inaccurate information that they had provided regarding the consequences of the reform of the Staff Regulations. Moreover, the applicant, who in his written pleadings directed criticism against the alleged incorrect and inadequate information provided by the Parliament in Notice of Competition PE/96/A, submitted at the hearing that the Commission had withheld, at the time of his appointment as a temporary staff member, information concerning the unfavourable consequences which the draft reform of the Staff Regulations being prepared by the Commission might have for his career.

179 In those circumstances, the applicant's claim for damages on grounds of the inaccurate information regarding the consequences of the reform constitutes a new head of claim, distinct from that included in the original claim for damages, and hence inadmissible. It should be noted that the rights of the defence and Article 35(1)(d) of the Rules of Procedure preclude as a matter of principle a party from altering the subject-matter of the dispute during the proceedings (see, to that effect, judgments of 25 September 1979 in Case 232/78 *Commission* v *France*, paragraph 3; of 14 July 2005 in Case C-433/03 *Commission* v *Germany*, paragraph 61; and of 11 November 2010 in Case C-543/08 *Commission* v *Portugal*, paragraph 20).

180 Furthermore, it should be pointed out that the arguments adduced by the applicant at the hearing differ from the position he had adopted in his reply and in his observations of 29 April 2009 and 20 January 2010, thereby rendering his claim for compensation for the provision of wrong or inadequate information vitiated by ambiguity and hence also inadmissible on that ground. An applicant is obliged to formulate in an unequivocal manner the forms of order he or she is seeking (judgment of 14 December 1962 in Joined Cases 46/59 and 47/59 *Meroni and Others* v *High Authority*).

181 Lastly, it must be recalled that claims for compensation, even when they are submitted in conjunction with a claim for annulment, are admissible in cases, such as the present one, where the damage alleged has its origin in wrongful maladministration independent of the measure which is the subject of that claim for annulment, only if they have been preceded, in accordance with Article 90(1) and (2) of the Staff Regulations, by an administrative complaint which itself follows a request to the administration to make good the damage suffered (see, to that effect, judgments of 8 June 1993 in Case T-50/92 *Fiorani* v *Parliament*, paragraph 46; of 29 February 1996 in Case T-547/93 *Lopes* v *Court of Justice*, paragraph 60; and of 11 May 2005 in Case T-25/03 *de Stefano* v *Commission*, paragraph 78; and order of 15 May 2006 in Case F-3/05 *Schmit* v *Commission*, paragraph 48). That was not so in the present case.

182 The claim for damages on the ground of the provision of wrong or inadequate information by the administration must therefore be rejected.

183 It follows from all the foregoing considerations that the application must be dismissed in its entirety.

Costs

184 Under Article 122 of the Rules of Procedure, the provisions of Title 2, Chapter 8, of those rules, on costs, are to apply only to cases brought before the Tribunal from the date on which those Rules of Procedure entered into force, namely 1 November 2007. The relevant provisions of the Rules of Procedure of the General Court on the subject are to continue to apply *mutatis mutandis* to cases pending before the Tribunal before that date.

185 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those rules provides that in proceedings between the Union and its servants the institutions are to bear their own costs.

186 Under the second subparagraph of Article 87(3) of the Rules of Procedure of the General Court, the Court may, however, order a party, even if successful, to pay to the other party costs which it has caused that party to incur and which the Court considers unreasonable or vexatious.

187 In the present case, the Commission did request at the hearing that the applicant should be ordered to repay to it the costs it incurred from 24 March 2009, the date on which it became clear, in view of its observations on the consequences of Case C-443/07 P *Centeno Mediavilla*, that there was no point in proceeding further with the case.

188 The Tribunal considers, however, having regard to the facts of the case and the reasoning set out above, that although the applicant's attitude has been undeniably intransigent, it cannot be taken to be manifestly unreasonable or vexatious.

189 Accordingly, there is no call to apply the second subparagraph of Article 87(3) of the Rules of Procedure of the General Court and since the applicant has been unsuccessful, each party must be ordered to bear its own costs, in accordance with Article 87(2) and Article 88 of those rules.

190 In addition, the first subparagraph of Article 87(4) of the Rules of Procedure of the General Court provides that institutions which intervened in the proceedings are to bear their own costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders each party to bear its own costs;

3. Orders the Council of the European Union, the intervener, to bear its own costs.

Mahoney Tagaras Van Raepenbusch

Delivered in open court in Luxembourg on 29 September 2011.

W. Hakenberg
Registrar

P. Mahoney
President