



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber, Extended Composition)

22 November 2018\*

(Civil service — Officials — Recruitment — Vacancy notice — Commission's mediator — Competent Appointing Authority — Delegation of powers — Procedure — Consultation of the Staff Committee — Responsibility)

In Case T-688/16

**Mercedes Janssen-Cases**, official of the European Commission, residing in Brussels (Belgium), represented initially by J.-N. Louis and N. de Montigny, and subsequently by J.-N. Louis, lawyers,

applicant,

v

**European Commission**, represented initially by C. Berardis-Kayser and G. Berscheid, and subsequently by G. Berscheid and L. Radu Bouyon, acting as Agents,

defendant,

APPLICATION pursuant to Article 270 TFEU seeking, first, annulment of the Commission Decision of 15 June 2016 appointing W as the Commission's mediator and of the note of 16 June 2016 by which the Commission informed the applicant of the outcome of the selection procedure, and, secondly, compensation for the damage allegedly suffered by the applicant,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

composed of M. van der Woude, President, D. Gratsias (Rapporteur), I. Labucka, A. Dittrich and I. Ulloa Rubio, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2018,

gives the following

\* Language of the case: French

## Judgment

### Background to the dispute

- 1 In 1977, the Commission of the European Communities decided to create a Mediation Service. That service is tasked with providing a non-bureaucratic way of resolving problems arising in the workplace in order to restrict, as much as possible, recourse to pre-litigation and litigation proceedings. The efficient performance of that task led the Commission to ‘formalise’ the operation of the service at issue. Thus, the Commission adopted Decision C(2002) 601 of 4 March 2002 on the reinforced Mediation Service (‘the decision on the reinforced Mediation Service’). Under Article 6(3) of that decision, ‘the President of the Commission shall nominate the mediator on the basis of a proposal from the Director-General for Personnel and Administration in consultation with the Staff Committee’.
- 2 By decision of the President of the Commission of 8 March 2012, the applicant, Mercedes Janssen-Cases, was appointed to the post of deputy mediator, forming part of the Mediation Service, attached to the Secretariat-General of the Commission.
- 3 In addition to her responsibilities as deputy mediator, the applicant served as acting mediator from 28 February 2013, and then, under the decision of 16 December 2013, she temporarily occupied the same post within the meaning of Article 7(2) of the Staff Regulations of Officials of the European Union (‘the Staff Regulations’) with retroactive effect from 1 March 2013.
- 4 By decision of the Commission of 16 October 2013, the principal adviser post of ‘mediator’ became a function of head of unit at Grade AD 13/AD 14.
- 5 On 10 February 2014, the Commission published vacancy notice COM/2014/366 relating to the post of mediator/head of unit at the Mediation Service (Grade AD 13/AD 14). The applicant submitted her application for the post in question on 27 February 2014.
- 6 By note of 7 May 2014, addressed to the Director-General of the Commission’s Directorate-General (DG) for Human Resources and Security, the Commission’s Central Staff Committee asked to be sent the curricula vitae of the selected candidates, as well as the assessment grid used by the Selection Committee. The Central Staff Committee requested that information in order to deliver the opinion provided for in Article 6(3) of the decision on the reinforced Mediation Service as a stage of the selection procedure.
- 7 By note of 20 June 2014, the Central Staff Committee asked the President of the Commission not to endorse the appointment to the post of mediator proposed by the Director-General of the Commission’s DG for Human Resources and Security for as long as it was not in a position to deliver its opinion in the absence of any communication of the information requested.
- 8 By note of 17 October 2014, addressed to the Director-General of the DG for Human Resources and Security, the Central Staff Committee delivered an unfavourable opinion in relation to the candidate proposed by that Director-General.
- 9 By note of 22 July 2015, the DG for Human Resources and Security informed the applicant of the decision of the President of the Commission to close the selection procedure without appointment to the post of mediator.
- 10 On 16 September 2015, the Commission decided to promote the post of mediator to the level of principal adviser (Grade AD 14/AD 15) and to approve and publish a vacancy notice for that post in accordance with Article 29(1)(a)(i) and (iii) of the Staff Regulations. According to that decision, the

decision enabling that post to be filled was to be adopted under Article 6(3) of the decision on the reinforced Mediation Service. On 7 October 2015, the Commission published vacancy notice COM/2015/1801 for the post of principal adviser at Grade AD 14/AD 15 with a view to filling the post of mediator. That notice stated that the President of the Commission appointed the mediator on the basis of a proposal made by the Director-General of the DG for Human Resources and Security after consultation with the Central Staff Committee.

