



## Reports of Cases

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

13 June 2012\*

(Civil service — Members of the temporary staff — Non-renewal of a contract for a fixed period — Discretionary power of the administration — Duty to have regard for the interests of officials — Article 8 of the CEOS — Article 4 of the Decision of the Director-General of OLAF of 30 June 2005 on a new policy for the engagement and use of OLAF's temporary staff — Maximum duration of temporary staff contracts)

In Case F-63/11,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

**Luigi Macchia**, former member of the temporary staff of the European Commission, residing in Woluwé-Saint-Lambert (Belgium), represented by S. Rodrigues, A. Blot and C. Bernard-Glanz, lawyers,

applicant,

v

**European Commission**, represented by J. Currall and D. Martin, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

composed of S. Van Raepenbusch (Rapporteur), President, I. Boruta and E. Perillo, Judges,

Registrar: G. Ruiz Plaza, assistant,

having regard to the written procedure and further to the hearing on 14 March 2012,

gives the following

### Judgment

- 1 By application received at the Registry of the Tribunal on 1 June 2011, Mr Macchia seeks, inter alia, annulment of the implied decision of the acting Director-General of the European Anti-Fraud Office (OLAF) of 12 August 2010 rejecting his request for extension of his temporary staff contract.

\* Language of the case: French.

## Legal context

2 With regard to the fundamental right to good administration, Article 41 of the Charter of Fundamental Rights of the European Union provides

‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

...

(c) the obligation of the administration to give reasons for its decisions.’

3 Under Article 2 of the Conditions of Employment of Other Servants of the European Union (‘the CEOS’):

‘For the purposes of these conditions of employment, “temporary staff” means:

(a) staff engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary;

...’

4 As regards the duration of temporary staff contracts as referred to in Article 2(a) of the CEOS, the first paragraph of Article 8 of the CEOS provides:

‘Temporary staff to whom Article 2(a) applies may be engaged for a fixed or indefinite period. The contracts of such staff who are engaged for a fixed period may be renewed not more than once for a fixed period. Any further renewal shall be for an indefinite period.’

5 Under the first paragraph of Article 11 of the CEOS, the provisions of Articles 11 to 26 of the Staff Regulations of Officials of the European Union (‘the Staff Regulations’), concerning the rights and obligations of officials, apply by analogy.

6 Article 47 of the CEOS provides:

‘Apart from cessation on death, the employment of temporary staff shall cease:

...

(b) where the contract is for a fixed period:

(i) on the date stated in the contract;

(ii) at the end of the period of notice specified in the contract giving the servant or the institution the option to terminate earlier. ...’

7 In addition, on 28 April 2004, the European Commission adopted Decision C(2004) 1597 on the maximum duration for the recourse to non-permanent staff in the Commission services (published in *Administrative Notices* No 75-2004 of 24 June 2004, ‘the Commission Decision of 28 April 2004’). As provided in Article 1(2)(a) of that decision, the Commission Decision of 28 April 2004 applies, in particular, to temporary staff engaged under Article 2(a) of the CEOS.

- 8 Article 3(1) of the Commission Decision of 28 April 2004 provides that ‘non-permanent staff may render their services through a combination of different types of contracts or engagements only for a maximum duration of six years counted on a twelve year period’.
- 9 By way of exception, as regards non-permanent staff recruited by OLAF, Article 4 of the Decision of the Director-General of OLAF of 30 June 2005 on a new policy for the engagement and use of OLAF’s temporary agents provides that ‘[t]he maximum period referred to in Article 3, paragraph 1, of Commission Decision [of 28 April 2004] applicable to OLAF non permanent staff shall be [eight] years counted on a 16 years period’ (‘the eight-year rule’).

## Facts

- 10 The applicant worked for the Commission as a national expert on secondment for four years, as from 16 June 2003.
- 11 In 2005, OLAF launched a selection procedure for the recruitment of temporary staff specialising, in particular, in the fields of investigations and intelligence analysis. The call for applications stated that the successful candidates would be engaged for a period of four years with the possibility of renewal, with the total permissible duration of the contract being limited to eight years, in accordance with the decision of 30 June 2005. Having passed the tests in the selection procedure, the applicant signed a temporary staff contract, as referred to in Article 2(a) of the CEOS, for a period of four years with effect from 1 May 2007, that is, until 30 April 2011.
- 12 In 2009, the applicant entered an internal competition organised by the Commission for the purpose of recruiting administrators in grade AD 8 specialising in fraud prevention but his candidature was unsuccessful on the ground that he did not have at least three years’ seniority as an official or member of the temporary staff of the Commission.
- 13 On 12 April 2010, the applicant and four other temporary staff members submitted a request to the acting Director-General of OLAF for extension of their contracts.
- 14 Since he did not receive any reply to that request, the request was the subject, on 12 August 2010, of an implied decision rejecting it, against which, on 10 November 2010, the applicant lodged a complaint in accordance with Article 90(2) of the Staff Regulations. That complaint was rejected by the Director-General of OLAF, acting as the authority empowered to conclude contracts of employment (‘the AECE’), by decision of 22 February 2011. In that decision, the AECE, after mentioning, inter alia, the administration’s broad discretion with regard to the renewal of temporary staff contracts concluded for a fixed period, stated that, ‘in the light of the budgetary possibilities, the interests of the service and [the applicant]’s merits and abilities ... it was unable to give a favourable reply to [his] request for renewal of the contract’. The AECE continued as follows:

