Reports of Cases

ORDER OF THE GENERAL COURT (Appeal Chamber)

13 December 2012*

(Appeal — Civil service — Officials — Appointment — Classification in grade and step — Competition published before the entry into force of the new Staff Regulations of Officials — Recruitment by the Parliament and simultaneous transfer to the Commission — No need to adjudicate in part — Appeal in part clearly unfounded)

In Case T-641/11 P,

APPEAL against the judgment of the European Union Civil Service Tribunal (Second Chamber) of 29 September 2011 in Case F-70/05 *Mische* v *Commission* [2011] ECR-SC, seeking to have that judgment set aside,

Harald Mische, official of the European Commission, residing in Brussels (Belgium), represented by R. Holland, J. Mische and M. Velardo, lawyers,

appellant,

the other parties to the proceedings being

the European Commission, represented by J. Currall, acting as Agent,

defendant at first instance,

the Council of the European Union, represented by A.F. Jensen and J. Herrmann, acting as Agents,

intervener at first instance,

THE GENERAL COURT (Appeal Chamber),

composed of M. Jaeger (Rapporteur), President, I. Pelikánová and A. Dittrich, Judges,

Registrar: E. Coulon,

having regard to the written procedure,

makes the following

* Language of the case: English.

Order

1 By his appeal lodged pursuant to Article 9 of Annex I to the Statute of the Court of Justice of the European Union, the appellant, Mr Harald Mische, seeks to have set aside the judgment of the European Union Civil Service Tribunal (Second Chamber) of 29 September 2011 in Case F-70/05 *Mische* v *Commission* [2011] ECR-SC ('the judgment under appeal'), by which the Civil Service Tribunal dismissed his action seeking, first, annulment of the decision of the Commission of the European Communities of 11 November 2004 in so far as it established his grade at A*6, step 2, secondly, the reinstatement of all his rights deriving from a lawful classification in grade, that is to say, at grade A 7, step 3, or its equivalent, A*8, step 3, and, thirdly, the award of damages to make good the harm caused to his career.

Legal context

2 The Staff Regulations of Officials of the European Communities, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 ('the Staff Regulations' or 'the new Staff Regulations'), entered into force on 1 May 2004. Regulation No 723/2004 introduced a new system of careers 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.

3 Under that new regime, identical conditions of recruitment and career progression are to apply to all officials belonging to the same function group (Article 5(5) of the Staff Regulations) and the appointing authority is to assign each official by appointment or transfer to a post in his function group which corresponds to his grade (Article 7(1) of the Staff Regulations). Candidates who have passed a competition are to be appointed to the grade of the function group set out in the notice of the competition they have passed, the grade of the competition notice being determined by the institution in accordance with the objective of recruiting officials of the highest standard and taking account of the quality of the professional experience required (Article 31(1) and (2) of the Staff Regulations).

4 Annex XIII to the Staff Regulations envisages transitional measures following the entry into force of Regulation No 723/2004, providing inter alia that, for the period from 1 May 2004 to 30 April 2006, first, Article 5 of the Staff Regulations is to be replaced by a provision pursuant to which the posts covered by the Staff Regulations are to 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, and secondly, any reference to the date of recruitment is to be taken to refer to the date of entry into service (Article 1(1) and (2) of Annex XIII to the Staff Regulations).

5 Under Article 5(4) of Annex XIII to the Staff Regulations, 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 are, if recruitment takes place as from 1 May 2004, to 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. Pursuant to Article 12(3) of that annex, 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 are to be graded so as that, inter alia, the competition grades A 7 and A 6 correspond to the recruitment grade A*6.

Background to the dispute

6 The background to the dispute is set out in paragraphs 12 to 20 of the judgment under appeal, as follows:

‘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 ...

13 The [appellant] 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 appellant] applied. It is not disputed that the DG requested the recruitment of [the appellant] 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 appellant] exchanged emails in September 2004 concerning [the appellant]’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 appellant] 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 appellant] 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 appellant], 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 appellant] to a post as an administrator (probationary official) at grade A*6, step 2, in DG Competition.

18 The Commission notified [the appellant] 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 appellant] 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 appellant] brought an action against that decision, which was ... registered as Case F-93/05.’

Proceedings at first instance and judgment under appeal

7 By application lodged at the Registry of the General Court (then the Court of First Instance) on 20 July 2005, the appellant sought annulment of the Commission's decision of 11 November 2004 in so far as, following his transfer from the European Parliament, it determines his grade to be A*6, step 2 ('the contested decision'), reinstatement of all his rights deriving from the correct classification, that is to say at grade A 7, step 3, or its equivalent, grade A*8, step 3, and the award of damages to make good the harm caused to his career.

8 By order of 11 November 2005 the Council of the European Union was granted leave to intervene in the case in support of the forms of order of the Commission, both those parties seeking the dismissal of the action.

9 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 case to that Tribunal. The action was registered at the Registry of the Civil Service Tribunal as Case F-70/05.

