



Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)
21 March 2013

Case F-93/11

Jamal Taghani
v
European Commission

(Civil service — Open competition — Selection board's decision not to admit to the assessment tests — Remedies — Court action brought without waiting for a decision on the administrative complaint — Admissibility — Amendment of the competition notice after admission tests held — Principle of the protection of legitimate expectations — Legal certainty)

Application: under Article 270 TFEU, applicable to the EAEC Treaty by virtue of Article 106a thereof, in which Mr Taghani seeks, first, annulment of the decision of the selection board for open competition EPSO/AST/111/10 not to admit him to the assessment tests and, second, an order that the European Commission compensate him for the harm he claims to have suffered as a result of that decision.

Held: The decision of the selection board for open competition EPSO/AST/111/10, of 15 June 2011, not to admit Mr Taghani to the assessment tests is annulled. The Commission is ordered to pay EUR 1 000 to Mr Taghani. The remainder of the action is dismissed. Each party is to bear its own costs.

Summary

*1. Actions brought by officials — Interest in bringing proceedings — Action brought against a decision of a selection board — Amendment of the competition notice after admission tests held — Candidate unable to be admitted to the next stage of the competition even without amendment — Inadmissibility — Exception
(Staff Regulations, Art. 91)*

*2. Actions brought by officials — Action brought against a decision not to admit a candidate to the tests in a competition — Whether unlawfulness of the competition notice may be relied upon
(Staff Regulations, Arts 90(2) and 91)*

*3. Actions brought by officials — Decision of a selection board — Prior administrative complaint — Optional nature — Decision based on a competition notice amended after admission tests held — No effect
(Staff Regulations, Arts 90(2) and 91(2))*

4. *Actions brought by officials — Decision of a selection board — Prior administrative complaint — Optional nature — Submission — Consequences — Retention of right to apply directly to the courts of the Union*

(Staff Regulations, Arts 90(2) and 91(2))

5. *Officials — Competition based on qualifications and tests — Requirements for passing — Fixing by the competition notice — Amendment of the competition notice after admission tests held having effect of reducing candidates' chances of success — Breach of principle of the protection of legitimate expectations*

(Staff Regulations, Annex III, Art. 1(1)(e))

6. *Officials — Competition based on qualifications and tests — Requirements for passing — Fixing by the competition notice — Amendment of the competition notice after admission tests held having effect of reducing candidates' chances of success — Breach of principle of legal certainty*

(Staff Regulations, Annex III, Art. 1(1)(e))

7. *Officials — Principles — Proportionality — Scope — Invoking as justification for a measure which infringes the principle of the protection of legitimate expectations — Not included*

1. In an action for annulment against a selection board's decision which was based on a competition notice amended by a corrigendum after the admission tests were held, and which refused to admit the applicant to the assessment tests, the applicant has no interest in bringing proceedings if it becomes apparent that, even without the corrigendum, he would not have been admitted to the next stage of the competition.

However, that does not apply where it is not proved satisfactorily that the applicant would not have been admitted to the next stage of the competition and where it is therefore not established with certainty that he has no interest in bringing proceedings.

(see paras 29, 31-32)

See:

9 November 2004, T-285/02 and T-395/02 *Vega Rodríguez v Commission*, paras 25 and 27

2. In the light of the complex nature of the recruitment procedure, which is composed of a series of very closely-linked decisions, an applicant is entitled to rely on irregularities occurring in the course of a competition, even if the origin of those irregularities may be found in the wording of the competition notice itself, in an action against a subsequent individual decision, such as a decision not to admit him to the assessment tests.

(see para. 38)

See:

16 September 1993, T-60/92 *Noonan v Commission*, para. 23

14 April 2011, F-82/08 *Clarke and Others v OHIM*, para. 79, and the case-law cited therein

3. The submission of a prior administrative complaint is mandatory where the author of the contested measure is the appointing authority, but optional where the measure was adopted by a selection board in a competition.

As regards an action against a selection board's decision not to include the applicant in the list of candidates with the best marks in the admission tests, the applicant may apply directly to the Courts of the Union without submitting a prior complaint, even if he is contesting an element defined in the competition notice or a corrigendum to that notice.

Moreover, the fact that a selection board's decision was based on a competition notice that was amended by a corrigendum after the admission tests were held does not have the effect of depriving the unsuccessful candidate of his right to bring a direct action against the selection board's decision.

(see paras 39-41)

See:

Noonan v Commission, para. 23

28 October 2010, F-77/08 *Vicente Carbajosa and Others v Commission*, paras 27 to 31 and 35 to 37

4. The administrative complaint procedure is devoid of purpose where a complaint is directed against the decisions of a selection board in a competition, since the appointing authority is not empowered to amend such decisions, so that the legal remedy open in respect of a decision of a selection board normally lies in a direct application to the Courts of the Union.

In that regard, it is not apparent either from the Staff Regulations or the case-law that a candidate in a competition who has nevertheless decided to lodge a complaint with the appointing authority against a decision of the selection board cannot apply to the Courts directly, without awaiting the appointing authority's decision on the complaint. On the contrary, where a candidate submits an administrative complaint to the appointing authority, such a step, whatever its legal significance may be, cannot have the effect of depriving him of his right to apply directly to the Courts. Consequently, where, in the circumstances described, a candidate in a competition decides to apply directly to the Courts, they must determine whether the application was brought within the period of three months and ten days from the date when the applicant was notified of the decision adversely affecting him.

(see paras 44, 46-48)

See:

20 June 2012, F-66/11 *Cristina v Commission*, paras 37, 40 and 41 and the case-law cited therein

5. The amendment of the rules on the marking of tests laid down in the competition notice is capable of affecting a person's prospects of being included on the list of candidates admitted to the assessment tests, 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 his prospects of being among the best candidates. In that respect, the application of the corrigendum to the competition notice after the admission tests were held is not consistent with the assurances given to that person by the competition notice and therefore infringes the principle of the protection of legitimate expectations.

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 paras 71-72, 75, 89)

See:

5 March 2003, T-24/01 *Staelen v Parliament*, para. 57

6. The principle of legal certainty aims to ensure that situations and legal relationships governed by EU law remain foreseeable. 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. Those conditions are not satisfied in the case of a corrigendum to a competition notice amending the grading of the admission tests to that competition after they had been held.

Admittedly, where the appointing authority finds, after the publication of a competition notice, that the conditions 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. However, the adoption of a corrigendum to the competition notice after some of the tests have been held cannot be regarded as equivalent to those solutions.

(see paras 76-78, 81-82)

See:

15 September 2005, C-199/03 *Ireland v Commission*, para. 69

2 October 1996, T-356/94 *Vecchi v Commission*, para. 56

10 November 2010, T-260/09 P *OHIM v Simões Dos Santos*, para. 48 and the case-law cited therein

7. In accordance with the principle of proportionality, which forms part of the general principles of EU 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. However, considerations relating 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.

(see para. 88)

See:

21 October 2004, T-49/03 *Schumann v Commission*, para. 52

30 September 2010, F-76/05 *Torijano Montero v Council*, para. 81 and the case-law cited therein