



Reports of Cases

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

24 March 2011 *

(Civil service — Officials — Promotion — 2009 promotion exercise — Decision not to promote — Consideration of comparative merits — Manifest error of assessment — Action for annulment — Action for damages)

In Case F-104/09,

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

Diego Canga Fano, an official of the Council of the European Union, residing in Brussels (Belgium), represented by S. Rodrigues and C. Bernard-Glanz, lawyers,

applicant,

v

Council of the European Union, represented by M. Bauer and K. Zieleskiewicz, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni, President, H. Kreppel and M.I. Rofes I Pujol (Rapporteur), Judges,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 14 September 2010,

gives the following

Judgment

- 1 By application lodged at the Registry of the Tribunal on 21 December 2009 by fax (the original having been received on 23 December 2009), Mr Canga Fano brought the present action for annulment of the decision not to promote him to grade AD 13 under the 2009 promotion exercise and for an order that the Council of the European Union pay him the sum of EUR 200 000 by way of compensation for the non-material and professional damage which he claims to have sustained.

* Language of the case: French.

Legal context

- 2 Article 45(1) of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'Promotion shall be by decision of the appointing authority in the light of Article 6(2) [of the Staff Regulations]. It shall be effected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the appointing authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) [of the Staff Regulations] and, where appropriate, the level of responsibilities exercised by them.'

Facts giving rise to the dispute

- 3 It is apparent from the case-file that the applicant entered the service of the General Secretariat of the Council ('the GSC') on 1 September 1991 as an official in grade A 7. He was promoted most recently to grade A 4 (now grade AD 12) on 1 June 2001. Since 1 April 1994 he has been assigned to the Council's Legal Service. However, during the period from 1 October 1999 to 30 September 2003, he was seconded in the interest of the service to the cabinet of Ms de Palacio, a member of the Commission of the European Communities. Following that period of secondment, the applicant rejoined the Legal Service in the 'External Relations' team, then from 1 October 2007 in team 1B 'Coreper I'. Since 1 June 2008 the applicant has been on secondment in the interest of the service to the cabinet of Mr Tajani, a member of the Commission, where he holds the post of Deputy Head of Cabinet.
- 4 By Notice to Staff No 50/09 of 5 March 2009 the GSC informed the officials of the material made available to the advisory committees on promotion for the 2009 promotion exercise and also of the measures adopted in order to implement Article 45 of the Staff Regulations. Annex 2 to that notice stated, for each grade, the number of promotions possible in 2009 and Annex 3 contained the list of officials eligible for promotion. Thus, according to Annex 2, there were 19 posts to be filled in grade AD 13 for administrators assigned to general duties, while there were 91 officials in grade AD 12 assigned to general duties on the list in Annex 3, where the applicant was placed 20th in order of seniority in grade.
- 5 According to Notice to Staff No 50/09, the advisory committees on promotion had at their disposal, inter alia, the staff reports on each official eligible for promotion from the time of his appointment to grade AD 12 to the most recent report available, namely the staff report for the period from 1 July 2006 to 31 December 2007 ('the 2006-07 staff report').
- 6 The GSC attached to Notice to Staff No 54/09 of 10 March 2009 statistics relating to the 2006-07 appraisal period in particular, Table 2.1, containing statistics drawn up according to the grades of the officials ('Table 2.1'), and Table 3.1, corresponding to statistics by directorate-general/directorate/large department ('Table 3.1'). According to Notice to Staff No 54/09, those statistics had also been communicated to the advisory committees on promotion.
- 7 On completion of its work, the advisory committee on promotion for function group AD (officials assigned to posts as administrator) submitted to the appointing authority a list — relating to administrators assigned to general duties — containing the names of the 19 officials proposed for promotion to grade AD 13 ('the list of officials promoted to grade AD 13'), 10 of whom had less seniority in grade than the applicant. The applicant was not on that list.

- 8 By Notice to Staff No 94/09 of 27 April 2009 the appointing authority informed officials that it had decided to follow the opinion expressed by the advisory committee on promotion and to promote to grade AD 13 the 19 officials proposed.
- 9 By letter of 27 May 2009 the applicant, referring to Article 90(1) of the Staff Regulations, challenged the decision not to promote him apparent from Notice to Staff No 94/09.
- 10 By decision of 24 September 2009, notified to the applicant the following day, the appointing authority classified the letter of 27 May 2009 as a complaint within the meaning of Article 90(2) of the Staff Regulations and rejected it.

Forms of order sought by parties

- 11 The applicant claims that the Tribunal should:
 - declare the present application admissible;
 - annul the appointing authority's decision not to include him in the list of officials promoted to grade AD 13, apparent from Notice to Staff No 94/09;
 - annul, in so far as necessary, the appointing authority's decision rejecting his complaint;
 - order the Council to pay the applicant:
 - a sum fixed on equitable grounds at EUR 150 000 by way of compensation for non-material damage, together with default interest at the statutory rate from the date on which such sum becomes payable;
 - a sum fixed on equitable grounds at EUR 50 000 by way of compensation for damage to his professional career, together with default interest at the statutory rate from the date on which such sum becomes payable;
 - order the Council to pay the costs.
- 12 The Council contends that the Tribunal should:
 - dismiss the action as unfounded;
 - order the applicant to pay all the costs.

