Reports of Cases

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

13 March 2013*

(Civil service — Open competition — Non-admission to the assessment exercises — Duty of the administration to interpret complaints with an open mind — Amendment of the vacancy notice after the admission tests — Principle of legitimate expectations — Legal certainty)

In Case F-125/11,

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

Isabel Mendes, residing in Brussels (Belgium), represented by S. Rodrigues and A. Blot, lawyers,

applicant,

v

European Commission, represented by J. Currall, acting as Agent,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

composed of M.I. Rofes i Pujol, President, I. Boruta and K. Bradley (Rapporteur), Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2012,

gives the following

Judgment

1 By application received at the Registry of the Tribunal on 28 November 2011, Ms Mendes brought the present action, seeking, first, the annulment of the decision of the selection board in open competition EPSO/AST/111/10 refusing to admit her to the assessment exercises and, second, an order that the European Commission pay damages to make good the loss which she suffered as a result of that decision.

* Language of the case: French.

Legal context

2 Article 90(2) of the Staff Regulations of Officials of the European Union ('the Staff Regulations') is worded as follows:

'Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. …'.

3 Article 91(2) and (3) of the Staff Regulations provides as follows:

'2. An appeal to the Court of Justice of the European Union shall lie only if:

— the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) within the period prescribed therein, and

— the complaint has been rejected by express decision or by implied decision.

3. Appeals under paragraph 2 shall be filed within three months. The period shall begin:

— on the date of notification of the decision taken in response to the complaint;

…'

4 Article 1(1) of Annex III to the Staff Regulations is worded as follows:

'Notice of competitions shall be drawn up by the appointing authority after consulting the Joint Committee.

It must specify:

…

(e) where the competition is on the basis of tests, what kind they will be and how they will be marked;

…'

5 On 17 November 2010, the European Personnel Selection Office (EPSO) published in the *Official Journal of the European Union* notice of open competition EPSO/AST/111/10 in order to constitute a reserve pool from which to recruit assistants in Grade AST 1 in the secretarial field (OJ 2010 C 312 A, p. 1; 'the competition notice'). The closing date for registration was 16 December 2010.

6 The competition notice made provision, in section IV, for admission tests and, in section V, for assessment exercises. The admission tests, of which there were six, were designed to assess, by multiple-choice questions, the aptitudes and general abilities of candidates in verbal reasoning (test (a)), numerical reasoning (test (b)), abstract reasoning (test (c)), and the secretarial field (test (f)). In addition, two tests related to candidates' professional capability and were designed to assess, respectively, accuracy and precision (test (d)) and prioritising and organising (test ((e)).

7 According to section IV of the competition notice, tests (a), (d), (e) and (f) were each marked from 0 to 20, with a pass mark of 10. Tests (b) and (c) were each marked from 0 to 10, with an aggregate pass mark of 10 for both tests.

8 Section V point 1 of the competition notice stated that candidates would be admitted to the assessment exercises if they had not only obtained one of the highest marks in the admission tests and a pass mark in each test but also fulfilled the general and specific conditions listed in section III of the competition notice.

9 That provision also stated that admission to the assessment exercises would be confirmed subject to subsequent verification of the supporting documents enclosed with each candidate's application form. In addition, a footnote to point 1 of section V of the competition notice stated that the number of candidates invited to take the assessment exercises would be approximately 2.5 times the number of successful candidates indicated in the competition notice. For candidates who had chosen Portuguese as their language, the table in section I point 1 of the competition notice indicated that the number of successful candidates envisaged was 19.

10 The competition notice also included, in a box and in bold, the following preliminary information:

'Before applying, you should carefully read the guide [to open competitions] published in Official Journal … C 184 A of 8 July 2010 and on the EPSO website.

This guide is an integral part of the competition notice and will help you to understand the rules governing the procedure and how to apply'.

11 The Guide to open competitions, in the version in force at the material time, states at Point 6.3, 'Appeal procedures':

'If, at any stage of the competition, you consider that EPSO or the selection board has acted unfairly or has failed to comply with:

— the rules governing the competition procedure, or

— the provisions of the competition notice,

and that your interests have been prejudiced as a result, you can take the following action:

— you can lodge an administrative complaint under Article 90(2) of the Staff Regulations …

…

— [y]ou can submit a judicial appeal under Article 270 [TFEU] and Article 91 of the Staff Regulations to the:

European Union Civil Service Tribunal

…

The time limits [laid down in the Staff Regulations] for initiating both types of procedure start to run from the time you are notified of the act allegedly prejudicing your interests.'

