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ARTICLE

The application of the Charter of Fundamental Rights in EU staff law

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Abstract The fundamental rights of EU staff members have been protected since long before the Charter was adopted. Since it acquired Treaty status in 2009, the Charter has nonetheless become the first point of reference in this area for the Union Courts, and it has been relied on in assessing the validity of and interpreting both normative measures and individual decisions. In particular, the Charter has been instrumental in defining substantive rights of staff members, such as the protection of family life or the right to just and fair working conditions, and procedural rights in administrative and judicial proceedings. It has thus contributed to raising the level of fundamental rights protection in EU law, including that governing the relations between institutional employers and their staff.

Keywords EU staff law · EU Charter of Fundamental Rights · Civil Service Tribunal · Private and family life · Protection of personal data · Protection from discrimination · Fair and just working conditions · Paid annual leave · Right to be heard · Statement of reasons · Rule of correspondence

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The author is acting in a private capacity; the views expressed are purely personal, and do not prejudice any position the author may take as a judge.

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1 Introduction

Reflecting in July 2011 on human rights norms in the staff law of the European Union, Paul Mahoney, the then President of the Civil Service Tribunal (the Tribunal), and currently judge at the European Court of Human Rights, concluded that 'the EU Charter has not … had a dramatic influence on the outcome of staff cases before the Tribunal or on [its] mode of jurisprudential reasoning'.[1] Now, while I would not entirely disagree with that assessment, I would like to qualify it somewhat by saying that, given the origins of the rights set out in the Charter, perhaps its influence was not intended to be 'dramatic', but rather more subtle and long-term. In any case, in my view the influence of the Charter has built up over the years, to a point where at least we would miss it if it were no longer there.

2 Sources of EU staff law

2.1 Original sources

The rights and obligations of the staff of the European Union—and of the institutions themselves—are set out in a variety of legal instruments at different levels. First and foremost there are the Treaties, which contain a number of important rules and principles. For the most part, these are of general application, such as the prohibition of discrimination on grounds of nationality, but there are one or two which are specific to the EU civil service. Article 298 TFEU, in particular, provides that the institutions 'shall have the support of an open, efficient, and independent European administration', and requires the legislature to adopt the necessary provisions to ensure such support. This is an interesting, if slightly mysterious, provision which I understand was inserted in the Treaty at the behest of certain Scandinavian members of the Convention which prepared the Constitutional Treaty, in order to lay down basic principles of good governance. So far it has been relied upon largely in academic debate as a legal basis for those who wish to promote a code of administrative law for the Union, but I wonder if it is not relevant for civil service law too.

Alongside the Treaty, the Court of Justice has identified a number of general principles of law, including fundamental rights, which, though not laid down expressly by the Treaties, are common to the legal systems of Europe, and which may also be relevant to staff law. A good example is the right for a person to be heard before a decision is taken which may adversely affect his legal position. This was developed in the case law of the Court long before it was included in Article 41 of the Charter.

Then there are the EU Staff Regulations and implementing rules, and the equivalent instruments for the institutions and agencies which do not apply the Staff Regulations. In adopting these, the institutions and agencies are obliged to respect fundamental rights, though of course the rules also tend to reflect their administrative heritage, as well as the social thinking of the era in which they are adopted.

[1] *Mahoney* [2], pp. 843–858.

Even though these instruments seek to ensure a fairly complete protection of the official as employee, there are still situations when officials may wish to invoke their fundamental rights. I would like start by giving you three examples from the case law of the Court of Justice which occurred well before the Charter was even drawn up.

2.2 Pre-Charter fundamental rights protection in EU staff law

The first case concerns equality of treatment of male and female officials; in the Staff Regulations in force until 1972, a female official who got married was only entitled to the expatriation allowance if she was also a head of household, which was subject to the existence of certain exceptional circumstances, whereas married male officials were automatically granted this status and hence the expatriation allowance. The Court found that this provision created 'an arbitrary difference of treatment between officials', and annulled without further ado the relevant provision of the Staff Regulations.[2] This was four years before the Court established equal pay for equal work as a principle of European Union law generally applicable to the working population,[3] which goes to show that sometimes staff law has a pioneering role in the case law of the Union Courts.