Procedure

- 13 The applicant requested the Tribunal to ask the Council, by way of measures of organisation of procedure provided for in Articles 55 and 56 of the Rules of Procedure, to produce the staff reports of the 19 officials promoted to grade AD 13. The Tribunal decided to grant that request in part.
- 14 Thus, the Council was initially asked, by letter of the Registry of the Tribunal of 15 June 2010, to answer a number of written questions and to produce the anonymised staff reports on the 10 officials with less seniority in grade than the applicant whose names were on the list of officials promoted to grade AD 13 ('the 10 officials concerned').

- 15 By letter received at the Registry of the Tribunal on 6 July 2010 by fax (the original having been received on 12 July 2010), the Council answered those questions and supplied the anonymised staff reports on the 10 officials concerned for the period from the time of their appointment to grade AD 12 to their staff report for the exercise 1 July 2006 to 31 December 2007. The Council also sent the Tribunal a synoptic table setting out the information extracted from the last two staff reports on the applicant and on each of the 10 officials concerned, identified by letters A to J. That table contains, for each of those staff reports, a description of the functions and/or level of responsibilities exercised, an extract from the general assessments and the average of the analytical assessments. The table also indicates the languages used in the execution of their duties ('the synoptic table').
- 16 Next, the parties were invited, in the preparatory Report for the Hearing, which was sent to them by letter from the Registry of the Tribunal of 23 July 2010, to provide the Tribunal, before the hearing, with their observations in support of their arguments in the light of the documents produced by the Council in answer to the measures of organisation of procedure. The applicant complied with that request by letter received at the Registry of the Tribunal on 31 August 2010 by fax (the original having been lodged on 2 September 2010), while the Council's observations were received at the Registry of the Tribunal on 1 September 2010 by fax (the original having been lodged on 6 September 2010).
- 17 In his reply, the applicant complained that the reproductions of the various staff reports supplied did not make it possible in all cases to distinguish clearly the mark attributed to the criteria 'Productivity' and 'Speed in performing tasks'.
- 18 Before the hearing, the President of the First Chamber asked the applicant's representative whether he accepted the averages of the analytical assessments in the synoptic table, which included the marks — relating to the two criteria mentioned in the preceding paragraph — assigned to each of the 10 officials concerned or whether, on the contrary, he requested that those reproductions be communicated in a more legible form.
- 19 The applicant's representative stated that he agreed that those averages should be considered correct and waived the right to have the pages of the staff reports containing a figure that was not readily legible communicated again.

Subject-matter of the action

- 20 In addition to the annulment of the appointing authority's decision not to include him in the list of officials promoted to grade AD 13, the applicant seeks annulment of the appointing authority's decision of 24 September 2009 rejecting the claims in the applicant's letter of 27 May 2009, which was classified by the appointing authority as a complaint within the meaning of Article 90(2) of the Staff Regulations ('the decision of 24 September 2009').
- 21 In that regard, 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 (judgment of 29 September 2009 in Case F-102/07 *Kerstens v Commission*, paragraph 31 and the case-law cited).
- 22 In the present case, as the claim for annulment of the decision of 24 September 2009, as such, lacks any independent content, the action must be deemed to be directed against the appointing authority's decision not to include the applicant in the list of officials promoted to grade AD 13, apparent from Notice to Staff No 94/09 ('the contested decision').

The claim for annulment

- 23 The applicant relies on two pleas in law in support of his claim for annulment. The first plea alleges breach of Article 45(1) of the Staff Regulations in that the appointing authority made a number of manifest errors of assessment. The second plea alleges misuse of power and of procedure.

