



Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

(Second Chamber)

22 September 2015*

(Civil service — Pension — Retirement pension — Early retirement without reduction of pension rights — General implementing provisions giving effect to Article 9(2) of Annex VIII to the Staff Regulations — Objection that the general implementing provisions are unlawful — Interests of the service — Definition — None — Length of the applicant's employment — Taking into account the entire professional career, both within and outside the EU institutions — Discretion of the institution — Legality)

In Case F-20/14,

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

Inge Barnett, former official of the European Economic and Social Committee, residing in Roskilde (Denmark), represented initially by N. Nikolajsen, lawyer, and subsequently by S. Orlandi and T. Martin, lawyers,

applicant,

v

European Economic and Social Committee (EESC), represented by M. Pascua Mateo, L. Camarena Januzec and K. Gambino, acting as Agents, and by M. Troncoso Ferrer and F.-M. Hilaire, lawyers,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

composed of K. Bradley, President, H. Kreppel and I. Rofes i Pujol (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2015,

gives the following

* Language of the case: French.

Judgment

- 1 By application lodged at the Registry of the Tribunal on 10 March 2014, Ms Barnett seeks annulment of the decision of the European Economic and Social Committee (EESC) of 11 July 2013 adopting for 2013 the list of beneficiaries of the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations of Officials of the European Union, in the version applicable until 31 December 2013 ('the Staff Regulations'), in so far as that decision did not allow her to benefit from that facility, and of the decision rejecting her complaint.

Legal context

- 2 Article 52 of the Staff Regulations provides:

'Without prejudice to the provisions of Article 50 [of the Staff Regulations], an official shall be retired:

...

- (b) at his own request on the last day of the month in respect of which the request was submitted where he is at least 63 years of age or where he is between 55 and 63 years of age and satisfies the requirements for immediate payment of a pension in accordance with Article 9 of Annex VIII [of the Staff Regulations]. ...

...'

- 3 Under Article 77 of the Staff Regulations:

'An official who has completed at least 10 years' service shall be entitled to a retirement pension. He shall, however, be entitled to such pension irrespective of length of service if he is over 63 years, if it has not been possible to reinstate him during a period of non-active status or in the event of retirement in the interests of the service.

...

The pensionable age shall be 63 years.'

- 4 Article 9 of Annex VIII to the Staff Regulations reads as follows:

'1. An official leaving the service before reaching the age of 63 years may request that his retirement pension:

- (a) be deferred until the first day of the calendar month following that in which he reaches the age of 63; or
- (b) be paid immediately, provided that he is not less than 55 years of age. In this case, the retirement pension shall be reduced by an amount calculated by reference to the official's age when he starts to draw his pension.

The pension shall be reduced by 3.5% for every year before the one in which officials would become entitled to a retirement pension within the meaning of Article 77 of the Staff Regulations. If between the age at which entitlement to a retirement pension is acquired within the meaning of Article 77 of the Staff Regulations and the age of the person concerned at the time, the difference exceeds an exact number of years, an extra year shall be added to the reduction.

2. The Appointing Authority may decide, in the interests of the service on the basis of objective criteria and transparent procedures introduced by means of general implementing provisions, not to apply the above reduction to the officials concerned. The total number of officials and temporary servants, who retire without any reduction of their pension each year, shall not be higher than 10% of the officials in all institutions who retired the previous year. The annual percentage may vary from 8% to 12%, subject to a total of 20% over two years and the principle of budget neutrality. Before five years have elapsed, the [European] Commission shall submit to the European Parliament and the Council [of the European Union] an evaluation report on the implementation of this measure. Where appropriate, the [European] Commission shall submit a proposal to fix after five years the maximum annual percentage rate between 5% and 10% of all officials in all institutions who retired the previous year, on the basis of Article 336 [TFEU].'

5 By Decision No 192/09 A of 13 March 2009, the President of the EESC adopted the general implementing provisions ('the GIP') referred to in Article 9(2) of Annex VIII to the Staff Regulations ('the GIP of the EESC'). The GIP of the EESC were adopted in two language versions, French and English.

6 The French version of the GIP of the EESC provides:

'...

5. Les fonctionnaires ou agents temporaires intéressés doivent, pour être éligibles, remplir les conditions suivantes :

- être en activité au sens de l'article 36 du [s]tatut,
- être âgés au moins de 55 ans avant la fin de l'année civile considérée dans la demande au cours de laquelle le dispositif prévu à l'article 9, [paragraphe 2], de l'annexe VIII [du statut] sera mis en œuvre,
- avoir effectué au moins [quinze] années de service en tant que fonctionnaire ou/et agent dans une des institutions ou un des organes [de l'Union européenne], au sens des articles 1 bis et 1 ter du [s]tatut. Ne seront comptabilisées comme temps de service que les périodes d'activité au sens de l'article 36 du [s]tatut.

6. Afin d'identifier les demandes qui répondent le mieux à l'intérêt du service, et afin d'assurer une transparence complète dans la création de la liste de[s] fonctionnaires pouvant bénéficier de la mesure, un système d'attribution de points est créé comme suit :

a) En fonction de l'âge [...] de l'intéressé :

[...]

