Reports of Cases

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

23 November 2010*

(Civil service — Officials — Open competition — Failure to include the applicant on the reserve list — Balanced representation of men and women on competition selection boards)

In Case F-50/08,

ACTION under Articles 236 EC and 152 EA,

Gábor Bartha, residing in Brussels (Belgium), represented by P. Homoki, lawyer,

applicant,

v

European Commission, represented by J. Currall, V. Bottka and A. Sipos, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni, President, H. Kreppel (Rapporteur) and H. Tagaras, Judges,

Registrar: W. Hakenberg,

gives the following

Judgment

1 By an application lodged at the Registry of the Tribunal on 19 May 2008 Mr Bartha essentially seeks, first, annulment of the decision of the selection board in open competition EPSO/AD/56/06 informing him that he had failed the tests in that competition, and, second, an order that the Commission of the European Communities compensate him for the damage allegedly suffered as a result of that decision.

* Language of the case: Hungarian.

Legal context

2 Article 3 of Annex III to the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides as follows:

'The [s]election [b]oard shall consist of a chairman designated by the Appointing Authority and of members designated by the Appointing Authority and the Staff Committee, each designating the same number.

For open competitions common to two or more institutions, the [s]election [b]oard shall consist of a chairman appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations and of members appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations on a proposal from the institutions, as well as of members appointed by agreement between the Staff Committees of the institutions, in such a way as to ensure equal representation.

The [s]election [b]oard may, for certain tests, be assisted by one or more examiners serving in an advisory capacity.

Members of the [s]election [b]oard shall be chosen from officials whose function group and grade is at least equal to that of the post to be filled.

If a [s]election [b]oard consists of more than four members, it shall comprise at least two members of each gender.'

Facts of the case

3 On 25 July 2006 the European Personnel Selection Office (EPSO) published a notice of open competition EPSO/AD/56/06 to constitute a reserve of administrators (AD 5) with Hungarian citizenship (OJ 2006 C 172 A, p. 3, 'the competition notice').

4 That competition covered four fields: 'European public administration/human resources', 'Law', 'Economics' and 'Microeconomics/Business Administration'.

5 The number of successful candidates for the 'Law' field was fixed at 10.

6 The applicant applied to take part in competition EPSO/AD/56/06 and opted, when registering, for the 'Law' field.

7 Having passed the admission tests organised with a view to carrying out a preliminary selection of candidates, the applicant sat the three written tests provided for in the competition notice, then the oral test reserved for candidates selected following the written tests.

8 In a letter of 19 November 2007 the chairman of the selection board informed the applicant that it had not been possible to include his name in the reserve list since the overall mark which he had obtained for the written and oral tests as a whole had been lower than that obtained by the 10 successful candidates in the competition (for the 'Law' option).

9 In a letter of 22 November 2007 the applicant requested a review of the decision not to include him on the reserve list for the competition.

10 Not having received the documents or information he had requested, the applicant repeated his request in an email sent to EPSO on 10 December 2007.

11 On 20 December 2007 EPSO sent the applicant a copy of his written tests (b) and (c) together with a copy of the corresponding assessment forms.

12 In a letter of 7 January 2008 the applicant, in the light of the documents sent to him by EPSO, added to the grounds for complaint originally contained in his request for review.

13 By a decision of 23 January 2008 the chairman of the selection board dismissed the request for review.

14 In an email sent to EPSO on 25 January 2008 the applicant disputed the content of the decision of 23 January 2008.

15 By a decision of 31 March 2008 the chairman of the selection board confirmed its refusal to include the applicant on the reserve list for the competition.

Procedure and forms of order sought

16 The application was lodged on 19 May 2008.

17 The applicant claims that the Tribunal should:

annul the decision of 19 November 2007;

annul the decision of 23 January 2008;

annul the decision of 31 March 2008;

order the Commission to make good the damage arising from the illegality of the decisions referred to above;

order the Commission to pay the costs.

18 The Commission claims that the Tribunal should:

dismiss the action;

order the applicant to pay the costs.

19 In a document entitled 'Amendment to the application', which the Tribunal regarded as a reply, the applicant also claimed that the Tribunal should:

order the Commission to pay him damages of EUR 924 per completed month for the period between 31 March 2008 and delivery of the present judgment, by way of compensation for material damage;

order the Commission to pay him the sum of EUR 10 000 by way of compensation for non-material damage;

order EPSO to take a fresh decision replacing that of 19 November 2007.