The second case concerns discrimination on grounds of religion, in the context of the organisation of level-entry competitions for the EU civil service; the candidate was unable, for religious reasons, to take the written test on the day scheduled, and subsequently challenged her exclusion from the competition.[4] Here the Court had to balance the requirement that all candidates be treated equally as regards the conditions under which competitions are held, and the obligation to respect religious beliefs. It held that a candidate who was unable to participate in exams on a particular date was obliged to inform the organising institution, rather than simply complain after the event. While the applicant did not in fact win her case, it remains the first occasion on which the Court dealt with discrimination on grounds of religion.

My final example concerns the right to transfer one's pension rights from a national scheme to the European Union scheme, where the Court found that the Staff Regulations gave such a right to those who had worked in the public sector but not those who had acquired pension rights as self-employed persons.[5] Here again, the Court annulled a provision of the Staff Regulations in the name of ensuring fundamental rights protection.

While significant, these are all relatively isolated examples where fundamental rights were called in aid in staff law matters. The circumstances which gave rise to the complaint in the latter two cases might be considered to have arisen accidentally or from an oversight on the part of the legislature, rather than a policy choice, while facts of the first example reflected the predominant thinking, or at least practice, of European society at the time.

[2] Sabbatini-Bertoni v Parliament, 20/71, EU:C:1972:48. While these early staff law judgments of the Court of Justice are available in all languages, this is not the case as regards most such judgments of the General Court and the Tribunal.

[3] Defrenne, 43/75, EU:C:1976:56.

[4] Prais v Council, 130/75, EU:C:1976:142.

[5] Weiser, C-37/89, EU:C:1990:254.

2.3 The EU Charter of Fundamental Rights

Until very recent times, the Treaties did not contain a comprehensive Bill of Rights defining the rights of the individual which the institutions, and Member States when they are implementing EU law,[6] may not transgress. The Charter of Fundamental Rights of the European Union ('the Charter') was first drafted in 2000, by a Convention of members of the national parliaments, the European Parliament and different government representatives and officials, and adopted as a non-binding instrument. It was updated and adopted again in 2007, and when the Treaty of Lisbon came into force in 2009, the Charter acquired the status of primary law,[7] that is, law of constitutional status which the institutions and agencies must comply with when they adopt legislation, including staff or employment regulations, implementing rules and individual decisions. As it lays down principles which are widely drawn, the Charter can also be used to fill any gaps in the law concerning staff matters which should arise, and may serve as a guide to the interpretation of staff law in case of uncertainty.

The Charter is not a completely new catalogue of fundamental rights; in fact, as noted above, the Union institutions, and especially the Court of Justice, have been committed to ensuring fundamental rights protection since the early 1970s, essentially on the basis of the European Convention on Human Rights and the 'constitutional traditions common to the Member States', as well as the relevant provisions of the Treaties themselves. The general rules on interpreting and applying the Charter, which are set out in the last title of the Charter, expressly make a link with these three sources of inspiration; it follows that Charter rights which derive from one of these three sources are to be interpreted in harmony with the equivalent right in the Treaties, the European Convention on Human Rights or the Member State constitutions, as the case may be.[8]

That said, the Charter is not just a snapshot of fundamental rights already being protected by the Union either; it is instead a progressive restatement, which is intended to bring the content of fundamental rights up to date, to strengthen their protection and to make those rights more visible and more comprehensible to the individual. It means of course that it is rather difficult, and not very useful, to make a sharp distinction between Charter rights and pre-existing fundamental rights in the EU legal order. It is for this reason, I suspect, that the Court of Justice felt entitled to apply the Charter in 2010 in order to annul Council and Commission measures which had been adopted several years before the Charter was given Treaty status.[9] In any case, the Charter is now the first point of reference for the courts in ascertaining what fundamental rights are relevant in a particular case, and Charter rights may, if appropriate, be interpreted in the light of pre-Charter case law.

