



Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

(Third Chamber)

30 January 2013*

(Civil service — Member of the temporary staff — Non-renewal of a fixed-term contract — Article 8 of the Conditions of Employment — Procedure — Infringement of essential procedural requirements — Competence)

In Case F-87/11,

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

Kari Wahlström, former member of the temporary staff of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union residing in Alimos (Greece), represented by S. Pappas, lawyer,

applicant,

v

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), represented by S. Vuorensola and H. Caniard, acting as Agents, and D. Waelbroeck and A. Duron, lawyers,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber),

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

Registrar: J. Tomac, Administrator,

having regard to the written procedure and further to the hearing on 23 May 2012,

gives the following

* Language of the case: English.

Judgment

- 1 By application received at the Registry of the Tribunal on 13 September 2011, Mr Wahlström requests the annulment of the decision of the Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), of 10 December 2010, notified on 16 December 2010, not to extend his contract as a member of the temporary staff.

Legal context

- 2 Under Article 17 of Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349, p. 1), the Staff Regulations of officials of the European Union ('the Staff Regulations') and the Conditions of employment of other servants of the European Union ('the Conditions of Employment') are to apply to Frontex's staff.

The Conditions of employment of other servants

- 3 Article 2 of the Conditions of Employment provides:

'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 the contract, the first paragraph of Article 8 of the Conditions of Employment 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 As regards the termination of the contract, Article 47 of the Conditions of Employment 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. ...'

The internal provisions regarding Frontex's staff appraisal procedure

- 6 Article 3 of the Decision of the Executive Director of Frontex of 27 August 2009 establishing a Staff Appraisal Procedure ('the decision of 27 August 2009') provides:

'1. By default the reporting officer shall be the jobholder's direct line manager at the launch of the exercise. The Director of the division shall act as the reporting officer for the heads of the units, the Deputy Executive Director shall act as reporting officer for Directors of Divisions.

2. By default the countersigning officer is the direct hierarchical superior of the reporting officer at the launch of the exercise.

If the Executive Director is the reporting officer of the jobholder, he/she shall in addition carry out also the role of countersigning officer.

In their role, countersigning officers, shall guarantee the consistent application of the appraisal standards...'

- 7 Article 11(3) to (6) of the decision of 27 August 2009 provides:

'3. If the countersigning officer agrees with the report he/she shall countersign the report and sen[d] it to the reporting officer, who shall forward it to the jobholder.

4. If he/she does not agree with the report, the countersigning officer shall summon the reporting officer and, if necessary, the jobholder for a consultation meeting to try and reach an agreement.

5. Once an agreement is reached, the countersigning officer shall countersign the report, amended in accordance with the outcome of the meeting, and sen[d] it to the reporting officer, who shall forward it in turn to the jobholder.

6. If the consultation meeting fails to result in an agreement, the final decision shall rest with the countersigning officer, who shall forward it to the reporting officer and jobholder.'

The contract renewal policy in respect of temporary staff within Frontex

- 8 The contract renewal procedure for temporary staff within Frontex is organised by means of guidelines, which were communicated on 26 July 2010 to Frontex's staff by Administrative Notice No 40, the objective of which is inter alia to ensure that the process is consistent, transparent and fair ('the Guidelines'). It is apparent from point 2 of the Guidelines that the renewal procedure consists of four stages:

— after the member of staff concerned has shown his interest in the renewal of his contract (points 2(a) and 2(b)), the reporting officer writes his comments and his proposal regarding renewal on an *ad hoc* form [point 2(c)];

— the countersigning officer assesses the proposal from the reporting officer and expresses his agreement or his disagreement with the reasons for it on the same form; if the reporting officer and the countersigning officer disagree, the latter must express the reasons for his disagreement in writing (point 2(d));

— the Director of the Division expresses a recommendation on the form (point 2(d));

— the Executive Director takes the final decision (point 2(e)).

9 Point 3(a) of the Guidelines provides:

‘When [the] Executive Director decides to renew the contract for [five] years, [the Human Resources department] will prepare a letter offering the staff member a renewal of the contract for this period...