57 ans ou plus 1,5 poin[t] ;

58 ans ou plus 2 points ;

59 ans ou plus 2,5 points ;

60 ans ou plus 3 points.

b) En fonction de la durée de l'activité professionnelle [...] :

[d]e 15 à 20 ans d'activité professionnelle 0,5 point ;

[p]lus de 20 ans d'activité professionnelle 1 point ;
[p]lus de 21 ans d'activité professionnelle 1,5 poin[t] ;
[p]lus de 22 ans d'activité professionnelle 2 points ;
[p]lus de 23 ans d'activité professionnelle 2,5 points ;
[p]lus de 24 ans d'activité professionnelle 3 points ;
[p]lus de 25 ans d'activité professionnelle 3,5 points ;
[p]lus de 26 ans d'activité professionnelle 4 points.

- c) En fonction de la moyenne arithmétique de[s] points des rapports de notation disponibles pour la période de [cinq] ans qui s'achève au 31 décembre de l'année d'application de la mesure de [retraite] anticipée [...].

Jusqu'à 3 points inclus 0 point ;

[d]e plus de 3 points jusqu'à 3,5 points inclus 1 point ;

[...]

[d]e plus de 4 points jusqu'à 4,5 points inclus 3 points ;

[d]e plus de 4,5 points jusqu'à 5 points inclus 4 points.

Pour fixer la liste des fonctionnaires ayant droit à la mesure, l'[autorité investie du pouvoir de nomination] prend en considération le total des points a + b + c résultant du système décrit ci-dessus.

[...]

L'[autorité investie du pouvoir de nomination] ne peut s'écarter de cet ordre que dans des cas exceptionnels et sur avis de la [c]ommission paritaire, qui est consultée dans tous les cas.

7. En fonction des possibilités existantes et des critères précités, l'[autorité investie du pouvoir de nomination] arrête la liste des fonctionnaires et agents pouvant bénéficier de la mesure, au titre de l'intérêt d[u] service et pour l'année en cours. Cette liste est complétée le cas échéant par une liste complémentaire de réserve.

Les listes sont publiées [au sein de] l'institution et notifiées aux candidats. Les intéressés disposent de [dix] jours ouvrables pour décider éventuellement de renoncer à leur candidature. En cas de renonciation de candidats figurant dans la liste principale, il est fait appel à la liste complémentaire de réserve.

[...]'

[The English version of those provisions reads:

'...

5. In order to be eligible, the officials or temporary servants concerned must fulfil the following conditions:
 - they must be in active employment within the meaning of Article 36 of the Staff Regulations,
 - they must have reached at least 55 years of age before the end of the calendar year specified in the application during which the facility provided for in Article 9(2) of Annex VIII [to the Staff Regulations] is to be implemented,
 - they must have completed at least [fifteen] years of service as an official and/or other servant in one of the institutions or bodies of the European [Union], pursuant to Article 1a and Article 1b of the Staff Regulations. Only periods of active employment within the meaning of Article 36 of the Staff Regulations will be counted as periods of service.
6. In order to identify which applications best serve the interests of the service and to ensure complete transparency in the drawing-up of the list of officials who can benefit from the facility, a following points system shall be established based on the following criteria:
 - (a) The age... of the person concerned:
 - 57 years or over 1.5 points;
 - 58 years or over 2 points;
 - 59 years or over 2.5 points;
 - 60 years or over 3 points.
 - (b) Length of employment ...:
 - 15 to 20 years of employment 0.5 points;
 - [m]ore than 20 years of employment 1 point;
 - [m]ore than 21 years of employment 1.5 points;
 - [m]ore than 22 years of employment 2 points;
 - [m]ore than 23 years of employment 2.5 points;
 - [m]ore than 24 years of employment 3 points;
 - [m]ore than 25 years of employment 3.5 points;
 - [m]ore than 26 years of employment 4 points.
 - (c) The average number of points awarded in performance reports over the previous five years up to 31 December of the year of application of the early retirement facility ...
 - Up to 3 performance points inclusive 0 points;
 - [m]ore than 3 points and up to 3.5 points inclusive 1 point;

...

[m]ore than 4 points and up to 4.5 points inclusive 3 points;

[m]ore than 4.5 points and up to 5 points inclusive 4 points.

When drawing up the list of officials who can benefit from the facility, the Appointing Authority shall take into consideration the total number of points obtained (a+b+c) under the above system.

...

The Appointing Authority may only depart from this system in exceptional cases and upon receipt of an opinion from the Joint Reports Committee, which shall be consulted in all cases.

7. On the basis of the quotas and the above criteria, the Appointing Authority shall adopt the list of officials and other servants who can benefit from the facility, in the interests of the service, for the year in progress. This list shall be supplemented by a reserve list, where necessary.

The lists shall be published [within] the institution and sent to the applicants, who then have [ten] working days to decide whether to withdraw their application. If applicants on the main list withdraw, names shall be taken from the reserve list.

...'

- 7 Paragraph 6(b) of the GIP of the EESC states in a footnote that the 'length of employment' corresponds to the 'actual periods of employment which have been duly substantiated as calculated on 31 December of the year of application of the early retirement facility'.

- 8 The English version of paragraph 6 of the GIP of the EESC provides:

'In order to identify which applications best serve the interests of the service and to ensure complete transparency in the drawing-up of the list of officials who can benefit from the facility, a following points system shall be established based on the following criteria:

...

(b) Length of employment ...

...'

- 9 The European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Union and the Court of Auditors of the European Union adopted their GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations on 6 October, 29 April, 28 April, 20 October and 21 December 2004, respectively.

- 10 Article 5 of the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the European Parliament ('the GIP of the Parliament'), entitled 'Consideration of the application by the [Directorate General] for Personnel and the Service or Political Group to which the candidate is attached', provides:

'...