‘Indeed, at the end of [the applicant]’s contract, the support and follow-up post to which he is assigned within OLAF will be redeployed to the field of investigations.

The redeployment of this budgeted post is part of a series of measures taken following the repeated recommendations of the Court of Auditors [of the European Union] in its special report of 2005 on OLAF and in its initial conclusions on the audit carried out in 2010, but also of the OLAF Supervisory Committee, contained both in its annual activity reports and in its opinions on the budget, in favour of refocusing OLAF’s activities on investigation activity.

...

[T]he OLAF Supervisory Committee stressed, in its opinion on the 2010 budget, that, OLAF had to prioritise all activities in order to improve the use of human and financial resources, and in particular focus its resources on investigation activities (its core task) and avoid assigning new staff to administrative support and coordination.

It is in that context that the budgeted post held by the complainant will be redeployed to investigation functions, as soon as the profile required for the new job description has been defined in the light of OLAF's strategic guidelines.'

### **Forms of order sought by the parties**

15 The applicant claims that the Tribunal should:

- declare the present application admissible;
- '[p]rincipally:
  - annul the implied decision adopted on 12 August 2010 by the Director-General of OLAF, in his capacity as AECE, not to renew the applicant's contract ...;
  - in so far as necessary, annul the decision adopted on 22 February 2011 by the AECE rejecting the complaint lodged by the applicant ...;

in consequence:

- reinstate the applicant in the post which he held within OLAF, by way of an extension of his contract in accordance with the requirements of the regulations;
- alternatively, and in the event that the claim for reinstatement set out above is not upheld, order the defendant to compensate the applicant for the material damage suffered, provisionally estimated *ex aequo et bono* at the difference between the remuneration which he received as a member of the temporary staff within OLAF and that which he receives in his present post (that is to say, around EUR 3 000 per month), at the very least for a length of time similar to that of his initial contract (four years) and beyond that period on the assumption that that contract would have been renewed for a third time, entitling him to a contract of employment for an indefinite period;
- in any event, order the defendant to pay a provisional *ex aequo et bono* sum of EUR 5 000 in compensation for the non-material damage, together with late-payment interest at the statutory rate as from the date of the judgment;
- order the defendant to pay the costs'.

16 The Commission contends that the Tribunal should:

- dismiss the action as in part inadmissible and in part unfounded;
- order the applicant to pay the costs.

## Law

- 17 It must be observed, as a preliminary point, that the applicant seeks, inter alia, annulment of the AECE's decision of 22 February 2001 rejecting his complaint. In that regard, it should be recalled that a claim for annulment formally directed against the rejection of a complaint has the effect of bringing before the Tribunal the act against which the complaint was submitted, where that claim, as such, lacks any independent content (see, to that effect, judgments of 17 January 1989 in Case 293/87 *Vainker v Parliament*, paragraph 8, and of 6 April 2006 in Case T-309/03 *Camós Grau v Commission*, paragraph 43).
- 18 In this case, as is apparent from paragraph 14 above, the AECE's decision rejecting the complaint contains a statement of reasons which was obviously lacking in the implied decision rejecting the request, against which the complaint was directed. In view of the evolving nature of the pre-litigation procedure, it is the statement of reasons contained in the decision rejecting the complaint which must be taken into account in the review of legality of the original act adversely affecting an official, since that statement of reasons is deemed to supplement that act (see, to that effect, judgment of 9 December 2009 in Case T-377/08 P *Commission v Birkhoff*, paragraphs 58 and 59, and the case-law cited). None the less, it is certainly the legality of the original act adversely affecting an official that is being examined, in the light of the reasons contained in the decision rejecting the complaint. In this case, since the claim for annulment directed against the decision of 22 February 2011 rejecting the complaint lacks any independent content, the action must be regarded as formally directed against the AECE's implied decision of 12 August 2010 rejecting the request for extension of the applicant's temporary staff contract ('the contested decision').