After receiving [a] positive answer from the staff member, [the Human Resources department] will prepare a reviewed contract which will be ready [two] months before the expiry of the current contract waiting for the staff member acceptance and signature...’

10 Point 3(c) states:

‘In the case [where the] Executive Director’s decision is not to renew the contract, [the Human Resources department] will prepare a letter reflecting the arguments given by the Reporting Officer (business reasons, performance related reasons, or both). The letter will be signed by the Executive Director and given to the staff member 12 months in advance of the [expiry] date of the current contract.’

Background to the dispute

11 The applicant entered the service of Frontex on 1 August 2006 as a member of the temporary staff within the meaning of Article 2(a) of the Conditions of Employment for a renewable period of five years. He was initially appointed Head of the Administrative Services Unit of Frontex and classified in grade A*12, step 2.

12 At the beginning of 2008, a new management layer made up of ‘Divisions’, headed by ‘Directors of Divisions’, was created between the units and the Executive Director. In Spring 2008, a selection procedure for the middle management posts of Directors of Divisions was launched. The applicant, encouraged at that point by the Executive Director to take part in that procedure, applied for the post of Director of the Administrative Division; his application was, however, not successful and Mr C. was selected to occupy that post.

13 Following an internal selection procedure and in accordance with an addendum to his contract, signed on 22 June 2010, the applicant was appointed Head of Frontex’s Operational Office in Piraeus (Greece) with effect from 1 August 2010. His duties as Head of the Administrative Services Unit had meanwhile been handed over to his hierarchical superior, Mr C.

14 As regards the appraisal of the applicant’s professional performance, an appraisal report was finalised in November 2009 in respect of the year 2008. In that report, the Director of the Administrative Division, Mr C., acting as reporting officer, and the Deputy Executive Director, acting as countersigning officer, assessed the applicant’s performance at level III, since, in their view, he had ‘partly met expectations with regard to efficiency, ability and conduct in the service’. By contrast, in the appraisal report which was finalised on 23 June 2010 in respect of the year 2009, the same reporting officer and countersigning officer rated the applicant’s performance at level II, as he had, in their view, ‘fully met expectations with regard to efficiency, ability and conduct in the service’. Lastly, on 23 February 2011, a draft appraisal report covering the year 2010 was sent to the applicant, in which the Deputy Executive Director, acting on this occasion as reporting officer, and the Executive Director, acting as countersigning officer, evaluated the level of the applicant’s performance at level III.

15 On 28 April 2011, the applicant lodged an appeal before the Joint Appraisal Committee to challenge that last appraisal. The process was still ongoing at the time when the present action was brought.

- 16 Furthermore, by email of 22 July 2010, and therefore prior to the communication to staff of the Guidelines, which took place, as stated above, on 26 July 2010, the Human Resources Sector asked the applicant whether he was interested in the renewal of his contract, which was to expire on 31 July 2011, in order to find out whether it was appropriate ‘to start the renewal process 12 months in advance’, as required by the Guidelines. By email of the same date, the applicant responded in the affirmative, stating that his ‘interest [was] even stronger ... in the present duties, circumstances and future perspectives [of the post], where [he could] serve Frontex supported by [his] education as a coast guard officer and [his] 20 years long career in the field of Border Management’. The Human Resources Sector replied to the applicant immediately, by return of email, that it was going to ‘start’ the contract renewal process and that a decision could be expected in that regard for the end of September or beginning of October 2010.
- 17 During a meeting on 9 December 2010, the Executive Director informed the applicant of his intention not to renew his contract. The following day, in accordance with the recommendation of the Deputy Executive Director, the applicant’s reporting officer, who had stated, in the form for the renewal of the applicant’s contract, that his professional performance over the last four years had not met expectations, the Executive Director formally adopted the decision not to renew the applicant’s contract (‘the contested decision’). That decision was notified to the applicant on 16 December 2010 by a letter from the Head of the Human Resources Sector.
- 18 On 4 March 2011, the applicant sent the Executive Director a letter headed ‘Appeal under Article 90[(2)] of the Staff Regulation[s] [against the contested decision]’, which concluded with a claim for damages. By decision of 29 April 2011, sent to the applicant’s place of residence in Greece by registered letter with acknowledgment of receipt on 5 May 2011, the Executive Director rejected the claims made by the applicant in his letter of 4 March 2011. However, as the applicant did not collect the registered letter sent by Frontex from the Greek postal services, it was returned, on 27 June 2011, to Frontex headquarters in Warsaw (Poland). The rejection decision was also notified by email, on 20 June 2011, to the applicant who states that he became aware of it on that day; it was again notified by registered letter to the applicant who took delivery of the letter on 30 June 2011.
- 19 On 19 September 2011, the applicant, through his lawyer, sent the Executive Director a letter headed ‘Appeal under Article 90[(2)] of the Staff Regulations’ against the rejection of the claim for damages in the letter of 4 March 2011, alleging that that claim for damages had been made under Article 90(1) of the Staff Regulations.

