

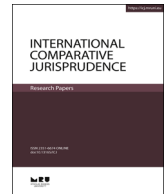
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Procedure before the European Union Civil Service Tribunal: Specific aspects[☆]

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ARTICLE INFO

Article history:

Received 15 March 2016

Accepted 16 May 2016

Available online 17 May 2016

Keywords:

European Union Civil Service Tribunal
 Procedure before the Civil Service Tribunal
 Rules of Procedure
 Amicable settlement of disputes
 Allocation of costs
 Abuse of process

ABSTRACT

The distinct character of the Civil Service Tribunal as well as its case-law has led to a number of procedural particularities and innovations. The Civil Service Tribunal encourages the parties to a case to favour an amicable settlement of the dispute. In the staff cases the amicable settlement procedure is of very significant value as it allows achieving a balanced and for both parties to a case acceptable solution.

The particular attention needs to be paid to the allocation of costs according to the rules governing the procedure before the Civil Service Tribunal. It is to be noted that a special rule previously had applied to the staff cases, according to which the applicant did not pay the institution's costs even if he lost the case. The special rule was abolished as from the 1st November 2007 and today a general rule stating that the unsuccessful party shall be ordered to pay the costs has to be applied. However, as it is apparent from the case-law of the Civil Service Tribunal, the general rule is not applied automatically.

Attention must be also drawn to the provisions granting the Tribunal the possibility of ordering any claimant bringing a manifestly abusive action to reimburse the costs occasioned by that action. The Tribunal is faced with an increasing number of actions from claimants who misuse that judicature, the cases brought by those applicants often take up a disproportionate amount of the Tribunal's time and impedes its functioning.

Thus, this article analyses the abovementioned specific aspects of the procedure before the Civil Service Tribunal. These procedural aspects are compared to the aspects of procedure before the Court of Justice and the General Court.

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[☆] Peer review under responsibility of Mykolas Romeris University.

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<http://dx.doi.org/10.1016/j.icj.2016.05.002>

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1. Introduction

European Union member states lawyers generally do not often have direct experience with the case law of the European Union Civil Service Tribunal, although the judgements of the Tribunal are interesting in a number of aspects. The same applies to the procedure before the Tribunal.

The Tribunal, which was established by Council Decision of 2 November 2004 (Decision 2004/752), adopted the new Rules of Procedure (CST Rules of Procedure, 2014) replacing the previously effective Rules of Procedure (CST Rules of Procedure, 2007) in order to take account of the

recasting of the Rules of Procedure of the Court of Justice, adopted on 25 September 2012 ([CJ Rules of Procedure, 2012](#)), and the experience gained during seven years of activities with a view of improving its operation and the course of proceedings.

The Rules of Procedure of the Civil Service Tribunal are the main legal act governing the procedure before the Tribunal which clearly reveals the particularities of the procedure before this Tribunal compared to the procedures in two other Union's courts. It is sufficient to point out some institutes which are not established either in the Rules of Procedure of the General Court or in the Rules of Procedure of the Court of Justice, for instance, the amicable settlement of disputes or the provisions concerning actions which are an abuse of process.

The ordinary course of the procedure before the Civil Service Tribunal is also particular: the requirement for an advance administrative procedure before the action is brought before the Tribunal, one exchange of pleadings in the written part of the procedure, the possibility for the parties to provide their opinion on certain aspects of the case in the hearing of the Tribunal, the absence of the possibility to deal with certain cases by applying expedited procedures, etc.

The main reason for the above particularities is the specificity of the disputes of the civil service of the European Union resolution whereof is an exclusive competence of the Civil Service Tribunal. Despite the fact that the cases of the civil service are far from being a new type of disputes in the European Union (before the establishment of the Civil Service Tribunal, resolution of above disputes was attributed to the competence of the Court of First Instance, currently the General Court, and before the establishment of the latter – the Court of Justice), the procedure for dealing with the above cases and the provisions governing it have undergone substantial changes after the establishment of the Civil Service Tribunal. Apart from the above mentioned institute of amicable settlement of disputes and the provisions concerning an abuse of process, the clearest evidence of that are the rules of allocation of costs which are quite new compared to the ones applied prior to 2007.

The article is dedicated to the analysis of the above three aspects which make the procedure before the Civil Service Tribunal more exclusive and particular.

The article consists of three parts. The first part deals with the institute of amicable settlement of disputes, the second one covers the mechanism of allocation of costs, and the third one discusses the measures established in procedural law that are aimed at fighting an abuse of process.

The topic selected for the analysis is relevant, primarily, because the above issues have not been examined yet in the Lithuanian legal doctrine. The provisions of the new Rules of Procedure of the Civil Service Tribunal have not been analysed in foreign literature either. Moreover, the particularities of the procedure before the Civil Service Court that are examined in the article, the provisions governing the institute of amicable settlement of disputes and positive results of their application in particular may inspire international or national administrative courts to

change the procedural provisions in the future. Finally, some completely new provisions, for instance, provisions concerning an abuse of process, application of which started on 1 October 2014 when the new Rules of Procedure of the Civil Service Tribunal took effect are analysed in the article. Worth noting is not only the analysis of the origin of the above provisions but also their application in practice, therefore, a number of case law examples are provided in the article. Interesting case law of the Civil Service Tribunal is also discussed in the analysis of the issue of costs.