10 By order of 14 March 2006 the procedure was suspended pending the delivery of the judgment in Case T-58/05 *Centeno Mediavilla and Others* v *Commission* [2007] ECR II-2523 and, following the appeal brought against that judgment, pending the delivery of the judgment of the Court of Justice in Case C-443/07 P *Centeno Mediavilla and Others* v *Commission* [2008] ECR I-10945.

11 After the delivery of the judgment in Case C-443/07 P *Centeno Mediavilla and Others* v *Commission*, paragraph 10 above, the appellant lodged, on 29 April 2009, observations relating to that judgment. On 20 January 2010 he also lodged observations on the Council's statement in intervention.

12 In the judgment under appeal, the Civil Service Tribunal first declared inadmissible the appellant's claim for reinstatement of his rights as they derive from a lawful and correct classification, on the grounds that the Courts of the European Union 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 (paragraphs 36 to 38 of the judgment under appeal). That part of the judgment under appeal is not challenged in this appeal.

13 In respect of the claims seeking annulment of the contested decision, the appellant put forward pleas that Article 12(3) of Annex XIII to the Staff Regulations, the legal basis of the contested decision, was vitiated by illegality, pleas which were founded on infringement of the principle of equal treatment and non-discrimination; 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 thereto; infringement of the principles of legal certainty, non-retroactivity and protection of legitimate expectations, and infringement of acquired rights. He also put forward a plea in law directed against the contested decision itself and alleging infringement of the principles of good administration, due care, transparency, good faith and equal treatment. Lastly, during the proceedings, he supplemented his arguments in support of the pleas put forward in the application at first instance by claiming infringement of Article 5(5) of the Staff Regulations, which in his submission was to be distinguished from the principle of equal treatment, and by putting forward a complaint alleging the legislature was not competent to identify service needs as regards staffing or to organise recruitment competitions (paragraphs 40, 42 and 44 of the judgment under appeal).

14 In the judgment under appeal, the Civil Service Tribunal rejected the abovementioned pleas of illegality, relying, inter alia, on the judgments in Cases T-58/05 and C-443/07 P *Centeno Mediavilla and Others* v *Commission*, paragraph 10 above (paragraphs 61 to 95, 98 to 100, 107 to 116 and 126 to 139).

15 The plea in law directed against the contested decision itself and alleging an infringement of 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 and that competition was conducted at a much slower pace than other similar competitions (paragraphs 140 and 141 of the judgment under appeal) – was rejected in paragraphs 144 to 152 of the judgment under appeal.

16 The complaint alleging an infringement of Article 5(5) of the Staff Regulations, which was to be distinguished from the principle of equal treatment, and the complaint that the legislature was not competent to identify the services' staffing needs or to organise recruitment competitions were rejected in paragraphs 156 to 159, 161 and 162 of the judgment under appeal.

17 As regard the application for damages to make good the harm caused to the appellant's career as a result of the contested decision, that was rejected on the ground that, as was apparent from the examination of the claims for annulment, the Commission had not committed any irregularity capable of rendering it liable to the appellant, and consequently the condition that there should be unlawful conduct on the part of the Commission had not been satisfied. According to the Tribunal, the same was true of the claim for payment of 'legal pay' and the claim seeking, in the alternative, a reduction in the appellant's contribution to the pension scheme, in so far as those claims were also based on the incorrect premiss that the pleas raised in support of the claims for annulment were well founded (paragraphs 167 to 173 of the judgment under appeal).

18 In respect of the claim for the award of damages on account of the inaccurate information given to the appellant regarding the consequences of the reform of the Staff Regulations, the Civil Service Tribunal held, while accepting that a lack of prior information was capable of being an effective argument in favour of the European Union incurring non-contractual liability to the persons concerned, that it was nevertheless necessary to distinguish that liability, based on an alleged omission, or even unwillingness by the administration to disclose information, from the liability resulting from the alleged unlawfulness of Article 12(3) of Annex XIII to the Staff Regulations or of the contested decision (paragraphs 176 and 177 of the judgment under appeal). The Tribunal continued as follows:

> '178 Although, in his application originating the proceedings, the [appellant] sought compensation for damage resulting from the unlawfulness of the contested decision ..., 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 [appellant], 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 appellant]'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 ...

180 Furthermore, it should be pointed out that the arguments adduced by [the appellant] 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. ...

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 ... That was not so in the present case.'

19 In those circumstances, the action was dismissed in its entirety.

On the appeal

Procedure and forms of order sought

20 By document lodged at the Registry of the General Court on 8 December 2011, the appellant brought the present appeal.

21 The appellant claims in essence that the Court should:

— set aside the judgment under appeal;

— uphold the claims submitted at first instance;

— order the Commission to pay the costs incurred in the proceedings at first instance and in the appeal proceedings;

— in the alternative, set aside the judgment under appeal and refer the case back to the Civil Service Tribunal.