### *The claim for annulment*

- 19 In support of his action, the applicant puts forward two pleas in law, the first alleging manifest error of assessment and misuse of powers, the second alleging breach of the principle of good administration and of the duty to have regard for the interests of officials.
- 20 The two pleas put forward by the applicant must be examined together.

### Arguments of the parties

– The first plea in law, alleging manifest error of assessment and misuse of powers

- 21 The applicant claims that, in order to justify the non-renewal of his contract, the AECE first relied, on the one hand, on the Commission decision of 28 April 2004, the decision of the Director-General of OLAF of 30 June 2005 and, in particular, on the eight-year rule and, on the other, on a technical consultation which took place on 9 February 2007 between the staff representatives, the Commission's Directorate-General (DG) Personnel and Administration and OLAF, during which the Director-General of OLAF undertook to bring the rules on recourse to non-permanent staff into line with the rules in force at the Commission, a technical consultation the terms of which applied only to staff recruited before 1 February 2006. The applicant relies, in that regard, on various informal exchanges which he had with his superiors and on a note from the acting Director-General of OLAF of 8 October 2010, addressed to the chairman of the local staff committee, who had drawn the attention of OLAF's senior management to the situation of the five members of the temporary staff, including the applicant, who had co-signed a request for renewal of their contracts. The refusal to renew the applicant's contract therefore did indeed result from the automatic application of the eight-year rule.

- 22 However, internal administrative decisions, such as the decision of the Director-General of OLAF of 30 June 2005, cannot have the effect of restricting the scope of higher-ranking rules, in this instance Article 8 of the CEOS, which does not set any temporal limits on the renewal of contracts of staff within the meaning of Article 2(a) of the CEOS. That was how the General Court ruled in its judgment of 16 December 2010 in Case T-143/09 P *Commission v Petrilli*, paragraphs 31 and 35, ‘the judgment in *Commission v Petrilli*’).
- 23 The applicant then claims that, subsequently, in the decision of 22 February 2011 rejecting the complaint, the AECE justified the non-renewal of his contract on the basis of the interest of the service. However, that new argument, which was also used vis-à-vis the other four temporary staff members who were co-signatories of the request of 12 April 2010, was constructed for the purposes of this case.
- 24 The argument contained in the rejection of the complaint is, in any event, wrong, since the AECE was no longer able to evade the undertaking given by the Director-General of OLAF, at the technical consultation of 9 February 2007, to bring OLAF’s policy on temporary staff into line ‘as far as possible’ with that of the Commission, in particular by reducing to six years the maximum length of service of non-permanent staff.
- 25 Furthermore, there was never any question, prior to the decision rejecting the complaint, of any redeployment of OLAF’s activities towards investigation activity. Such an intention to redeploy emerged only after the delivery of the judgment in *Commission v Petrilli*, and it came as a surprise, moreover, to the applicant that the recommendations of the Court of Auditors, dating from 2005 and which were never mentioned during the exchanges which he had with his superiors after the submission of his request for renewal of his contract, were suddenly taken into account six years later.
- 26 In any event, the redeployment of the post held by the applicant to investigation activity cannot justify the non-renewal of his contract since he himself is perfectly competent in the field of investigations. The applicant relies, in that regard, on his status as a successful candidate, in 2005, in the selection procedure opened by OLAF for the recruitment of temporary staff, on the requirements for taking up his last post within OLAF, and on the experience which he had acquired in Italy, at the finance inspectorate, and within the European administration specifically in the follow-up and analysis of investigations in the field of the fight against fraud and corruption. Finally, the alleged redeployment of the budgeted post which the applicant held was merely hypothetical since it was not due to take place, in the actual words of the decision rejecting the complaint, until ‘the profile required for the new job description has been defined in the light of OLAF’s strategic guidelines’; however, the job profile has still not been created and OLAF’s strategic guidelines have not been laid down either.
- 27 The Commission replies that the statement of reasons used by the AECE to justify the non-renewal of the applicant’s contract can only, in this case, be that contained in the decision rejecting the complaint. The fact that a technical consultation took place in 2007, that is, several years before the applicant requested the renewal of his contract, and even before the contract was signed, manifestly has no bearing on these proceedings.
- 28 The Commission then recalls the broad discretion which the European Union institutions have to organise their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, on condition that the staff are assigned in the interest of the service, which explains why renewal of a temporary staff contract is not an entitlement, but merely a possibility left to the discretion of the competent authority: the Commission cites, in that regard, the judgment of 15 October 2008 in Case T-160/04 *Potamianos v Commission*, paragraph 30, and the judgment of 7 July 2009 in Case F-54/08 *Bernard v Europol*, paragraph 46. The Commission submits that, in this case, the AECE fully justified the contested decision in the light of the interest of the service, which is a dynamic concept, the definition of which, because it leaves room for the exercise of a broad discretion by the administration, is variable over time.