12 On 3 March 2011, EPSO published a corrigendum to the competition notice (OJ 2011 C 68 A, 'the corrigendum'). The corrigendum, which related to the marking of tests (d) and (e), was worded as follows:

'On page 3, in Section IV 2:

for:

"Test (d)	Professional capability: accuracy and precision	Marking: 0-20 Pass mark: 10
Test (e)	Professional capability: prioritising and organising	Marking: 0-20 Pass mark: 10"

read:

"Test (d)	Professional capability: accuracy and precision	Marking: 0-20
Test (e)	Professional capability: prioritising and organising	Marking: 0-20
		The aggregate pass mark for tests (d) and (e) is 20"

,

Facts giving rise to the dispute

13 The applicant applied to take part in competition EPSO/AST/111/10, choosing Portuguese as her principal language, and sat the admission tests on 11 February 2011. The closing date of the admission tests was set at 15 February 2011.

14 By letter of 22 February 2011, EPSO informed the applicant of the forthcoming publication of the corrigendum and its content, namely that the two tests (d) and (e) would be aggregated and marked out of 40, with a pass mark of 20 for both tests.

15 By letter of 17 March 2011, EPSO informed the applicant that she had obtained the pass mark in the admission tests and, in particular, a mark of 11 in test (d), that she had an overall mark of 67.07 points and that she would be informed as soon as possible whether she was among the candidates admitted to the following stage of the competition.

16 By letter of 7 April 2011, EPSO informed the applicant that she had not been included on the list of candidates invited to participate in the assessment exercises, since the candidates admitted had obtained a mark of at least 68.8 and she had obtained a lower mark ('the non-admission decision'). In the same letter, EPSO informed the applicant that her candidature had not been considered by the selection board.

17 By letter dated 12 April 2011 and registered on 14 April 2011, the applicant lodged a complaint under Article 90(2) ('the complaint'), alleging, essentially, that the adoption of the corrigendum was a procedural irregularity which caused her harm. Accordingly, she sought annulment of the corrigendum in that it amended an eliminatory stage of the competition, for which the tests had already taken place and been marked ('I request … the annulment of the corrigendum, as modifying

an eliminatory stage that has been already completed and corrected') and claimed that only the candidates who had obtained the pass mark in all the tests should be invited to the following stage ('… the invitation at the next stage of only those who have obtained a pass mark in all tests (including test d').

18 By decision of 16 August 2011, EPSO, acting as appointing authority, rejected the complaint. By that decision, EPSO informed the applicant that the corrigendum had been adopted because the estimates of the results of the admission tests, carried out on the basis of the data available after the tests, had revealed that the success rate in test (d) was substantially lower than expected.

Forms of order sought and procedure

19 The applicant claims that the Tribunal should:

— as a principal claim:

annul the non-admission decision;

in consequence, declare that the applicant must be reinstated in the recruitment process;

in any event, request EPSO to disclose the information at its disposal regarding the results obtained by all of the candidates in tests (d) and (e);

— in the alternative, in the event that the principal claim should not be not upheld, pay the applicant an amount fixed provisionally and ex aequo et bono at EUR 50 000;

— in any event, pay the applicant, by way of damages for non-material harm, an amount fixed provisionally and ex aequo et bono at EUR 50 000.

20 The defendant contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay all the costs.

21 By letters of 25 April 2012, the Tribunal requested certain information and documents from the parties, who complied with those requests within the prescribed period.

22 The parties presented oral argument and answered the questions put by the Tribunal at the hearing on 28 June 2012. Following the hearing, the oral procedure was closed and the case entered the deliberation stage.

23 By order of 12 July 2012, the Tribunal reopened the oral procedure and requested the Commission to explain how the access tests in the competition were organised and in particular whether candidates were free to choose how to divide the time allowed for all the tests between the individual tests or whether the maximum time for each test was determined in advance. In addition, the Tribunal asked the Commission to state whether that information was available to candidates in the competition before the tests and if so how it was communicated to them.

24 The Commission complied with those requests by letter of 17 July 2012.

25 By letter of 6 September 2012, the Tribunal informed the parties that the oral procedure was closed and that the case had entered the deliberation stage.

Admissibility of the action

1. *Arguments of the parties*

26 In its defence, the Commission raises an objection of inadmissibility, based on the fact that the action was not preceded by a complaint.