22 In their replies, lodged at the Court Registry on 8 and 11 May 2012 respectively, the Commission and the Council contend that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

23 By the order in Case T-642/11 P [2012] ECR-SC, the General Court (Appeal Chamber) dismissed the appeal brought by the appellant against the judgment of the Civil Service Tribunal of 29 September 2011 in Case F-93/05, whereby the Civil Service Tribunal dismissed his action seeking, inter alia, the annulment of the Parliament's decision of 4 October 2004 which appointed him an official, in so far as it determined his grade at A*6, step 1.

24 At the General Court's invitation, the parties, in pleadings of 24, 25 and 26 September 2012, stated their views on the possible consequences of that order for the present proceedings, in particular so far as concerns the appellant's standing to bring legal proceedings.

Law

25 Under Article 145 of its Rules of Procedure, where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the General Court may at any time dismiss the appeal by reasoned order, even where a party has asked the Court to hold a hearing (see, to that effect, order in Case T-233/07 P *Lebedef-Caponi* v *Commission* [2008] ECR-SC I-B-1-3 and II-B-1-19, paragraphs 21 and 22). In this case, the Court considers that it has sufficient information from the documents before it and decides, pursuant to that article, not to take further steps in the proceedings.

26 Furthermore, it is settled case-law that the Court may of its own motion raise the objection that a party has no interest in bringing or in maintaining an appeal on the ground that an event subsequent to the judgment under appeal removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason. For an appellant to have an interest in bringing proceedings the appeal must be likely, if successful, to procure an advantage to the party bringing it (see, to that effect, Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13, and order of the President of the Court of Justice of 27 October 2011 in Case C-605/10 P(R) *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, not published in the ECR, paragraph 15).

27 In the present case, one reason why the appellant asks this Court to set aside the judgment under appeal, is that it rejected his claims for the annulment of the contested decision in so far as it established his grade at A*6. Following the order in *Mische* v *Parliament*, paragraph 23 above, the appeal, if successful, is not likely to procure an advantage to the appellant so far as concerns his classification in grade since, first, the Parliament's decision of 4 October 2004 appointing him as a probationary official at grade A*6 became final following that order in *Mische* v *Parliament*, paragraph 23 above, secondly, every institution is required, in the context of an interinstitutional transfer, to classify the official which it appoints in the same grade as that in which he was classified by his original institution except in the situation where that transfer is to be treated as a promotion and, thirdly, the appellant does not allege any promotion in the context of the contested decision which could have led the Commission to classify him in a grade other than that in which he was classified at the time of his recruitment by the Parliament. In that regard, it must be observed that, while the appellant was recruited on the initiative of the Commission after having passed Competition PE/96/A organised by the Parliament and simultaneously transferred to the Commission, the fact remains that the decision to appoint the applicant as a probationary official and to classify him in grade A*6 was adopted by the Parliament and not by the Commission. As is apparent from Article 29(1)(b) of the Staff Regulations, the possibility of filling a vacant post by means of interinstitutional transfer is restricted to 'officials of the same grade in other institutions' and, therefore, it must be held that only a person who has previously been appointed an official in an institution may be transferred between institutions.

28 In so far as the Commission takes the view that its appointment decision of 11 November 2004 replaced that of the Parliament of 4 October 2004, its argument, under which the appointment decision properly adopted by one institution can be attributed to another institution, is incompatible with the strict and formal nature of the conditions relating to the creation and validity of a decision appointing an official. Indeed, there is no support for such an argument in the judgment in Case 127/84 *Esly* v *Commission* [1985] ECR 1437, paragraphs 12 and 15 to 18), concerning the reclassification of an official who, after having passed a competition organised by the Parliament and having been appointed a probationary official by that institution in 1980, was never 'in fact' a member of the Parliament's staff, since he had immediately been transferred to the Commission, which had proposed his classification and requested his transfer. In that judgment, the Court merely held that the Commission could not refuse the official concerned a (subsequent) reclassification which it had granted, in 1983, to two of his colleagues who performed similar functions to his own, by justifying that refusal solely by the fact that, unlike those colleagues, he had been recruited in 1980 by the Parliament and simultaneously transferred to the Commission. The Court, without ruling on the

lawfulness of the recruitment and transfer procedure which had been followed in the case, thus acknowledged that the individual concerned was entitled to rely on an event subsequent to his recruitment and simultaneous interinstitutional transfer, as a new fact, in order to obtain a reclassification.

29 Furthermore, the fact that the appellant did not make an express request for a transfer does not preclude the application of Article 29(1)(b) of the Staff Regulations, which concerns 'requests for transfer ... from officials of the same grade in other institutions'. By itself sending the Parliament a formal request for the appellant's transfer, the Commission, in so doing, gave effect to the intention of the appellant, who had never worked for the Parliament, but intended to continue, as an official, the work which he had already carried out for the Commission as a member of the temporary and auxiliary staff. Such a situation must, a fortiori in comparison with a straightforward request made solely by the official concerned – the typical case envisaged by the legislature –, be considered to be covered by Article 29(1)(b) of the Staff Regulations.