- 29 The Commission points out that both the Court of Auditors and the OLAF Supervisory Committee have issued recommendations for the redeployment of certain types of post, including that held by the applicant, to the field of investigations. The Commission adds that the quality of the work carried out by the applicant during the period of his contract was not called into question but that, in the context of the staff redeployments envisaged, the renewal of his contract was not imperative and was not justified by any overriding reason in the interest of the service, an interest which cannot be placed on the same footing as the applicant's personal interest in obtaining renewal of his contract.
- 30 Nor can there be any question of a misuse of powers. The only evidence put forward by the applicant in support of this complaint is the claim that the argument contained in the decision rejecting the complaint emerged after the delivery of the judgment in *Commission v Petrilli*. However, that is not sufficient evidence to demonstrate that the AECE refused to renew the applicant's contract in order to achieve aims other than those pleaded. Moreover, the Commission contends that it does not follow from the case-law that it does not have the power, within the limits of its broad discretion in assessing the interest of the service, to adopt internal decisions of general application by which it imposes a limit on itself in the exercise of its discretion as regards the renewal of contracts concluded for a fixed period. What the Courts of the Union have prohibited it from doing is to waive completely the exercise of its discretion in individual cases.
- 31 The Commission adds that the judgment in *Commission v Petrilli* concerned the case of a member of the contract staff within the meaning of Article 3b of the CEOS and was based on Article 88(b) of the CEOS, which applies to that category of staff. No comparable provision exists for members of the temporary staff as referred to in Article 2(a) of the CEOS.
- 32 The Commission further observes that the post of legal officer (responsible for administrative support and coordination) held by the applicant was converted, after his departure, into a post of policy officer, with specific responsibility for fraud prevention, in accordance with OLAF's new strategic guidelines, as laid down in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy (SEC(2011) 791 final), giving priority to prevention. The Commission stresses, in that regard, the need for OLAF to benefit from a 'refreshing' of its staff's knowledge through the recruitment of individuals with recent experience in Member States, particularly against the current background of economic crisis which increases the risk of fraud.
- 33 It follows that the applicant has not demonstrated either that, in this case, the AECE completely waived its discretion or that the refusal to renew the applicant's contract is manifestly contrary to the interest of the service.
- 34 At the hearing, the Commission stated that the post held by the applicant and converted on his departure into a policy officer post had since been allocated to a member of the temporary staff as referred to in Article 2(a) of the CEOS. It also observed that, even if the Tribunal, which has no jurisdiction in this respect, were to put a question to it on this point, it would not be obliged to give a precise explanation of the reasons for its refusal to renew a contract concluded for a fixed period or to award a new contract to a member of the temporary staff whose initial contract had expired.
- The second plea in law, alleging breach of the principle of good administration and of the duty to have regard for the interests of officials
- 35 The applicant complains that the AECE did not satisfy the requirements of good administration and regard for the interests of officials which he was entitled to expect of it. Under Article 8 of the CEOS, refusal to renew a temporary staff contract can result only from an individualised examination of the particular situation of the staff member concerned, of his abilities and of the services which he is able to render to the institution. However, in this case, account was not taken of the assessment given by

the applicant's head of unit, according to which the applicant's departure constituted a break in the continuity of the service, or of the laudatory assessments contained in the applicant's staff report for 2009, or of the applicant's expertise, notably in the field of structural funds, which made him particularly indispensable to the proper functioning of the service. The applicant relied, at the hearing, on a compendium which he had drafted in 2011 for the attention of OLAF investigators, before his contract expired, identifying the warning signs necessary for the detection of cases of fraud.