20 In its rejoinder the Commission again claimed that the Tribunal should:

dismiss the applicant's action;

order the applicant to pay the costs.

21 In accordance with Article 48(2) of the Rules of Procedure, the Tribunal decided, with the agreement of the parties, to proceed to judgment without a hearing.

Decision

A – *The claims for annulment*

1. *Initial observations on the subject-matter of the claims for annulment*

22 It must be recalled that, according to the case-law, where a candidate in a competition seeks review of a decision taken by a selection board, it is the decision taken by the latter after the review of the candidate's situation that constitutes the act adversely affecting him (Case T-173/05 *Heus* v *Commission* [2006] ECR-SC I-A-2-329 and II-A-2-1695, paragraph 19). Consequently, the decision of 23 January 2008, adopted following the request for review submitted by the applicant on 22 November 2007, replaced the selection board's original decision of 19 November 2007 and therefore constitutes the act adversely affecting him ('the contested decision').

23 Furthermore, the material in the case-file discloses that, having received the contested decision, on 25 January 2008 the applicant sent an email to EPSO, to which, in accordance with the competition notice, not just requests for review but also complaints submitted by candidates on the basis of Article 90(2) of the Staff Regulations were to be addressed. In that email he contested the validity of that decision and stressed, in particular, that it had been taken contrary to certain rules governing the proceedings of selection boards in competitions. Having regard to the subject-matter of that email and given that EPSO's decision to forward it to the chairman of the selection board for a reply can have no bearing on the legal characterisation to be given to that email by the Tribunal, it must be regarded as a complaint within the meaning of Article 90(2) of the Staff Regulations, which was explicitly rejected by the decision of 31 March 2008. According to the case-law, claims for annulment formally directed against the decision rejecting a complaint have the effect, where that decision lacks any independent content, of bringing before the Tribunal the act against which the complaint was submitted (see, to that effect, Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 8; see also Case F-104/07 *Hoppenbrouwers* v *Commission* [2009] ECR-SC I-A-1-259 and II-A-1-1399, paragraph 31). That being so, since the decision of 31 March 2008 lacks any independent content, there is likewise no need to rule on the claim for annulment of that decision.

2. *The claim for annulment of the contested decision*

a) Admissibility

24 The Commission argues that an action against the contested decision should have been brought within a period which expired 3 months and 10 days after notification of that decision, in other words by 3 May 2008 at the latest. The present application was not brought until 19 May 2008. It should therefore, in the Commission's view, be dismissed as inadmissible.

25 According to settled case-law, the legal remedy available regarding decisions of a competition selection board normally consists of a direct application to the European Union court. However, if the person concerned chooses, as the applicant in the present case did, to refer the question first to the administration by means of a complaint through official channels, the admissibility of the action brought subsequently will depend on his compliance with all the procedural requirements applicable to the prior complaint (order in Case T-41/04 *Pérez Díaz* v *Commission* [2005] ECR-SC I-A-373 and II-1697, paragraph 32).

26 In the present case, since the applicant had chosen to bring an administrative complaint against the contested decision, he was required by the provisions of Article 90(2) of the Staff Regulations to lodge the complaint within three months of the date of notification of that decision. It is clear from the documents in the case-file that he complied with that requirement, since his complaint reached EPSO on 25 January 2008, two days after he was notified of the contested decision on 23 January 2008.

27 Furthermore, whereas, by virtue of Article 91(3) of the Staff Regulations, actions under that Article must be filed within a period of 3 months from the date of notification of the decision taken in response to the administrative complaint, extended on account of distance by a single period of 10 days in accordance with Article 100(3) of the Rules of Procedure, it is not in dispute that the applicant brought the present action before the Tribunal on 19 May 2008, in other words within the period of 3 months and 10 days. That being so, the Commission is not justified in maintaining that the action was filed out of time.

b) Merits

28 In support of his claim the applicant originally submitted six pleas, alleging, first, infringement of the fifth paragraph of Article 3 of Annex III to the Staff Regulations, second, infringement of the requirement that the procedure be fair, third, infringement of the principles governing assessment, fourth, infringement of Article 90(2) of the Staff Regulations, fifth, misuse of power and infringement of the principle of sound administration, and sixth, infringement of the principle of legal certainty.