30 Article 29(1) and (2) of the Staff Regulations is included under Chapter I, 'Recruitment', of Title III, 'Career of Officials', of those Staff Regulations and exhaustively regulates the possibilities of filling vacant posts, that is to say by transfer, appointment in accordance with Article 45a, promotion, competitions and selection procedures other than the competition procedure. Article 29(1)(b) provides that interinstitutional transfer can apply only to 'officials of the same grade'. It follows that the tranfer cannot, in itself, lead to an alteration in the classification in grade of the official concerned. Consequently, in the context of the interinstitutional transfer of the appellant, the Commission was, in principle, required to classify him in the same grade as that in which he had been classified by the Parliament, namely grade A*6.

31 That principle that grades must be identical in the event of interinstitutional transfer is borne out by Article 8 of the Staff Regulations, relating to transfer after a secondment. In that connection, the Court held, in its judgment in Case C-184/01 P *Hirschfeldt* v *EEA* ([2002] ECR I-10173, paragraphs 58 to 61), that the transfer of an official to an institution to which he had been seconded, in itself and as a rule, has no effect on the position of the official transferred, inter alia so far as concerns his grade, and that that rule may only be derogated from in the situation, exceptional and in derogation from the general rule, envisaged in the third subparagraph of Article 8 of the Staff Regulations, where the transfer must be treated as a promotion. This may only take place in the circumstances provided for in Article 45 of the Staff Regulations. It is common ground that, in the present case, the decision of 4 October 2004 to appoint the appellant and to transfer him from the Parliament was adopted having regard solely to the fact that the appellant had passed Competition PE/96/A and that the contested decision was adopted without there ever being any question of promotion pursuant to Article 45 of the Staff Regulations.

32 Consequently, there is no further need to rule on the appeal in so far as it is directed against the rejection, in the judgment under appeal, of the claims for the annulment of the contested decision because it establishes the appellant's grade at A*6.

33 The examination of the appeal must therefore be restricted to solely those of the appellant's claims on which it is still necessary to rule. In support of the appeal, the appellant puts forward three sets of grounds of appeal. He criticises the Civil Service Tribunal, first, for having infringed Article 41(1) and (3) of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 392) by failing to examine that provision, secondly, for having incorrectly rejected the plea alleging infringement of Article 5(5) of the Staff Regulations and, thirdly, for having disregarded the plea based on the continuity of career of former members of the temporary staff under Article 5(4) of Annex XIII to the Staff Regulations.

34 The Commission and the Council criticise the lack of clarity in the appeal, compounded by its excessive length, which renders any defence very difficult.

35 In this connection, it is appropriate, having regard to the confused and largely unstructured nature of the numerous grounds of appeal and arguments which the appellant submitted in the appeal, to regroup them and examine them according to whether they are directed against the rejection, in the judgment under appeal, of the claims seeking annulment of the contested decision in so far as it established his grade at A*6, step 2, or against the rejection of the claims seeking the award of damages.

Pleas directed against the rejection, in the judgment under appeal, of the claims seeking annulment of the contested decision in so far as it established the appellant's grade at A*6, step 2

36 As stated in paragraph 51 of the judgment under appeal, the appellant submitted, at first instance, that he had suffered discrimination as compared with members of the temporary staff who had been recruited as officials prior to 1 May 2004 after having passed competitions for access to the grade which they already held and who had retained their grading. The appellant pointed out, in this connection, that as a member of the temporary staff he had been classified in grade A 7, step 3, observing that members of the temporary staff should retain their grading where they are recruited on the basis of a competition organised to fill a post in a grade corresponding to the grade which they have already acquired, inter alia under the third paragraph of Article 32 of the Staff Regulations and the general implementing provisions relating to classification in step adopted by the Parliament.

37 Since the Civil Service Tribunal dismissed, in the judgment under appeal, the action brought at first instance in so far as the appellant sought to obtain classification in step 3 instead of step 2, it is necessary to examine the complaints in the appeal which are directed against the judgment under appeal so far as concerns that dismissal.

38 In that regard, the appellant states in the appeal that the Parliament had appointed him an official at grade A*6, step 1, while transferring him to the Commission, which awarded him step 2. He complains that the Commission thus failed to take into account the fact that his career began in November 2002 and that that classification was two grades and one step below that which he had held previously as a member of the temporary staff and two grades below the grade published in Competition Notice PE/96/A. He adds that the Commission, in 2002, had linked its offer of employment as a member of the temporary staff with his subsequent recruitment as an official in grade A 7 by explaining that, in accordance with its settled administrative practice, members of the temporary staff at grade A 7 who pass an A 7/A 6 competition retain their grading so far as concerns their seniority (step 3) and grade (A 7).