27 In particular, the Commission submits that in her complaint the applicant requested only that the decision to adopt the corrigendum be annulled and that only candidates who had obtained the pass mark for each test, including test (d), be admitted to the assessment exercises. In contrast, the present action is directed against the non-admission decision. Consequently, the subject-matter of the action is different from that of the complaint and the action cannot be regarded as having been preceded by the complaint but, rather, must be regarded as a direct application to the Tribunal. Such a direct action ought to have been brought within three months, with the addition of a standard period of 10 days on account of distance, of the notification of the non-admission decision, that is to say, no later than 18 July 2011, as 17 July was a Sunday. However, the present action was not brought until 28 November 2011 and is therefore out of time and, consequently, manifestly inadmissible.

28 At the hearing, the applicant replied, first, that according to the case-law the complaint must enable the appointing authority to know with sufficient precision the criticisms which those concerned are making against the contested decisions and that, as at that stage the persons concerned are able to act without a lawyer, as the applicant did in the present case, the administration must not interpret complaints restrictively but must do so with an open mind. Secondly, the applicant asserted that she had raised the same objections in the complaint and in the application, thus complying with the rule of consistency as laid down in the case-law. Thirdly and finally, the applicant maintained that the complaint was implicitly directed against the non-admission decision.

2. *Findings of the Tribunal*

29 It should first of all be borne in mind that, according to Article 91(2) of the Staff Regulations, an action before the Civil Service Tribunal is admissible only if the appointing authority has previously had a complaint submitted to it and if that complaint has been rejected by express decision or by implied decision.

30 It has consistently been held, however, that the condition in Article 91 of the Staff Regulations applies only to acts that the appointing authority might be able to amend (see, to that effect, judgment of 14 July 1983 in Case 144/82 *Detti* v *Court of Justice*, paragraph 16), so that the remedy available against a decision of a selection board normally consists in a direct application to the Tribunal (see, for example, judgment of 31 May 2005 in Case T-294/03 *Gibault* v *Commission*, paragraph 22, and judgment of 23 November 2010 in Case F-50/08 *Bartha* v *Commission*, paragraph 25).

31 If the person concerned none the less chooses to submit an administrative complaint to the administration against a decision of a selection board, the admissibility of the action brought subsequently against the decision rejecting that complaint will depend on compliance by the person concerned with all the procedural requirements applicable to the prior complaint (*Gibault* v *Commission*, paragraph 22). In particular, the deadline for bringing an action against an express decision rejecting a complaint begins to run, in accordance with Article 91 of the Staff Regulations, on the date of notification of that decision (judgment of 20 June 2012 in Case F-66/11 *Cristina* v *Commission*, paragraph 45 and case-law cited).

32 In order to determine whether in the present case the complaint and the present action have the same subject-matter, it is appropriate to examine whether the complaint is directed against the non-admission decision.

33 In that regard, it has been held on a number of occasions that the precise legal classification of a letter or a note is a matter for the Tribunal alone and not for the parties or for one of them (judgment of 29 June 2000 in Case C-154/99 P *Politi* v *European Training Foundation*, paragraph 16).

34 A letter from an official which does not expressly request the withdrawal of the decision in question but is clearly intended to challenge the decision adversely affecting him constitutes a complaint (judgment of 16 February 2005 in Case T-354/03 *Reggimenti* v *Parliament*, paragraph 43). In that respect, the content of the act takes precedence over its form (judgment of 14 July 1998 in Case T-219/97 *Brems* v *Council*, paragraph 45 and the case-law cited).

35 Furthermore, the pre-litigation procedure, during which those concerned may act without the assistance of a lawyer, is informal in character and the administration must not therefore interpret the complaints restrictively but, on the contrary, must consider them with an open mind (judgment of 14 March 1989 in Case 133/88 *Del Amo Martínez* v *Parliament*, paragraph 11, and judgment of 21 October 2004 in Case T-49/03 *Schumann* v *Commission*, paragraph 39).

36 In the present case, the Tribunal finds at the outset that the complaint, which is dated 12 April 2001 and was registered by EPSO on 14 April 2011, postdates the non-admission decision, which undoubtedly adversely affects the applicant.

37 Next, there is nothing in the complaint to suggest that the applicant was acting in the general interest. On the contrary, she expressly referred to her personal situation, stating that she had been successful in all the tests and in particular that she was among the few candidates who had been successful in test (d). In the words of the complaint, the applicant formally complains of a procedural irregularity which causes her harm ('I … hereby would like to formally complain … about a procedural irregularity that brings me prejudice'). She then observes that, without the corrigendum, candidates who did not achieve the pass mark in test (d) would be eliminated, but that the corrigendum radically changed the situation, altering the number and composition of the group of candidates admitted to the following stage ('[c]andidates with no pass mark in test 9 (d) would be eliminated, but the corrigendum changes radically this … the population of candidates to be admitted to the next stage would change in both composition and numbers'). She asserts, moreover, that, in the light of the pass mark of 10 for test (d), she had adopted a different approach and preparation, in particular with respect to managing her time and selecting the most important parts of the test, from those which she would have adopted had there been no pass mark for that test ('in order to succeed in test (d) with a pass mark of 10, I had a different approach and preparation (time management, focusing on the most important parts, etc.) than if there was no pass mark').