The above-mentioned aspects are analysed without taking into consideration the ongoing reform of the judicial architecture of the Court of Justice of the European Union because this topic requires a separate detailed examination and could form the basis for the authors next article once the amendments to the Rules of Procedure of the General Court submitted in order to provide it with an appropriate procedural framework for dealing at first instance with disputes between the European Union and its officials and staff (currently being examined by the legislature) and other documents related to the above-mentioned reform are adopted.

The systematic, comparative and historical methods were widely used in the preparation of the article: the provisions of the Rules of Procedure of the Civil Service Tribunal are compared with the provisions established in the Rules of Procedure of two other courts and the previously effective Rules of Procedure of the Tribunal, as well as the overall Union's judicial system is taken into account. The deductive and synthesis methods have been used too.

The article may be considered a logical continuation of the articles by the authors dedicated to the first and only Union's specialist court ([Točickienė & Jablonskaitė-Martinaitienė, 2014](#); [Jablonskaitė-Martinaitienė & Točickienė, in press](#)).

2. Amicable settlement of disputes

The institute of amicable settlement of disputes is among the particularities of the procedure before the Civil Service Tribunal. The idea of amicable settlement of disputes existed already in the Rules of Procedure of the Court of First Instance ([CFI Rules of Procedure, 1991](#), Art. 64 (2d) and Art. 70), and the possibility for amicable agreement is presently enshrined in the Rules of Procedure of the General Court and the Court of Justice ([CJ Rules of Procedure, 2012](#), Art. 147; [GC Rules of Procedure, 2015](#), Art. 98). However, it needs to be stated that the Rules of Procedure of the latter courts do not establish the court's initiative and amicable settlement basically has to be initiated by the parties of the case by starting the procedure of amicable settlement of disputes in the course of proceedings, and the courts do not play any active role in this matter.

In case of the Civil Service Tribunal, the importance of an alternative settlement of disputes is emphasised in particular in the seventh recital of Decision 2004/752 and Article 7(4) of Annex 1 to the Statute ([Statute of the Court of Justice, 2012](#)). The above provisions are established in

order to attach critical importance to the possibility of amicable settlement of disputes in the Civil Service Tribunal and establish measures to promote it (Kanninen, 2006, p. 298). A separate chapter is dedicated to an amicable settlement of disputes in the Rules of Procedure (Chapter 6 of Title 2 'Procedural Provisions') consisting of Articles 90-92. The above institute is governed in a separate chapter so that in this case 'firstly, the applicable legal provisions are clear and separated from 'ordinary' legal provisions governing the proceedings and, secondly, the importance that the Tribunal attaches to this method of settling disputes is emphasised' (Boni, 2007, pp. 744–745). Such regulation also allows for clearer separation of this procedure from proceedings. Besides, procedural documents aimed at an amicable settlement of disputes are stored in a separate part of a case file (Instructions to the Registrar of CST, 2014, Art. 6(4)). It is noteworthy that Article 7(4) of Annex 1 to the Statute and the above-mentioned chapter of the Rules of Procedure are the result of long negotiations. The institute of amicable settlement of disputes in the Civil Service Tribunal was greatly affected by the traditions of German law and German labour, civil and administrative case law. The judges of German labour courts are obliged to attempt to settle a case amicably already in the first court hearing (Kreppel, 2012, p. 153). In Spain, France and Belgium, however, the institute of amicable settlement of disputes is hardly used in practice.

The above provisions stipulate that the amicable settlement of the dispute is possible at any stage of the proceedings, however, the definition of the amicable settlement of disputes is not provided. Thus, the Civil Service Tribunal has a discretion in this case, i.e. it can encourage the parties to discuss the possibilities for the amicable settlement of disputes, organise their informal meeting and start negotiations or take active steps and help to arrive at a compromise, apply concessions, find the actual causes of disputes, specify potential ways of dispute settlement and provide specific proposals on agreement (Van Raepenbusch, 2013, p. 292). Pursuant to Article 90 of the Rules of Procedure, first of all the Tribunal examines whether the amicable settlement of the dispute is in general possible in a specific case. The court hearing the case makes the decision on the use of this possibility upon the proposal by the Judge-Rapporteur to find an alternative way for dispute settlement. If the Tribunal agrees with the proposal, the Judge-Rapporteur assists the parties to find a way to agree and implements specific measures. Granting of such competence to the Judge-Rapporteur has at least two advantages: firstly, the Judge-Rapporteur is able to take the necessary decisions fast, therefore, the procedure of amicable settlement of disputes may be quite flexible, and, secondly, other judges of the Tribunal hearing the case are not directly involved in the attempts to settle a dispute amicably and if amicable agreement is not achieved, there are no grounds to raise the question concerning impartiality of the majority of judges hearing a specific case (Boni, 2007, p. 748). In practice, the parties take the proposals by the Judge-Rapporteur with regard to amicable settlement of a dispute more seriously in the course of the hearing or after it is over because the defects of their arguments may come up. The parties often find it

difficult to agree immediately in the hearing because differently from civil servants who upon consultations with the lawyer may express their opinion on specific proposals, the representatives of a defendant institution are inclined to consult the administration because the latter will be affected by the revocation or change of the decision taken by it after the arrival at a compromise (Currall, 2012, p. 658).

It is important to note that in order adhere to the principle of an adversarial process, the Judge-Rapporteur may not have separate contacts (in writing or orally) with one of the parties (such contacts may be permitted only in exceptional cases, on very specific issues or in order to prepare the final version of the agreement and only upon the consent of both parties) and must hand over all the documents submitted by one party to the other to the extent they are important for settling a dispute in an amicable manner (Internal Guidelines, 2008).