[6] Article 51, Charter; on the extent of the duties of the Member States to apply the Charter, see in particular Åkerberg Fransson, C-617/10, EU:C:2013:105.

[7] 'The … Charter … shall have the same legal value as the Treaties': Art 6(1), 1st para, TEU.

[8] Art 52(2) to (4), Charter.

[9] Volker and Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662.

3 Structure and content of the Charter

3.1 Overview

The Charter contains 54 articles, divided into 7 sections or 'Titles' dealing with different groups of fundamental rights and principles, which are of more or less relevance to the area of civil service law: these are Dignity, Freedoms (in the sense of personal freedoms), Equality and non-discrimination, Solidarity, Citizens' Rights, Justice and the Interpretation and application of the Charter. As they apply to the staff law of the European Union, the most pertinent rights can be divided into three categories: substantive rights, procedural rights in relations with the employing institution, and 'jurisdictional rights', that is, rights which are relevant in legal proceedings in the area of staff rights.

3.2 Substantive rights

I will start with substantive rights. Of these, the Charter rights which have had the most marked impact in the field of EU staff law are the rights to respect for private and family life (Article 7), to protection of personal data (Article 8), equality before the law and protection from discrimination on various grounds, including sexual orientation (Articles 20 and 21), and the right to fair and just working conditions (Article 31).

3.2.1 Protection of private and family life

Under EU law, it is not only an Englishman's home which is his castle; the same can be said of accommodation provided to an official by the Commission outside the territory of the Union. The particular official was posted to the Commission's delegation in Luanda, but fell ill after about 18 months and was reassigned to Brussels, though in fact he went back to Italy to recuperate. When the Commission terminated the rental contract on the property in Luanda, it put the official's personal effects in storage. He then claimed compensation for 'material, non-material, psychological and existential damage' for the intrusion into his home, including the taking of photographs of his personal belongings. The case law of the Court of Justice, and the European Court of Human Rights, had already established the inviolability of a person's private dwelling as a fundamental right in Union law; the fact that the official concerned was in Italy on sick leave did not mean that the Luanda property was not his private home, and indeed the official concerned had taken legal proceedings to challenge his posting to Brussels. In the particular circumstances of the case,[10] the Tribunal upheld the complaint, and ordered the Commission to pay him €5000 by way of damages.

In common with most fundamental rights, the right to family and private life is not absolute. In one dispute about the conduct of a competition for entry into the EU civil service, the applicant complained that the selection board had asked him questions

[10] Marcuccio v Commission, F-56/09, EU:F:2010:48.

during the interview concerning his personal and family situation.[11] It appears that the candidate had himself indicated that one of the reasons he was applying for the competition was because his fiancée was already living and working in Brussels; the problem was that the competition was in the field of external relations, and the jury was explicitly required to assess the candidates' aptitude to work outside the territory of the European Union. The Tribunal noted that the right to private and family right could be restricted in the pursuit by the Union of objectives of general interest, as long as the restrictions did not constitute an excessive and intolerable interference with the essence of the right. The selection board's questions sought to ensure the Commission would not recruit unsuitable candidates, and were held to be legitimate and reasonable in the circumstances.

Similarly, the Tribunal has acknowledged that the director of an agency was entitled to ask an official to provide a declaration that she was not having an affair with her head of section; her husband, who was in the same section, had made accusations to this effect.[12] The fact of making such a request was not an indication of harassment by the director; it was not contested that the nature of the official's relations with the head of section had seriously affected the working climate in the section and that the declaration—which she had provided—was justified with a view to 'avoiding disorder' in the sense of Article 8 of the European Convention on Human Rights.

3.2.2 Protection of personal data

The right to protection of personal data has been the subject of Union legislation since 1995, but it was only introduced into the Treaty, as both an express Treaty right and a Charter right, in 2009.[13] In their capacity as employers, the institutions detain large amounts of personal information about each official, including sensitive information concerning his state of health; indeed, the Staff Regulations lay down rules about what the personal file of an official should contain and on his right of access to the file.[14] On the other hand, they do not lay down any rules concerning the transfer of such information from one institution to another, where, for example, a candidate for a job applies to two institutions in succession.