First plea, alleging breach of Article 45(1) of the Staff Regulations

Arguments of the parties

- 24 The applicant maintains that the appointing authority made a manifest error of assessment when carrying out a comparative examination of the staff reports. In so far as 10 of the 19 officials promoted had less seniority in grade than the applicant and it is only in the alternative that the appointing authority can take the age and seniority in grade or service into account those 10 officials must, in order to be promoted, necessarily have been more deserving than the applicant. However, there is a real body of evidence such that it would be unlikely that 10 persons having less seniority in grade than the applicant would have greater merits.
- 25 In the applicant's submission, his staff reports from the time of his appointment to grade AD 12 until his report for the period 1 July 2006 to 31 December 2007 are particularly complimentary, the last report stating expressly that 'he deserves to be promoted to a higher grade'. The fact that he has not been promoted since 2001 is therefore 'clearly a departure from the norm'. In the 2006-07 staff report the applicant obtained, in his analytical assessments, an average of 2, which is significantly better than the average score of AD 12 officials in the GSC and that of officials in the Legal Service. Last, the fact that he carried out perfectly his task as chair of the selection board for competitions EPSO/AD/46/06 and EPSO/AD/47/06 for the recruitment of lawyers in grade AD 5 from Romania and Bulgaria and that he speaks five languages ought to demonstrate the extent of his merits.
- 26 The applicant also takes issue with the appointing authority for having made a manifest error of assessment in that it failed to take his linguistic abilities into account. The applicant asserts that, apart from the minimum required, that is to say, English and French, he speaks three other languages. Those additional qualities ought to have been taken into account in the examination of his merits.
- 27 Last, in the applicant's submission, the appointing authority also made a manifest error of assessment in so far as it failed to take into consideration, among the applicant's responsibilities, the fact that he chaired the selection board for competitions EPSO/AD/46/06 and EPSO/AD/47/06, referred to above, notice of which was published in June 2006 and the list of successful candidates in December 2007. The applicant claims that the chairmanship of the selection boards for those competitions, which had a large number of candidates and which had entailed an increased workload for the applicant, in addition to his duties within the Legal Service, was an important, difficult and delicate task, which he was able to bring to a successful conclusion. There was no negative effect on the quality of his work in the Legal Service. The fact that he accomplished that task, which is not an insignificant matter, constitutes a significant achievement that ought to have had a substantial impact on the evaluation of his merits.
- 28 The Council contends that this plea should be rejected as unfounded.

Findings of the Tribunal

- 29 It should be borne in mind at the outset that, pursuant to Article 45(1) of the Staff Regulations, when considering comparative merits of officials eligible for promotion, the appointing authority is in particular to take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge and, where appropriate, the level of responsibilities exercised by them.
- 30 The Tribunal has held that, in a sphere in which the administration has a wide discretion, the express reference to those criteria in Article 45 of the Staff Regulations shows the particular importance which the legislature attached to their being taken into account (judgment of 31 January 2008 in Case F-97/05 *Buendía Sierra v Commission*, paragraph 62). The particular reference in Article 45(1) of the Staff Regulations to the level of responsibilities exercised by the official seems to acquire even greater significance because the General Court, in its judgment of 12 July 2001 in Case T-131/00 *Schochaert v Council*, paragraph 43, had held that the fact of taking as a decisive criterion the level of responsibilities exercised by the officials eligible for promotion was contrary to Article 45(1) in the version in force before 1 May 2004 (judgment of 5 May 2010 in Case F-53/08 *Bouillez and Others v Council*, paragraph 49).
- 31 Furthermore, the Tribunal has held, first, that the provisions of Article 45(1) of the Staff Regulations applicable from 1 May 2004 are clearer, with respect to the elements to be taken into consideration for the purposes of promotion, than the provisions of that article in the version in force before that date, since, in addition to referring to the staff reports, they refer to the use of languages other than the language for which the officials concerned have produced evidence of thorough knowledge and, where appropriate, the level of responsibilities exercised. The Tribunal has held, second, that in principle it is in the light of those three elements that the appointing authority must now consider the comparative merits of the officials eligible for promotion, the word 'merits' in Article 45(1) of the Staff Regulations thus having a different and substantively wider scope than the same word used in the version of that article applicable before 1 May 2004 (judgment of 7 November 2007 in Case F-57/06 *Hinderyckx v Council*, paragraph 45). The Tribunal has also held that the expression 'where appropriate' simply means that while, in principle, officials in the same grade are supposed to hold posts involving equivalent duties and responsibilities, where that is not in fact the case that circumstance must be taken into consideration in the promotion procedure (see, to that effect, *Bouillez and Others v Council*, paragraph 56).
- 32 The appointing authority may, as a subsidiary matter, where the merits of the officials eligible for promotion are equal, on the basis of the three elements expressly referred to in Article 45(1) of the Staff Regulations, take into account other elements, such as candidates' age and their seniority in grade or in the service (*Bouillez and Others v Council*, paragraph 50).
- 33 Last, it must be borne in mind that, according to consistent case-law, the appointing authority has, for the purposes of considering the comparative merits of officials who are candidates for promotion, a wide discretion and that review by the Courts of the European Union must be limited to ascertaining whether, regard being had to the ways and means that led the administration to its assessment, it remained within unimpeachable limits and did not manifestly misuse its power. The Courts cannot therefore substitute their own assessment of the candidates' qualifications and merits for that of the appointing authority (judgment of 15 September 2005 in Case T-132/03 *Casini v Commission*, paragraph 52).
- 34 However, the wide discretion thus conferred on the administration is limited by the need to consider candidates' comparative merits carefully and impartially, in the interest of the service and in accordance with the principle of equal treatment. In practice, that examination must be carried out on a basis of equality, using comparable sources of information (*Casini v Commission*, paragraph 53).