Article 91 of the Rules of Procedure governs the consequences of amicable agreement. In all cases of amicable agreement, whether it is achieved before the Tribunal or the parties to the case simply notify the Tribunal that they managed to achieve such an agreement, the case is removed from the register. The agreement with regard to allocation of costs in case of an amicable settlement of a dispute may be reached by the parties to the proceedings themselves and in the event of their failure to do so, the President of the Chamber hearing the case makes the decision at his discretion. Where an agreement is not reached, the Civil Service Tribunal notes down in the file of the case that the agreement has not been reached. In this case, the proceedings are continued. The Judge-Rapporteur may, but is not obliged to, recuse himself from the proceedings so that the parties do not have any doubts about the Tribunal's impartiality.

Finally, Article 92 of the Rules of Procedure establishes a prohibition to use in the contentious proceedings information (any opinion expressed, suggestions made, proposals put forward, concessions made or documents drawn up) obtained in an attempt to achieve an amicable settlement of a dispute in the proceedings when such an attempt is not successful. The above prohibition is based on two circumstances: an amicable settlement of a dispute is a 'parallel procedure' to the proceedings, therefore, it is necessary to separate, in a sense, the information exchanged in the course of this procedure from later proceedings and, secondly, it is necessary to ensure the 'freedom of speech' to facilitate negotiations between the parties because such a guarantee seems to be necessary in order avoid that, for example, an opinion expressed or concession made cause harm to the party concerned if the dispute is not settled in an amicable manner. The above is of particular relevance where one of the parties is a small agency because information spreads fast or in case of psychological harassment because it may inflict harm to a person who claims to have suffered from psychological harassment.

A question arises how the institute of amicable settlement of disputes is applied in practice. According to some legal theoreticians, despite the special significance attached to this institute by the legislator and the Civil

Service Tribunal itself, an amicable settlement of disputes is rather rare according to the quantitative criterion (Kraemer, 2009, p. 1898). The above conclusion is based on statistical data. In 2014, the Civil Service Tribunal proposed to settle disputes in an amicable manner in another 14 cases, however, the parties failed to do so, and in 2013, such proposal did not receive any response in 18 cases. From 1 January 2006 to 31 December 2014, the Civil Service Tribunal initiated the procedure for an amicable settlement of disputes in 156 cases out of 1236 closed cases; an amicable agreement was reached in 67 cases (Annual Reports, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014). In 2010 and 2014, 12 cases were settled in an amicable manner and it is the best result achieved by the Civil Service Tribunal in the period from 2006 to 2014 (Annual Report, 2014). The proposals by the Civil Service Tribunal to seek for an amicable settlement of disputes may be disapproved because of several reasons which were stated by the Civil Service Tribunal itself when drafting its first Rules of Procedure. It specified three major reasons for limited application of this institute: firstly, an amicable settlement of disputes with the assistance of the Tribunal was not fully integrated into the culture of the Union's institutions, agencies or bodies (including the Civil Service Tribunal itself); secondly, the Civil Service Tribunal is addressed when a dispute is not resolved during the advance administrative procedure lasting for several months, therefore, it simply means that the possibility for an amicable settlement of the dispute was rejected in the pre-trial procedure³; thirdly, there are disputes (it is especially applicable to the disputes related to the amendments to the Staff Regulations made in recent years) which require an interpretation from the Tribunal, for instance, the cases involving the common interest to seek for the punishment of an institution imposed by the Civil Service Tribunal for its inappropriate conduct so that it does not repeat in the future; the cases causing serious legal problems; the applications that are manifestly unfounded or inadmissible, excluding exceptional cases; the cases where the claim is obviously acceptable and founded unless the administration recognises that it made a mistake in the course of the proceedings and seeks to correct it (Internal Guidelines, 2008). The main purpose of the proceedings in the area of the civil service, i.e. the control of legitimacy of legal acts adopted by institutions, which is considered by the President of the Civil Service Tribunal the major reason for going to the merits of the case and taking a decision, should be attributed to the above motives (Van Raepenbusch, 2013, p. 298).

Based on the Internal Guidelines of the Civil Service Tribunal on amicable settlement of disputes (Internal Guidelines, 2008), certain categories of cases can also be specified where an amicable settlement of disputes is advised. To be more precise, these are the cases where court

costs incurred by the parties considerably exceed the desirable result (pecuniary or non-pecuniary); the cases where a legal decision alone is not sufficient for effective disposal of the case (where interpersonal conflict situations are examined); the cases where the Appointing Authority using its discretion may have taken a measure leading to less unfavourable consequences to the civil servant; the cases the publicity whereof is not fully justified and the legal significance is not obvious (the cases of psychological harassment, appointment of an official to another position due to the conflict with the superior); the cases brought against the decision taken by the Civil Service Tribunal in the main proceedings where a similar decision may be taken and the cases the result whereof is disputable due to the difficulties related to the establishment of factual circumstances (Kreppel, 2012, p. 156). The list is not finite, and in every specific case the Chamber dealing with the case has discretion to take a decision whether an amicable settlement of the dispute should be sought.