39 The appellant states that the analysis made by the Tribunal, in paragraphs 75 to 86 of the judgment under appeal, is vitiated by the fact that they failed to take into account his acquired rights to continuity of career. They also infringed Article 5(4) of Annex XIII to the Staff Regulations, which confers on former members of the temporary staff who are successful candidates in an internal competition the right to retain their seniority and their grading, since there is no objective reason for excluding other members of the temporary staff from the scope of that provision. In that context, the appellant draws attention to the fact that his responsibilities and the tasks he performed at the Commission always remained the same. Consequently, there was no reason to disregard, in terms of the grade and step, the seniority and merits which he had acquired as a member of the temporary staff. He takes the view that his arguments have recently been borne out by the judgment in Case C-177/10 *Rosado Santana* [2011] ECR I-7907. In addition, he submits that the plea alleging the illegality of Article 5(4) of Annex XIII to the Staff Regulations was incorrectly declared to be inadmissible, where he had expressly requested that that provision be applied by analogy and, should that not be possible, that it be declared incompatible with Article 5(5) of the Staff Regulations.

40 By those grounds of appeal, the appellant is not claiming that the Tribunal erred in law in its examination of the application, to his administrative status, of the third paragraph of Article 32 of the Staff Regulations, concerning the award of steps, or of a general implementing scheme relating to classification in step. In any event, even if the appellant had intended to claim such an error, his appeal would not be admissible in that regard since it does not state precisely either the alleged flaws in the judgment under appeal or the pertinent legal arguments relied on in support of his claim that that judgment should be set aside (see, to that effect, judgment of 19 July 2012 in Case C-264/11 P *Kaimer and Others* v *Commission*, not published in the ECR, paragraph 61 and case-law cited).

41 In respect of the continuity of career claimed by the appellant as a former member of the temporary staff, the argument that Article 5(4) of Annex XIII to the Staff Regulations is unlawful on the ground that that provision is said to be incompatible with Article 5(5) of the Staff Regulations must be rejected immediately. It is settled case-law that an annex to the Staff Regulations whose function consists in setting out the rules for implementing an article thereof – in the present case, Article 107a – has the same legal force as the articles of the Staff Regulations, since that annex and those articles have the same rank in the hierarchy of norms (see, to that effect, Case C-40/10 *Commission* v *Council* [2010] ECR I-12043, paragraphs 60 and 61). Consequently, it cannot validly be claimed that Article 5(5) of the Staff Regulations takes precedence over Article 5(4) of Annex XIII to the Staff Regulations. On the contrary, Article 5(4) of Annex XIII to the Staff Regulations, as lex specialis, derogates from the general rule in Article 5(5) of the Staff Regulations and prevails over that latter provision in the situation which it specifically seeks to regulate (see, to that effect, Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraph 57 and Case T-371/03 *Le Voci* v *Council* [2005] ECR-SC I-A-209 and II-957, paragraph 122), namely that regarding the transitional grading of the officials concerned.

42 The Civil Service Tribunal was therefore fully entitled to reject the complaint alleging the illegality of Article 5(4) of Annex XIII to the Staff Regulations.

43 In respect of the application by analogy of Article 5(4) of Annex XIII to the Staff Regulations to the appellant's case, advocated by the appellant at least so far as concerns his classification in step, the Civil Service Tribunal held, in paragraphs 84 and 85 of the judgment under appeal:

'[84] ... In order for [that provision] to apply, a temporary staff member must ... transfer from a 'former category' to a 'new category' ... In the present case, ... the [appellant], 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 [appellant]'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, ... 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 [appellant]'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 ..., 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 ...'

44 Those findings are not vitiated by any error of law.

45 The transitional rule in Article 5(4) of Annex XIII to the Statute, having the nature of an exception to a general principle, must be strictly interpreted (see, to that effect and by analogy, judgment in Case T-237/00 *Reynolds* v *Parliament* [2005] ECR-SC I-A-385 and II-1731, paragraph 101). Following a strict literal interpretation of Article 5(4) of Annex XIII to the Staff Regulations, it must indeed be held, as the Civil Service Tribunal did in the judgment under appeal, that, first, that provision does not apply to members of the temporary staff who are successful candidates in an open competition, since such a competition does not normally give rise to recruitment in a different category, and, secondly, the wording of that provision does not give the administrative authority any discretion to interpret and apply it differently.

46 While it is true that all members of the temporary staff, whatever type of competition they sit, have some professional experience within the institutions, the fact remains that the European Union legislature deliberately excluded from the scope of Article 5(4) of Annex XIII to the Staff Regulations members of the temporary staff who were successful candidates in an open competition. If the benefit of that transitional rule, applied exceptionally, was reserved to members of the temporary staff who were successful candidates in a competition to obtain a transfer to another category or in an internal competition, the objective was to encourage those staff to participate in such competitions in order to become established as officials while also obtaining a transfer to another category. By contrast, open competitions are open to all interested parties, even from outside the institutions (see, to that effect, Case 176/73 *Van Belle* v *Council* [1974] ECR I-1361, paragraph 8), and are therefore not designed to combine recruitment and establishment as an official with such a transfer to another category. In those circumstances, there is no reason to think that the legislature wished to extend the benefit of the scheme provided for in Article 5(4) of Annex XIII to the Staff Regulations to members of the temporary staff who were successful candidates in an open competition.