38 It is clear from the wording of the complaint, therefore, when it is assessed as a whole, and from the factual background against which the complaint was drawn up, that, contrary to the Commission's contention, the assertion that the corrigendum constituted a procedural irregularity which caused her harm was the plea on which the applicant based her request for annulment of the non-admission decision rather than the subject-matter of the request.

39 Consequently, it must be held that the appointing authority, in its decision rejecting the complaint, and the Commission, in its defence, were wrong to consider that the complaint was directed solely against the corrigendum, when it was implicitly, but unequivocally, directed against the non-admission decision and against the corrigendum only by way of a plea in support.

40 Therefore, it must be concluded that the present action, directed against the non-admission decision, has the same subject-matter as, and was therefore preceded by, the complaint. Even on the assumption, which the Commission has not established, that the decision dated 16 August 2011 rejecting the complaint was notified the same day, the last valid date for bringing the action would have been 28 November 2011, as 26 November 2011 was a Saturday. Accordingly, the action, which was lodged on 28 November 2011, was submitted within the prescribed period.

41 It follows that the objection of inadmissibility raised by the Commission must be rejected.

Substance

1. *The claim seeking the applicant's reinstatement in the recruitment process and proposing the adoption of measures of organisation of procedure*

42 By her second principal head of claim, the applicant seeks to be reinstated in the recruitment process initiated by the competition.

43 It has consistently been held that it is not for the Courts of the European Union, in the context of the review of legality, to issue injunctions to the institutions of the Union or to take decisions in the place of those institutions (judgment of 5 April 2005 in Case T-336/02 *Christensen* v *Commission*, paragraph 17, and judgment of 8 February 2012 in Case F-23/11 *AY* v *Commission*, paragraphs 13 and 14).

44 This head of claim must therefore be rejected as inadmissible.

45 By the third principal head of claim, the applicant requests the Tribunal to order EPSO to disclose the information in its possession relating to the results obtained by all candidates in tests (d) and (e).

46 As the Tribunal considers that it is sufficiently well informed by the written pleadings exchanged, by the parties' answers to the questions put to them at the hearing and by the documents and observations submitted following the hearing, it rules that the abovementioned claim should not be granted.

2. *The claims for annulment*

47 In support of her claim for annulment of the non-admission decision, the applicant relies on two grounds, first, a plea of illegality against the corrigendum and, second, a plea of breach of the principle of sound administration and the duty to have regard for the welfare of candidates.

First ground, raising a plea of illegality against the corrigendum

48 In support of the first ground, the applicant puts forward four complaints alleging breaches, respectively, of Article 29(1) of, and of Annex III to, the Staff Regulations and of the principles of legal certainty and protection of legitimate expectations.

49 As regards the first two complaints, it must be observed that they are merely stated in the application and are not supported by any argument. Contrary to the rule laid down in Article 35(1)(e) of the Rules of Procedure, the applicant does not explain why the corrigendum constitutes a breach of Article 29(1) of, or Annex III to, the Staff Regulations. Those complaints must therefore be rejected as inadmissible and only the complaints alleging breach of the principles of legal certainty and legitimate expectations will be examined.

Arguments of the parties

50 So far as the alleged breach of the principle of legitimate expectations is concerned, the applicant observes that, on the basis of the initial version of the competition notice, she had obtained the pass mark in all the admission tests, and she maintains that if the corrigendum, adopted after she had sat the admission tests, had not been applied to her, she would most certainly have obtained one of the best marks in those tests.

51 The change made to the conditions of marking tests (d) and (e) necessarily had an effect on the results of those tests and on the ensuing classification. The number of candidates who were successful in tests (d) and (e) marked together was higher than the number of candidates who were successful in tests (d) and (e) marked separately. In so far as the number of candidates admitted as a result of the corrigendum was higher, the applicant's prospects of being admitted to the assessment exercises by obtaining a higher average mark than that of her competitors were reduced.

52 The applicant refers to the case-law according to which the principle of legal certainty precludes a measure adopted by the institutions of the European Union from taking effect from a point in time before its publication, save, exceptionally, where the aim to be achieved so requires and where the legitimate expectations of those concerned are duly respected. In the present case, no exceptional circumstance justified the adoption of the corrigendum.