- 35 It is therefore in the light of those principles that the Tribunal must examine whether the contested decision is vitiated by a manifest error of assessment. In that regard, the Tribunal observes that, without prejudice to the practical effect that the appointing authority's discretion must be acknowledged to have, an error is manifest where it is easily recognisable and can be readily detected, in the light of the criteria to which the legislature intended decisions on promotion to be subject.
- 36 It is apparent from the documents in the file that under the system of promotion applied at the Council the appointing authority has a wide discretion when considering the comparative merits of officials who are candidates for promotion.
- 37 In the present case, in order to deliver its opinion, on which the appointing authority relied, the advisory committee on promotion for function group AD had before it, in particular, the staff reports drawn up on each official eligible for promotion from the time of his appointment to grade AD 12 until his staff report for the period 1 July 2006 to 31 December 2007, career histories, summaries of leave taken on the ground of sickness or accident during the last three years and also Tables 2.1 and 3.1.
- 38 Furthermore, while it is true that the applicant, in the arguments which he develops in support of the first plea, refers to the 19 officials promoted to grade AD 13, and that he asked the Tribunal to request communication of the staff reports on those 19 officials, it is apparent from the file that he disputes, in fact, the appointing authority's consideration of the comparative merits of the applicant and the 10 officials concerned.
- 39 Indeed, at paragraphs 25, 32 and 33 of the application, the applicant asserts that the assessment of merits is the decisive criterion of any promotion and that it is only as a subsidiary matter, where the merits are equal, that the appointing authority may take candidates' age and seniority in grade or service into account. Since 10 of the 19 officials promoted had less seniority in grade AD 12 than the applicant, the likelihood that they had greater merits is in his view very small.
- 40 Likewise, at no time in the procedure, or in the written observations submitted before the hearing in the light of the Council's response to the measures of organisation of procedure, or during the hearing, did the applicant take issue with the fact that the Tribunal had limited those measures to the staff reports on the 10 officials concerned, nor did he refer to the 9 officials whose seniority in grade AD 12 was greater than the applicant's, whose staff reports the Tribunal had not requested the Council to produce.
- 41 The first plea of breach of Article 45(1) of the Staff Regulations must therefore be understood as alleging that the appointing authority made errors of assessment when considering the comparative merits of the applicant and the 10 officials concerned.
- 42 For the purpose of undertaking a comprehensive examination of the relevance of this plea, it is appropriate to analyse not only the staff reports but also the other evidence in the file relating to the use of languages and the level of responsibilities exercised.

– The staff reports

- 43 The applicant has produced, *inter alia*, the staff reports relating to him from his appointment to grade AD 12 to the staff report for 2006-07, with the exception of the staff report for the period 1 October 2003 to 31 December 2004. When questioned on that point at the hearing, the applicant expressed doubt as to the existence of a staff report covering that period and indicated that the explanation might be that, on 1 October 2003, when he rejoined the Legal Service following his secondment to the Commission, the appraisal procedure at the Council was already in progress.

- 44 In the first place, as regards the analytical assessments, it is apparent from the Council's observations of 1 September 2010 that the advisory committee on promotion essentially took into account the analytical assessments corresponding to the 2006-07 reports on the applicant and the 10 officials concerned. Those analytical assessments are divided into 13 headings, which must be graded with the comment 'excellent', 'very good', 'good', 'fair' or 'unsatisfactory'.
- 45 In Staff Notice No 54/09 it is stated that the grades 'excellent', 'very good', 'good', 'fair' and 'unsatisfactory' correspond to the numbers '1', '2', '3', '4' and '5' respectively. The numbered grades were used in preparing statistics, in particular Tables 2.1 and 3.1, which show the average marks established respectively according to grade and by directorate-general. It follows from Table 2.1 that the average mark obtained by officials in grade AD 12 was 2.28.
- 46 Indeed, the average of the applicant's analytical assessments for the period from 1 July 2006 to 31 December 2007, namely 2, was significantly better than the average mark mentioned in the preceding paragraph. That element is indicative of the quality of the applicant's merits as regards the last appraisal period taken into account for the purpose of the 2009 promotion exercise.
- 47 It is apparent from the documents in the file that in their 2006-07 staff reports 4 of the 10 officials concerned, namely A, E, I and J, obtained an average in their analytical assessments which is lower than the applicant's and therefore better (1.77 for the first of those officials and 1.92 for the other three). Three of the 10 officials concerned, namely B, C and H, had an average of 2, like the applicant, while the average obtained by officials D, F and G was higher than the applicant's and therefore not as good (2.15 for the first and 2.08 for the other two).
- 48 It must be observed, however, that the discrepancy between the average of the applicant's analytical assessments and the — worse — average of the latter three officials is in a very narrow margin, so that that discrepancy may be regarded, in the present case, as negligible.
- 49 The applicant maintains that the fact that 4 of the 10 officials concerned obtained a lower average in their analytical assessments than the applicant's average must be placed in perspective, in so far as those officials work in directorates-general in which, according to Table 3.1, the appraisal was lower than the average mark in the GSC.
- 50 In that regard, it must be held that, as is apparent from that table, the average mark obtained by officials of the Legal Service, namely 2.35, is very close to the general average mark of the GSC, which is 2.36. It also follows from the documents in the file that the four officials promoted with analytical assessments the average of which is lower than the applicant's belong to directorates-general in which the average mark is between 2.21 and 2.30, and therefore at a lower level than that in the Legal Service. According to that table, the average marks of the various directorates-general vary between 2.05 (the best) and 2.63 (the least good).
- 51 It is therefore true that the four officials referred to above belong to directorates-general in which the assessors were more 'generous' with all their staff than the assessors in the Legal Service. The fact none the less remains that the lowest average mark in those directorates-general is 2.21, or 0.15 below the general average mark in the GSC and 0.14 of a point below the average mark in the Legal Service, while the average marks in the various directorates-general differ by 0.58 of a point.
- 52 Against that background, it should be observed that the difference pointed out in the preceding paragraph between the average mark of the appraisal in the Legal Service and that in the directorates-general to which the four officials promoted whose analytical assessments are, on average, better than the applicant's belong cannot be decisive for the grant of promotion.