The question arose in the case of *V v European Parliament*.[15] Parliament offered V a post as a contractual agent; at the same time, they contacted the Commission, where V had previously worked, to request her medical file. It appeared from the file that the Commission had refused to give V a contract on health grounds; on the basis of the same information, Parliament withdrew its offer of a post.

V challenged Parliament's decision on a number of substantive grounds drawn from the Staff Regulations, which the Tribunal upheld. Though it was arguably not strictly necessary, the Tribunal also went out of its way to examine whether Parliament had infringed V's fundamental right to privacy. That the transfer of medical data

[11] Vonier v Commission, T-165/03, EU:T:2004:331.

[12] CF v EASA, F-40/12, EU:F:2013:85.

[13] Respectively, Directive 95/46/EC (OJ 1995 L 281, p. 31), Art 16 TFEU and Art 8 TEU.

[14] Arts 26 and 26a, Staff Regulations.

[15] V v Parliament, F-46/09, EU:F:2011:101.

was an interference with this right was not really in issue; the interesting question was whether the transfer of medical data from one institution to another, in order to facilitate the work of the latter's medical officer, could be seen as justified. The Tribunal found that the pre-recruitment medical examination served a legitimate interest, that the institutions only recruit persons who are fit to carry out their duties. On the other hand, that interest was not sufficient to justify the transfer of particularly sensitive personal data, V's medical file, without her consent; moreover, the medical data were already some years old and Parliament could have verified V's state of health by less intrusive means, for example, by carrying out its own medical examination. The Tribunal upheld V's plea in this regard too.

3.2.3 Equality before the law and protection from discrimination

Under Union law, an official who has a stable non-marital partner is entitled to the head of household allowance, like a married official, but only where 'the couple has no access to legal marriage in a Member State'. But what happens if getting married would leave the official open to criminal proceedings in one of the countries of which he is a national? Can the institution rely on the wording of the provision or is it obliged to take account of the official's particular situation?

W was a homosexual with both Belgian and Moroccan nationalities, living in a registered partnership in Belgium. The couple did have access to marriage in Belgium, but W argued that the law of Morocco, where he was born and where his parents lived, criminalised homosexual acts. W challenged the Commission's refusal to grant him the household allowance.[16] The Court noted at the outset that the extension of the entitlement of the household allowance to same-sex non-marital partners reflected both the prohibition of discrimination on grounds of sexual orientation, provided for in Article 21 of the Charter, and the need to protect officials from interference by the administration in the exercise of their right to respect of their family and private life, under Article 7 of the Charter. Taking inspiration from the case law of the European Court of Human Rights in Strasbourg, the Tribunal held that fundamental rights 'must be interpreted in such a way as to make those rules as effective as possible, so that the right in question is not theoretical or illusory but practical and effective'. Given these Charter provisions, the Commission could not limit itself to a purely formal approach to the 'access to marriage' criterion; the risk of criminal sanctions to which W would be exposed should he marry his partner rendered his access to marriage in the particular circumstances theoretical and illusory. The Tribunal was nonetheless at pains to verify that the relevant provisions of the Moroccan criminal code were applied in practice; having satisfied itself that this was so, the Tribunal annulled the Commission's refusal to grant W the household allowance.

More recently the Tribunal has dealt with the converse case, where an official in a stable heterosexual non-marital relationship claimed the benefit of the household allowance; when this was refused, on the grounds that the couple did have access to legal marriage, he claimed that he was the victim of discrimination based on his

[16] W v Commission, F-86/09, EU:F:2010:125.

sexual orientation, as a homosexual couple in the same situation—he was in post in Luxembourg rather than Belgium—would be entitled to the household allowance.[17]

On this occasion, the Tribunal held that the statutory condition regarding access to marriage depended on the legal regime in each Member State regarding non-marital partnerships; any difference of treatment arose from the differing legislations of the Member States and was hence objectively justified, which was precisely as the authors of the Staff Regulations intended. Upholding the applicant's claim in this case would, the Tribunal held, in effect abolish the statutory condition and open the household allowance to all non-marital partnerships.