47 It follows that the appellant, as a successful candidate in an open competition, was not in a comparable legal situation to that of candidates successful in a competition for transfer to another category or in an internal competition. In the light of the distinction made between those types of competition and the objective pursued by the European Union legislature, the appellant cannot rely on the professional experience and seniority which he had acquired as a member of the temporary staff before his recruitment in order to demonstrate that he was nevertheless in a comparable situation to that of those other members of the temporary staff, since the legislature did not accept those aspects as being legally relevant criteria for comparison or differentiation and did not leave any discretion to the administrative authority in that regard.

48 That conclusion is not affected by the judgment in Rosado Santana, paragraph 40 above, relied on by the appellant, since that judgment refers only to equal treatment between 'fixed-term' workers and 'comparable permanent' workers and it has no bearing on the assessment which is at issue in the present case of the comparability of situations of members of the temporary staff who are successful candidates in various types of competitions. As the Commission has correctly observed, the case giving rise to that judgment does not concern the Staff Regulations, or the power of the legislature to amend them, or the interpretation of any transitional provision which may accompany those amendments.

49 In so far as the appellant criticises, lastly, paragraph 86 of the judgment under appeal, in which the Tribunal held that he had no grounds for inferring that there was a breach of the principle of equal treatment from the non-application, by the Commission, of the Parliament's decision of 13 February 2006 by which the latter decided to regrade temporary staff who were in a situation comparable to his

own in order to correct the discriminatory treatment of those temporary staff and officials after the entry into force of the new Staff Regulations, it is sufficient to observe that the measures adopted by one institution in favour of a specific group of persons consitute, in the absence of any legal obligation under the Staff Regulations, measures which may not be relied on in support of a plea alleging infringement of the principle of equal treatment with regard to another institution (see judgment in Case T-271/08 P *Boudova and Others* v *Commission* [2009] ECR-SC I-B-1-71 and II-B-1-441, paragraph 53 and case-law cited). It follows that the Civil Service Tribunal did not err in law in holding that the Commission was not required to follow the example set by the Parliament in regrading the appellant.

50 The grounds of appeal alleging an infringement of the principle of the continuity of career of former members of the temporary staff must therefore be rejected as clearly unfounded so far as concerns the appellant's classification in step.

Grounds of appeal directed against the rejection of the claims for the award of damages

51 According to the appellant, the Civil Service Tribunal misapplied the principle of good administration and failed to examine Article 41(1) and (3) of the Charter of Fundamental Rights. He submits that the Parliament and the Commission provided him, in October 2002, with inadequate, incomplete and misleading information, there was an excessive delay in the closure of the procedure relating to Competition PE/96/A and the candidates successful in that competition were discriminated against in comparison with those of parallel competitions.

52 It must be observed in this connection at the outset that all the appellant's arguments as to errors made by the Civil Service Tribunal in the assessment of the allegedly unlawful and prejudicial conduct of the Parliament must be dismissed as ineffective. The Parliament is not a party to the present appeal where the appellant and the Commission are the opposing parties, nor was it a party at first instance. In any event, by the order in *Mische* v *Parliament*, paragraph 23 above, the General Court dismissed the appeal brought by the appellant against the judgment of the Civil Service Tribunal of 29 September 2011 in Case F-93/05 *Mische* v *Parliament* [2011] ECR-SC, dismissing the action seeking, inter alia, annulment of the Parliament's decision of 4 October 2004 in so far as it establishes his grade at A*6, step 1, and the award of damages. Consequently, the Civil Service Tribunal cannot be criticised for having failed to find that that conduct was unlawful and prejudicial and to attribute it to the Commission. Moreover, the appellant, instead of stating how that conduct was to be attributed to the Commission, states that the Commission was directly liable on the ground that in October 2002 it provided him with inadequate, incomplete and misleading information.

53 In respect of the grounds of appeal directed against the rejection, in paragraphs 176 to 182 of the judgment under appeal, of the claim for the award of damages on account of the inadequate, incomplete and misleading information allegedly provided by the Commission in October 2002 on the consequences of the reform of the Staff Regulations, the appellant alleges that the Civil Service Tribunal erred in rejecting that claim for damages as being inadmissible. He submits that an analysis of the text of the pre-litigation complaint and of the application and the reply which were lodged at first instance proves that that claim was in fact brought in due time. Furthermore, the Tribunal infringed the appellant's right to a fair hearing by claiming that his arguments were vitiated by 'ambiguity', without having given him the opportunity to provide explanations in that regard. By ruling out examination of the merits of the claim for damages, the Civil Service Tribunal infringed Article 41(3) of the Charter of Fundamental Rights, according to which every person has the right to have the European Union make good any damage caused by its institutions in the event of an infringement of the right to good administration. The appellant claims that the Commission does not dispute that in October 2002 it provided inadequate, incomplete and misleading information.

54 In that regard, it must be observed that, according to settled case-law, where one of the grounds adopted by the Civil Service Tribunal is sufficient to sustain the operative part of its judgment, any defects that might vitiate other grounds also given in the judgment concerned in any event have no bearing on that operative part and, accordingly, a plea relying on such defects is ineffective and must be rejected (see, to that effect and by analogy, judgment in Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 68 and case-law cited).