Forms of order sought and procedure

- 20 The applicant claims that the Tribunal should:
- annul the contested decision;
 - order Frontex to pay the costs.
- 21 Frontex claims that the Tribunal should:
- dismiss the action as inadmissible and, in any event, unfounded;
 - order the applicant to pay the costs.
- 22 By letter of the Registry of 3 February 2012, the Tribunal requested the applicant, by way of measures of organisation of procedure, to provide it, in the light of paragraph 44 the order of 16 December 2010 in Case F-25/10 *AG v Parliament*, with any explanations which would establish that he was prevented from being properly apprised of any notice of attempted delivery placed in his letter box concerning

the registered letter sending the decision of the Executive Director of 29 April 2011. By the same letter, Frontex was requested, also in the light of paragraph 44 of the order in *AG v Parliament*, to provide all available evidence that the applicant was properly notified by registered letter of the abovementioned decision, in particular by the leaving of a notice of attempted delivery at his address. The parties complied with that request by letters of 17 February 2012.

Law

Admissibility of the action

Arguments of the parties

- 23 Frontex takes the view that the application is inadmissible on two grounds. First, the applicant's purported complaint of 4 March 2011 does not specify any cause of action. It merely provides a lengthy account of the facts from the applicant's point of view, a number of allegations made against the management of Frontex, some assumptions regarding 'side-issues [which allegedly] might have influenced' the contested decision and a list of grievances against that decision, without however containing an application for annulment. The forms of order sought in his purported complaint are limited to a claim in damages. According to Frontex, since the purported complaint is not sufficiently explicit as regards the scope which the applicant wished to give it, it should be analysed as a claim for damages. It is therefore clear that the relief sought and the cause of action of the purported complaint differ from those of the application, which seeks the annulment of the contested decision. Frontex also disputes that the alleged complaint of 4 March 2011 may be reclassified as a request within the meaning of Article 90(1) of the Staff Regulations, as the applicant claims. It was part of the duty of diligence which lay with the applicant, particularly in his capacity as the former Head of the Administrative Services Unit, to identify the appropriate legal basis for his internal action.
- 24 Secondly, the action was lodged after the expiry of the time-limit. The applicant did not go to the post office of his place of residence in Greece to collect the registered letter which had been sent to him on 5 May 2011 and contained the decision of 29 April 2011 rejecting his purported complaint.
- 25 The applicant counters by submitting, first, that his letter of 4 March 2011 aimed, as is apparent from its wording, to challenge the legality of the contested decision. The fact that he did not formally claim that it should be annulled, but simply disputed its legality, cannot call into question its categorisation as a complaint within the meaning of Article 90(2) of the Staff Regulations, which, moreover, appears explicitly from the subject-matter of the letter. The applicant refers, in that regard, to the case-law according to which, since the pre-litigation procedure is an informal procedure and those involved at that stage are generally acting without the assistance of a lawyer, the administration must not interpret complaints restrictively but should, on the contrary, examine them with an open mind (judgment of 23 January 2002 in Case T-386/00 *Gonçalves v Parliament*, paragraphs 42 to 45).
- 26 The letter of 4 March 2011 also included a claim for damages on the grounds of the treatment received by the applicant and the harassment he suffered within Frontex. That part of the letter, which should be analysed as a claim for damages under Article 90(1) of the Staff Regulations, is still at the pre-litigation stage, as the applicant submitted a complaint against the Executive Director's rejection decision of 29 April 2011, which was itself submitted within the period of 3 months provided for in Article 91(3) of the Staff Regulations, in the present case on 19 September 2011. In those circumstances, the subject-matter of the present action is only the legality of the contested decision.