Although possibilities to apply the institute of amicable settlement of disputes are limited and non-existent in certain cases, promotion of such alternative settlement of disputes in the future is certainly applaudable because an amicable settlement of disputes may help to achieve the objective to save time and money for the parties (by managing to avoid costly and difficult proceedings) and it is often instrumental in finding the way to settle the dispute which is a more appropriate and better represents the interests of the parties compared to the judgement of the court by which the application is [simply] upheld or dismissed (Mahoney, 2008, p. 960). An amicable settlement of disputes is usually achieved taking into account the interest of both parties and after striking a balance between these interests. The idea that it is a valuable institute because it helps to avoid the 'win-lose' situation which usually arises after the court delivers the judgement may only be agreed. Upon reaching a sustainable solution which is acceptable to both parties, it is easier to recreate the 'positive atmosphere' and continue working together (Kreppel, 2012, p. 151). The idea that it is necessary to continue the search for the ways to improve the mechanism of amicable settlement of disputes should not be dismissed either. Both the Union's institutions and applicants should see more value in it.

Finally, it is noteworthy that an amicable settlement of disputes makes a positive impact not only on the achievement of the aim of social peace between the parties to the dispute but also on the duration of the proceedings. According to the statistics, the cases where such a solution is reached are resolved faster (Kreppel, 2012, p. 161).

3. Mechanism for allocation of costs

The issue of costs that will be incurred after lodging the application with the Civil Service Tribunal is relevant to every body governed by law considering a possibility to bring an action before the Tribunal because the applicant having lost the case may have to pay from 6000 to 10,000

³ Nevertheless President of the Civil Service Tribunal Sean Van Raepenbusch noted that the responses of the administration to civil servants' complaints show that in the course of the pre-trial procedure, the administration often limits itself to examination of the legitimacy of the issue and does not actively look for the ways to settle disputes in an amicable manner (Van Raepenbusch, 2013, p. 293).

EUR on average for the proceedings in the Civil Service Tribunal without taking into account the value of the application (Kreppel, 2012, p. 165).

Over time, the mechanism for allocation of costs has been radically changed in the Union's public service. Since 1959, a special rule has been included in the Rules of Procedure of the Court of Justice which is applied only to the cases between the Community's institutions and their civil servants and according to which institutions had to cover their costs in any case. Thus, by diverging from the general rule applied in two other courts of the Union according to which 'the unsuccessful party shall bear the costs', unsuccessful civil servants were not ordered to pay the costs incurred by institutions and they had to pay only their own costs (Tagaras, H., 2008, pp. 976–977). It was decided to change the system that was favourable for the Union's civil servants by Decision 2004/752. In this respect, when drafting the first Rules of Procedure, the Civil Service Tribunal was governed by Article 7(5) of Annex 1 to the Statute stipulating that 'The Civil Service Tribunal shall rule on the costs of a case. Subject to the specific provisions of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs should the court so decide'. According to the interpretation of the above provision contained in the Statute by the Civil Service Tribunal, it is required to waive the provisions contained in the Rules of Procedure governing that institutions bear their costs in cases with civil servants irrespective of the judgement.

The application of the new system for allocation of costs started in the Civil Service Tribunal on 1 November 2007, i.e. after the first Rules of Procedure took effect, and in the Judgment of *Falcione* (*Falcione/Commission*, F-16/05, para. 77–86) the Civil Service Tribunal stated that old system established in the Rules of Procedure of the Court of First Instance was to be applied by the day the Rules of Procedure took effect. A radical change in the provisions of procedural law governing the allocation of costs (revocation of the special rule and a transition to the general rule applied in two other courts of the Union) was primarily based on an attempt to ensure procedural economy better. According to the principles of procedural economy, the cases that are obviously unreasonable may not be brought. The rules governing costs are very significant for that because they may encourage a potential applicant to evaluate the application-related financial consequences at least roughly before lodging an application (Kraemer, 2009, p. 1893). It is to be stated that the issue of allocation of costs in the Civil Service Tribunal is subtle and the revocation of the special rule which was applied for a number of years in the cases related to civil service stirred discussions. The special (unconventional) rule according to which the administration had to bear their costs even in case of winning was aimed at ensuring that the civil servant did not refuse their right to bring the action only because they were to pay the costs of the other party in case of success. It is natural that a question arises whether such a system does not restrict civil servants' right to defence in general because the financial possibilities of the latter and institutions are not the same. Besides, institutions sometimes seem to widely exercise their right to be represented

before the Civil Service Tribunal by an external lawyer. This is the reason why their costs increase. Therefore, the application of the special rule seemed to be founded because it reflected the need to protect the interests of the weaker party, at least from the financial perspective, and the right of the Union's civil servants to defence to the highest degree.

Nonetheless, it is impossible not to agree with the arguments by the judges of the Civil Service Tribunal claiming that civil servants abusing their right to bring the action before the Tribunal impede not only the functioning of the Tribunal and the processing of other cases heard there by creating obstacles to disposal of other cases within a reasonable period of time but also efficient enforcement of other applicants' right to fair trial (*CST Draft Rules of Procedure*, 2006).

It is also noteworthy that the 'new' rule of allocation of costs is not absolute (Bernard-Glanz & Rodrigues, 2008, p. 66). As can be seen from Article 102 of the Rules of Procedure, the general rule that 'the unsuccessful party pays' may be not applied if equity so requires or if different allocation of costs is justified by the conduct by the successful party.