3.2.4 Right to fair and just working conditions

This is one of the flagship social rights in the Charter Title on 'Solidarity', which also includes, for example, the right of workers to information and consultation, collective bargaining, protection against unjust dismissal, and access to social security and health care. Article 31 contains two paragraphs laying down respectively the right of every worker to 'working conditions which respect his or her health, safety and dignity' and the right to a limitation of maximum working hours, to daily and weekly rest periods and to paid annual leave. Obviously these matters are already dealt with in the Staff Regulations; yet the Charter has on occasion proved to be decisive in interpreting the relevant provisions. I'd like to present one example for each of the two paragraphs.

The first case concerns CH, who was an accredited parliamentary assistant to a Member of the European Parliament. The accredited parliamentary assistant is a special kind of contractual agent under the conditions of employment of other servants of the European Union. Acting on behalf of the MEP, Parliament's administration concludes an employment contract with the assistant, which remains valid as long as there exists 'a relationship of mutual trust' between Member and assistant. The idea is to reconcile the duty of the employer to provide the employee with some basic employment rights, and the strong desire of MEPs that they be free to hire and fire their assistants at will. CH worked for one Member of the European Parliament without any problems for three years before she started working for Mrs. P in late 2009. In November 2011, CH was diagnosed as suffering from depression due to harassment at work; she informed Parliament's administration of the situation and just before Christmas formally requested it to protect her from the harassment. At the beginning of January 2012, Mrs. P. requested Parliament to terminate CH's contract, which is precisely what Parliament did, a few days later.

CH challenged both the decision not to protect her from harassment and the termination of her contract.[18] Parliament's line of defence was simple; they argued that once the Member has determined that the 'relationship of mutual trust' no longer exists, the administration simply carries out the instruction to terminate the contract, no questions asked.

[17] Forget v Commission, F-153/12, EU:F:2014:61.

[18] CH v Parliament, F-129/12, EU:F:2013:203.

The Tribunal noted that Parliament was obliged by its own implementing rules on contracts for accredited parliamentary assistants to ensure the legal conditions for termination were fulfilled, and that the institution was therefore obliged to ensure that the reasons given for the termination did not infringe her fundamental rights. As Parliament's administration was aware that CH was suffering from harassment-like symptoms several weeks before termination was requested, it should have examined whether the request for termination was linked to the request for protection from harassment. The Tribunal acknowledged that this was a difficult and delicate task; however, it was the only means of ensuring the employee's Charter right, under Article 31(1), 'to working conditions which respect … her health, safety and dignity' was respected. It also annulled Parliament's decision to reject CH's request for protection, again largely on the basis of Article 31(1) of the Charter. CH was awarded €50 000 in compensation for non-material damage she had suffered at the hands of the institution, which is a fairly substantial sum.

The judgment was particularly timely, being handed down a few months before last May's elections to the European Parliament, when other accredited parliamentary assistants might have found themselves without a job, though hopefully not so ill-treated as CH.

3.2.5 Right to paid annual leave

Amongst the guarantees of Article 31(2) of the Charter is the right to paid annual leave. EU staff is entitled to about five weeks of paid leave per year under the Staff Regulations; if the official does not take all his leave in a given year, he may carry over a maximum of 12 days to the following year, but the rest is forfeit. But what happens if an official is unable to take his annual leave because of illness? Is the carry-over limited to 12 days, or should the rule not be applied in these circumstances?

The question arose in the case of an official who was ill for 10 months of 2004 and hence unable to take his annual leave. When he subsequently retired on grounds of ill-health, the Commission paid him compensation for 12 days, rather than for the full complement of days of leave lost through illness.

The Tribunal judgment in favour of the official was overruled on appeal. The General Court took the view that the application of the 12-day rule did not affect the substance of the official's fundamental right to paid leave, and that the 'health and safety requirements' the institutions must comply with in accordance with the Staff Regulations are minimum technical standards, rather than substantive provisions such as those on paid leave. In any case, the interpretation of the Staff Regulations should take account of 'the need to prevent unlimited amounts of unused leave building up and … the need to protect the financial interests of the Union'.