27 Lastly, as regards the allegation that the action is out of time, the applicant maintains that he was never informed of the existence of the registered letter which was sent to him by Frontex on 5 May 2011. During the hearing, he pointed out an error in the post code in the address on the envelope containing that registered letter.

Findings of the Tribunal

28 It must be borne in mind, as regards the first plea of inadmissibility raised, that, according to the case-law, there is an administrative complaint for the purposes of Article 90(2) of the Staff Regulations where the official or the member of staff protests in a specific manner against the measure adopted with regard to him (see, to that effect, judgment of 31 May 1988 in Case 167/86 *Rousseau v Court of Auditors*, paragraph 8) or clearly expresses his intention to challenge the decision which adversely affects him (order of 25 February 1992 in Case T-67/91 *Torre v Commission*, paragraph 29).

29 In the present case, it is apparent from the very wording of the letter of 4 March 2011 that in it the applicant challenges the contested decision. In that letter, which has the words ‘Appeal under Article 90[2] of the Staff regulation[s] on Frontex Executive Director’s decision on [the applicant’s] contract extension’ in the subject field, the applicant inter alia, under a heading entitled ‘Arguments against the decision ...’, challenged the merits of the grounds of the administration set out in the form for the renewal of his contract; he also refers to certain issues which could have unlawfully influenced the tenor of the decision and concludes that the contested decision ‘is illegal, unfair and [contrary] to the Staff Policy’. The fact, on which Frontex relies, that the applicant did not expressly request the abrogation or the withdrawal of the contested decision clearly did not make it impossible for Frontex to understand the applicant’s action, particularly as the administration must always exercise due care towards the members of its staff.

30 Consequently, the plea of inadmissibility alleging that there is no actual administrative complaint must be rejected.

31 As regards the question whether the action is out of time, Article 91(3) of the Staff Regulations provides that an appeal must be filed ‘within [a period of] three months [which] shall begin on the date of notification of the decision taken in response to the complaint’.

32 According to settled case-law, the periods for lodging complaints and bringing actions referred to in Articles 90 and 91 of the Staff Regulations are matters of public policy and cannot be left to the discretion of the parties or the Court, which must ascertain, of its own motion if need be, whether they have been complied with. Those periods meet the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, judgment of 7 July 1971 in Case 79/70 *Müllers v ESC*, paragraph 18, and judgment of 29 June 2000 in Case C-154/99 P *Politi v European Training Foundation*, paragraph 15; order of 15 May 2006 in Case F-3/05 *Schmit v Commission*, paragraph 24).

33 It is however for the party who relies on the expiry of the time-limit to adduce proof of the date on which time began to run (judgment of 5 June 1980 in Case 108/79 *Belfiore v Commission*, paragraph 7; judgment of 7 October 2009 in Case F-101/08 *Pappas v Commission*, paragraph 43).

34 In that regard, for a decision to be duly notified for the purposes of the provisions of the Staff Regulations, it must not only have been communicated to the person to whom it is addressed, but that person must also have been given an opportunity to have effective knowledge of its content (judgment of 15 June 1976 in Case 5/76 *Jänsch v Commission*, paragraph 10; judgment of 8 June 1993

in Case T-50/92 *Fiorani v Parliament*, paragraph 16; judgment of 3 June 1997 in Case T-196/95 *H v Commission*, paragraphs 32 to 35; judgment of 25 April 2007 in Case F-71/06 *Lebedef-Caponi v Commission*, paragraphs 29 to 31).