55 In the present case, it is apparent from paragraphs 178 to 182 of the judgment under appeal that the Civil Service Tribunal based the inadmissibility of the claim for damages on three distinct grounds. First, it stated that that claim was not included in the document initiating the proceedings and had been formulated for the first time in one of the appellant's later written pleadings, and should therefore be treated as a new head of claim which was out of time and inadmissible. Secondly, it held that the arguments expounded by the appellant at the hearing differed from the position which he had adopted in his written pleadings, which rendered his claim both ambiguous and inadmissible. Thirdly, pointing out that the harm alleged had its origin in wrongful maladministration which was not in the nature of a decision, it stated that the pre-litigation procedure provided for in Article 90(1) and (2) of the Staff Regulations had not been observed, in so far as it had not been initiated by a request sent to the administrative authority asking it to make good the harm suffered.

56 The third ground upheld by the Civil Service Tribunal, which in itself is sufficient to justify the rejection of the claim for damages as being inadmissible, is not vitiated by any of the errors of law relied on by the appellant in the appeal, and consequently the grounds of appeal and arguments directed against that ground must be rejected as clearly unfounded.

57 It is settled case-law that, in the system of legal remedies established by Articles 90 and 91 of the Staff Regulations, an action for damages, which is a legal action independent of an action for annulment, is admissible only where it has been preceded by a pre-litigation procedure which complies with the provisions of the Staff Regulations. That procedure differs depending on whether the harm for which compensation is sought stems from an act adversely affecting an official, for the purposes of Article 90(2) of the Staff Regulations, or conduct of the administration which is not in the nature of a decision. In the former case, the onus is on the official or staff member concerned to submit a complaint against the act in question to the appointing authority within the prescribed period. In the latter case, on the other hand, the administrative procedure must start by the submission of a request within the meaning of Article 90(1) of the Staff Regulations, seeking compensation, and be continued, where necessary, by a complaint directed against the decision rejecting the request. Where there is a direct link between the action for annulment and the action for damages, the latter is admissible as ancillary to the action for annulment, without necessarily having to be preceded either by a request calling on the appointing authority to make good the harm allegedly suffered or by a complaint challenging the merits of the implied or express rejection of the request. By contrast, where the harm alleged does not stem from an act against which an action for annulment has been brought but from several faults and ommissions allegedly committed by the administrative authority, it is mandatory that the pre-litigation procedure start with a request calling on the appointing authority to make good that harm (judgments in Case T-15/96 *Liao* v *Council* [1997] ECR-SC I-A-329 and II-897, paragraphs 57 and 58; Case T-378/00 *Morello* v *Commission* [2002] ECR-SC I-A-311 and II-1479, paragraph 102, and Case T-25/03 *de Stefano* v *Commission* [2005] ECR-SC I-A-125 and II-573, paragraph 78).

58 In the present case, as the Tribunal correctly observed, the alleged inadequacy of the prior information provided and the alleged subsequent provision of incomplete and misleading information constitute instances of wrongful maladministration which are not in the nature of decisions and which were committed before the adoption of the contested decision, so that the onus was on the appellant to observe the two-stage pre-litigation procedure set out in the preceding paragraph. It is common ground that the appellant did not follow that procedure before bringing proceedings before the Civil

Service Tribunal. Consequently, that Tribunal was fully entitled to reject the claim for damages as being inadmissible on the grounds that the pre-litigation procedure provided for in the Staff Regulations had not been followed.

59 That conclusion is not called into question by the appellant's reference to two judgments of the Civil Service Tribunal, namely the judgment in Case F-4/07 *Skoulidi* v *Commission* [2008] ECR-SC I-A-1-47 and II-A-1-229, paragraphs 56 and 57, and the judgment in Case F-101/09 *AA* v *Commission* [2011] ECR-SC, paragraphs 73 to 76, from which it is apparent that, in a situation characterised by the particular circumstances of the present case, the two-stage pre-litigation procedure mentioned at paragraph 57 above should not be followed. The complaint cannot be made that the Civil Service Tribunal departed from previous case-law in the judgment under appeal, since the judgments relied upon relate to situations which are different from those of the present case. Thus, the judgment in *Skoulidi* v *Commission* is irrelevant for the purposes of the present proceedings, since the action for damages which was the subject of that judgment was based on the illegality of a decision, whereas the claim for damages at issue in the present case concerns instances of wrongful maladministration which are not in the nature of a decision. The same is true of the judgment in *AA* v *Commission*, which concerns claims for damages based on alleged wrongful conduct of the administrative authority in the enforcement of a judgment ordering annulment, in only providing partial compensation for the consequences of the unlawful act committed. The Civil Service Tribunal interpreted those claims as criticising the administrative authority for having failed to adopt, under Article 266 TFEU, a measure analogous to a measure prescribed by the Staff Regulations, within the meaning of Article 90(2) thereof, to allow the conclusion that the appellant was not required to observe the two-stage pre-litigation procedure, since the failure to take a measure prescribed by the Staff Regulations constitutes an act adversely affecting an official which may be directly challenged by a complaint.