29 However, in his reply the applicant informed the Tribunal that he was withdrawing the pleas alleging infringement of the requirement that the procedure be fair, infringement of the principles governing assessment, and infringement of the principle of legal certainty.

30 The plea alleging infringement of the fifth paragraph of Article 3 of Annex III to the Staff Regulations must be examined.

Arguments of the parties

31 The applicant points out that, according to the fifth paragraph of Article 3 of Annex III to the Staff Regulations, '[i]f a selection board consists of more than four members, it shall comprise at least two members of each gender'. In the applicant's view, that provision has been infringed in the present case, since the selection board, which consisted of more than four members, comprised only one female member at his oral test.

32 In its defence, the Commission claims that the plea was inadmissible since it was not raised in the pre-litigation procedure, and stresses for the sake of completeness that the fifth paragraph of Article 3 of Annex III to the Staff Regulations was not applicable in the present case, since the selection board consisted of only four full members and four alternate members. In any event, even if the selection board was required to comply with that provision, the Commission maintains that the fifth paragraph of Article 3 of Annex III to the Staff Regulations, which makes no distinction between full members and alternate members, was complied with, since the selection board comprised two female members.

33 The applicant contends, regarding the admissibility of the plea, that the rule of correspondence between the administrative complaint and the originating application does not apply to competitions and that, in any event, the plea alleging infringement of the rule requiring parity in competition selection boards is a plea raising an issue of public policy which may be relied on for the first time before the Tribunal. As to the merits of the case, the applicant maintains that, in order to ascertain whether the requirement laid down in the fifth paragraph of Article 3 of Annex III to the Staff Regulations, the purpose of which is to prevent any discrimination, has been satisfied, only the full members or, at the very least, those present at the oral test should be taken into consideration.

Findings of the Tribunal

– Admissibility of the plea

34 As the Tribunal held in its judgment of 1 July 2010 in Case F-45/07 *Mandt* v *Parliament*, paragraphs 119 and 120, the rule of correspondence between the administrative complaint and the originating application is not complied with only where the judicial action alters the relief sought in the complaint or its cause of action, and the concept of 'cause of action' must be given a broad interpretation. According to such an interpretation, as regards claims for annulment, the 'cause of action of the dispute' must be understood as the applicant's challenge to the substantive legality of the contested decision or, in the alternative, the challenge to its procedural legality. Consequently, and subject to pleas alleging illegality of a legislative or regulatory text, and to grounds raising a public-policy issue, the cause of action of the dispute would be altered, and the correspondence rule therefore breached, where the applicant, who criticised in his administrative complaint solely the formal validity of the act adversely affecting him, including in its procedural aspects, raised substantive pleas in the originating application, or in the opposite case where the applicant, after having disputed in the complaint only the substantive legality of the act adversely affecting him, submitted an application containing pleas relating to the formal validity of that act.

35 In the present case, while it is true that the plea alleging infringement of the fifth paragraph of Article 3 of Annex III to the Staff Regulations is not referred to, even implicitly, in the administrative complaint, the applicant nevertheless challenged the procedural legality of the contested decision in that complaint, by claiming, in particular, that his copy of written test (c) had not been corrected by a Hungarian-speaking examiner, which in his view rendered the entire procedure flawed, and that the contested decision lacked adequate grounds in the light of the observations set out in the letters of 22 November 2007 and 7 January 2008. That being so, the plea referred to above, which relates to the same legal cause of action as some of the pleas set out in the complaint, is admissible.

– Substance of the plea

36 First of all the Tribunal must consider whether the selection board which examined the applicant's performance consisted of 'more than four members', within the meaning of the provisions of the fifth paragraph of Article 3 of Annex III to the Staff Regulations, in order to ascertain whether, in this particular case, the selection board was required to comply with those provisions.

37 The expression 'members [of the selection board]' in the fifth paragraph of Article 3 of Annex III to the Staff Regulations must be understood, in view of its general nature, to refer to all the members of the selection board, including the chairman, and not just to those members of the selection board who do not have the position of chairman. It follows that selection boards consisting, as in the present case, of at least five members, including the chairman, fall within the scope of the abovementioned provision.

38 Next, it is necessary to examine whether the selection board satisfied the rule set out in the fifth paragraph of Article 3 of Annex III to the Staff Regulations, in other words that it included 'at least two members of each gender', which means that the Tribunal must decide, first, whether compliance with the rule must be determined when the selection board is constituted, as shown in the list published by the institution(s) organising the competition, or when the tests actually take place; and second, whether account must be taken only of the full members of the selection board or also of the alternate members.