Firstly, as to the concept of 'equity', Article 102(1) of the Rules of Procedure stipulates that if equity so requires, it may be decided that an unsuccessful party which bears his own costs 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. Consequently, if taking into account the circumstances of the case and/or the situation of the parties it seems unreasonable for the unsuccessful party to bear all costs, the Civil Service Tribunal may allocate them differently (*CST Draft Rules of Procedure*, 2006). It is pointed out in the legal doctrine that the concept of 'equity' is difficult to define (Boni, 2007, p. 739) and establish in what cases such an exception to the general rule should be applied. In drafting its first Rules of Procedure, the Civil Service Tribunal also provided certain references to the cases when the 'equity'-related rule may be applied. It used the legal systems of several member states (Spain, Finland, Greece and Italy) as examples and stated that in the above systems account is taken of the degree of doubt regarding the result of the dispute and the newness and complexity of considered issues or the possibility to interpret the provisions concerned differently. In its practice, it also applied this rule in the situation when costs incurred by the successful defendant institution were higher than usual because it was represented by a hired lawyer instead of its civil servant (*Blais / ECB*, F-6/08). It is worth emphasising that the Civil Service Tribunal has the discretion to establish the meaning and scope of the exception to the general rule in its orders and judgments (*CST Draft Rules of Procedure*, 2006).

Secondly, as to a different allocation of costs taking into account the conduct by the successful party, it is worth noting that this possibility is established in Article 102 (2) of the Rules of Procedure under which in cases when the conduct by the successful party is to be criticised and especially in cases when the unsuccessful party incurred costs due to the actions of the successful party that are recognised as unreasonable or vexatious, the successful

party may be ordered to bear some or all of the costs incurred by the unsuccessful party. Delay of proceedings,⁴ failure to fulfil an obligation to submit certain information⁵ and disregard of case law⁶ may be attributed to the above conduct.

Besides, it is noteworthy that in taking the decision on the merits of the case only the issue of allocation of costs rather than the issue of determining a specific amount of these costs is considered because in case of a dispute the latter is tackled according to a separate procedure for taxation of costs (*CST Rules of Procedure, 2014*, Art. 106). Basically, there are two grounds upon which costs may be challenged. The first one when the unsuccessful party considers the costs unrecoverable within the meaning of Article 105 of the Rules of Procedure. The second one when the party challenges the validity of the costs.

Pursuant to Article 105 of the Rules of Procedure of the Civil Service Tribunal, sums payable to witnesses and experts, expenses occasioned by letters rogatory ordered by the Tribunal and expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of the agent, adviser or lawyer, are regarded as recoverable costs.

Obviously, only expenses necessarily incurred for the purpose of the proceedings are regarded as recoverable costs, i.e. the above concept does not cover the expenses incurred prior to the proceedings. There are authors⁷ who believe that the above rule should be applied less strictly because some civil servants contact the lawyer for assistance already in the pre-trial procedure in order to draft an administrative complaint.

It is clear from Article 105 of the Rules of Procedure and the established case law of the Civil Service Tribunal that the concept of necessary expenses include the fees paid to the lawyer not only by the civil servant but also by the institution despite the fact that in the proceedings against the civil servant the latter may be represented by its representative. Situations where institutions are represented by hired lawyers have not been an exception for a long

time already. It is often the case with small agencies and institutions where human resources are insufficient for their staff members to participate in the proceedings and where language obstacles are encountered.

As is apparent from the first paragraph of Article 19 of the Statute of the Court, applicable before the Civil Service Tribunal, institutions may freely choose to be represented by a lawyer and they are not obliged to prove that such assistance is objectively warranted. Nonetheless it is worth noting that they must supply precise information that the costs actually incurred for such assistance was really necessary. In order to determine the amount of costs incurred for the purposes of the proceedings which may ultimately be recovered, the Civil Service Tribunal has to assess the data of the case at its discretion taking into account its subject-matter and nature, its importance in relation to the Union's law, the complexity of the case, the potential workload of the representatives and advisers participating in the proceedings and the impact of the dispute on the financial interests of the parties (*Marcuccio/Commission, F-69/10 DEP*).

Considering the huge importance of the issue of costs for the unsuccessful civil servant, the Civil Service Tribunal is not able to determine the amount of fees to be paid by the parties to their lawyers, however, it can establish the maximum amount of reimbursement to be paid by the party which is ordered to cover costs (*Marcuccio / Commission, F-69/10 DEP*). Besides, when taking the decision, the Tribunal does not have to take into account either the tariff of the lawyer's fee established at the national level or a potential contract concluded on the issue between the interested person and its representatives or advisers (*Marcuccio/Commission, F-69/10 DEP*).

It is also important to point out that due to the specific nature of cases in the civil service field the Civil Service Tribunal is forced to take into account the work completed by the services of the institution in the administrative procedure when evaluating the amount to be reimbursed to the external lawyer because it may be presumed that the external lawyer already knew the major circumstances of the dispute which as a result facilitated his work and shortened the time necessary to prepare for the proceedings (*Loukakis and others/Parliament, F-82/11 DEP*). In the evaluation of the scope of work related to the proceedings, the Tribunal takes into account the total number of hours worked which may have been objectively required for the proceedings (*Ntouvas / ECDC, F-107/11 DEP*).

In keeping with the principle that only costs "necessarily incurred by the parties" are "recoverable" within the meaning of the Rules of Procedure, the Tribunal does not recognise travel expenses incurred by the institution due to personal meetings of its staff member with lawyers as necessary expenses, unless the institution proves that such meetings were necessary for the main proceedings and that it was necessary for them to go to the state where the lawyer is established (*Possanzini/Frontex, F-61/11 DEP*). Expenses related to translation of documents to be provided by the Union's institutions and agencies are neither considered recoverable costs because recognition of translation expenses as recoverable costs would mean linguistic discrimination; such expenses would not have

⁴ For instance, in *Judgement of 12 May 2011, Livio Missir Mamachi di Lusignano / European Commission, F-50/09*, EU:F:2011:55, the Civil Service Tribunal acknowledged that by refusing to submit certain documents and information to the Tribunal and by providing inaccurate responses due to which the Tribunal was forced to convene the second hearing, the Commission delayed the proceedings.