- 11 The applicant submitted her application for the post of mediator on 16 October 2015 and was one of three candidates selected to sit the examinations and attend the interviews held before a preselection committee and the Consultative Committee on Appointments. Taking the view that W, who was then Head of the Medical Service within DG for Human Resources and Security, was the only candidate offering the necessary qualifications, on 25 February 2016 the Consultative Committee on Appointments delivered a favourable opinion in his regard for the post of mediator.
- 12 By note of 13 May 2016, addressed to K. Georgieva, Vice-President of the Commission responsible, inter alia, for human resources, the Central Staff Committee responded to the request for an opinion, made on 20 April 2016 by the Director-General of the Commission's DG for Human Resources and Security, on the appointment of W to the post of mediator. In that regard, the Central Staff Committee regretted the fact that the request for an opinion concerned only the proposed candidate, and it therefore did not have at its disposal information relating to the unsuccessful candidates, making it impossible for it to deliver a useful opinion.
- 13 By decision of 15 June 2016, the Commission appointed W to the post of mediator and, by note of 16 June 2016, it informed the applicant of the outcome of the selection procedure (together, 'the contested decisions').
- 14 On 15 September 2016, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the contested decisions. By decision of 5 January 2017, the Commission rejected that complaint.

### **Procedure and forms of order sought by the parties**

- 15 By application lodged at the Registry of the General Court on 28 September 2016, in accordance with Article 91(4) of the Staff Regulations, the applicant brought the present action.
- 16 By a separate document, lodged at the Registry of the General Court on the same date, the applicant sought to suspend the operation of the decision appointing W to the post of mediator.
- 17 On 7 October 2016, pursuant to Article 91(4) of the Staff Regulations, the proceedings were suspended until such time as an express or implied decision had been delivered rejecting the complaint brought by the applicant on 15 September 2016. The proceedings were resumed on 17 January 2017, following the express rejection of that complaint.
- 18 By order of 17 February 2017, *Janssen-Cases v Commission*, (T-688/16 R, not published, EU:T:2017:107), the President of the General Court rejected the application to suspend the operation of the decision appointing W to the post of mediator.
- 19 Acting on a proposal from the Fifth Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to refer the case to a Chamber sitting in extended composition.
- 20 The applicant claims that the Court should:
  - annul the contested decisions;

- order the Commission to pay the sum of EUR 100 000 by way of compensation for the material and non-material damage suffered;
  - order the Commission to pay the costs.
- 21 The Commission contends that the Court should:
- dismiss the action;
  - order the applicant to pay the costs.

## Law

### *The application for annulment of the contested decisions*

#### *Admissibility*

- 22 According to the guidelines for the Commission departments in relation to the appointment of senior Commission officials of October 2008, only the notification to the unsuccessful candidate(s) constitutes an act having adverse effect. However, it should be noted that, although that notification must be regarded as the formal rejection of the application in question, which triggers the time limit for lodging a complaint for the purposes of Article 90 of the Staff Regulations, the fact remains that the act terminating the selection procedure with the choice of a candidate, the only act provided for in the contested vacancy notice, also gives rise to legal effects, the inevitable consequence of which is the abovementioned formal rejection (see, in that regard, judgment of 30 June 1983, *Schloh v Council*, 85/82, EU:C:1983:179, paragraph 40).
- 23 It follows that the application for annulment brought by the applicant in the context of the action is admissible in its entirety.