In reviewing the appeal judgment, the Court of Justice held that the right to paid leave means that the worker must actually have had the opportunity of exercising that right, and that the leave entitlement may not be reduced where the worker is on sick leave.[19] The EU institutions must interpret the Staff Regulations, as far as possible, in the light of the Charter, including the right to paid leave it lays down, and the General

[19] Review Commission/Strack, C-579/12 RX-II, EU:C:2013:570.

Court had erred in holding that paid leave was excluded from the notion of 'minimum health and safety requirements' with which the institutions must comply.

What is significant about this ruling is that the highest level of the Union Courts relied directly on the Charter to answer a question which the Staff Regulations had left open. It also dismissed as irrelevant the financial considerations which so influenced the General Court, in the interpretation of a staff entitlement which reflects a Charter right, even though financial entitlements are, generally speaking, subject to strict interpretation.

3.2.6 Fundamental rights as a bridge to the application of social protection laws

Before moving on to procedural and administrative rights, I should also like to mention the role fundamental rights protection plays in acting as a bridge to the application by the institutions of general social law in their relations with their staff. Most social protection measures which apply to workers generally are adopted by the Union in the form of directives; the principal characteristic of directives, according to the Treaty, is that they are addressed to the Member States, and therefore they do not formally create any obligations for the institutions. The question then arises, can the institutions simply ignore them?

The answer is, not quite.

In the first place, the Staff Regulations expressly provide that the working conditions of officials must be at least equivalent to the minimum requirements under generally applicable Union law;[20] that particular provision was at issue in the case regarding monetary compensation for leave not taken discussed above.

Secondly, the General Court has held that the provisions of a directive may be indirectly applicable to an institution if they constitute the expression of a general principle of Union law, including fundamental rights protected under the Charter. So, where a directive is adopted to give effect to a Charter right, the institutions would be bound to respect not just the Charter right, but at least those provisions of the directive which constitute 'the specific expression of fundamental rule of the … Treaty and of general principles imposed directly on those institutions'.[21] '[I]n a [Union] based on the rule of law', the General Court continued, 'the uniform application of the law is a fundamental requirement … [and] the institutions must comply with the[se] rules … in the same way as any other person subject to the law'.

3.3 Procedural rights in administrative procedures

In the civil service law of the EU, procedural and administrative rights have a very important role; in practice, the major decisions in the employment relationship are taken in the form of administrative acts, normally under certain predefined procedures and with predefined consequences, and as a result the Tribunal operates under the forms and procedures of an administrative court. The Staff Regulations do not, indeed could not, lay down exhaustively the procedure for taking every decision in

[20] Art 1e(2), Staff Regulations.

[21] Adjemian and Others v Commission, T-325/09 P, EU:T:2011:506.

the professional life of an official, and there is still ample scope for the development of a judicial code of rights in accordance with Article 41 of the Charter, the right to good administration.

Article 41 sets out a number of rights of the individual in his dealings with the institutions; while these are designed primarily to benefit the general public which comes in direct contact with the Union, the content and limitations of such rights were previously developed in the Court's case law *inter alia* on staff matters, and have been relied upon regularly, almost systematically, by applicants before the Civil Service Tribunal, both before and after the Charter gained binding effect under the Lisbon Treaty.

3.3.1 Right to be heard

Article 41(2)(a) of the Charter includes amongst the rights to good administration the 'right of every person to be heard, before any individual measure which would affect him … adversely is taken'. It is not necessary, according to the terms of this article, that the official be the subject of any kind of administrative procedure against him, such as disciplinary proceedings; it is enough that the act adversely affect his legal situation.[22]

This right has been reaffirmed time and again by the Tribunal. For example, in a recent case, the External Action Service had recalled a head of delegation a year early, following a negative inspection report on the functioning of the delegation.[23] As the decision had a negative effect on the official's career, the Court held that Service was obliged to hear him before taking it; the fact that such a recall could be taken against the wishes of the official did not change the fact that he should be heard first. In that case, the decision was taken on the same day as the official had submitted his comments on the inspection report, and it was obvious that the Service had not taken these into account.