⁵ In *Judgement of 18 September 2012, Cuallado Martorell / Commission, F-96/09*, EU:F:2012:129, the Civil Service Tribunal stated that if the European Personnel Selection Office (EPSO) had satisfied the candidate's request to provide candidate-related information on examinations in writing, the candidate would not have brought an action or would have drafted the complaint and/or action better.

⁶ In *Judgement of 19 February 2013, BB / European Commission, F-17/11*, EU:F:2013:14, the Civil Service Tribunal stated that as the Commission raised a plea of inadmissibility for several times and did not explain the reasons why it diverged from the case law in this issue, the Tribunal was forced to request the parties for a second exchange of pleadings and organise a hearing so that the parties could express their opinion on the specified case law and as a result the applicant incurred additional costs which otherwise could have been avoided.

⁷ See, for instance, *Christophe (2011)*. L'accès au juge devant le Tribunal de la fonction publique de l'Union européenne à travers la question des dépens. *Revue universelle des droits de l'homme*, (20), No 1–3, p. 92.

been incurred by the agency if the applicant had chosen the language of the proceedings which the agency understands (*Longinidis/Cedefop*, T-283/08 P-DEP).

In the procedure for taxation of costs, the Civil Service Tribunal must not only assess whether costs are recoverable but also whether they are reasonable. Several specific cases are of interest in this respect. In the case *Nicola / European Investment Bank* (*Nicola/EIB*, F-55/08 DEP), the European Investment Bank requested the Tribunal to order the civil servant to pay the amount of EUR 18232.25, which, *inter alia*, consisted of EUR 17,000 for the fees paid to its lawyer. The work of the lawyer was evaluated at 75 h and EUR 220 per hour. Although the Tribunal recognised that EUR 220 per hour was a reasonable remuneration, it stated that taking into consideration the work completed by the officials of the Bank before the proceedings the work of the lawyer reasonably amounted to 25 h and ordered the institution to pay only the amount of EUR 6000. Another interesting case in terms of the amount of costs is *Missir Mamachi di Lusignano / Commission* (*Missir Mamachi di Lusignano / Commission*, F-50/09 DEP). It should be noted first that although the applicant lost the case, the Civil Service Tribunal, taking into account the conduct of the Commission,⁸ ordered it to reimburse the applicant all the costs incurred. When the dispute arose between the parties, the applicant addressed the Civil Service Tribunal with a request to order the Commission to pay the amount of EUR 75976.75 with the fees to the lawyer alone amounting to EUR 61750. The applicant founded the amount of the fees on an extremely complicated nature of the case, two hearings in Luxembourg, the necessity for its lawyers to come to the Registry of the Tribunal several times and finally the conduct of the Commission due to which the duration of the proceedings extended considerably and the workload of lawyers as well as costs increased. According to the applicant, taking into account the above circumstances, 351 h dedicated to the case by its lawyers were reasonable and in line with the particularities and complexity of the case. The Commission, in its turn, requested the Civil Service Tribunal to evaluate that recoverable costs amounted to EUR 19040.70 because the case was not very complicated and the applicant did not have the right to the refund of the value-added tax. The Civil Service Tribunal recognised that delicate issues with no case law available which were related to the failure by the Commission to fulfil its obligation to ensure its civil servants' security, the impact of the actions by the third party on the liability of institutions or potential no-fault liability of institutions were raised in proceedings. It also stated that the lawyers of the applicant performed an unusually thorough, comprehensive and high-quality work in drafting the application, letters, comments, performing studies and analyses, as well as the necessity for them to pay several visits to Luxembourg not only to participate in the hearing but also to familiarise with confidential documents provided by the Commission which were necessary for making the decision in the proceedings. Finally, the Tribunal took into account the

huge financial interests of the applicant in the proceedings (the applicant requested the Tribunal to order to reimburse around EUR 3 million of material and non-material damage to the children of the murdered official, his son). Taking account of all the circumstances of the case, the Tribunal recognised 200 h of lawyers' work as objectively necessary for the proceedings and made a decision to order the Commission to pay to the applicant the amount of EUR 44259.25. However it is to be mentioned that the Tribunal reduced the amount of the recoverable costs taking into account the fact that the same lawyer helped the applicant in drafting the administrative complaint and already had a deep knowledge of the case during the pre-trial procedure; this knowledge facilitated his work and shortened the time necessary to prepare for the case. As the applicant was not a value-added tax payer, the Tribunal did not recognise his right to the refund of the above tax.