- 53 First, the average marks established by directorates-general are calculated by reference to the number of officials in each one, without any distinction between officials according to their grade, the function group to which they belong or whether or not they are eligible for promotion during the exercise in question. Second, the average of the analytical assessments constitutes only part of the data which the advisory committee on promotion takes into account when considering the comparative merits.
- 54 The applicant claims, moreover, that in the evaluation of his merits the fact that he had acted as chair of the selection board in competitions EPSO/AD/46/06 and EPSO/AD/47/06 was not taken into account. The applicant emphasised at the hearing that that task entailed a considerable increase in his workload, which he carried out without any adverse effect on his normal activities within the Legal Service of the Council.
- 55 It must be observed, in that regard, first, that the applicant's 2006-07 staff report expressly mentions, in the description of the tasks performed by the applicant, that '[d]uring a large part of the reference period, [the applicant] chaired the selection board for competitions [EPSO/AD/46/06 and EPSO/AD/47/06] (lawyers)'. Second, as regards the analytical assessment of the quality of the applicant's work in the same staff report, the applicant was awarded an 'excellent', whereas in his staff report for the period 1 January 2005 to 30 June 2006 he was given only a 'very good'.
- 56 It follows that both the first two assessors who acted as 'first assessor' and drew up the applicant's staff report and the second assessor were aware of the additional effort made by the applicant during the reference period. The improvement in the analytical assessment of the quality of the applicant's work referred to above, moreover, appears to indicate that his acting as chair of the selection board in those competitions was indeed taken into account when his 2006-07 staff report was drawn up.
- 57 In the second place, as regards the general assessments, it is true that the general assessments in the applicant's staff reports since his appointment to grade AD 12 are expressed in particularly glowing terms. Thus, in his 2006-07 staff report, the first assessor who appraised the applicant for the period 1 July 2006 to 30 September 2007 states that the applicant is 'an outstanding colleague' and 'an excellent lawyer'. In addition, the first assessor who appraised the applicant for the period 1 October to 31 December 2007 states that he has an 'exceptional knowledge of Community law', that 'his particularly well-developed capacity for comprehension and judgement enable him to provide legal opinions, both orally and in writing, of a very high level' and adds that '[h]e deserves to be promoted to the next higher grade'.
- 58 However, it is apparent from the file that the general assessments expressed in the staff reports on the 10 officials concerned since their appointment to grade AD 12 are equivalent to the applicant's. The Tribunal has seen no remark that would indicate that their merits were less.
- 59 It should likewise be noted that phrases such as 'the official concerned deserves to be promoted or to be given increased responsibilities' appear, for several of the 10 officials concerned, in their staff reports before their 2006-07 staff reports. However, such appraisals on the part of the first assessors cannot bind the appointing authority as regards the grant of promotion to the official concerned, which is confirmed by the fact that, in spite of receiving such appraisals, none of those officials was promoted before the 2009 exercise.
- 60 Indeed, the rules applicable to the assessment procedure do not provide that the assessors are to comment on whether the official being appraised deserves to be promoted. Where the assessors take the initiative to recommend promotion for one or other of the members of their team, they are expressing a view that cannot bind the appointing authority, in so far as promotion can be awarded only after consideration of the comparative merits of all the officials of an institution who are eligible for promotion to the same grade. Consequently, such appraisals cannot have the same weight as those

resulting from elements which the assessor is required to appraise, and the appointing authority is entitled to promote an official when it considers that such promotion is justified, even in the absence of comments in favour of promotion expressed in the official's staff report.