4. With regard to the interests of the service, a request by an official who is subject to reorganisation measures decided on by the [i]nstitution shall be considered a priority: in particular in the case of the cessation of an official's tasks following ongoing restructuring measures, where no new task appropriate to the person concerned has been identified or is likely to be in the near future.

5. In drawing up the priority groups ... and the order of priority for each of them, the service shall also take into account ... the length of service of the candidate in the European Parliament and his age[.]

...'

- 11 Article 6(2) of the GIP of the Parliament, entitled 'Selection procedure by the [Directorate-General] for Personnel' provides:

'The [list of officials and temporary staff whom the Director-General of the Directorate-General for Personnel is putting forward for early retirement] shall take into account:

...

(b) the interests of the service, having regard in particular to the need to renew skills within the ... Parliament;

...'

- 12 Article 5 of the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the Council ('the GIP of the Council') provides:

'1. The concept of the interests of the service shall be assessed in the light of the circumstances and of different factors including:

- the need for structural redeployment of certain departments;
- the need for renewal or refocusing of the skills required in the General Secretariat of the Council in the light of the new tasks assigned to it and the constraints imposed by enlargement.

2. The [Appointing Authority] shall at the appropriate time request the Joint Committee to deliver an opinion on the objective and specific criteria for implementing paragraph 1 during the year in question. The Joint Committee shall give its opinion within [fifteen] working days of receiving the request.'

- 13 After consulting the Joint Committee in accordance with Article 5(2) of the GIP of the Council with regard to applying the interests of the service criterion laid down in paragraph 1 of that article, the Appointing Authority of the Council adopted the following criteria for 2004, notified to the staff in Staff Note 105/04 of 15 July 2004:

'(a) the interests of the service, in accordance with Article 5 of the general implementing provisions [of the Council], which shall be assessed in the light, in particular, of:

- the need for structural redeployment of certain departments,
- the need for renewal or refocusing of the skills required in the General Secretariat of the Council in the light of the new tasks assigned to it and the constraints imposed by enlargement,

[50 points];

(b) the actual length of service with the European Communities

[25 points];

(c) the official's merits in terms of his performance at the institution and throughout his career

[25 points].'

¹⁴ Article 5 of the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the Commission ('the GIP of the Commission'), entitled 'Assessment of application by Commission services', provides:

'...

2. Each year, each Directorate-General and Service shall draw up a list of applicants on the basis of the criteria set out in paragraphs 4, 5, 6 and 7.

The eligible applicants shall be listed in three priority groups depending on whether the interest of the service is considered to be high, low or non-existent. ...

...

4. The following criteria concerning the applicant's tasks shall be considered as conferring high priority on his application with regard to the interest of the service:

(a) Criteria relating to reorganisation measures:

- i) cessation of the applicant's tasks as a result of current reorganisation measures, where no suitable new tasks have been identified and are not likely to be identified in the near future;
- ii) current reorganisation or redeployment measures affecting the applicant which make it difficult to find him a new assignment due to the nature of his skills;
- iii) recent reorganisation or redeployment measures affecting the applicant which resulted in being assigned new tasks which have not proved appropriate to his skills; or
- iv) likelihood of reorganisation or redeployment measures affecting the applicant in the near future, in particular where his current tasks are likely to be phased out or substantially modified or are likely to be considered as no longer being a priority task for his Directorate-General or service, and where identifying a new assignment is likely to prove difficult due to the nature of his skills;
- v) the applicant occupies a sensitive post and would be obliged to change duties in the next [twelve] months and for which no suitable new post has been identified nor is likely to be identified within the [twelve] month period.

(b) Criteria relating to the applicant's skills:

- where new job requirements do not correspond to the applicant's aptitudes and skills and where identifying an appropriate new assignment is likely to prove difficult.

...

6. In establishing the priority groups referred to by paragraph 2 and the order of priority therein, the service can also take into account ... the applicant's length of service with the Commission and/or his past positive contribution to the work of the service and/or the Commission.

...'

- 15 The second paragraph of Article 5 of the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the Court of Justice ('the GIP of the Court of Justice') provides:

'Within a period of [fifteen] working days from the date on which it was consulted, the Joint Committee shall forward to the Appointing Authority the list, in order of priority, of officials and temporary staff that it considers, from the point of view of the interests of the service, eligible to benefit from the measure. This list shall be drawn up taking account in particular of the objective criteria listed below:

- the professional situation of the person concerned following, amongst other things, reorganisation measures in the service
- age
- length of service

...'

- 16 Article 5 of the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the Court of Auditors ('the GIP of the Court of Auditors') reads as follows:

'...

Within a period of [fifteen] working days from the date on which it was consulted, the Joint Committee shall forward to the Appointing Authority the list of officials and temporary staff that it considers, from the point of view of the interests of the service, eligible to benefit from the measure. This list shall be drawn up taking account in particular of the objective criteria listed below in order of priority:

- the professional situation of the person concerned following, amongst other things, reorganisation measures in the service
- the contribution of the person concerned to the running of the institution
- age
- seniority of service in the European Communities
- personal or family situation of the person concerned.

...'

Background to the dispute

- 17 The applicant entered the service of the EESC on 1 March 1982 as a temporary staff member. She was recruited as a probationary official on 1 June 1982 and subsequently became established on 1 December 1982.