Finally, it is noteworthy that apart from the above provisions related to costs, special rules as to allocation of costs are established in the Rules of Procedure (*CST Rules of Procedure*, 2014, Art. 103 and 113). For instance, where there is more than one unsuccessful party or where a case does not proceed to judgment, allocation of costs is in the discretion of the Tribunal. Where each party succeeds on some and fails on other heads, the Tribunal usually states that the parties bear their own costs. The parties also bear their own costs if costs are not applied for. The Member States and institutions which have intervened in the proceedings bear their own costs. Other interveners bear their own costs, unless the Civil Service Tribunal decides otherwise. A party who discontinues or withdraws from proceedings bears its own costs and is ordered to pay the costs incurred by the other party. Where the recipient of legal aid has to bear his own costs, the Tribunal fixes the lawyer's disbursements and fees which are to be paid by the cashier of the Tribunal. Where the recipient of legal aid succeeds in the proceedings, the unsuccessful party is to refund to the cashier of the Tribunal any sums advanced by way of aid. Where the recipient of legal aid is unsuccessful, the Civil Service Tribunal may, if equity so requires, order that one or more parties should bear their own costs or that those costs should be borne, in whole or in part, by the cashier of the Tribunal by way of legal aid.

To conclude, it should be noted that the case law of the Civil Service Tribunal in the area of costs is still under development and, as it is obvious from the above analysis, it is slightly different from the case law of the Court of Justice and the General Court. These differences may also be explained by the specific nature of civil service cases.

4. Provisions concerning actions which are an abuse of process

Some applicants bring actions before the Civil Service Tribunal by abusing their right of access to courts. Such applicants constantly seek for litigation and lodge actions one after another. It should be stated that the actions brought before the Tribunal by ten same applicants represent around 14% of all actions brought before the Civil

⁸ *Supra* note 2.

Service Tribunal to date. The first Rules of Procedure of the Civil Service Tribunal already provided for a possibility to order the party to pay the costs incurred by the Tribunal primarily because the party applied to it unreasonably for a number of times, for instance, by lodging repetitive and barely motivated actions, and evaluate these costs without exceeding the amount of EUR 2000 (CST Rules of Procedure, 2007, Art. 94). However, experience showed that in fact the above provision did not deter vexatious litigants from applying to the Tribunal without any necessity, therefore, in its new Rules of Procedure, the Civil Service Tribunal decided to reinforce the mechanism established in the former ones by including a provision enabling it to recover the amount of EUR 8000 of its costs. Article 108 (a) of the Rules of Procedure establishes the maximum amount of refund which means that a specific amount is determined by the Tribunal taking into account the scope of abuse and the financial situation of the party to the proceedings. The above provision is applied not only in cases of abuse when the action brought before the Tribunal is manifestly inadmissible or unreasonable, contains wrong information or is too lengthy but also when the conduct of the applicant is inappropriate in the course of the proceedings, for example, when the applicant submits an unreasonably large number of procedural documents or when the scope of procedural documents is unreasonably large and when the Tribunal is not notified about new circumstances. Unlike Article 102 analysed before, Article 108 is aimed at the party due to which the Tribunal incurs unreasonable costs rather than the successful party due to whose conduct the other party incurs costs which otherwise may have been reasonably avoided.

It is noteworthy that the above provision was applied by the Civil Service Tribunal for the first time in the Order of 7 October 2009 (*Marcuccio/Commission, F-3/08*). The Tribunal founded the application of the provision on the fact that 12 out of 18 previous actions of the applicant were dismissed as manifestly inadmissible or manifestly legally unfounded. Moreover, the Tribunal had already stated in several of its orders that the applicant chose to settle the dispute in proceedings without any grounds and as his application was again dismissed as manifestly legally unfounded, the Tribunal decided to order the applicant to pay EUR 1000. Later, the same applicant was penalised by the Tribunal several times for the abuse of process. After several years, in the Order of 29 February 2012 (*Marcuccio/Commission, F-3/11*), apart from the aforementioned arguments for applying Article 94(a) of the first Rules of Procedure, the Civil Service Tribunal noted that prior to this order the applicant brought more than 90 actions against the Commission before one of the Union's courts and that more than 20 of them had already been dismissed as manifestly inadmissible or manifestly legally unfounded. The Tribunal also based its arguments on Article 47 of the Charter of Fundamental Rights under which everyone has the right to effective remedy and a fair trial. Thus, on the one hand, in accordance with the main principle of effective remedy, everyone must be able to fully exercise their right to effective remedy, whereas, on the other hand, the court which was appealed to should be enabled to administer justice effectively by taking into

account the interests of all persons who, as the applicant, are entitled to effective remedy. The Tribunal noted that the person's right to remedy should be exercised without making obstacles for the Tribunal to perform its functions properly and within a reasonable period of time.

In the Order of 5 May 2011 (*Caminiti/Commission, F-71/08*), the Civil Service Tribunal founded the application of Article 94(a) of its Rules of Procedure on the argument that the action brought by the applicant was not only manifestly inadmissible and manifestly legally unfounded but also that the action was brought sooner than within a year after the General Court announced its decision on the action where identical legal issues were raised and due to which the hearing of the applicant's case was suspended, however, the applicant did not withdraw his action. The amount of EUR 5000 was ordered to be paid in this case.

In the Order of 28 November 2011 (*Bömcke/EIB, F-105/10*), the Civil Service Tribunal ordered the applicant to pay the amount of EUR 200 for his refusal to prepare the non-confidential version of the application and its annexes. The Registry of the Tribunal had to prepare it.

It may only be hoped that the increase of the amount of refund up to EUR 8000 in the new Rules Procedure, the number of unfounded actions will reduce.