- 36 In any event, the AECE should have examined the possibility of extending the applicant's contract until the alleged deployment of his post became effective or of reassigning the applicant to the post of investigator to be filled following that redeployment. The applicant relies, in that regard, on the judgments of 9 December 2010 in Case F-87/08 *Schuerings v ETF*, paragraph 59, which is the subject of an appeal pending before the General Court in Case T-107/11 P, and Case F-88/08 *Vandeuren v ETF*, paragraph 60, which is the subject of an appeal pending before the General Court in Case T-108/11 P.
- 37 The Commission, while not disputing the fact that the applicant was the subject of a positive staff report for 2009, contends that this is not, in itself, relevant for the purpose of establishing that the interest of the service called for the extension of the applicant's contract. Such a position would lead to the interest of the service being confused with the personal interest of any temporary staff member who had been the subject of a favourable staff report, in which case the person concerned would be entitled to have his contract for a fixed period renewed, or even to be awarded a contract for an indefinite period. Moreover, as the Tribunal held in the judgment of 27 November 2008 in Case F-35/07 *Klug v EMEA*, paragraph 79, the personal interest of the staff member concerned, although it must be taken into account in assessing the interest of the service, is never decisive for the institution. The AECE has a broad discretion in assessing the interest of the service and that assessment can be penalised only if it is manifestly demonstrated that the refusal to renew the contract of a temporary staff member had no rational connection with that interest or that the refusal is actually motivated by an unacceptable reason, which has not been demonstrated in this case.
- 38 The Commission further submits that, according to the case-law, the burden of proof of prejudice to the public interest rests on the applicant, in order to respect the presumption of legality which attaches to administrative decisions.
- 39 Finally, as regards the duty to have regard for the interests of officials, the Commission disputes the validity of the solution adopted by the Tribunal in the judgments in *Schuerings v ETF* and *Vandeuren v ETF* and points out that those two judgments are the subject of appeals brought by the defendant pending before the General Court. The Commission submits that, in any event, that case-law, which concerns staff members employed under the system of contracts for an indefinite period, cannot apply to holders of fixed-term contracts which are coming to an end.

#### Findings of the Tribunal

- 40 It must be noted, as a preliminary point, that, in the decision rejecting the complaint, adopted after the delivery of the judgment in *Commission v Petrilli*, which dismissed the appeal brought by the Commission against the judgment of 29 January 2009 in Case F-98/07 *Petrilli v Commission*, the AECE made no reference to the eight-year rule in order to justify the non-renewal of the applicant's contract, but relied on the broad discretion which it has in matters concerning the renewal of fixed-term contracts for temporary staff, stating that, 'in the light of the budgetary possibilities, of the interest of the service and of [the applicant]'s merits and abilities ... it was unable give a favourable reply to [his] request for renewal of the contract'.



- 41 In the rejection of the complaint, the AECE thus departed from the considerations it had articulated in the past and, in particular, in a note of 8 October 2010 by the Director-General of OLAF on the implications of the eight-year rule, and instead adopted different grounds related to ‘budgetary possibilities’, to the interest of the service and to the applicant’s merits and abilities. That fact cannot, of itself, render the non-renewal decision illegal, since the whole point of the complaint procedure is to allow review by the AECE of the contested decision, in this instance an implied decision, in the light of the grievances put forward by the complainant, where appropriate amending the grounds which may have arisen from the context of which that decision was part. As was recalled in the context of the examination of the subject-matter of the claim for annulment (paragraph 18 above), the legality of the contested decision must therefore be examined taking into account the reasons contained in the decision rejecting the complaint.
- 42 In those circumstances, there is no need to examine the plea directed against the reason, not contained in the decision rejecting the complaint, based on the eight-year rule which, moreover, the file does not show was, in the end, actually applied in this case. Such a plea must therefore be considered ineffective.
- 43 As regards the plea alleging manifest error of assessment, it should be recalled that, according to settled case-law, a member of the temporary staff who is the holder of a fixed-term contract does not, in principle, have any right to the renewal of his contract, which is a mere option, subject to the condition that such renewal is consistent with the interest of the service (see, to that effect, judgment of 6 February 2003 in Case T-7/01 *Pyres v Commission*, paragraph 64, and *Bernard v Europol*, paragraph 44).
- 44 By contrast with officials, whose security of tenure is guaranteed by the Staff Regulations, members of the temporary staff are subject to different conditions based on the contract of employment entered into with the institution concerned. It is clear from Article 47(b) of the CEOS that the duration of the employment relationship between an institution and a member of the temporary staff engaged for a fixed period is, necessarily, governed by the conditions laid down in the contract concluded between the parties.
- 45 Moreover, equally settled case-law recognises that, in the light of the relevant provisions of the CEOS, the administration has a broad discretion with regard to the renewal of a contract (see, to that effect, judgments of 17 October 2002 in Joined Cases T-330/00 and T-114/01 *Cocchi and Hainz v Commission*, paragraph 82, and 23 November 2010 in Case F-8/10 *Gheysens v Council*, paragraph 75). Consequently, review by the Courts must be limited to ascertaining whether, regard being had to the factors and reasons that led the administration to its assessment, it remained within unimpeachable limits and did not manifestly misuse its power.
- 46 At the hearing, the Commission argued from the foregoing considerations that the Tribunal is not entitled to carry out any review of the grounds of the contested decision, which falls within the administration’s broad discretion.
- 47 On that point, the reply which must be given to the Commission is that, even though the administration has a broad discretion, when the Tribunal has before it an action for annulment directed against an act adopted in the exercise of that discretion, it none the less carries out a review of legality, which manifests itself in several respects regardless of the existence or otherwise of a formal obligation to state reasons.
- 48 Thus, the Tribunal may be required to verify that the administration did not base its decision on incorrect or incomplete material facts (see, to that effect, judgment of 26 October 2004 in Case T-55/03 *Brendel v Commission*, paragraph 60). For that purpose, it must satisfy itself that the administration exercised its powers effectively in order to establish the facts which served as the basis for its decision, so as to take into account all the relevant evidence (see, to that effect, judgments of 15 February 2005 in Case C-12/03 P *Commission v Tetra Laval*, paragraph 39; of 10 July 2008 in Case