39 On the question whether compliance with the rule laid down in the fifth paragraph of Article 3 of Annex III to the Staff Regulations must be determined when the list of the selection board members is published or when the oral tests take place, the Tribunal considers that the provisions concerned

must be interpreted as referring to the members of the selection board shown in the published list. If the rule in question had to be satisfied when the tests take place, considerable practical difficulties would ensue for the administration responsible for organising the competitions, given that any other interpretation would impose an excessive burden in terms of staff management, since selection boards must also, under the second paragraph of Article 3 of the same Annex III to the Staff Regulations, consist of both members appointed by the appointing authority and members appointed by the Staff Committee(s).

40 As for whether only full members of the selection board or also alternate members must be taken into consideration for the purpose of determining compliance with the fifth paragraph of Article 3 of Annex III to the Staff Regulations, it should be borne in mind, as a preliminary point, that the case-law accepts that an administration constituting a selection board for a competition may lawfully appoint not just full members but also alternate members, even if that possibility is not expressly referred to in the Staff Regulations. The point of appointing alternate members to a selection board is to enable full members to be replaced if they are unable to attend, so as to ensure that the selection board is able to complete its proceedings within a reasonable period while maintaining a stable composition throughout the oral tests (Case T-100/04 *Giannini* v *Commission* [2008] ECR-SC I-A-2-9 and II-A-2-37, paragraph 207).

41 However, in order to determine whether the rule set out in the fifth paragraph of Article 3 of Annex III to the Staff Regulations has been satisfied, only the full members of the selection board should, in principle, be taken into consideration, since they are usually the ones who are called upon to take part in the actual conduct of the tests.

42 Furthermore, if the fifth paragraph of Article 3 of Annex III to the Staff Regulations were to be interpreted as requiring all members of the selection board, whether full or alternate, to be taken into consideration in order to assess the conformity of the selection board's composition, that interpretation would deprive the provision of much of its scope. The requirement that a selection board with more than four members must include at least two members of each gender was laid down by the legislature so that the composition of selection boards would have a more or less balanced representation of both genders. That objective would not be attained if, in a selection board with at least eight members, including alternates, it was sufficient for either gender to be represented by only two alternate members.

43 It follows that a selection board consisting, when the list of members is published, of more than four full members cannot be regarded as satisfying the requirements of the fifth paragraph of Article 3 of Annex III to the Staff Regulations unless those full members include at least two members of each gender.

44 However, the requirement that only the full members of the selection board at the stage when the list of members is published must be taken into consideration may be qualified in a particular situation where, despite the fact that the composition of the selection board at that stage does not satisfy the rule laid down in the fifth paragraph of Article 3 of Annex III to the Staff Regulations, as interpreted in the previous paragraph, its composition when the tests actually take place is in accordance with that rule. In such a situation, the purpose of the fifth paragraph of Article 3 of Annex III to the Staff Regulations, which is to ensure that the performance of candidates in a competition is assessed by a selection board in which there is guaranteed to be balanced representation between women and men, is ultimately entirely fulfilled.

45 In the present case, although EPSO, in a letter of 23 August 2006, had invited the institutions and the Staff Committees to propose the names of suitable persons to make up the selection board and had in particular reminded them that a selection board with more than four members had to include at least two members of each gender, the documents in the case-file disclose that, shortly before the oral tests took place, EPSO published on its website the list of members — full and alternate — of the selection

board in open competition EPSO/AD/56/06, which showed that the selection board consisted of a full chairman, male, and four full members, also male, but no female members, contrary to the fifth paragraph of Article 3 of Annex III to the Staff Regulations.

46 It is true that the list published by EPSO also included an alternate chairman and an alternate member who were both female, and that, in particular, that alternate member sat on the selection board at the applicant's oral test.

47 However, that fact does not show that the selection board satisfied the requirements of the fifth paragraph of Article 3 of Annex III to the Staff Regulations, since it is neither proved nor even claimed that the female alternate chairman, as well as the female alternate member, actually formed part of the stable composition of the selection board which examined the candidates' abilities when the tests were conducted.

48 It must therefore be concluded that, in the present case, the composition of the selection board did not comply with the provisions of the fifth paragraph of Article 3 of Annex III to the Staff Regulations.