60 Moreover, neither can the appellant criticise the Civil Service Tribunal for not having exercised the unlimited jurisdiction which it has pursuant to the second sentence of Article 91(1) of the Staff Regulations in disputes of a financial character. Although, admittedly, that power may be exercised even in the absence of proper claims to that effect, it is settled case-law that the Courts of the European Union 'may' make use of it and, 'if need be', order of its own motion the defendant institution to pay compensation (judgments in Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743, paragraph 14; Case T-130/96 *Aquilino* v *Council* [1998] ECR-SC I-A-351 and II-1017, paragraph 39; Case T-10/02 *Girardot* v *Commission* [2004] ECR-SC I-A-109 and II-483, paragraph 89, and Case T-132/03 *Casini* v *Commission* [2005] ECR-SC I-A-253 and II-1169, paragraph 101). Thus, the Courts of the European Union are not subject to an obligation to exercise its power in favour of the appellant. The Civil Service Tribunal therefore did not err in law in refraining in the present case, after having rejected all the claims submitted at first instance, from exercising its unlimited jurisdiction.

61 It follows that, in accordance with the case-law cited at paragraph 54 above, the grounds of appeal and arguments directed against the other two grounds, and all the arguments relating to the merits, can be rejected as being ineffective. Consequently, the grounds of appeal directed against the dismissal, in the judgment under appeal, of the claim for damages to make good the harm alleged suffered by the appellant because of the provision, in October 2002, of inadequate, incomplete and misleading information on the consequences of the reform of the Staff Regulations must all be rejected as being either clearly unfounded or ineffective.

62 Lastly, since none of the grounds of appeal directed against the rejection of the claims for annulment of the contested decision have been upheld, the ground of appeal – put forward in the context of the alleged infringement of Article 5(5) of the Staff Regulations – directed against paragraphs 171 and 172 of the judgment under appeal, which rejected the claim that the appellant's contribution to the pension scheme should be reduced, cannot succeed. Since the appellant is alleging that the Civil Service Tribunal failed to answer the arguments raised in paragraph 121 of the application at first instance, it must be stated that that part of the application concerns the 'consequence[s] of a legal and regular employment with respect to ... payment' and the 'obligation to duly implement the ... judgment [of the

Civil Service Tribunal] in order to ensure the effect of the [Tribunal's] judgment', which would oblige the Commission to 'reinstate the [a]ppellant in all his rights as deriving from a legal and regular employment', that is to say a 'legal and regular grading' at grade A 7, step 3. However, since the contested decision relating to his classification in grade and step has become final, the appellant is prevented from challenging its legal consequences as regards contribution to the pension scheme.

63 Further, for the same reason the Civil Service Tribunal correctly dismissed, in paragraphs 167 to 170 of the judgment under appeal, the claim for damages to make good the harm caused to the appellant's career as a result of the contested decision and seeking payment of 'legal pay', on the ground that the condition that there had to have been unlawful conduct on the part of the Commission had not been satisfied and that that claim was therefore based on the incorrect premiss that the claims for annulment of the contested decision were well founded.

64 It follows from all the foregoing that there is no further need to rule on the appeal to the extent that it is directed against the judgment under appeal in so far as that judgment dismisses the claims for annulment of the contested decision because that decision establishes the appellant's grade at A*6, and that the appeal must be dismissed as to the remainder.

Costs

65 Pursuant to the first paragraph of Article 148 of the Rules of Procedure, where the appeal is unfounded, the General Court is to make a decision as to costs.

66 Under the first subparagraph of Article 87(2) and Article 87(6) of those Rules, applicable to appeal proceedings by virtue of Article 144 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings and where a case does not proceed to judgment, the costs shall be in the discretion of the General Court.

67 Since the applicant has essentially been unsuccessful and the Commission has applied for costs, the applicant is to bear his own costs and pay those incurred by the Commission in the present proceedings. Having regard to the circumstances of the present case, the same must apply as regards that part of the case that will not proceed to judgment.

68 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which intervened in the proceedings are to bear their own costs. Therefore, the Council is to bear its own costs.

On those grounds,

THE GENERAL COURT (Appeal Chamber)

hereby orders:

1. **There is no further need to adjudicate on the appeal to the extent that it is directed against the judgment of the Civil Service Tribunal (Second Chamber) of 29 September 2011 in Case F-70/05 *Mische* v *Commission* in so far as that judgment dismisses the claims for annulment of the decision of the Commission of the European Communities of 11 November 2004 because that decision determines Mr Harald Mische's grade to be A*6.**

2. **The appeal is dismissed as to the remainder.**

3. **Mr Harald Mische shall bear his own costs and pay those incurred by the European Commission in the present proceedings.**

4. The Council of the European Union shall bear its own costs.

Luxembourg, 13 December 2012.

Registrar
E. Coulon

President
M. Jaeger