53 In addition, the applicant states that the Commission justifies the adoption of the corrigendum by requirements of the service, arising from the high risk of not achieving a sufficient number of candidates admitted to the second stage of the competition, the stage of the assessment exercises, and she maintains that the Commission has adduced no evidence capable of proving the existence of such requirements.

54 The Commission replies that the corrigendum was adopted in order to avoid the consequences of the unnecessary strictness of test (d) and that such an aim is lawful in itself and consistent with the interest of the service. Where the appointing authority finds that the conditions laid down in a competition notice are excessively strict, it may always amend them provided that it does so for objective reasons and not in the light of the candidates who have applied.

55 In any event, that measure is consistent with the principle of proportionality and also reflects an intention to have regard for the welfare of candidates in so far as it avoids imposing on them the delays that would result if a new competition were arranged. In addition, such a measure is consistent with the principle of sound administration, since it makes it possible to save the public funds that would have to be wasted if, following the annulment of a competition, the administration were obliged to arrange a new competition.

56 As for the interest of the service, the Commission contends that it would be as much in the interest of the candidates themselves as in the interest of the appointing authority for the appointing authority to maintain a permanent review of the reliability of the tests which it has prescribed, especially in the case of tests used for the first time, as in this instance. In the absence of such a review, the Tribunal might well be required to deal with numerous actions challenging exclusions attributable to unnecessarily strict tests.

57 As regards the alleged breach of the principle of legitimate expectations, the defendant submits that the corrigendum was adopted at a time when the applicant could not have any assurance that she would satisfy the conditions for admission to the second stage of the competition.

Findings of the Tribunal

58 It should be borne in mind, first of all, that, under Article 1(1)(e) of Annex III to the Staff Regulations, where the competition is on the basis of tests, the notice of competition must specify what kind of tests they will be and how they will be marked (see, to that effect, *Detti* v *Court of Justice*, paragraph 27).

59 Furthermore, according to settled case-law, the terms of the competition notice constitute both the legal framework and the basis for assessment for the selection board (see *Schumann* v *Commission*, paragraph 63 and the case-law cited).

60 In the present case, it is not disputed that the corrigendum amended, after the end of the admission tests, the marking of tests (d) and (e) as provided for in the competition notice by providing that those two tests would be aggregated and marked out of 40 with a pass mark of 20.

61 The Tribunal must therefore ascertain whether, as the applicant submits, the amendment of the marking of the tests after they had taken place constitutes a breach of the principles of protection of legitimate expectations and legal certainty.

– Breach of the principle of legitimate expectations

62 The Tribunal recalls that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the administration has led him to entertain justified expectations by giving him precise assurances in the form of precise, unconditional and consistent information from authorised and reliable sources (judgment of 11 July 2007 in Case T-58/05 *Centeno Mediavilla and Others* v *Commission*, paragraph 96).

63 In this case, the competition notice contained such assurances, on the basis of which the applicant was entitled to expect that the candidates admitted to the assessment exercises would be chosen only from among those who had obtained the pass mark in the admission tests and, in particular, the pass mark of 10 in test (d).

64 In that regard, it should be borne in mind that comparative tests are by definition tests in which the performance of each candidate is assessed by reference to those of the other candidates, so that the number of candidates admitted to those tests is likely to have an impact on the selection board's assessment of the candidates. Those assessments reflect the value judgment made of a candidate's performance by comparison with the performance of other candidates. It follows that the greater the number of candidates in that type of test, the higher the standard of performance expected of those candidates by the selection board will be (see judgment of 5 March 2003 in Case T-24/01 *Staelen* v *Parliament*, paragraph 57).

65 The amendment of the rules on the marking of tests (d) and (e) laid down in the competition notice is capable of affecting the applicant's prospects of being included on the list of candidates admitted to the assessment exercises, in so far as such an amendment is likely to have the effect of increasing the number of candidates who have obtained the pass mark in the tests and thus reducing her prospects of being among the best candidates.

66 It is common ground between the parties that such an increase was the very reason for the corrigendum adopted after EPSO's finding that there was a 'serious and unexpected problem concerning the results of test (d)'. According to EPSO, the test had been designed to obtain a success rate of around 50% but in fact the success rate was around 15%.