- 18 In the Notice to Staff of 18 March 2013 ('the Notice of 18 March 2013'), published in French and in English, members of the staff of the EESC were invited to express an interest, if they wished, in the possibility of early retirement without reduction of pension rights and to submit their applications by 7 April 2013. The abovementioned notice stated that the number of beneficiaries had been set at two for the year 2013.
- 19 Eight officials from the EESC, including the applicant, submitted their applications in good time.
- 20 By decision of 11 July 2013, the appointing authority of the EESC drew up the list for 2013 of the two beneficiaries of the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations, in this case Ms X and Ms Y.
- 21 By letter of 14 August 2013, the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the decision of the appointing authority of the EESC of 11 July 2013 adopting the list for 2013 of the two beneficiaries of early retirement without reduction of pension rights, in so far as that decision did not include her name on that list and had thus rejected the application she had submitted on 19 March 2013 ('the contested decision').
- 22 By decision of the appointing authority of the EESC of 9 December 2013, the complaint was rejected ('the decision rejecting the complaint'). Two tables were annexed to that decision, the first showing the number of points allocated under paragraph 6(a), (b) and (c) of the GIP of the EESC to Ms X and Ms Y and to the applicant, together with the total number of points allocated, namely 9.5 points, 9.5 points and 8.5 points respectively, and the second showing the order in which the applicants had been placed; according to that second table, the applicant was placed third, after Ms X and Ms Y.
- 23 Following her request, the applicant was retired with effect from 1 January 2014; her pension rights were reduced accordingly.

Forms of order sought and procedure

- 24 The applicant claims that the Tribunal should:

'[–] ... annul the decision of the EESC refusing to allow her to benefit, in respect of 2013, under Article 9(2) of Annex VIII to the Staff Regulations ..., ... as that refusal was embodied in [the decision of 11 July 2013 adopting the list for 2013 of the two beneficiaries of early retirement without reduction of pension rights and in the decision rejecting the complaint] ...;

[–] ... order [the EESC] to pay the costs.'

- 25 The EESC contends that the Tribunal should:

- declare the action admissible but unfounded;
- order the applicant to pay the costs.

- 26 By letter from the Registry of 6 March 2015, the EESC was asked to respond to a number of measures of organisation of the procedure; it complied with that request within the prescribed period.

- 27 Also by letters from the Registry of 6 March 2015, the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors were asked to respond to a number of measures of inquiry, in particular to produce the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by their respective appointing authorities. Those institutions complied with that request within the prescribed period.

Law

Subject-matter of the action

- 28 By her first head of claim, the applicant seeks annulment not only of the contested decision but also of the decision rejecting the complaint.
- 29 It should be borne in mind 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 *Vainker v Parliament*, 293/87, EU:C:1989:8, paragraph 8, and of 15 September 2011 in *Munch v OHIM*, F-6/10, EU:F:2011:139, paragraph 25).
- 30 In the present case, the Tribunal notes that the contested decision does not state the reasons why the applicant was not selected to benefit from the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations and that the list of officials selected to benefit from the abovementioned facility relates only indirectly to the applicant in as much as her name does not appear on that list. The decision rejecting the complaint upholds the contested decision and supplements it by supplying the reasons both for the decision to include Ms X and Ms Y in the list of beneficiaries and for the decision to exclude the applicant.
- 31 In such circumstances, it is indeed the legality of the initial act adversely affecting the official or staff member that must be examined, taking into account the grounds given for the decision rejecting the complaint, those grounds being supposed to coincide with that act (judgment of 9 December 2009 in *Commission v Birkhoff*, T-377/08 P, EU:T:2009:485, paragraphs 58 and 59 and the case-law cited).
- 32 Consequently, the claim for annulment of the decision rejecting the complaint lacks any independent content and the action must be regarded as being directed against the contested decision, as clarified, with regard to the reasons for it, by the decision rejecting the complaint.

Substance

- 33 The applicant puts forward two pleas in law in support of her application. The first, the main plea, alleges an error of law in the interpretation of paragraph 6(b) of the GIP of the EESC. The second plea, raised in the alternative in case the Tribunal rejects the first plea, alleges that paragraph 6(b) of the GIP of the EESC is unlawful.

First plea in law, the main plea: an error of law in the interpretation of paragraph 6(b) of the GIP of the EESC

– Arguments of the parties

- 34 As her main plea, the applicant claims that the difference between the number of points awarded to Ms X and Ms Y and the number of points awarded to her is due to an error on the part of the EESC in interpreting paragraph 6(b) of its GIP. When awarding points under the length of employment criterion contained in that provision, the EESC took into account the total employment of Ms X and Ms Y, both within the EU institutions and outside, whereas only years of service with the European Union should have been taken into consideration. If the EESC had correctly interpreted that paragraph 6(b) the applicant would have been placed first, because she had begun her professional career within the EU institutions several years before Ms X and Ms Y.