- 61 For the sake of completeness, the observation that the applicant deserves promotion must be placed in perspective in so far as it was made by a first assessor whose appraisal covered only 3 of the 18 months of the period being assessed.
- 62 In his observations received at the Registry of the Tribunal on 31 August 2010, the applicant also claims that in one of the staff reports placed on the file by the Council, according to which the official being appraised deserves to be promoted, the second assessor stated that he agreed with the written observations of the first assessor, but that he considered that the analytical assessments awarded were inconsistent with the instructions given. However, in so far as the second assessor did not alter the analytical assessments, the Tribunal must consider that they were endorsed by the latter.
- 63 In the light of the foregoing, it must be held that a comparative examination of the staff reports does not clearly demonstrate that the other officials were not more deserving than the applicant.

– Use of languages

- 64 As regards the use of languages, the applicant claims that he speaks five languages and takes issue with the appointing authority for not having attributed sufficient importance to his linguistic abilities.
- 65 With respect to those linguistic abilities, the Council states in its defence that the criterion of the use of languages 'constitutes rather a subsidiary criterion which makes it possible to distinguish between candidates whose staff reports are equivalent'.
- 66 However, in the light of Article 45(1) of the Staff Regulations, it is clear that the criterion relating to the use by officials in the exercise of their duties of languages other than the language for which they have produced evidence of thorough knowledge is not a subsidiary criterion, in the sense that it is only where the officials eligible for promotion have equal merits that that criterion might constitute a decisive factor in the appointing authority's choice.
- 67 In its response of 6 July 2010 to the measures of organisation of procedure, the Council stated that 'the relative weight of each of the elements taken into account is not precisely determined' and that the appointing authority's choice was based on an overall assessment of the merits of officials in which the staff reports taken as a whole and the level of responsibilities carried the greatest weight, while the use of languages was taken into account in the consideration of comparative merits at a weight 'well below' the two elements referred to above. At the hearing the Council confirmed that the use of languages is one of the first criteria to be taken into account in the examination of merits, but that that criterion carries less weight than the other two. Likewise, the defendant emphasised that the appointing authority did not compare each of the criteria in isolation, but that, for each candidate, it made an overall and weighted assessment of those criteria.
- 68 In that regard, the Tribunal observes that it is true that the administration has a certain discretion as to the respective importance that it ascribes to each of the three criteria provided for in Article 45(1) of the Staff Regulations, as that provision does not preclude the possibility of weighting.
- 69 As regards the languages employed in the execution of duties, the Tribunal observes that the applicant does not specify whether he used the five languages referred to above in the execution of his duties during the period examined, namely between 1 June 2001 and 31 December 2007.

70 In that regard, it should be observed that the applicant's 2006-07 staff report states, in the first part, Section III, entitled 'Languages':

'[The applicant], a native Spanish speaker, regularly works in French and English, both orally and in writing. He sometimes also works in German (orally).'

71 At the hearing the applicant stated that, during the period examined for the purposes of the 2009 promotion exercise, he used German, Italian and Portuguese only orally, in or in connection with meetings.

72 As regards the concept of languages used, the Tribunal observes that, according to the sheet providing information on knowledge of languages, which has the headings 'understanding', 'spoken [language]' and 'written [language]', attached to the 2006-07 staff report and completed by the applicant on 29 January 2007, the applicant stated that he had very good knowledge of French and English, but, as regards German, only a good ability to understand the language, a good level of the spoken language and a fair level in written language and, as regards Italian, only a good ability to understand the language and a fair level of spoken and written language. Last, still according to that information sheet, the applicant's knowledge of Portuguese is limited to a fair level of understanding.

73 In his letter of 27 May 2009 the applicant states that he now has good knowledge of Italian, which is one of the working languages which he uses most owing to his role as Deputy Head of Cabinet of Mr Tajani, a member of the Commission, a post which he has held since 1 June 2008.

74 However, as the Council quite rightly observes in its decision of 24 September 2009, the advisory committee on promotion could not take into consideration elements relating to a period after the last staff report of the officials eligible for promotion, namely the staff report covering the period from 1 July 2006 to 31 December 2007. In addition, the only elements relating to languages which the advisory committee on promotion had available were the staff reports on each official eligible for promotion from the time of his appointment to grade AD 12 until to the 2006-07 staff report. In accordance with the principle of equal treatment, neither that committee nor the appointing authority could therefore allow officials who were not promoted to rely on elements on which the other officials eligible for promotion had been unable to rely.

75 It must therefore be held that the applicant's claims at the hearing concerning his knowledge of spoken Italian and Portuguese do not coincide with the information relating to his knowledge of languages in the sheet attached to the 2006-07 staff report. According to that sheet, the applicant states that he has a fair knowledge of spoken Italian, while the boxes corresponding to his concepts of Portuguese, as a spoken language, are not even completed.

76 While it is true that that sheet was completed on 29 January 2007 and could not therefore apply to the applicant's knowledge of languages on 31 December 2007, the Tribunal observes that the applicant himself insists that his abilities in Italian are now at the same level as his abilities in French and English. The applicant therefore implicitly admits that on 31 December 2007 his abilities in Italian were less good than they are now. In any event, the applicant adduces no evidence to demonstrate that on 31 December 2007 his knowledge of spoken Italian and Portuguese had improved since January 2007. The Tribunal can therefore reasonably consider that on that date the applicant's abilities in spoken Italian and Portuguese were not sufficiently high to be taken into account for the purposes of the comparison of linguistic merits.