C-413/06 P *Bertelsmann and Sony Corporation of America v Impala*, paragraph 145; and of 27 September 2006 in Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank v Commission*, paragraph 67). The Tribunal may also find it necessary to examine whether the administration undertook a detailed, or specific, examination of the relevant aspects of the individual case, in such a way that that examination is undertaken with care and impartiality (see, as regards consideration of the comparative merits of officials who are candidates for promotion, judgments of 30 November 1993 in Case T-78/92 *Perakis v Parliament*, paragraph 16, and of 8 May 2001 in Case T-182/99 *Caravelis v Parliament*, paragraph 32; see also judgment of 13 July 2006 in Case T-413/03 *Shandong Reipu Biochemicals v Council*, paragraph 63).

- 49 It is therefore the task of the Tribunal, in the context of the pleas in law put forward by the applicant, to establish whether the administration committed a manifest error in assessing the facts which it used in order to adopt the contested decision. However, in the context of a broad discretionary power which the administration is recognised as having, as in the present case, establishing that the administration made a manifest error in assessing the facts, such as to justify the annulment of the decision adopted on the basis of that assessment, presupposes that the evidence, which the applicant must produce, is sufficient to make the factual assessments used by the administration implausible (see, to that effect, judgments of 12 December 1996 in Case T-380/94 *AIUFFASS and AKT v Commission*, paragraph 59, and of 12 February 2008 in Case T-289/03 *BUPA and Others v Commission*, paragraph 221).
- 50 It should also be added that, according to settled case-law, the duty of the administration to have regard to the interests of its officials and the principle of good administration imply in particular that when the competent authority takes a decision concerning the situation of an official or other staff member, even in the exercise of a broad discretion, it should take into consideration all the factors which may affect its decision; when doing so, it must take into account not only the interests of the service but also those of the official or staff member concerned (see, as regards the organisation of the service, judgments of 28 May 1980 in Joined Cases 33/79 and 75/79 *Kuhner v Commission*, paragraph 22, and of 29 October 1981 in Case 125/80 *Arning v Commission*, paragraph 19). Having regard specifically to the extent of the institutions' discretion in evaluating the interests of the service, the review undertaken by the Courts of the Union must be confined to the question whether the competent authority remained within reasonable limits and did not use its discretion incorrectly (see, for example, judgments of 6 July 1999 in Joined Cases T-112/96 and T-115/96 *Séché v Commission*, paragraphs 147 to 149, and of 2 March 2004 in Case T-14/03 *Di Marzio v Commission*, paragraphs 99 and 100).
- 51 It is in the light of the foregoing considerations that the arguments advanced by the applicant in support of the pleas alleging manifest error of assessment and breach of the principle of good administration and of the duty to have regard for the interests of officials must now be examined.
- 52 It is apparent from the decision rejecting the complaint that the AECE was unable to give a favourable reply to the applicant's request seeking renewal of his contract, 'in the light of the budgetary possibilities, of the interest of the service and of [the applicant]'s merits and abilities'. The decision explains that that post held by the applicant will be 'redeployed to the field of investigations', that such redeployment is part of a series of measures for the reorganisation of OLAF, taken following the recommendations of, inter alia, the Court of Auditors and the OLAF Supervisory Committee in favour of 'refocusing' OLAF's activities on 'investigation activity', its 'core task', and that, 'in that context ... the budgeted post held by the complainant will be redeployed to investigation functions, as soon as the profile required for the new job description has been defined in the light of OLAF's strategic guidelines'.
- 53 In the first place, it is clear that the 'budgetary possibilities' alluded to in the decision rejecting the complaint could not, without further explanation, prevent the award of a new contract to the applicant, since it is apparent from that decision itself that the applicant's post was going to be 'redeployed' to a post related to investigation functions. In fact, as is apparent from the explanations

provided by the Commission at the hearing, the post held by the applicant was converted into a post of policy officer, with specific responsibility for fraud prevention, and is now held by a member of the temporary staff, as referred to in Article 2(a) of the CEOS, which corresponds exactly to the nature of the budgeted post formerly held by the applicant.