Nevertheless, having regard to its previous case law, the fact that the disposal of the cases brought by vexatious litigants take up a lot of time, inter alia, due to their extravagant nature, the fact that such procedural conduct impedes the functioning of the Tribunal and the processing of other cases, the parties to which rightly expect that their cases will be dealt with within a reasonable period of time, the fact that the Tribunal does not have any means to refuse to deal with the actions which overload both the Tribunal and its appellate court because such applicants usually have a marked propensity to bring appeals before the General Court (CST Draft Rules of Procedure, 2013), in its new Rules of Procedure, the Civil Service Tribunal included the provision not present in the Rules of Procedure of two other Union's courts which permits to pay by way of exception the deposit in respect of actions which are an abuse of process. Pursuant to Article 109 of the new Rules of Procedure, the President of the Civil Service Tribunal may order the applicant to deposit, with the cashier of the Tribunal, a maximum sum of EUR 8000. Although such new provisions may seem *a priori* to threaten the person's right to access courts, there are several reasons why it is deemed to be proportional. Firstly, such a measure pursues a legitimate objective of allowing the Civil Service Tribunal to prevent its case list from being overburdened so that it is able rule within a reasonable period of time. Moreover, it is proportional because, first, it is intended to apply the measure only by way of exception; second, it can only be taken with regard to an applicant who has already brought several actions and who has already been warned that these are manifestly an abuse of process; third, it presupposes that the President of the Tribunal considers the new action to be *prima facie* an abuse of process; fourth, the decision to order to pay the deposit must be duly reasoned; fifth, the President of the Tribunal retains a discretion to establish the amount of the deposit required in order to prevent that deposit from constituting an

interference with the very substance of the right of access to a court; and, sixth, the conduct of the proceedings is merely suspended until the sum required has been deposited; the measure suggested therefore has no effect on the admissibility *ratione temporis* of the action. Besides, as provided for in Article 109(4), the President of the Civil Service Tribunal who has taken the decision to order the applicant to pay the deposit must abstain from participating in the judgement of the action. In summary, it should be stated that the Civil Service Tribunal intends to use this measure only in exceptional cases by adhering to the principles of objectivity and impartiality. As little time passed after the new Rules of Procedure took effect, it is difficult to predict the scope and consequences of application of Article 109. It may be only hoped that it will be effective and will not restrict the rights of honest applicants unreasonably.

5. Conclusions

The European Union Civil Service Tribunal deals with the cases by applying legal provisions that are specifically intended for governing the procedure before this court. The specific nature of the procedural law provisions applied therein is primarily determined by the particularity of civil-service-related disputes brought before the Tribunal.

The institute of amicable settlement of disputes is one of the specific aspects of the procedure before the Civil Service Tribunal analysed in the article. The particularity of this institute, compared to the procedures before other Union's courts, is the result of the active role provided to the Civil Service Tribunal and the possibility to propose an alternative way to settle a dispute at any stage of the proceedings. Such institute is especially valuable because it enables to achieve a sustainable decision acceptable to both parties which is particularly important in the Union's civil service field where working relations usually have continuous and collective nature. Cultivation of good relations helps to build confidence between the parties, achieve the most optimum results at work and guarantees an appropriate course of the service.

With a view of achieving procedural economy, on 1 November 2007, the European Union Civil Service Tribunal started applying the general rule as to allocation of costs 'the unsuccessful party shall bear the costs' which is applied in two other Union's courts and the special rule applied in the cases related to the Union's civil service field by that time under which the officials and civil servants of the European Union litigating with institutions were not ordered to bear costs incurred by institutions was revoked. There is no doubt that when the new rule was introduced the Union's officials and civil servants ended up in a less favourable position compared to the former. One may wonder whether it did not restrict the right of the Union's officials and civil servants to defence taking into account that their financial possibilities and those of institutions are not equal in the first place.

It is obvious that the new rule is not an instrument of deterring applicants from unnecessary or unfounded

appeals to the Tribunal; separate provisions are embedded in the new Rules of Procedure of the Civil Service Tribunal intended for fighting actions which are an abuse of process. It is rather aimed at making the position of civil servants and institutions equal, encouraging the parties to the proceedings to make a more efficient use of the possibilities offered by the administrative procedure, evaluating thoroughly the potential result of the dispute and expedience of proceedings. Besides, the case law of the Civil Service Tribunal evidences that the general rule is not automatically applied. The Tribunal takes account of the conduct by the parties on a case by case basis and applies the equity exception if deems it to be reasonable.

The provisions of the Rules of Procedure concerning actions which are an abuse of process are aimed at deterring vexatious litigants from appealing to the Tribunal without any reasonable and serious grounds. As experience showed that the provisions of the former Rules of Procedure were not effective, it increased the amount of proceedings-related costs which the Tribunal may order the party who brought unreasonable and hardly motivated actions without any necessity or many times to pay and supplemented the Rules of Procedure with a completely new article under which, by way of exception, the Tribunal may require the applicant who was warned earlier that his actions constituted an abuse of process to pay the deposit. Such provisions are not present in the Rules of Procedure of the Court of Justice and the General Court. The European Union Civil Service Tribunal included them into its Rules of Procedure having identified in the period of its functioning that some persons bring actions before the Civil Service Tribunal on a massive scale merely on the basis of their formal right to access courts. In absolute majority of cases, these actions were unfounded and the Civil Service Tribunal dismissed them. As the Tribunal does not have any means to refuse to deal with such actions, the new Rules of Procedure of the Civil Service Tribunal stipulating that the person who brought an action constituting an abuse of process may be ordered to refund the costs incurred by the Civil Service Tribunal which otherwise might have been avoided seems reasonable and proportional bearing in mind that the cases and procedure of its application are clearly governed.

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