- 35 The applicant sets out several arguments in support of her first plea. In the first place, she maintains that paragraphs 5 and 6 of the GIP of the EESC must be read one after the other and that they both necessarily relate to years of service with EU institutions or bodies.
- 36 Secondly, the applicant contends that the interpretation advocated by the EESC, that the expressions ‘durée de l’activité professionnelle’ and ‘length of employment’ used in the French and English versions respectively of paragraph 6(b) of the GIP of the EESC cover all employment which applicants for early retirement without reduction of pension rights have had during their lives, make it virtually impossible to use the full range of points set out in that provision, since that would almost inevitably lead to every applicant receiving the maximum number of points allocated for that criterion.
- 37 Thirdly, the applicant states that the expression ‘length of employment’, used in the English version of paragraph 6(b) of the GIP of the EESC, shows that only service within the EU institutions by applicants for early retirement without reduction of pension rights is covered. Moreover, the English version of the Notice of 18 March 2013 uses the expression ‘length of service’ where the French version uses ‘durée de [l]’activité professionnelle’ [‘length of employment’], which shows even more clearly that the EESC is required to take into consideration only years worked within the EU institutions.
- 38 Fourthly, the applicant contends that the interpretation of paragraph 6(b) of the GIP of the EESC advocated by the EESC might lead to a situation in which years of employment completed outside the EU institutions are taken into account in the same way as those completed within those institutions, even where the period of weekly working time was reduced. Such a situation might give rise to infringement of the principle of equal treatment, since it would make it possible ‘to obtain benefit in the form of additional pension rights in respect of the same period of employment’.
- 39 Fifthly and lastly, the applicant considers that, in the light of the divergence between the two language versions of the GIP of the EESC, it is necessary to interpret paragraph 6(b) of those GIP according to the general economy and purpose of the regulations of which that provision forms part. Thus, there is no reason to believe that the EESC intended to afford the same weight to professional experience acquired outside the EU institutions as to service within those institutions. On the contrary, it appears more probable that the EESC intended to favour officials who had spent a greater part of their working lives in its service or in the service of the EU institutions as compared to those who had worked for less time in the EU institutions. That is, moreover, the criterion applied by the Parliament, the Council and the Court of Justice.
- 40 The EESC replies, in the first place, that paragraphs 5 and 6 of its GIP are intentionally worded differently. Thus, paragraph 5 of the GIP of the EESC states that the applicant for the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations must have accumulated fifteen ‘years of service’ as an official or other servant of the European Union, whilst paragraph 6(b) of those GIP deliberately uses the expression ‘employment’, an expression used on many occasions in the Staff Regulations when referring to diverse employment engaged in by the official or other servant concerned outside the EU institutions.
- 41 Second, the EESC considers that the scope of paragraph 5 of the GIP of the EESC is different from that of paragraph 6 of those GIP. Thus, the purpose of paragraph 5 of the GIP of the EESC is to lay down the eligibility criteria that must be met by applicants for early retirement without reduction of pension rights, whilst paragraph 6 of those GIP is designed to lay down the selection criteria for deciding between the applications shortlisted.
- 42 Third, the EESC maintains that the applicant’s argument leads to infringement of the principle of equal treatment, since it results in the favouring of officials and other servants who are nationals of the founding Member States of the European Union or of countries which acceded to the Union at a very early stage.

- 43 Fourth, the EESC considers that footnote 4 to paragraph 6(b) of the GIP of the EESC (see paragraph 7 above) shows that, when applying that provision, it is permissible to take into consideration all employment of applicants, including any outside the EU institutions. Since the footnote refers to ‘actual periods of employment duly substantiated’ this can only mean professional experience acquired outside the EU institutions, since an institution does not need evidence of the professional career of an official within the European Union, as it is in possession of all the necessary information relating to that career.
- 44 Fifth, the EESC points out that both the expression ‘durée de l’activité professionnelle’ in the French text and the expression ‘length of employment’ in the corresponding English version of paragraph 6(b) of its GIP support its argument that all of an applicant’s professional experience should be taken into consideration, including his employment outside the EU institutions. As regards the English version of the Notice of 18 March 2013, it was as a result of a clerical error that the expression ‘length of service’ was used where the French version used the expression ‘durée de [l]’activité professionnelle’. In any event, a clerical error such as this contained in a notice to staff does not establish any form of right, the only valid text being that of paragraph 6(b) of the GIP of the EESC, in both French and English.
- 45 Sixth, the EESC denies that its interpretation of paragraph 6(b) of the GIP of the EESC would lead to infringement of the principle of equal treatment, since the facility in question would not allow additional pension rights to be awarded to an official with a record of employment outside the EU institutions, but would merely allow him to take early retirement without any reduction of his pension rights.
- 46 In seventh and last place, the EESC, referring to the settled case law of the Court of Justice on the question, considers that the French and English versions of the GIP of the EESC are not divergent and that in any event the purpose and overall scheme of the GIP of the EESC show precisely that its interpretation of paragraph 6(b) of those provisions is correct.

– Findings of the Tribunal

- 47 It is clear from the two tables annexed to the decision rejecting the complaint that Ms X and Ms Y were both placed equal first, each having an average mark of 4.30 and a total of 9.5 points, broken down as 2.5 points for having reached the age of 59 years by 31 December 2013, 4 points for the length of their employment — 33 and 26 years, respectively — and 3 points for their staff reports. The applicant was placed third, immediately after Ms X and Ms Y, with an average mark of 4.50 and a total of 8.5 points, namely 1.5 point for having reached the age of 57 years by 31 December 2013, 4 points for the length of her employment — 31 years — and 3 points for her staff reports.
- 48 It is also clear from the documents in the case that Ms X and Ms Y both started their professional careers within the EU institutions in 1991. Having retired in 2013, they therefore each worked within the EU institutions for at least 22 years and just under 23 years, respectively. So far as the applicant is concerned, it is agreed that she worked at the EESC for 31 years.
- 49 In order to determine the number of points to be awarded under the criterion of the length of employment of Ms X and Ms Y — 33 years and 26 years, respectively — the EESC therefore added their years of employment outside the EU institutions to their years of service within the institutions, in this case just under 23 years and at least over 22 years. However, if the EESC had merely taken into consideration their years of service with the European Union, Ms X and Ms Y would each have only received 2 points under that criterion, which would have reduced their total number of points to 7.5 and would have led to the applicant being placed first.