67 In addition, it is apparent from the file, and in particular from the simulation which EPSO carried out on the basis of the data available after the tests and without taking account of either the neutralisation of certain questions or the selection board's decision as to the eligibility of candidatures, which was produced by the Commission as an annex to its defence ('the simulation'), that the corrigendum produced the desired effect. In particular, for candidates who, like the applicant, had chosen Portuguese as their first language, the estimate of the number of candidates who would have passed test (d) without the corrigendum was 50, while with the corrigendum 211 candidates had passed tests (d) and (e) together. According to the simulation, when the number of candidates who had been successful in test (d) without the corrigendum was taken into account, the pass mark required in order to be among the 48 best candidates admitted to the assessment exercises was 65.533. With the corrigendum on the other hand, the pass mark required to be among the 48 best candidates was 73.400.

68 The effect of the corrigendum on the applicant's situation is all the more evident when it is noted that, having obtained a mark of 67.07 in the admission tests, she would have been, without the corrigendum, among the 48 best Portuguese-language candidates.

69 Furthermore, and for the sake of completeness, the Tribunal observes that, in answer to a question put at the hearing, the Commission acknowledged that, in the context of the application of a corrigendum to a competition notice after the assessment exercises had been held, it would have been theoretically possible for members of EPSO or of the selection board to know the names of the candidates who had been successful in the tests. In those circumstances, and although it is emphasised that the applicant has not submitted that there was such an abuse in the present case, it must be held that the Commission is unable to establish that recourse to such a technique does not entail a risk of abuse.

70 It follows that the application of the corrigendum to the applicant was not consistent with the assurances which had been given to her by the competition notice as to the marking of tests (d) and (e) and, accordingly, constituted a breach of the principle of protection of legitimate expectations.

– Breach of the principle of legal certainty

71 It is settled case-law that the principle of legal certainty aims to ensure that situations and legal relationships governed by Community law remain foreseeable (judgment of 15 September 2005 in Case C-199/03 *Ireland* v *Commission*, paragraph 69).

72 Although in general that principle precludes a measure of the institutions of the Union from taking effect from a point in time before its publication, it is exceptionally otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (judgment of 10 November 2010 in Case T-260/09 P *OHIM* v *Simões Dos Santos*, paragraph 48 and the case-law cited).

73 In the present case, the cumulative conditions laid down in the case-law for the adoption of a measure having retroactive effect, such as the corrigendum amending the marking of tests (d) and (e) after they had been held, are not satisfied.

74 As regards the first condition, relating to the aim to be achieved, the Commission claims that the adoption of the corrigendum enabled the appointing authority to carry out a permanent review of the effectiveness of the prescribed tests in order, in particular, to avoid excessive severity.

75 The Tribunal finds that, while such control is undoubtedly in the interest of the administration and of the candidates themselves, it cannot prejudice the legitimate expectation of candidates that the tests in the competition will take place according to the procedures established by the competition notice, which precludes the possibility of amending ex post facto the criteria for marking the tests as set out in the competition notice.

76 Admittedly, the case-law accepts that where the appointing authority finds, after the publication of a competition, that the conditions of eligibility required were more exacting than the needs of the service demanded, it may either continue the procedure and, if necessary, recruit a smaller number of successful candidates than that initially foreseen, or re-open the competition procedure after withdrawing the original competition notice and replacing it with an amended notice (see, by analogy, in a case involving a vacancy notice, judgment of 2 October 1996 in Case T-356/94 *Vecchi* v *Commission*, paragraph 56).

77 However, the adoption of a corrigendum to the competition notice after some of the tests have been held cannot be regarded as equivalent to either of the solutions envisaged in the preceding paragraph of the present judgment.

78 It is sufficient to observe that, when the appointing authority decides to re-open a competition procedure, the candidates in the initial procedure may, in general, apply to take part in the new procedure. On the other hand, such a possibility is not open to candidates who, like the applicant in the present case, are eliminated following a decision adopted on the basis of an amendment of the competition notice.

79 In addition, the decision to continue the competition procedure and recruit a smaller number of successful candidates than that initially foreseen makes it possible to respect the legitimate expectation of all candidates that the tests will be carried out in accordance with the detailed arrangements laid down in the competition notice.

80 The ex post facto amendment of a competition notice must also be distinguished from the various techniques of neutralising questions in the written tests (see, for example, judgment of 17 January 2001 in Case T-189/99 *Gerochristos* v *Commission*, paragraphs 25 and 26, and *Schumann* v *Commission*, paragraphs 58 and 61).

81 In the present case, the appointing authority, by the corrigendum, altered the arrangements for marking tests (d) and (e). Those marking arrangements come within the concept of 'how [the tests] will be marked' appearing in Article 1(1)(e) of Annex III to the Staff Regulations and must therefore be determined in the competition notice. On the other hand, the neutralisation of questions in the written tests relates to the number of questions in an examination and also the individual marking of each question. Such factors do not come within the concept of 'how [the tests] will be marked' referred to above and do not need to appear in a competition notice, so that any change to them after the tests have commenced does not in any way alter the competition notice.