#### *Substance*

- 24 The applicant puts forward four pleas in support of her action, alleging:
- infringement of Article 6(3) of the decision on the reinforced Mediation Service;
  - infringement of Article 27 of the Charter of Fundamental Rights of the European Union;
  - misuse of powers and abuse of procedure;
  - manifest error of assessment, infringement of the principles of sound management, sound administration, protection of legitimate expectations and proportionality, and the equal opportunities policy.
- 25 The argument set out by the applicant in the context of the first plea comprises two parts. By the first part, the applicant submits that the College of Commissioners did not have competence to adopt the decision to appoint W to the post of mediator, as that decision falls to the President of the Commission under Article 6(3) of the decision on the reinforced Mediation Service. The second part alleges infringement of that provision by reason of an improper consultation of the Staff Committee.

- 26 In particular, in the context of the first part of the first plea, the applicant submits that, under Article 6(3) of the decision on the reinforced Mediation Service, the appointment of Commission's mediator falls within the competence of the President of the Commission, who is designated as appointing authority (AIPN) in this specific matter, in accordance with Article 2(1) of the Staff Regulations. That competence of the President of the Commission is referred to in the vacancy notice that gave rise to the contested selection procedure. In the present case, however, it was the Commission, that is to say an authority with no competence in that regard, which adopted the contested decisions, without first being empowered to do so.
- 27 In the context of the second part, the applicant submits that, in the absence of any communication to the Central Staff Committee of the files of all the applications that were initially successful, there had been no due consultation of the Committee, consultation which is provided for in Article 6(3) of the decision on the reinforced Mediation Service. The purpose of the consultation in question is to provide the Director-General of the DG for Human Resources and Security with an informed opinion on the merits, competencies and profile of the various candidates. The applicant submits that delivering an opinion on the only candidate proposed to the President of the Commission deprives that consultation of its effectiveness, and makes it merely an endorsement of the proposal made by the Director-General of the DG for Human Resources and Security, which the Central Staff Committee would never have accepted.
- 28 As regards the complaint based on the lack of competence of the author of the contested decisions, the Commission submits that it delegated the power to appoint the mediator to its President under Article 6(3) of the decision on the reinforced Mediation Service. There is nothing to prevent the Commission from exercising that power itself in a particular case where, as in the present case, it assumes the role of appointing authority on account of the grade attached to the post to be filled, in accordance with its Decision C(2013) 3288 final of 4 June 2013 on the exercise of powers conferred by the Staff Regulations on the appointing authority (AIPN) and by the Conditions of Employment of Other Servants on the authority empowered to conclude contracts of employment (AHCC). The Commission adds that that decision led to an implied specific amendment of the decision on the reinforced Mediation Service. In any event, the applicant has not demonstrated that she has suffered damage as a result of the adoption of the contested decisions by the College of Commissioners. Furthermore, Article 6(3) of the decision on the reinforced Mediation Service does not require the Commission to consult the Central Staff Committee in connection with all applications that are initially successful. According to the Commission, it is clear from that provision that the Central Staff Committee must be consulted solely in relation to the proposal submitted to the President of the Commission by the Director-General of the DG for Human Resources and Security, which that committee seems itself to accept.
- 29 As regards the first part, it is clear from Article 6(3) of the decision on the reinforced Mediation Service that the President of the Commission appoints the mediator. To that extent, the provision in question must be regarded as an act under which the Commission determined the relevant competent appointing authority for the purposes of Article 2(1) of the Staff Regulations.
- 30 In that regard, it must be held that the Commission's argument that, under Article 6(3) of the decision on the reinforced Mediation Service, it 'delegated' the power to appoint the mediator to its President and may, therefore, itself exercise that power where it considers it appropriate to do so, cannot succeed.
- 31 A delegation of power constitutes an act which deprives the delegating authority of the power delegated to the authority receiving the delegation (see, to that effect, judgment of 13 June 1958, *Meroni v Haute Autorité*, 10/56, EU:C:1958:8, pp. 77 and 78). The delegation of power therefore has the effect of causing a transfer of powers, which prohibits the delegating authority from referring to the transferred power, without rendering its decision invalid on the ground of a lack of competence. The delegating authority may exercise the power again only where it first adopts an act under which

it recovers the delegated power. In the same way as a delegation of power requires the adoption of an express act transferring the power concerned (judgment of 13 June 1958, *Meroni v Haute Autorité*, 9/56, EU:C:1958:7, p. 42), the principle of legal certainty, which underpins the formal nature of operations involving the delegation of power, requires that the withdrawal of that delegation be made through the adoption of an express act.