- 50 Consequently, the question arising is whether, in order to calculate the length of employment of the applicants, as provided for in paragraph 6(b) of the GIP of the EESC, the EESC should have taken into account all of the individual professional experience of each of the applicants, both inside and outside the EU institutions, or if it should have taken into account only years of service with the European Union.
- 51 In that regard, the Tribunal notes, first, that, the French version of the Notice of 18 March 2013 uses the expression ‘durée de [l]’activité professionnelle’ [length of employment] where the English version uses ‘length of service’. That linguistic divergence does not create any right for the applicant, since the Notice of 18 March 2013 is a measure implementing the GIP of the EESC and is consequently a provision of a lower rank than the GIP. Secondly, the Tribunal notes that the expressions ‘durée de l’activité professionnelle’ and ‘length of employment’, contained in the French and English versions of paragraph 6(b) of the GIP of the EESC, are not divergent, but that their wording does not enable a clear answer to be given to the question raised in the preceding paragraph. A teleological and contextual interpretation of paragraph 6(b) of the GIP of the EESC is therefore required.
- 52 Such an interpretation of paragraph 6(b) of the GIP of the EESC needs to be compatible with higher rules and, primarily, with Article 9(2) of Annex VIII to the Staff Regulations (see, to that effect, judgment of 12 September 2006 in *De Soeten v Council*, F-86/05, EU:F:2006:87, paragraph 42 and the case law cited), which brings the Tribunal to examine first the *ratio legis* of that latter provision.
- 53 On that point, the Tribunal notes that two documents drawn up in the course of the preparatory work for Article 9(2) of Annex VIII to the Staff Regulations, produced by the Council in response to the measures of inquiry, contain information as to the purpose of that provision. Thus, according to Note 9522/03 of the Presidency of the Council of 19 May 2003 containing the proposal of the Presidency of the Council concerning revision of the Staff Regulations, addressed to the Council, the provision at issue ‘is intended to facilitate personnel management in particular in the smaller institutions’. According to Note 12957/03 of the Presidency of the Council of 26 September 2003 approving the results of the conciliation committee’s work in connection with the revision of the Staff Regulations, addressed to the Committee of Permanent Representatives, that provision is intended ‘to ensure that the institutions have the appropriate flexibility, in particular with regard to the process of enlargement [of the European Union]’. The Tribunal notes that, subsequently, recital 33 of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1) was adopted, which provides that ‘the provision [on the flexible retirement arrangements] should be intended to facilitate personnel management in particular in the smaller institutions’.
- 54 The Tribunal considers that the *ratio legis* of Article 9(2) of Annex VIII to the Staff Regulations is to facilitate personnel management in the EU institutions through the granting of early retirement without reduction of pension rights. That provision is not therefore designed to favour officials or other servants who at the end of their professional career have a greater number of years’ service within the EU institutions in comparison with those who have fewer years’ service in the EU institutions because more of their career has been spent outside those institutions.
- 55 Secondly, it should be noted that, according to Article 9(2) of Annex VIII to the Staff Regulations, the facility of early retirement without any reduction of pension rights must be granted only ‘in the interests of the service’. In that regard, it has been held that the assessment of the interests of the service must be made on the basis of objective criteria and transparent procedures introduced by means of GIP and that the legislature intended to limit the discretion of the administration as regards the interests of the service. It has also been held that the importance of the benefit under the Staff Regulations, and the safeguards which the legislature has attached to granting it, justify specific review by the EU judicature, on the basis of criteria defined by the institutions themselves, of the appointing authority’s assessment of the interests of the service (judgment of 12 September 2006 in *De Soeten v*

Council, F-86/05, EU:F:2006:87, paragraph 48). Each institution of the European Union adopts by means of GIP its own definition of interests of the service justifying the granting of early retirement without reduction in pension rights.