- 35 It has also been held, as regards the time-limit for lodging a complaint referred to in Article 90(2) of the Staff Regulations, that the awareness of an act to which that provision refers is the awareness resulting from notification or publication of such an act (judgment of 18 March 1997 in Case T-35/96 *Rasmussen v Commission*, paragraph 40).
- 36 As the Tribunal held in the order in *AG v Parliament*, although notification by registered letter with acknowledgment of receipt is not the only possible method of notification of administrative decisions, the fact remains that it is a particularly reliable approach because of the specific safeguards it has both for officials and for the administration (order in *AG v Parliament*, paragraph 38). In the present case, concerning a decision refusing to renew a contract of employment by an agency, notification by registered letter seems particularly appropriate to communicate the response to a complaint made against such a decision, inasmuch as the person concerned was resident in a Member State other than that of the agency's headquarters.
- 37 It has however been held that the validity of a notification made by registered letter with acknowledgment of receipt is as a rule subject to compliance with the national rules concerning mail deliveries in the Member State concerned (see, to that effect, judgment of 15 September 1998 in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission*, paragraphs 76 and 77; order in *AG v Parliament*, paragraph 40).
- 38 Furthermore, where a decision is notified by registered letter with acknowledgment of receipt, the person to whom it is addressed is deemed to have been notified of it on the basis of the signature which he places on the acknowledgment of receipt (order in *AG v Parliament*, paragraph 41). However, it may happen that the acknowledgment of receipt of a registered letter cannot be signed by the recipient, where that person, who is not at his place of residence at the time when the postman calls, fails to take any action and, in particular, does not collect the letter within the period for which the postal service keeps letters.
- 39 In such a case, the decision must be regarded as having been duly notified to the person to whom it is addressed on expiry of the period for which the postal service keeps the letter. If it were accepted that, by failing to take any action and, in particular, by not collecting the registered letter within that period, the recipient could prevent the proper notification of a decision by registered letter, first, the safeguards offered by that method of notification would be considerably weakened, notwithstanding the fact that it constitutes a particularly reliable and objective method of notification of administrative measures. The administration would be required to use other methods of notification, which are either less reliable, such as notification by standard letter, or expensive, if not disproportionate, such as service by writ. Secondly, the recipient would have a certain discretion in establishing the starting point of the period for initiating proceedings, although, as has been stated, such a period may not be left to the discretion of the parties and must meet the requirements of legal certainty and the sound administration of justice (order in *AG v Parliament*, paragraph 43).
- 40 Nevertheless, the presumption that the recipient has received notification of the decision on expiry of the period for which the postal service normally keeps registered letters is not absolute in nature (order in *AG v Parliament*, paragraph 44). Its application is subject to the provision of evidence by the administration of proper notification by registered letter, in particular through the leaving of a notice of attempted delivery at the latest address supplied by the recipient. Furthermore, that presumption is not irrebuttable as the recipient may seek to prove that he was prevented, in particular by illness or by a case of *force majeure* beyond his control, from being apprised in fact of the notice of attempted delivery.

- 41 It is in the light of the foregoing considerations that the plea of inadmissibility put forward by Frontex, alleging that the action is out of time, must now be examined.
- 42 It is apparent from the documents in the file and it is not disputed:
- that Frontex sent from Warsaw, where its headquarters are located, on 5 May 2011, the Executive Director's decision of 29 April 2011 rejecting the complaint by recorded letter with acknowledgment of receipt to the address of the applicant's place of residence in Greece,
 - that the letter was received by the Greek postal service on 17 May 2011,
 - that, not having been collected by the applicant from the Greek postal service within the period for which the postal service keeps letters, the letter was returned to the Polish postal service, which received it on 24 June 2011,
 - that it arrived, on its return, at Frontex's headquarters on 27 June 2011, and
 - that the address of the applicant on the envelope of the registered letter does not correspond exactly to that on the application, the postcodes given being 17456 and 17455 respectively.
- 43 That last finding may in itself already explain why the applicant was, as he maintains, never informed of the existence of the registered letter of 5 May 2011.
- 44 In any event, it is not apparent from the file that a notice of attempted delivery was actually left at the applicant's place of residence by the Greek postman. Still less does the file allow the date on which such a notice would have been left to be established, which would, according to the circumstances, make it possible to prove that the applicant actually failed to take any steps to collect the letter within the period for which it was normally kept by the Greek postal service or allow the Tribunal to evaluate the reasons, put forward by the applicant, why such steps could not have been taken.
- 45 In those circumstances, as Frontex has not adduced proof of proper notification by registered letter, the plea of inadmissibility alleging that the action is out of time must be rejected.