82 The Commission maintains that the adoption of the corrigendum is also justified by considerations relating to sound administration and the duty to have regard for the welfare of candidates. However, such considerations cannot be upheld in the present case. It is sufficient to observe that the adoption of the corrigendum certainly did not benefit all candidates and had the effect of excluding from the competition procedure candidates who, like the applicant, had obtained the pass mark in all the tests according to the criteria for marking the tests laid down in the competition notice.

83 Nor, last, can the Commission maintain that the adoption of the corrigendum does not constitute a breach of the principle of legal certainty by relying on the principle of proportionality. In accordance with this latter principle, which has consistently been recognised in the case-law as forming part of the general principles of European Union law, the legality of a measure adopted by an institution of

the Union is subject to the condition that, where there is a choice between several appropriate measures, it is appropriate to have recourse to the least onerous measure and the disadvantages caused must not be disproportionate to the objective pursued (see *Schumann* v *Commission*, paragraph 52). However, considerations linked to the proportionality of a measure cannot justify the adoption of a measure which breaches the principle of legitimate expectations, such as the amendment of a competition notice after the admission tests have been held, since the principle of proportionality is applicable only where there is a choice between several appropriate measures (judgment of 30 September 2010 in Case F-76/05 *Torijano Montero* v *Council*, paragraph 81 and the case-law cited).

84 As regards the second condition, concerning respect for the legitimate expectations of the persons concerned, it is sufficient to refer to paragraphs 64 to 69 of this judgment, from which it is clear that the application of the corrigendum constitutes a breach of the legitimate expectations of candidates who, like the applicant, expected that only candidates who had obtained the pass mark in the admission tests, as provided for in the competition notice, would be included on the list of candidates admitted to participate in the assessment exercises.

85 It follows from the foregoing that the application of the corrigendum to the applicant constitutes a breach of the principle of legal certainty.

86 It must therefore be held that, by applying the corrigendum to the applicant, in breach of the principles of legitimate expectations and legal certainty, the appointing authority vitiated the competition procedure by an irregularity and that, in consequence, the decision not to admit the applicant to the assessment exercises must be annulled.

Second ground, alleging breach of the principle of sound administration and of the duty to have regard for the welfare of candidates

87 The applicant submits that, by adopting the decision not to admit her to the assessment exercises, EPSO breached the principle of sound administration and the duty to have regard for the welfare of candidates in that the contested decision has the effect of excluding from the recruitment procedure a candidate who satisfies all the conditions for admission provided for in the competition notice and who, owing to the professional experience already acquired, satisfies the interest of the service from every aspect.

88 In that regard, it is sufficient to observe that the duty to have regard for the welfare of candidates does not require the selection board to include on the reserve list all the candidates who in their own opinion satisfy the requirements of the posts to be filled (see *Cristina* v *Commission*, paragraph 83).

89 Furthermore, even on the assumption that the applicant put forward in her application evidence capable of establishing that she satisfied all the conditions of admission and the interest of the service, it is settled case-law that the selection board for a competition on the basis of qualifications and tests has a discretion, in the framework of the provisions of the Staff Regulations on competition procedures, to assess, on a case-by-case basis, whether the qualifications produced by each candidate, as well as their previous professional experience, correspond to the level required by the Staff Regulations and by the competition notice concerned. In the context of its review of legality, the Tribunal must confine itself to ascertaining that the exercise of that discretion was not vitiated by a manifest error of assessment (see judgment of 21 November 2000 in Case T-214/99 *Carrasco Benítez* v *Commission*, paragraphs 69 to 71). As the applicant has adduced no evidence capable of demonstrating the existence of such an error, the present ground can only be rejected.

90 This ground must therefore be rejected as unfounded.

3. *The claims for damages*

Arguments of the parties

91 The applicant maintains that, owing to the irregularity of the decision not to admit her to the assessment exercises, she has sustained material and non-material harm.

92 The material harm, which the applicant quantifies provisionally and ex aequo et bono at the sum of EUR 50 000, in her submission, results from the fact that she was deprived of the opportunity to become an official.

93 The non-material harm, which the applicant evaluates ex aequo et bono at EUR 50 000, in her submission, results from the particularly negligent way in which EPSO dealt with her case and from its failure to have regard for her welfare.

94 The Commission contends that, as it has committed no irregularity, the claims for damages are manifestly unfounded and that in any event they are inadmissible, as they were not raised in the complaint.