- 56 It is also clear from Article 9(2) of Annex VIII to the Staff Regulations that the legislature intended to grant the appointing authority of each of the EU institutions discretion as to the criteria to be used to select the officials and other servants to whom the facility of early retirement without reduction in pension rights should be granted, on condition that those criteria are objective and laid down in advance. The abovementioned provision does not therefore require all the EU institutions to adopt common criteria for deciding between applicants. As the EESC correctly states, if that had been the legislature's intention it could have required the institutions to draw them up by mutual agreement or it could have laid them down directly in the Staff Regulations, but it did not do so. Moreover, given that there is no general principle of law that required all the EU institutions to accept the same criteria when adopting their GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations, the conclusion must be drawn that the EU institutions were each at liberty, in their respective GIP, to specify the interests of the service justifying the grant of early retirement without reduction of pension rights and to lay down the objective criteria which they each considered appropriate for the purposes of deciding between applications for that facility.
- 57 Consequently, since Article 9(2) of Annex VIII to the Staff Regulations does not require the institutions to consider length of service within the EU institutions as an objective criterion for deciding between applicants for early retirement without reduction of pension rights — nor does it prevent the institutions from adopting that criterion for deciding between applicants — it cannot be ruled out that an institution may choose to exercise its discretion by including in its GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations, among other criteria, the criterion of length of service within the European Union. Such a choice amounts to giving priority to officials who have spent more years in the service of the EU institutions, by placing them higher up the list of applicants for the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations than their colleagues whose professional life has been spent to a lesser extent within the EU institutions.
- 58 That is moreover, as is clear from paragraphs 9 to 16 above, the choice that was made by the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. In the case of the Parliament and the Commission, Article 5(5) of the GIP of the Parliament and Article 5(6) of the GIP of the Commission both provide that length of service with the institution concerned constitutes one of the criteria to be taken into account in the selection of applicants. As regards the Council and the Court of Auditors, it is clear from paragraph 3 of the Council's Staff Note No 105/04 and from Article 5 of the GIP of the Court of Auditors that added value is attached to length of service within any of the EU institutions. As regards the Court of Justice, Article 5 of the GIP of the Court of Justice provides that 'length of service' is one of the objective criteria. When questioned in that regard by the Tribunal in the context of the measures of inquiry, the Court of Justice stated that that term included not only periods of service spent by an official in the service of the Court of Justice, but also those spent in the service of other EU institutions.
- 59 As the choice made by the institutions referred to in the preceding paragraph was by no means binding on the EESC, the latter was entitled to exercise its discretion by adopting in its GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations, as an objective criterion for selecting candidates, the total length of employment of those concerned, without limiting it solely to employment within the EU institutions.
- 60 In the light of the above considerations, an affirmative answer must be given to the question whether, in order to calculate the length of employment, as provided for in paragraph 6(b) of the GIP of the EESC, the EESC was permitted to take into account all the professional experience of the applicants, acquired both within and outside the EU institutions.

- 61 It should be added that that finding is not affected by the applicant's argument that such an interpretation of paragraph 6(b) of the GIP of the EESC might lead to infringement of the principle of equality, in that successful applicants whose employment has also been outside the EU institutions would be granted 'additional pension rights in respect of the same period of employment'.
- 62 Since pension rights are calculated on the basis of years of service with the EU institutions and, where appropriate, on the basis of transferred national pension rights, the fact of granting early retirement without reduction of pension rights to an official who can claim employment outside the EU institutions will not give him additional pension rights as compared with the situation of another official who is also granted early retirement without reduction of pension rights, all of whose professional experience was acquired within the EU institutions.
- 63 In the light of all of the foregoing, the first plea must be rejected as unfounded. A ruling must therefore be given on the plea raised by the applicant in the alternative.

The second plea, raised in the alternative: paragraph 6(b) of the GIP of the EESC is unlawful

– Arguments of the parties

- 64 The applicant claims in the alternative that paragraph 6(b) of the GIP of the EESC is unlawful in so far as that provision is to be interpreted as meaning that it also includes work performed outside the EU institutions. Although the institutions enjoy a degree of discretion as regards the objective criteria they adopt under Article 9(2) of Annex VIII to the Staff Regulations, those criteria must nonetheless actually be in the interests of the service. In so far as only service rendered within EU institutions, and not work performed outside the latter, is actually in the interests of the service, paragraph 6(b) of the GIP of the EESC conflicts with Article 9(2) of Annex VIII to the Staff Regulations.
- 65 At the hearing, the applicant argued in that regard that the EESC was required to adopt objective criteria in relation to the specific interest of the service concerned and that the EU judicature should be able to review the legality of that interest. It contended that the EU judicature should acquaint itself with that interest of the service and examine whether the objective criteria adopted by the EESC enabled that interest to be achieved. However, in the present case, the GIP of the EESC contain no information making it possible to assess the interest of the service pursued by the EESC when it applies the criterion provided for in paragraph 6(b) of its GIP concerning length of employment.
- 66 The EESC replies that it enjoys broad discretion when adopting measures in the interests of the service and that the EU judicature, in its review of compliance with the principle of non-discrimination, must merely ensure that it has not engaged in differentiation that was arbitrary or manifestly contrary to the interests of the service. The EESC continues that the objective criteria contained in paragraph 6 of its GIP are neither arbitrary nor contrary to the interests of the service.

– Findings of the Tribunal

- 67 As was held in paragraphs 55 and 56 above, the facility of early retirement without reduction of pension rights under Article 9(2) of Annex VIII to the Staff Regulations may be granted where the interests of the service so justify, such interests being freely determined by each EU institution in its GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations. Next, in order to decide between applicants, the appointing authority must adopt and apply objective criteria and transparent procedures, also laid down in the GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations adopted by the institution.