Substance

- 46 In support of his action, the applicant relies on four pleas in law alleging (i) infringement of essential procedural requirements, (ii) breach of the principle of the protection of legitimate expectations, (iii) a manifest error of assessment and (iv) an insufficient and contradictory statement of reasons.
- 47 In the first plea, alleging infringement of essential procedural requirements, the applicant submits that, according to the decision of 27 August 2009, the Deputy Executive Director should have acted, in the process for the renewal of his contract, exclusively as countersigning officer and not as both reporting officer and countersigning officer. The duties of reporting officer should have been carried out both by the Director of the Administrative Division, as regards the tasks performed in the Administrative Services Unit and the administrative tasks performed within Frontex's Operational Office in Greece, and by the Director of Operations, as regards the Frontex Operational Office pilot project. That lack of competence vitiated the contested decision and deprived the applicant of the guarantee represented by the consultation between the reporting officer and the countersigning officer, referred to in Article 11(4) of the decision of 27 August 2009.
- 48 Frontex contends, first, that the internal directives do not provide for a conciliation procedure between the staff member concerned, on the one hand, and the reporting officer and countersigning officer on the other.

- 49 Secondly, the reporting officer is, by default, the jobholder's direct line manager at the beginning of the appraisal exercise, whilst the countersigning officer is, by default, the direct hierarchical superior of the reporting officer. At the hearing, Frontex explained that it was necessary to designate as reporting officer the jobholder's hierarchical superior in office at the time when the procedure for the renewal of the contract was carried out. Frontex relied, in that regard, on a communication to staff concerning the appraisal procedure in which the reporting officer is designated as 'the jobholder's direct line manager at the end of the period covered by the report (31 December)'.
- 50 In the present case, Frontex states that, following his appointment, in August 2010, as Head of Frontex's Operational Office in Greece, the applicant was placed under the hierarchical authority of the Deputy Executive Director, who thereby became his reporting officer, while the Executive Director thereby became his countersigning officer in his capacity as the hierarchical superior of the reporting officer. It is precisely in their respective capacities as countersigning officer and reporting officer that the Executive Director and the Deputy Executive Director acted during the procedure for the renewal of the applicant's contract. The Deputy Executive Director also acted as countersigning officer in making his recommendation not to renew the applicant's contract, while the Executive Director's signature covered his acting both as countersigning officer and as Executive Director as such.
- 51 In that regard, it must be borne in mind that, according to point 2 of the Guidelines, the procedure for the renewal of contracts of members of Frontex's temporary staff consists of four stages:
- after the member of staff concerned has shown his interest in the renewal of his contract (points 2(a) and 2(b)), the reporting officer writes his comments and a proposal regarding renewal on a specific form (point 2(c));
 - the countersigning officer assesses the proposal from the reporting officer and expresses his agreement or his disagreement and the reasons for it on the same form; if the reporting officer and the countersigning officer disagree, the latter must state the reasons for his disagreement in writing (point 2(d));
 - the Director of the Division makes a recommendation on the form (point 2(d));
 - the Executive Director takes the final decision [point 2(e)].
- 52 In the present case, it is apparent from the file that the Deputy Executive Director carried out the duties of reporting officer in implementing the procedure for renewal of the applicant's contract under the Guidelines. He also intervened to make a recommendation for non-renewal, which the Executive Director followed in taking the contested decision. The fact remains that no-one acted, in the process for the renewal of the applicant's contract, as countersigning officer or, in any event, the Deputy Executive Director acted both as reporting officer as countersigning officer.
- 53 Under Article 3 of the decision of 27 August 2009, the reporting officer is, by default, the jobholder's direct line manager at the start of the appraisal exercise, which commences at the beginning of each year following that in the course of which the merits of the person concerned are appraised, as is apparent from Article 4(1) of that decision. The question that arises is which exercise should be taken into consideration as regards a contract renewal procedure which was carried out, as in the present case, in 2010. In the absence of any information to the contrary, that can only be the 2010 exercise. It would not be justifiable, despite the observations made Frontex at the hearing in reply to the questions asked by the Tribunal, to take the 2009 exercise into consideration, since, in that case, the reporting officer would be the hierarchical superior of the member of the staff at the beginning of 2009, a period in time which is relatively distant from that of the expiry of the contract in question. It would also be surprising if the 2011 exercise were to be taken into account as, by definition, it would not yet have begun at the time when the renewal procedure was carried out.