77 It must therefore be concluded that at the end of the period examined by the advisory committee on promotion, namely on 31 December 2007, in addition to Spanish, as his mother tongue, the applicant had a command of French and English. He also had a good knowledge of German, although his

knowledge of written German was limited, and he had a good understanding of Italian. As for the use of those languages, while it is true that the applicant occasionally spoke German, the fact remains that he used only two languages regularly in his work, namely English and French.

78 In that regard, it is apparent from the documents in the file that, among the 10 officials concerned, all used English and French in the execution of their duties. Contrary to the Council's contention, however, not all those officials had a perfect command of those two languages and among those having English or French as their mother tongue not all had a command of at least one third language. It is none the less clear from the file that all those without a command, or a perfect command, of the languages concerned had at least a good knowledge of them.

79 Consequently, the applicant's knowledge of languages appears to be essentially equivalent to that of the 10 officials concerned in the execution of their duties.

– The level of responsibilities exercised

80 As regards the level of responsibilities exercised, it is apparent from the file that all the 10 officials concerned, with the exception of official B, carried out management functions during the period from 1 July 2006 to 31 December 2007. Those nine officials exercised the functions of head of unit or coordinated de facto the work of a team in sensitive areas. The applicant and official B worked during that period as lawyers in the Council's Legal Service.

81 It must be held, consequently, that 9 of the 10 officials concerned executed duties involving, in terms of management, a higher level of responsibilities than the applicant's, while the duties of the 10th official, official B, were at the same level.

82 In that context, the applicant maintains that any additional tasks entrusted to officials eligible for promotion must be examined as the responsibilities assumed in the performance of their duties. Thus, he emphasises that, during the period between June 2006 and December 2007, namely for most of the period examined in the 2006-07 staff report, he acted as chair of the selection board for competitions EPSO/AD/46/06 and EPSO/AD/47/06, which entailed an increased workload in addition to his duties within the Legal Service. Practically none of the 10 officials concerned assumed equivalent additional tasks. Accordingly, the applicant maintains that the appointing authority made a manifest error of assessment in so far as it did not sufficiently take into account, in the assessment of the applicant's merits, the fact that the applicant, in addition to performing his normal tasks, had chaired the selection board for those competitions.

83 The Tribunal must therefore ascertain whether, in the light of the management duties and the high level of responsibilities executed by 9 of the 10 officials concerned, the merits of those officials seem to be greater than the applicant's, taking account of the fact that the applicant assumed the additional task referred to above.

84 In that regard, it is common ground that the task of chairing the selection board for competitions EPSO/AD/46/06 and EPSO/AD/47/06 is evidence not only of an increased workload, over and above the duties which the applicant was required to execute within the Legal Service, but also of a high level of responsibilities, as, moreover, the Council acknowledges. However, as the Council submits, the fact of chairing a selection board is a temporary task. While it is true that that task extended over a considerable time, in fact one and a half years, the fact remains that, according to the documents in the file, the nine officials who were promoted performed management functions on a permanent basis and had done so for longer. Thus, six of them had carried out management functions since at least 1 July 2003, while two had done so since at least 1 January 2005. Last, one official had been seconded to the Special Representative of the European Union for the Great Lakes Region since 1 February 2004 and, in the context of his duties, the Council states that he assumed a very high level of responsibilities.

- 85 In the light of the foregoing, the Tribunal considers that the additional task carried out by the applicant, which indeed is praiseworthy, does not prevail, in the global assessment of merits, over management functions exercised permanently and over a long period.
- 86 The Tribunal must also ascertain whether the Council made a manifest error of assessment when undertaking an overall comparison of the applicant's merits, and in particular of the level of responsibilities exercised, with those of official B.
- 87 It is apparent from the file that official B had occupied grade AD 12 from 1 January 2004 and that, during the period between that date and 31 December 2007, he was a member of the Council's Legal Service. It follows that, during the period 1 October 2003, the date on which the applicant rejoined the Legal Service following his secondment, to 31 December 2007, the applicant and official B were attached to the same service and executed duties with a similar level of responsibility.
- 88 It is clear from the file, and the point was emphasised by the Council at the hearing, that, during the period referred to above, official B, like the applicant, had to carry out additional tasks. During the appraisal procedure for the period 1 July 2003 to 31 December 2004, official B was a marker for certain tests in an EPSO competition and he participated in the secretariat of the intergovernmental conference, notably in the updating of the draft Treaty establishing a Constitution for the European Union. In the Council's submission, the latter task constituted work the scale and volume of which were comparable to chairing a selection board for an EPSO competition. At the hearing the Commission also emphasised that official B was an extremely sound lawyer, who was extraordinarily reliable and had remarkably deep powers of analysis.
- 89 In that regard, it must be borne in mind that, as indicated at paragraph 33 of the present judgment, the appointing authority has a wide discretion and review by the Courts of the European Union must be limited to ascertaining whether the appointing authority remained within unimpeachable limits and did not manifestly misuse its power.
- 90 In the light of all the foregoing considerations, it must be held that it is not readily apparent that, on the basis of the overall assessment of the criteria laid down in Article 45(1) of the Staff Regulations, the merits of official B were not greater than the applicant's. It cannot therefore be considered that the balance ought clearly to have come down in favour of the applicant.
- 91 It follows from all the foregoing that the first plea must be rejected as unfounded.