- 54 Admittedly, in his request of 12 April 2010, the applicant was, literally, seeking only the ‘renewal of his contract’. However, it was incumbent on the AECE, by virtue of its duty to have regard for the interests of officials, to give full scope to that request by which the applicant was seeking, in essence, to continue his employment relationship within OLAF, by examining, in particular, whether there was another temporary staff post, as referred to in Article 2(a) of the CEOS, in respect of which the applicant’s contract could, in the interest of the service, have legitimately been renewed (*Schuerings v ETF*, paragraphs 58 and 60, and *Vandeuren v ETF*, paragraphs 59 and 60). However, without denying the existence of such posts, the Commission stated at the hearing that the AECE had not undertaken that examination because it considered that it was not obliged to do so.
- 55 In the second place, the Commission has failed to explain to the Tribunal to what extent the applicant’s ‘merits and abilities’ mentioned in the decision rejecting the complaint were actually taken into account by the AECE in order to justify the rejection of the request for renewal of the contract, particularly in the light of the laudatory assessments given by the applicant’s immediate superiors, in particular in his last staff reports, and on which the applicant relied both in his written pleadings and at the hearing. The Commission has not, moreover, disputed the applicant’s merits and abilities. By contrast, it argued at the hearing that, although it is true that the applicant’s merits and abilities could not, as such, justify the ending of the employment relationship, they were nevertheless not sufficient to justify the renewal of the contract or the award of a new contract to the applicant. Such a contention formulated in general terms without the addition, even at the hearing, of the slightest elaboration or comment, at the very least on the applicant’s professional qualifications in relation to investigation activity, which was regarded as a priority by OLAF, cannot be taken into account by the Tribunal as a sufficiently serious ground of justification, from the point of view of the applicant’s merits and abilities, for the decision not to renew his contract. In those circumstances, the reference to the applicant’s merits and abilities, contained in the decision rejecting the complaint, must be considered a formula without any real relevance for the purpose of assessing the validity of the contested decision.
- 56 In the third and last place, the Commission has referred to the interest of the service. The decision rejecting the complaint mentions, in that regard, the redeployment of posts to investigation activity, which falls within OLAF’s core task.
- 57 It must be observed, in that regard, in the light of the applicant’s staff reports and of his professional qualifications, that he has long experience in the field of anti-fraud activity and that his merits in the performance of the duties of legal officer, which he last performed within OLAF, were duly appreciated by his immediate superiors, precisely because of his professional capabilities and knowledge. Without further elaborating on this assessment, the Commission claims that the applicant was not qualified to hold the new post of policy officer, to which his former post was deployed, even though the description of that new post is not fundamentally different from that of the old post.
- 58 Admittedly, it is by no means established by the file that the interest of the service necessarily required that only the applicant be appointed to that new post of policy officer or that the refusal to continue the employment relationship between the applicant and OLAF was, as such, contrary to the interest of the service, since an administration may find it necessary, in the interest of the service and in the context of its staff policy, to dispense with the services of staff members, even though meritorious, in the event of a reorientation of its activities.
- 59 However, it is apparent from the file and from the explanations provided by the Commission at the hearing that the administration was primarily seeking, as part of its policy on renewing the contracts of its staff members, to work in favour of the ‘refreshing’ of its staff’s knowledge, which allowed it to

avoid any extension of a contract or continuation of an employment relationship which might, eventually, lead to the conclusion of contracts for an indefinite period. Such an intention precluded the administration, in this case, from seeking, in practical terms, a possible way of continuing the employment relationship with the applicant in another temporary staff post within OLAF.