- 54 In those circumstances, it must be held that, in the present case, at the time when the 2010 exercise began, the applicant's reporting officer was Mr C., his direct hierarchical superior in January 2010, and the countersigning officer was the Deputy Executive Director, who was, at that time, Mr C.'s direct hierarchical superior.
- 55 It follows that the procedure as organised by the Guidelines was not properly followed in this case.
- 56 It is settled case-law that an internal directive is a decision of a European Union institution or body which is communicated to all staff and seeks to ensure that the officials and members of the staff concerned are treated identically, in an area in which that institution or body has a broad discretion conferred by the Staff Regulations, and must, as such, be regarded as an indicative rule of conduct which the administration imposes upon itself and from which it may not depart without stating the reasons which have led it to do so, since otherwise the principle of equal treatment would be infringed (judgment of 9 July 1997 in Case T-92/96 *Monaco v Parliament*, paragraph 46; see, as regards the appraisal of staff, judgment in Joined Cases F-99/07 and F-45/08 *Bernard v Europol*, paragraph 79 and the case-law cited).
- 57 In the present case, the Guidelines, which set out a certain number of rules concerning the renewal of contracts of members of the temporary staff within Frontex, constitutes an internal directive for the purposes of the abovementioned case-law.
- 58 It is true that the lack of competence established above does not concern the author of the contested decision himself, namely the Executive Director of Frontex, but the persons who should have been consulted, in this case the reporting officer and the countersigning officer, in the course of the process for the renewal of the applicant's contract in accordance with the Guidelines. Such a procedural irregularity could therefore result in the annulment of the contested decision only if it is shown that that procedural irregularity could have had an influence on the content of the decision (see, to that effect, judgment of 29 October 1980 in Joined Cases 209/78 to 215/78 and 218/78 *Landewyck and Others v Commission*, paragraph 47; judgment of 9 March 1999 in Case T-212/97 *Hubert v Commission*, paragraph 53). That is inherently the case here, since it cannot be ruled out that, had the reporting officer and the countersigning officer been properly selected, they would have made different or differently reasoned proposals as regards the renewal of the applicant's contract when called upon to decide on the applicant's professional performance, and thus had an influence on the content of the decision of the Executive Director entitled to take the final decision.
- 59 The contested decision must therefore be annulled for infringement of essential procedural requirements, without there being any need to examine the other pleas put forward by the applicant.

Costs

- 60 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.
- 61 It follows from the reasoning set out in the present judgment that Frontex is the unsuccessful party. Furthermore, in his pleadings the applicant expressly requested that Frontex 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, Frontex must bear its own costs and be ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

hereby:

- 1. Annuls the decision of the Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, of 16 December 2010, not to extend Mr Wahlström's contract as a member of the temporary staff;**
- 2. Orders the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union to bear its own costs and to pay the costs incurred by Mr Wahlström.**

Van Raepenbusch

Boruta

Perillo

Delivered in open court in Luxembourg on 30 January 2013.

W. Hakenberg
Registrar

S. Van Raepenbusch
President