Second plea, alleging misuse of power and of procedure

Arguments of the parties

- 92 The applicant maintains that he is able to supply sufficient precise, objective and consistent indicia from which it appears that the contested decision was taken for the purposes of covertly penalising him, contrary to Articles 37 and 38 of the Staff Regulations, for having been on secondment in the interest of the service to the Commission since 1 June 2008. The applicant emphasises that the fact of applying his abilities in the service of a cabinet of a member of the Commission is a merit and an asset, which ought to have been taken into consideration at the time of the consideration of the comparative merits of the officials eligible for promotion. In refusing to take account of that merit, and also of the precarious nature of his secondment, the Council penalised him twice, thus misusing its power, the misuse of procedure being only one form of such misuse of power.
- 93 The Council contends that the applicant produces no evidence to support his argument and that it is therefore unable to respond to this plea.

Findings of the Tribunal

- 94 First of all, it must be observed that the applicant was seconded to the Commission in June 2008, on a date after the period covered by the last staff report taken into account for the 2009 promotion exercise, namely the 2006-07 staff report. Since the advisory committees on promotion could examine only the merits which officials eligible for promotion had shown up to 31 December 2007, that secondment could not be assessed under the 2009 promotion exercise.
- 95 Furthermore, it has been held on numerous occasions that a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty (judgment of 11 July 2007 in Case F-105/05 *Wils v Parliament*, paragraph 119 and the case-law cited).
- 96 In the present case, as the Council correctly observes, the applicant has not established, or even alleged, the existence of such evidence. Indeed, he merely claims that he is more deserving than the 10 officials concerned. However, that argument is not such as to demonstrate that the contested decision was drawn up for the sole purpose of harming him.
- 97 For the sake of completeness, it is apparent from the file that the applicant was promoted to grade A 4 (now AD 12) in 2001, when he was on secondment in the interest of the service to the Commission, and to grade AD 13 in 2010, while he was on secondment in the interest of the service to the cabinet of Mr Tajani. The latter promotion may be taken into account here, even though it came after the date of the adoption of the contested decision, since it provides evidence of the conditions in which that decision was taken. In the light of that promotion, it must be held that the applicant cannot validly contend that his secondments in the interest of the service resulted in covert penalties in that they prevented his being promoted.
- 98 Consequently, it is not established that the contested decision was adopted for purposes unconnected with the promotion procedure and that it is vitiated by misuse of power.
- 99 It follows from the foregoing that the second plea must also be rejected as unfounded.
- 100 It follows that the claim for annulment must be rejected.

The claim for compensation

Arguments of the parties

- 101 The applicant claims that the fact that he was not promoted in the 2009 promotion exercise caused him to sustain serious harm, both professional harm and non-material damage. Not only did he lose one year (to be capitalised for the progress of his career and future promotions), but he was also denied the opportunity to accede to posts requiring grade AD 13. The applicant estimates that this professional harm amounts to EUR 50 000. In addition, that failure to be awarded promotion caused significant stress that contributed to undermining his health, which was already delicate owing to serious illness. That non-material damage comes to EUR 150 000.
- 102 The Council contends that this claim for compensation for professional and non-pecuniary harm should be rejected.

Findings of the Tribunal

- 103 According to consistent case-law relating to the civil service, a claim for compensation for damage must be dismissed where there is a close connection between it and a claim for annulment which has been rejected as unfounded (judgment of 12 March 2009 in Case F-104/06 *Arpaillange and Others v Commission*, paragraph 137 and the case-law cited).
- 104 In the present case, the claim for annulment has been rejected as unfounded. It follows that the claim for compensation must be dismissed.
- 105 It follows that the action must be dismissed in its entirety.

Costs

- 106 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title II 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), if equity so requires, the Tribunal may 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.
- 107 It follows from the reasons set out above that the applicant is the unsuccessful party. Furthermore, in its pleadings the Council has expressly requested that the applicant be ordered to pay the costs. Since the circumstances of this case do not warrant application of the provisions of Article 87(2) of the Rules of Procedure, the applicant must be ordered to pay the costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Mr Canga Fano to pay all the costs.**

Gervasoni

Kreppel

Rofes i Pujol

Delivered in open court in Luxembourg on 24 March 2011.

W. Hakenberg
Registrar

S. Gervasoni
President