Reports of Cases

JUDGMENT OF THE CIVIL SERVICE TRIBUNAL
(Second Chamber)
10 November 2011

Case F-18/09

Mohamed Merhzaoui
v
Council of the European Union

(Civil service — Officials — Promotion — Classification in grade — Local staff appointed as officials — Article 10 of Annex XIII to the Staff Regulations — Article 3 of the Annex to the CEOS — Promotion exercise for 2008 — Consideration of comparative merits of officials attached to the career stream AST — Procedure based on staff reports 2005/2006 — Criterion of the level of responsibilities exercised)

Application: brought under Articles 236 EC and 152 EA, in which Mr Merhzaoui essentially seeks annulment of the Council's decisions to assign him to the career stream AST 1-7 in the assistants' function group and not to promote him to grade AST 2 in the 2008 promotion procedure.

Held: The application is dismissed. The applicant is to bear his own costs and those incurred by the Council.

Summary

1. Officials — Conditions of Employment of Other Servants — Local staff — Applicability of Annex XIII to the Staff Regulations
(Staff Regulations, Annex XIII, Art. 10(3); Conditions of Employment of Other Servants, Annex, Art. 1(1); Council Regulation No 723/2004)

2. Procedure — Introduction of new pleas during the proceedings — Conditions — New factor — Definition
(Rules of Procedure of the Civil Service Tribunal, Art. 43(1))

3. Officials — Actions — Pleas in law — Inadequate statement of reasons — Finding made by the Tribunal of its own motion

4. Officials — Promotion — Consideration of comparative merits — Administration's discretion — Factors which may be taken into consideration — Level of responsibilities exercised
(Staff Regulations, Art. 45)

5. Officials — Acts of the administration — Presumption of validity — Dispute — Burden of proof

6. Officials — Actions — Interest in bringing proceedings — Need to have personal grounds for complaint

7. Officials — Promotion — Consideration of comparative merits — Administration's discretion — Factors which may be taken into consideration
(Staff Regulations, Art. 43)

8. Officials — Promotion — Complaint by a candidate who has not been promoted — Rejection decision — Obligation to state reasons — Scope
(Staff Regulations, Arts 25 and 45)

1. Article 10(3) of Annex XIII to the Staff Regulations is applicable to local staff because, under the terms of Article 1(1) of the Annex to the Conditions of Employment of Other Servants, the provisions of Annex XIII to the Staff Regulations apply by analogy to other servants employed on 30 April 2004, and thus also to local staff.

(see para. 35)

2. Article 43(1) of the Rules of Procedure of the Civil Service Tribunal prohibits the introduction of new pleas after the first exchange of written pleadings unless they are based on elements which come to light in the course of the procedure. In that respect, a judgment of a Court of the European Union which had not yet been delivered when the applicant brought his action, but which merely indicates a pre-existing legal situation, cannot be regarded as a new element.

(see para. 36)

See:

20 May 2003, T-80/01 *Diehl-Leistner* v *Commission*, para. 38

3. Failure to state reasons constitutes a ground involving a matter of public policy which must, in any event, be considered by the Union judicature of its own motion. Consequently, a plea in law alleging a breach of the obligation to state reasons cannot be inadmissible on the ground that it is not presented in sufficient detail in the application.

(see para. 47)

See:

20 February 1997, C-166/95 P *Commission* v *Daffix*, para. 24

3 October 2006, T-171/05 *Nijs* v *Court of Auditors*, para. 31

4. The expression 'where appropriate' in Article 45 of the Staff Regulations means that since, in principle, staff in the same grade are supposed to hold posts involving equivalent responsibilities, where that is not the case that circumstance must be taken into consideration in the promotion procedure and, consequently, the administration must, when considering the comparative merits of officials eligible for promotion, take account of the level of responsibilities exercised by such an official where they exceed those normally conferred on an official in his grade.

(see para. 59)

5. An administrative act is presumed to be lawful and the burden of proof lies, in principle, with the person claiming it to be unlawful, so that it is for the applicant to provide at the very least sufficiently precise, objective and consistent information to corroborate the truth or likelihood of the facts in support of his claim. Consequently, an official who has neither any evidence nor, at the very least, a body of supporting information must accept that promotion decisions adopted are presumed to be lawful, and he cannot expect the Civil Service Tribunal to acquaint itself with all the staff reports of the other promotion candidates and to consider the levels of responsibilities exercised by the promotion candidates in order to ascertain whether the appointing authority committed a manifest error of assessment when it decided not to promote him.

(see para. 61)

See:

4 February 2010, F-15/08 *Wiame* v *Commission*, para. 21

6. While an official is not entitled to act in the interests of the law or of the institutions and may put forward, in support of an action for the annulment of a measure, only such claims as relate to him personally, it is sufficient that the unlawfulness pleaded affected his legal situation for a claim based on that unlawfulness to be regarded as one which relates to him personally.

(see para. 63)

See:

23 January 2007, F-43/05 *Chassagne* v *Commission*, para. 100

7. Although the staff report constitutes an indispensable criterion of assessment each time an official's career is taken into consideration for the purpose of adopting a decision concerning his promotion, Article 43 of the Staff Regulations requires that staff reports be drawn up only once every two years. Since the Staff Regulations do not require the promotion procedure to have the same regularity as the reports procedure, they do not preclude the appointing authority from deciding on a promotion without having a recent staff report available.

Given that there is no requirement in either the Staff Regulations or any institution's internal rules for the reports and promotion procedures to be synchronised and that the administration enjoys a wide discretion when organising the promotion procedure, even if it is desirable for the administration to make every effort to have the most recent staff reports available in order to decide on promotions, its failure, in exceptional cases, to take account of those reports is not unlawful, particularly where all the officials eligible for promotion have been treated in the same way.

That is particularly true where the absence of a staff report is the result of the normal conduct of the reports procedure. Since the appointment of officials may occur, depending on the interests of the service, irrespective of the starting date of the appraisal period relating to the reports procedure, it is therefore inevitable that newly appointed officials will be appraised over a shorter period than that used to assess their colleagues.

(see paras 64-67)

See:

17 December 1992, C-68/91 *Moritz* v *Commission*, para. 16

15 November 2001, T-194/99 *Sebastiani* v *Commission*, paras 45, 46 and 49

8. Although the appointing authority is not required to include in its decisions not to promote officials the reasons for those decisions, it is, however, required to provide those reasons when it rejects a complaint from a candidate who has not been promoted.

The extent of the obligation to state reasons depends on the specific circumstances, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressee of the measure may have in obtaining explanations. In the case of a statement of reasons for a decision adopted in a procedure affecting a large number of individuals, such as a promotion procedure, the appointing authority cannot therefore be expected, when rejecting a complaint, to provide reasons for its decision which go further than the claims relied on in that complaint, in particular by explaining why the merits of each of the officials eligible for promotion were greater than those of the author of the complaint.

(see paras 71, 75)

See:

26 January 1995, T-60/94 *Pierrat* v *Court of Justice*, paras 31 and 32; 11 June 1996, T-118/95 *Anacoreta Correia* v *Commission*, para. 82; 27 April 1999, T-283/97 *Thinus* v *Commission*, para. 73; 25 October 2005, T-83/03 *Salazar Brier* v *Commission*, para. 78; 23 November 2006, T-422/04 *Lavagnoli* v *Commission*, para. 69

8 October 2008, F-81/07 *Barbin* v *Parliament*, para. 27