- 32 Assuming that the mechanism for determining the competent appointing authority laid down in Article 2(1) of the Staff Regulations must be classified as a delegation of power or treated in the same way as such a delegation, it is by disregarding the loss of competence resulting from such a ‘delegation’ that the Commission claims to be competent itself to exercise, instead of its President, the power to appoint the mediator, where it considers it appropriate to do so.
- 33 However, it should be noted that, according to Decision C(2013) 3288 final, referred to in paragraph 28 above, adopted pursuant to Article 2(1) of the Staff Regulations, the College of Commissioners is the appointing authority with competence to appoint a principal adviser under Article 29(1)(a)(i) and (iii) of the Staff Regulations.
- 34 As was set out in paragraph 10 above, by decision of 16 September 2015, the Commission decided to promote the post of mediator to the rank of principal adviser (Grade AD 14/AD 15).
- 35 Taking into account those developments, which took place after the adoption of the decision on the reinforced Mediation Service, the appointing authority with competence to appoint the Commission’s mediator is the College of Commissioners. In that context, the reference in the decision of 16 September 2015 to Article 6(3) of the decision on the reinforced Mediation Service must be read as relating not to the body competent to appoint the mediator but the formal requirements with which that body, namely the Commission, must comply in the context of the procedure giving rise to the appointment of the mediator, in particular as regards consultation of the Staff Committee. The reference to that effect in the vacancy notice must be read in the same way.
- 36 Therefore, the Commission was the appointing authority with competence to adopt the decision of 15 June 2016 to appoint W to the post of mediator, that decision having been taken, furthermore, as is clear from the minutes of the 2173rd meeting of the Commission, on a proposal from its President. It follows that the first part of the first plea must be rejected.
- 37 As regards the second part of the first plea, it should be noted that according to Article 6(3) of the decision on the reinforced Mediation Service, the decision-making body appoints the mediator ‘in consultation with the Staff Committee’.
- 38 In that regard, as was set out in paragraphs 35 and 36 above, although the Commission was the appointing authority with competence to adopt the decision to appoint W to the post of mediator, the other procedural requirements established by Article 6(3) of the decision on the reinforced Mediation Service still applied. The Commission does not dispute, furthermore, the requirement of the decision-making body to consult the Staff Committee under that latter provision.
- 39 As the Commission itself submits, Article 6(3) of the decision on the reinforced Mediation Service must be interpreted as requiring that the Staff Committee be consulted by the body responsible for making the final decision closing the procedure. Furthermore, although that consultation consists merely of a right to be heard, and does not confer on the Staff Committee the right to co-decide with the decision-making body, the consultation must be such as to have an influence on the substance of the measure adopted (see, to that effect, judgment of 6 March 2001, *Dunnett and Others v BEI*, T-192/99, EU:T:2001:72, paragraphs 89 and 90), which implies the exercise of wide discretion (judgment of 12 February 1987, *Bonino v Commission*, 233/85, EU:C:1987:82, paragraph 5).