- 60 However, although it is not for the Tribunal to review the choice of the staff policy which an institution seeks to pursue in order to carry out successfully the tasks assigned to it, it may legitimately, when it has before it, as in this case, a claim for annulment of a rejection of renewal of a temporary staff contract, seek to satisfy itself that the reasons given by the administration are not such as to call into question the basic criteria and conditions laid down by the legislature in the Staff Regulations and aimed in particular at ensuring that contact staff have the opportunity to benefit, where appropriate, in due course, from a measure of continuity of employment. That is how the first paragraph of Article 8 of the CEOS must be construed, which provides that the contracts of temporary staff as referred to in Article 2(a) of the CEOS may be renewed not more than once for a fixed period and that any further renewal is to be for an indefinite period, provisions which can in fact be regarded as preventive measures designed to combat job insecurity (see, to that effect, judgment of 8 March 2012 in Case C-251/11 *Huet*, paragraph 37). That interpretation is borne out by the duty to have regard for the interests of officials, from which it has in particular been inferred that the onus is on the competent authority to establish whether there is a post to which the temporary staff member could, in the interest of the service and in the light of the priority requirements of the individual case, be usefully appointed or reappointed.
- 61 It follows from all the foregoing that the AECE, within the limits of its broad discretion regarding the request for renewal of the applicant's temporary staff contract, failed to comply with its duty to have regard for the interests of officials and with Article 8 of the CEOS by referring, in an abstract way, to the 'budgetary possibilities' and to 'the applicant's merits and abilities' while omitting to establish, by means of an individualised examination of the applicant's particular situation and of the services which he would be able to render to the institution, whether the interests of the service which it was pursuing could be reconciled with the assignment of new tasks and duties to the applicant and therefore with the possibility of renewing his contract or awarding him a new temporary staff contract. By proceeding thus, the AECE restricted, in a general and abstract way, the scope afforded by the first paragraph of Article 8 of the CEOS for renewing temporary staff contracts as referred to in Article 2(a) of the CEOS in order to guarantee the contract staff concerned a measure of continuity of employment.
- 62 For that reason, the contested decision must therefore be annulled. However, in view of the fact that the Commission did not take into account all the relevant aspects of the situation in question, no ruling can be given as to whether it committed a manifest error of assessment in evaluating them.

*The claim for reinstatement of the applicant and for the Commission to be ordered to pay compensation for the material damage sustained*

- 63 The applicant seeks, as a consequence of the annulment of the AECE's decision not to renew his temporary staff contract, his reinstatement in the post which he held within OLAF or, should his claim for reinstatement not be upheld, payment of the difference in remuneration between what he received previously as a member of the temporary staff of OLAF and what he now receives, over a period of four years, or even more on the assumption that his contract would have been renewed for a third time, for an indefinite period.
- 64 As regards the applicant's claim seeking his reinstatement within OLAF, it must be recalled that the annulment of a measure by the Courts has the effect of retroactively eliminating that measure from the legal system, and that where the measure annulled has already been carried out, the abolition of its effects means that the applicant must be restored to the legal position he was in before it was



adopted (judgments of 26 October 2006 in Case F-1/05 *Landgren v ETF*, paragraph 92, and of 26 May 2011 in Case F-83/09 *Kalmár v Europol*, paragraph 88, the subject of an appeal pending before the General Court in Case T-455/11 P). Furthermore, in accordance with Article 266 TFEU, the institution whose act has been annulled must ‘take the necessary measures to comply with the judgment’.

- 65 It is also important to point out, in that regard, that the contested decision has been annulled because the AECE did not undertake, in particular in the light of its duty to have regard for the interests of officials, a full and detailed examination of the facts in the light of the interest of the service and of the applicant’s merits and abilities.
- 66 Against that background, it is, in any event, still possible that the AECE could consider that it is able once again to adopt a decision not to renew the applicant’s temporary staff contract after a full and detailed review of the file, taking into account the grounds of this judgment.
- 67 Consequently, the Tribunal cannot order the Commission to pay the applicant’s salary as from the date on which the AECE improperly decided not to renew his contract. It follows that the applicant’s claim to that effect cannot be upheld.

*The claim for the Commission to be ordered to pay compensation for the non-material damage sustained*

- 68 The applicant seeks, in essence, compensation for the non-material damage sustained by him both on account of the illegalities which he alleges against the AECE in his claim for annulment and on account of the lack of due care and attention, or even the ineptitude, with which the AECE dealt with his case. He provisionally estimates the non-material damage sustained by him at EUR 5 000.
- 69 It must, however, be noted that the application does not contain the slightest proof as to whether the non-material damage pleaded could not be wholly compensated for by the annulment of the contested decision giving rise to it.
- 70 Consequently, the claim for compensation for the non-material damage must be rejected.

### **Costs**

- 71 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.
- 72 It follows from the grounds set out in this judgment that the applicant is successful in his main head of claim, namely annulment of the contested decision. Furthermore, in his pleadings, the applicant has expressly applied for the Commission to be ordered to pay the costs. Since the circumstances of this case do not warrant application of the provisions of Article 87(2) of the Rules of Procedure, the Commission must be ordered to bear its own costs and, in addition, to pay the costs incurred by the applicant

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)



hereby:

- 1. Annuls the decision of the acting Director-General of the European Anti-Fraud Office (OLAF) of 12 August 2010 rejecting the request for extension of Mr Macchia's temporary staff contract;**
- 2. Dismisses the action as to the remainder;**
- 3. Declares that the European Commission must bear its own costs and orders it to pay Mr Macchia's costs.**

Van Raepenbusch

Boruta

Perillo

Delivered in open court in Luxembourg on 13 June 2012.

Registrar  
W. Hakenberg

President  
S. Van Raepenbusch