A breach of the right to be heard does not, however, lead automatically to the annulment of the contested act; the Court must first verify if the decision could have been different if the official had been able to present his views on the matter. It is not enough to argue, as the Service had, that it would have adopted an identical decision in any case, as this would deprive Article 41 of any useful effect; it is essential that the official be given the possibility to influence the outcome of the decisional process. Moreover, the Charter seeks to strengthen effective protection of fundamental rights in a concrete manner; it is therefore not enough for an institution in these circumstances to claim to have taken account of the observations of an official, or to argue that its decision was justified notwithstanding those observations. The institution must provide some evidence that it has exercised its discretion in respect of those comments, even if where it does not accept them.

[22] The French version somewhat ambiguously refers to '*une mesure … prise à son encontre*'.

[23] Delcroix v EEAS, F-11/13, EU:F:2014:91.

3.3.2 Statement of reasons

Article 41(2)(c) of the Charter obliges the administration to give reasons for its decisions; this reflects the rule in Article 25 of the Staff Regulations that 'any decision adversely affecting an official shall state the reasons on which it is based', a rule which does not admit of any explicit derogations or exceptions.

While insisting that there must be such a statement of reasons, the case law of the Court has long been relatively relaxed about the point in time at which the reasons must be provided. It has thus allowed the administration to provide its reasons when replying to the complaint of the staff member, rather than requiring that the reasons accompany the contested decision. This approach by the Court was originally motivated by the consideration that it would be inappropriate to require the institution, when promoting certain officials, to explain why it was not promoting the other hopefuls, though this relaxation of the obligations of Article 25 of the Staff Regulations has since been applied to many other situations.

Recently, however, the Tribunal has started to tighten things up, for the benefit of staff members, at least in relation to decisions on harassment at the workplace. In one case, the Tribunal first held that the decision of the appointing authority that the official had not been a victim of harassment only provided her with the beginnings of a statement of reasons, which was not sufficient to comply with Article 25 of the Staff Regulations.[24] As the Charter establishes the right to reasons as a fundamental general principle, any exception to the rule in Article 25 must be interpreted restrictively and be objectively justified by the circumstances in which the decision was adopted. Requiring an official in effect to submit a staff complaint—one which may, in any case, never be answered—in order to know the reasons for the rejection of his request for assistance would be incompatible with the obligation on the institution to act with rapidity and solicitude in a situation as serious as psychological harassment. The Tribunal appears to be attempting to discipline somewhat the duty to provide reasons as currently applied, as regards the moment at which it must be provided, while recognising that there are circumstances which may require a certain temporal flexibility.

3.4 Jurisdictional fundamental rights—the rule of correspondence

Title VI of the Charter is grandly entitled 'Justice'. Article 47(1) grants 'the right to an effective remedy' before an independent and impartial tribunal to anyone who enjoys rights and freedoms under Union law. The Charter is not very explicit as to what such a right entails, beyond a few basics, such as effective access to justice, the presumption of innocence, *nulla poene sine lege* and a rule against double jeopardy. This article has nonetheless been relied on in a large number of cases before the Union Courts, including the Tribunal, since the Charter came into force. The application of Article 47 can be illustrated by a recent and rather delicate case, which is specific to EU staff law, concerning effective judicial protection and the so-called 'rule of correspondence'.

[24] Tzirani v Commission, F-46/11, EU:F:2013:115.

Under some very old case law of the Court of Justice, an official was required to set out in his administrative complaint, at least in skeletal form, the legal grounds on which he sought to challenge the decision complained of, on pain of the inadmissibility of any grounds raised for the first time in the application to the Court. In 2010, the Tribunal ruled that if the applicant had challenged the substantive validity of the decision in his complaint, he could raise any other argument on the substantive validity before the court; likewise, he could raise before the Court any argument on the procedural validity of the decision, if he had raised a procedural validity argument in his staff complaint.[25] This was intended to be, and in effect was, a significant loosening of the restrictions on the possibility for a staff member to challenge administrative decisions before the Court. Though novel, the judgment did not contradict any provision of the Staff Regulations, as the so-called rule of correspondence was entirely judge-made in any case, and, indeed, the defendant institution did not challenge the Tribunal's ruling. However, in an appeal in an unrelated matter in December 2013, in *Moschonaki v Commission*, the General Court ruled that the Union Courts must apply the strict version of the rule of correspondence; if an applicant has not raised the *particular* argument on substantive or procedural validity in his staff complaint, he may not then rely on it in his complaint.[26]