- 40 In that context, the effectiveness of the consultation in question may be guaranteed only where the subject of the consultation is the same as the subject to be assessed by the body that is to take the final decision. Thus, the consultation of the Staff Committee must concern the same candidates as those in respect of which the body in question is required to exercise its discretion. That consultation is not effective where the Staff Committee was called upon to give its opinion in respect of only one candidate whereas the decision-making body undertook to assess several candidates before deciding which one to select.
- 41 In the present case, first, it is clear from the opinion of the Consultative Committee on Appointments of 25 February 2016 that it examined three applications and made a proposal to select W's application for the post at issue (see paragraph 11 above). It is also stated in that opinion that that Committee sent to the College of Commissioners the evaluation sheets and the curricula vitae for the three candidates.
- 42 Secondly, it should be pointed out that the appointing authority, which takes the final decision on appointment, must therefore be placed in a position to know and assess itself the factors which, at each stage of the selection procedure, have led, at the various administrative levels consulted, such as the Consultative Committee on Appointments, to the adoption of the advisory opinions submitted to it (see, to that effect, judgment of 15 October 2014, *Cour des comptes v BF*, T-663/13 P, EU:T:2014:883, paragraph 25).
- 43 In that context, the minutes of the 2173rd meeting of the Commission, which led to the decision of 15 June 2016 to appoint W, state, in agreement with the opinion of the Consultative Committee on Appointments of 25 February 2016, that the College of Commissioners had received files relating to the three candidates examined by that Committee for the post at issue. According to those minutes, the Commission took into account, inter alia, the opinion of the Consultative Committee on Appointments of 25 February 2016 and made a comparison of the merits of the candidates in view of the characteristics of the post. In that regard, the minutes in question state that the Commission took into consideration their ability, efficiency and conduct in service, and decided to appoint W to the post.
- 44 Thirdly, it is clear from the note of 13 May 2016, sent by the Central Staff Committee to the Vice-President of the Commission responsible, inter alia, for personnel, that that Committee had received a request for an opinion from the Director-General of the DG for Human Resources and Security on 20 April 2016, namely after submission of the proposal of the Consultative Committee on Appointments to the College of Commissioners, and that that request for an opinion related only to the candidate whose appointment was proposed to the College of Commissioners, and not to the three applications that had been sent to that College.
- 45 The Commission does not dispute that only the information relating to W's application was submitted for opinion to the Central Staff Committee. Therefore, the College of Commissioners exercised its discretion in relation to a subject matter that was not the same as that which had been identified for consultation by the Central Staff Committee (see paragraph 12 above).
- 46 In those circumstances, it must be stated that the minimum requirements guaranteeing the effectiveness of the consultation of the Staff Committee and requiring that Committee to be able to formulate an opinion on the candidates that will be assessed by the decision-making body for the purposes of its final decision have not been respected.
- 47 It follows that, as argued by the applicant in the context of the second part of the first plea, the decision of 15 June 2016 to appoint W to the post of the Commission's mediator was adopted in breach of Article 6(3) of the decision on the reinforced Mediation Service with regard to consultation of the Staff Committee and that it must, accordingly, be annulled, there being no need to examine the other pleas in law put forward in support of the action.

48 In so far as the note of 16 June 2016, by which the applicant was informed of the closure of the procedure and the unfavourable outcome for her, also contested (see paragraphs 13 and 22 above), is expressly based on the choice of another candidate, and the decision incorporating the choice in question is vitiated by an infringement of Article 6(3) of the decision on the reinforced Mediation Service resulting in its annulment, that note must also be annulled.

### *Application for damages*

49 The applicant submits that, having regard to the number of cases she has processed as deputy mediator, acting mediator or interim mediator, the contested decisions are detrimental to her reputation and her professional credibility. Moreover, they deprive her of any possibility of reaching Grade AD 14. Given, furthermore, the fact that, for more than three years, she carried out those functions under strained and uncertain conditions, she considers that compensation of the sum of EUR 100 000 is appropriate for reparation of the material and non-material damage caused by the Commission's conduct.

50 The Commission, for its part, insists on the lawful nature of all of its actions, and therefore no unlawfulness can be relied on in support of the contested application for damages, which is closely linked to the application for annulment of the contested decisions.

51 In disputes arising from relations between the institutions and their officials, a right to reparation is recognised if three 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 (judgment of 12 July 2011, *Commission v Q*, T-80/09 P, EU:T:2011:347, paragraph 42).

52 First, the applicant submits that there is a causal link between the contested decisions and alleged non-material damage as a result of the impression created by those decisions that the candidate selected is better qualified than she is.

53 However, the fact that another candidate was able to be selected for a post such as that at issue is not, in itself, detrimental to the candidates who were not ultimately selected. Even where that choice means that another candidate was considered to be more deserving on that occasion, that fact does not imply any negative assessment as regards the merit of the other candidates, particularly where those candidates were included on the list examined by the Consultative Committee on Appointments, as is the case with the applicant.