49 In so far as it has not been established that, without that irregularity, the contested decision would have had the same content, it follows that the contested decision must be annulled without there being any need to consider the other pleas in the application.

B – *The claim that the Tribunal should order EPSO to take a fresh decision replacing that of 19 November 2007*

50 In accordance with settled case-law, it is not for the courts of the European Union to issue injunctions to the administration as part of a review of legality on the basis of Article 91 of the Staff Regulations (Case T-14/03 *Di Marzio* v *Commission* [2004] ECR-SC I-A-43 and II-167, paragraph 63). The abovementioned claim must consequently be dismissed as inadmissible.

C – *The claim for damages*

1. *Arguments of the parties*

51 The applicant seeks compensation for the material and non-material damage which he claims to have suffered as a result of the contested decision. He states that the material damage consists of the difference between the salary of an official at grade AD 5, step 2, and the remuneration which he currently receives, as well as loss of entitlement to social security and the European Union retirement pension.

52 The Commission claims that the abovementioned claim should be dismissed.

2. *Findings of the Tribunal*

53 In accordance with settled case-law, the administration can be held liable for damages only if a number of conditions are satisfied: the illegality of the allegedly wrongful act committed by the institutions, actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered (see Case 136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 42, and Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 52). Those three conditions are cumulative. The absence of any one of them is sufficient for the claim for damages to be dismissed.

54 As regards the causal link, the applicant must, in principle, adduce proof of a direct causal nexus between the wrong committed by the institution concerned and the injury pleaded (see Case T-140/97 *Hautem* v *EIB* [1999] ECR-SC I-A-171 and II-897, paragraph 85).

55 However, the degree of certainty of the causal link required by the case-law is attained where the wrongful act committed by a Community institution has definitely deprived a person, not necessarily of recruitment, to which the person concerned could never prove he had a right, but of a genuine chance of being recruited as an official or other member of staff, resulting in material damage for the person concerned in the form of loss of income (see Case T-45/01 *Sanders and Others* v *Commission* [2004] ECR II-3315, paragraph 150, Case F-46/07 *Tzirani* v *Commission* [2008] ECR-SC I-A-1-323 and II-A-1-1773, paragraph 218).

56 As regards material damage, the applicant seeks compensation for the material damage resulting, first, from the loss of remuneration suffered, in the present case the difference between the salary of an official at grade AD 5, step 2, and the remuneration which he currently receives, and second, from the loss of entitlement to the social security and pension associated with the status of official. However, in the present case it is not established that, had a wrongful act not been committed in the composition of the selection board, the applicant would have been recruited as an official or, at the very least, would have had a genuine chance of being recruited. Consequently, since the condition requiring the existence of a causal link between the fault committed by the administration and the injury pleaded is not satisfied, the claim for compensation for material damage must be dismissed. In any event, it will be for the administration whose act has been annulled to take the necessary measures to comply with the present judgment and, in particular, to adopt, in compliance with the principles of the European legislation applicable, such measures as will provide due compensation for the damage which the applicant has suffered as a result of the act which has been annulled (see, to that effect, Case T-132/03 *Casini* v *Commission* [2005] ECR-SC I-A-253 and II-1169, paragraph 98).

57 As regards non-material damage, it has to be pointed out that the applicant has not demonstrated that he suffered non-material damage separable from the wrongful act justifying the annulment of the contested decision and not capable of being entirely remedied by that annulment (see, to that effect, Case T-49/08 P *Michail* v *Commission* [2009] ECR-SC I-B-1-121 and II-B-1-739, paragraph 88).

58 It follows that the claim for damages must be dismissed.

Costs

59 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of the chapter relating to costs, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.

60 It is apparent from the reasons set out above that the Commission has for the main part been unsuccessful. Furthermore, in his pleadings the applicant has expressly applied for the Commission to pay the costs. As the circumstances of the present case do not justify the application of Article 87(2) of the Rules of Procedure, the Commission must therefore be ordered to pay the costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby:

1. **Annuls the decision of 23 January 2008, by which the selection board of competition EPSO/AD/56/06 dismissed Mr Bartha's application for review of the decision of that selection board rejecting his candidature;**

2. **Dismisses the remainder of the application;**

3. **Orders the European Commission to bear all of the costs.**

Gervasoni Kreppel Tagaras

Delivered in open court in Luxembourg on 23 November 2010.

W. Hakenberg
Registrar

S. Gervasoni
President