- 68 In that regard, the Tribunal notes that the GIP of the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors do indeed contain a definition of ‘interests of the service’ for the purposes of Article 9(2) of Annex VIII to the Staff Regulations. Thus, in the case of the Parliament, Article 5(4) of the GIP of the Parliament makes reference to reorganisation measures decided on by the Parliament and in particular to the cessation of an official’s tasks following ongoing restructuring measures, where no new task appropriate to the person concerned has been, or is likely to be, identified in the near future. Likewise, with regard to the Council, Article 5(1) of the GIP of the Council provides that the concept of the interests of the service are to be assessed in the light of the circumstances and of different factors, including the need for structural redeployment of certain departments and the need for renewal or refocusing of the skills required in the General Secretariat of the Council in the light of the new tasks assigned to it and the constraints imposed by enlargement of the European Union. As regards the Commission, Article 5(4) of the GIP of the Commission lays down criteria relating to reorganisation measures in order to assess the interest of the service, such as current reorganisation or redeployment measures. As regards the Court of Justice and the Court of Auditors, Article 5 of the GIP of the Court of Justice and Article 5 of the GIP of the Court of Auditors identify reorganisation of the service as being an interest of the service.
- 69 Next, the Tribunal notes that the GIP of the five institutions mentioned in the preceding paragraph go on to lay down objective criteria that make it possible to grant the facility to some applicants rather than others, such as their age, the length of their professional experience or their personal or family situation, together with the procedure to be followed by applicants and by the institution.
- 70 However, paragraph 6 of the GIP of the EESC provides that, ‘in order to identify which applications best serve the interests of the service and to ensure complete transparency in the drawing-up of the list of officials who can benefit from the facility, a points system shall be established’. According to paragraph 6 of the GIP of the EESC, that points system takes into account the age of the person concerned (paragraph 6(a) of the GIP of the EESC), the length of his employment (paragraph 6(b) of the GIP of the EESC), which must be understood, as was held in paragraph 60 above, as covering all the professional experience of the person concerned, and the average number of points awarded in performance reports over the previous five years (paragraph 6(c) of the GIP of the EESC).
- 71 It is thus clear from the wording of paragraph 6 of the GIP of the EESC that the EESC merely laid down, first, criteria linked to age, length of professional experience and the merits which the candidates have shown over their previous years of service within the EESC or the institutions, criteria designed simply to help decide between applicants, and, secondly, the procedure to be followed both by the latter for submitting their applications and by the appointing authority in adopting its decision, but it failed to identify the interests of the service justifying the grant of the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations.
- 72 The above examination of the wording of paragraph 6 of the GIP of the EESC shows that the EESC considered that it was in the interests of the service of that body to facilitate the early retirement of its oldest officials, who have worked the most years during their career and have the highest number of points in their last performance reports. However, those criteria alone do not meet the *ratio legis* of Article 9(2) of Annex VIII to the Staff Regulations, which, as noted in paragraph 54 above, is to facilitate personnel management in the institutions.
- 73 Questioned in that regard at the hearing, the EESC confirmed that the GIP of the EESC do not identify the interests of the service referred to in Article 9(2) of Annex VIII to the Staff Regulations. According to its statements, the EESC examines first of all whether there is ‘a general interest of all of the service’ that Article 9(2) of Annex VIII to the Staff Regulations should be applied and, if so, it invites applications from all the staff of the EESC. The names of all eligible applicants who meet the three criteria laid down in paragraph 6 of the GIP of the EESC relating to age, length of employment and

merits in the service, are placed on a list in decreasing order of the number of points obtained. That list is published and notified to the applicants. Applicants can then decide whether or not to forego early retirement.

- 74 The Tribunal must therefore find that the EESC failed to define in its GIP giving effect to Article 9(2) of Annex VIII to the Staff Regulations interests of the service justifying the granting of early retirement without reduction of pension rights, and that in practice the EESC regarded the interests of the service as equating to the early retirement of its oldest officials, who have worked the most years during their career and have the highest number of points in their last performance reports.
- 75 However, the criterion of length of employment, whether within the EU institutions or outside them, provided for in paragraph 6(b) of the GIP of the EESC, is not sufficient, either alone or jointly with the criteria relating to age and merits, contained in paragraph 6(a) and (c), respectively, of those GIP, to define interests of the service justifying the granting of early retirement without reduction of pension rights.
- 76 It follows that paragraph 6(b) of the GIP of the EESC, either alone or read in conjunction with subparagraphs (a) and (c) of that paragraph, was not sufficient to enable the EESC to assess the interests of the service, within the meaning of Article 9(2) of Annex VIII to the Staff Regulations, in the light of which it was required to examine applications, such as the applicant's, to benefit under that latter provision.
- 77 Consequently, after hearing the parties at the hearing addressing the question whether the way in which the interests of the service had been taken into account by the EESC in its GIP justified annulment of the contested decision, the Tribunal must uphold the plea of illegality raised, declare paragraph 6(b) of the GIP of the EESC inapplicable in the present case and accept the second plea.
- 78 Since the contested decision is based on an unlawful provision, that decision is unlawful and must therefore be annulled.

Costs

- 79 Pursuant to Article 101 of the Rules of Procedure, subject to the other provisions of Chapter 8 of Title 2 of those Rules, the unsuccessful party is to bear his own costs and is to be ordered to pay the costs incurred by the other party if they have been applied for in the other party's pleadings. Under Article 102(1) of those Rules, if equity so requires, the Tribunal may decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.
- 80 It follows from the reasoning set out in the present judgment that the EESC is the unsuccessful party. Moreover, in her pleadings, the applicant has expressly applied for the EESC to pay the costs. As the circumstances of the present case do not justify the application of the provisions of Article 102(1) of the Rules of Procedure, the EESC must bear its own costs and pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

- 1. Annuls the decision of the European Economic and Social Committee of 11 July 2013 adopting the list of beneficiaries, in respect of 2013, of the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations of Officials of the European Union, in so far as that decision does not allow Ms Barnett to benefit from that facility;**
- 2. Orders the European Economic and Social Committee to bear its own costs and to pay the costs incurred by Ms Barnett.**

Bradley

Kreppel

Rofes i Pujol

Delivered in open court in Luxembourg on 22 September 2015.

W. Hakenberg
Registrar

K. Bradley
President