Findings of the Tribunal

95 As regards the admissibility of the claims for damages, it is sufficient to recall that, in the scheme of remedies provided for in Articles 90 and 91 of the Staff Regulations, where there is a direct link between a claim for annulment and a claim for compensation, a claim for compensation made for the first time before the Tribunal is admissible, although the prior administrative complaint sought only annulment of the allegedly harmful decision, since a claim for annulment may entail a claim for compensation of the alleged harm (judgment of 15 May 1997 in Case T-273/94 *N* v *Commission*, paragraph 159, and judgment of 18 February 2004 in Case T-320/02 *Esch-Leonhardt and Others* v *ECB*, paragraph 47).

96 In the present case, there is a direct link between the claim for annulment and the claim for damages, so that the latter claim is admissible, notwithstanding the fact that it did not appear in the complaint.

97 In addition, as regards the claim for compensation in respect of material harm, the Tribunal finds that it was made in the alternative. In so far as the applicant's main claims for reinstatement in the competition procedure were rejected as inadmissible at paragraph 44 of the present judgment, the claim made in the alternative for compensation for that head of damage must be examined.

98 It has consistently been held that in order for the administration to incur liability, the applicant must demonstrate the existence of an irregularity, of actual damage and of a causal link between the irregularity and the harm relied on (see, to that effect, judgment of 1 June 1994 in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others*, paragraph 42, and judgment of 21 February 2008 in Case C-348/06 P *Commission* v *Girardot*, paragraph 52).

99 In the present case, the applicant seeks compensation for the material and non-material harm allegedly sustained owing to the adoption of the non-admission decision. As that decision has been annulled, it is appropriate to examine whether the irregularity found caused harm to the applicant and whether there is a causal link between that harm and the irregularity.

100 As regards the material harm alleged, under Article 266 TFEU it will be for the Commission to take the necessary measures to comply with the present judgment and, in particular, to adopt, in compliance with the principle of legality, all measures liable to provide fair compensation for the disadvantage which the applicant has suffered as a result of the act which has been annulled (see, to

that effect, judgment of 15 September 2005 in Case T-132/03 *Casini* v *Commission*, paragraph 98, and judgment of 7 June 2011 in Case F-84/09 *Larue and Seigneur* v *ECB*, paragraph 64), without prejudice to the possibility the applicant has of subsequently bringing an action against the measures adopted by the Commission in order to comply with this judgment. In those circumstances, it must be held that the claim for compensation in respect of the material harm is premature and must therefore be rejected.

101 As regards the claim for compensation for the non-material harm which the applicant claims to have sustained, on the other hand, the nature of the harm sustained and the causal link between the conduct and the harm relied on is clear from the sense of frustration and injustice which the applicant quite legitimately feels on account of having been the victim of an unlawful act.

102 The Tribunal observes that the annulment of an act of the administration already constitutes in itself appropriate and, in principle, sufficient compensation for any non-material harm, unless the applicant shows that he has sustained non-material harm that can be separated from the illegality on which the annulment is based and that cannot be compensated in full by that annulment (judgment of 9 December 2010 in Case T-526/08 P *Commission* v *Strack*, paragraph 99). That is the case, in particular, where, first, the annulled measure includes an explicitly unfavourable assessment of the applicant's abilities capable of causing him injury; second, where the illegality is of particular severity; and, third, where the annulment has no practical effect and is unable in itself to constitute appropriate and sufficient compensation for any non-material harm caused by the annulled measure (judgment of 12 May 2011 in Case F-66/10 *AQ* v *Commission*, paragraphs 105, 107 and 109).

103 In the present case, the annulment of the decision not to include the applicant on the list of candidates admitted to the assessment exercises in open competition EPSO/AST/111/10 will not remove the effects of the illegality found and, in particular, cannot constitute in itself adequate compensation for the efforts made and time spent by the applicant in preparing herself to no avail. Consequently, the Tribunal holds that the Commission must pay the applicant the sum of EUR 2 000 by way of compensation for non-material harm.

Costs

104 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

105 It follows from the grounds set out above that the Commission has been unsuccessful. However, as the applicant did not apply for costs, the parties must each bear their own costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. **Annuls the decision of the selection board in open competition EPSO/AST/111/10 of 7 April 2011 not to admit the applicant to the assessment exercises;**

2. **Orders the European Commission to pay EUR 2 000 to the applicant;**

3. **Dismisses the application as to the remainder;**

4. **Declares that the parties are to bear their own costs.**

Rofes i Pujol Boruta Bradley

Delivered in open court in Luxembourg on 13 March 2013.

W. Hakenberg
Registrar

M.I. Rofes i Pujol
President