54 In any event, while it is true that, in support of her action, the applicant put forward a plea, in the present case the fourth plea, relating to the assessment of her merits compared with those of W, the fact remains that the decision of 15 June 2016 to appoint W to the post of mediator is annulled under the present judgment on a ground relied on by the applicant in the context of the first plea. In that context, the act incorporating the conclusion on the comparative assessment of the merits carried out in the present case is declared to be void in accordance with the first paragraph of Article 264 TFEU and the Commission is now required to take the necessary measures to comply with the present judgment in accordance with Article 266 TFEU.

55 It follows that, as things currently stand, the alleged non-material damage relied on by the applicant is not, in any event, certain.

56 Secondly, the applicant submits that the rejection of her application unlawfully deprived her of the possibility of reaching Grade AD 14.



- 57 However, it is sufficient to point out, in that regard, that there is nothing to guarantee that, in the absence of the unlawfulness established, the applicant would have been selected for the contested post, or that she would subsequently have reached Grade AD 14. That head of damage therefore does not have, in any event, a direct causal link with the unlawfulness established.
- 58 Furthermore, in so far as the claims in question may be understood as seeking compensation for damage resulting not from the contested decisions but from the Commission's conduct prior to the adoption of vacancy notice COM/2015/1801, it should be noted that they are inadmissible as a result of the non-exhaustion of the pre-litigation procedure. When questioned on this point at the hearing, the applicant submitted that that conduct was closely linked to the contested decisions. Yet it should be noted that the conduct in question is, by its nature, distinct from the choice made pursuant to the decision of 15 June 2016 to appoint W to the post of mediator. Consequently, paragraphs 192 to 194 of the applicant's complaint, relating to that conduct, should be regarded as a request within the meaning of Article 90 of the Staff Regulations. That request, which was rejected by decision of 5 January 2017 (see paragraph 14 above) was not followed up by a complaint.
- 59 In any event, under Article 7(2) of the Staff Regulations, the duration of a temporary posting may not, it is true, exceed one year, except where the posting is to replace an official who is seconded to another post in the interests of the service, called up for military service or absent on protracted sick leave. It is also true that the applicant occupied the post of interim mediator from 1 March 2013 to 1 October 2016, yet the reasons that led to that temporary posting were not any of those capable of justifying its extension beyond one year.
- 60 However, it is clear from Article 7(2) of the Staff Regulations that, from the fourth month of the temporary posting, the official is entitled to a differential allowance, which excludes any causal link with financial damage.
- 61 Lastly, as regards the non-material damage resulting from the uncertain situation in which the applicant found herself, it should be noted that the selection procedure initiated under vacancy notice COM/2014/366 was closed with no candidate having been selected, which was beneficial to the applicant, who was not the proposed candidate on that occasion and who was therefore able to continue to perform her duties as interim mediator. Moreover, the fact that the applicant performed her duties while the procedure initiated by vacancy notice COM/2015/1801 was pending is inherent in any situation in which a competition is held to fill a post. Also inherent in that situation is the uncertainty caused by that competitive procedure for all the candidates taking part.
- 62 In that context, the fact that the applicant's colleagues did not understand why the Commission had not concluded, in good time, the procedures enabling the post of mediator to be filled is not, assuming that fact to be established, capable of damaging the applicant's image.
- 63 It follows that the application for damages must be dismissed.

### **Costs**

- 64 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been essentially unsuccessful, it must be ordered to pay the costs, including those relating to the proceedings for interim measures, in accordance with form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

hereby:

- 1. Annuls the decision of the European Commission of 15 June 2016 appointing W as the Commission's mediator and the note of 16 June 2016 by which the Commission informed Mercedes Janssen-Cases of the outcome of the selection procedure for that post;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the Commission to pay the costs, including those relating to the proceedings for interim measures.**

Van der Woude

Gratsias

Labucka

Dittrich

Ulloa Rubio

Delivered in open court in Luxembourg on 22 November 2018.

[Signatures]