This raised two interesting issues for the Tribunal. One is the extent to which the lower court is bound to follow judgments of the appeal jurisdiction; after all, the Union Courts are modelled on the courts of the civil law systems of the founding Member States, which do not have a doctrine of *stare decisis* such as obtains in common law jurisdictions. That said, the Union Courts have a long tradition of according great respect to their own prior decisions and a slightly shorter tradition—the Court of Justice only became an appeal court in 1989 when a lower court was set up for the first time—of according even greater respect to appeal judgments.[27]

The second is whether the rule of correspondence also applied to the 'plea of illegality'. The plea of illegality is the possibility for an individual to challenge an administrative decision by arguing that the act of general scope on which the administrative decision is based, and which the individual was unable to challenge, is itself illegal. In a case decided early in 2014, an official had been ordered to repay some family allowances, to which he was not entitled and which he had been receiving over a twelve-year period.[28] The official pleaded that the provision allowing recovery of the sums wrongly paid outside the normal five-year prescription period, the last sentence of Article 85 of the Staff Regulations, was itself illegal, as being a disproportionate response to his behaviour and as contravening the requirement of legal certainty. Under one reading of the General Court's judgment, the applicant would have been unable to challenge the legality of the relevant provision, as he had not done so in his staff complaint. On the other hand, the *Moschonaki* judgment had not dealt explicitly with the plea of illegality, and the application of the General Court's

[25] Mandt v Parliament, F-45/07, EU:F:2010:72.

[26] Commission v Moschonaki, T-476/11 P, EU:T:2013:557.

[27] *Bradley* [1] pp. 47–65.

[28] CR v Parliament, F-128/12, EU:F:2014:38.

reasoning to such a plea could be seen as an extrapolation, rather than a simple application, of that reasoning.

The Charter right to effective judicial protection provided the Tribunal with a way out of this conundrum. The Tribunal noted that the staff complaint procedure was designed to allow the institution and the staff member to settle their differences without recourse to legal proceedings; even if the institution agreed with the official that, for example, the last sentence of Article 85 of the Staff Regulations were illegal, it would have no choice but to apply it. Moreover, an official is supposed to know the content of the Staff Regulations and hence be capable, in theory, of challenging administrative decisions for their failure to respect these regulations; on the other hand, pleas of illegality will often raise breaches of rules and principles of Union law outside the four corners of staff law, which the ordinary official is not expected to know. Finally, the Tribunal ruled that, while the official's access to justice is subject to rules of judicial procedure, the very substance of this right would be impaired if he were required to raise pleas of illegality already at the stage of the administrative complaint.

The Tribunal thus avoided the question of a possible legal obligation to follow the *Moschonaki* judgment of the General Court by using the well-known common law technique of distinguishing the earlier case. To resolve the substantive question of the existence or not of a requirement to raise such a plea in the administrative complaint, a close analysis of the *raison d'être* of the administrative complaint procedure and its inherent limitations, viewed through the prism of the Charter, provided the Tribunal with a way out.

4 Conclusions

Since it achieved Treaty status in December 2009, the Union Courts have taken the Charter of Fundamental Rights to heart; the inclusion of references to Charter rights in Tribunal judgments has become an everyday occurrence, provided of course the parties have raised a breach of the relevant rights in a sufficiently clear and timely manner, in accordance with the Rules of Procedure. It should also add a new dimension to staff law for the institutions as well, in their capacities as makers of rules and takers of decisions. The Charter has thus contributed to a rising tide of fundamental rights protection which lifts all boats, including the good ship 'EU staff law'.

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