



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

12 September 2018*

(Civil service — Temporary agents — Recruitment — Internal competition — Constitution of a reserve list for the recruitment of assistants — Eligibility condition relating to the requirement of 12 months' continuous employment before the expiry of the deadline for submitting an application — Leave on personal grounds — Non-admission to the tests in a competition)

In Case T-73/17,

RS, former temporary agent of the European Commission, represented by S. Orlandi and T. Martin, lawyers,

applicant,

v

European Commission, represented by G. Berscheid and L. Radu Bouyon, acting as Agents,

defendant,

ACTION under Article 270 TFEU seeking, first, annulment of the decision of the selection board for internal competition COM/02/AST/16 (AST 2) rejecting the applicant's candidature and, secondly, compensation for the damage he allegedly suffered,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, K. Kowalik-Bańczyk and C. Mac Eochaidh (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2018,

gives the following

* Language of the case: French.

Judgment

Background of the dispute

- 1 From 16 June 2010 to 15 June 2013, the applicant, RS, worked at the European Commission as a contract agent in Function Group III. From 16 June 2013 to 15 June 2016, he worked as a temporary agent under a contract concluded on the basis of Article 2(b) of the Conditions of Employment of Other Servants of the European Union ('the CEOS').
- 2 From 1 October to 30 November 2015, the Authority Empowered to Conclude Contracts authorised the applicant to take unpaid leave under Article 17 of the CEOS.
- 3 On 9 February 2016, the Commission published a notice of internal competitions based on tests to constitute a reserve list from which to recruit secretaries/clerks in grade 2 (AST/SC 2), assistants in grade 2 (AST 2) and administrators in grade 6 (AD 6) ('the competition notice'). The reference numbers for those three competitions were, respectively, as follows: COM/01/AST-SC/16 (AST/SC 2) — Secretaries/Clerks, COM/02/AST/16 (AST 2) — Assistants, and COM/03/AD/16 (AD 6) — Administrators.
- 4 In section III, 'Eligibility', Article 2.1 of the competition notice stated the following in particular as regards candidates' administrative status:

'You must:

 - (a) have served for at least 42 months, which do not have to be consecutive, as an official or member of the temporary or contract staff in the Commission; periods of employment spent in Agencies or other Institutions are not taken into account; periods of employment spent in the Commission as interimaire, auxiliary or local staff or seconded national expert (SNE) are not taken into account either;
 - (b) have spent at least the last 12 months before the closing date for online applications as an official or member of the temporary or contract staff of the Commission; during these twelve months you must have had the administrative status "in active employment", "on leave for military service", "on parental or family leave", "on secondment in the interests of the service", or "on secondment at your own request" (in the first six months of that secondment) within the meaning of Articles 37 et seq. of the [Staff Regulations of Officials of the European Communities]'.
- 5 On an unknown date, the applicant applied for the COM/02/AST/16 (AST 2) internal competition.
- 6 On 11 April 2016, the selection board of the internal competition COM/02/AST/16 (AST 2) informed the applicant of its decision to reject his candidature ('the contested decision'), because he did not fulfil the condition laid down in the competition notice requiring him to 'have spent at least the last 12 months before the closing date for online applications ... [under] the administrative status "in active employment", "on leave for military service", "on parental or family leave", "on secondment in the interests of the service", or "on secondment at your own request" (in the first six months of that secondment) within the meaning of Articles 37 et seq. of the [Staff Regulations of Officials of the European Communities]' ('the condition at issue').
- 7 On 11 July 2016, the applicant lodged a complaint against the contested decision.
- 8 By a decision of 21 October 2016, served on the applicant on 24 October 2016, the appointing authority dismissed his complaint and sent its decision to his advisers.

Procedure and forms of order sought by the parties

- 9 By application lodged at the Registry of the General Court on 3 February 2017, the applicant brought the present action.
- 10 By letter of 3 February 2017, the applicant applied, first, for anonymity under Article 66 of the Rules of Procedure of the General Court and, secondly, that his case be joined, under Article 68 of those rules, with Case T-55/17, *Healy v Commission*, on account of the connection between them.
- 11 By letter of 15 February 2017, the applicant and the Commission were invited to submit their observations on the potential joinder of this case and Cases T-55/17, *Healy v Commission*, and T-79/17, *Schoonjans v Commission*.
- 12 By letter of 23 February 2017, the applicant declared that he was in favour of this case being joined with Cases T-55/17, *Healy v Commission*, and T-79/17, *Schoonjans v Commission*, and did not apply for any information in the procedural documents and documents in the case file to be treated confidentially.
- 13 On 4 April 2017, the Commission lodged its defence.
- 14 By decision of 6 April 2017, the General Court granted the applicant's application for anonymity.
- 15 By letter of 18 May 2017, the applicant waived his right to lodge a reply.
- 16 By letter of 30 May 2017, the applicant requested that a hearing be held.
- 17 By decision of 14 November 2017, the President of the Ninth Chamber of the Court ordered that this case should not be joined with Cases T-55/17, *Healy v Commission*, and T-79/17, *Schoonjans v Commission*.
- 18 At the hearing on 18 January 2018, the parties presented oral argument and replied to the questions put to them by the Court.
- 19 The applicant claims that the General Court should:
 - annul the contested decision;
 - order the Commission to pay him the sum of EUR 5 000 in respect of the non-pecuniary harm which he allegedly suffered;
 - order the Commission to pay the costs.
- 20 The Commission claims that the General Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

Law

The claims for annulment

Arguments of the parties

- 21 In support of the action, the applicant relies on a single plea in law, essentially raising a plea of illegality of the competition notice, alleging that the condition at issue, on which the contested decision is based, infringes Article 24a and the first paragraph of Article 27 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the principle of equal treatment.
- 22 According to the applicant, it is apparent from Article 29 of the Staff Regulations that competitions internal to an institution are open to any person working for that institution, including temporary agents, and that any exception to that principle must be duly justified in the light of the interests of the service.
- 23 In the applicant's view, it is not disputed that he was working for the Commission at the time his application for internal competition COM/02/AST/16 (AST 2) was filed and examined. He also submits that this is the first time that the Commission has interpreted the requirement that candidates must be 'in the service of the institution' as meaning that they must have been in an administrative position of active employment (or on one of the types of leave to which the competition notice refers) during the 12 months preceding the closing date for registering for the competition.
- 24 According to the applicant, contrary to what the appointing authority stated in its decision of 21 October 2016, the condition at issue does not enable it to attain the dual objective pursued, that is to say, on the one hand, of having highly skilled and immediately operational staff and, on the other, of regularising, in the interests of the service, the situation of contract and temporary agents who had worked for the Commission continuously for a long period of time.
- 25 In the first place, the applicant believes that there are no grounds for presuming that he was likely to be 'less immediately operational' than another agent who had enjoyed a longer period of leave (for example, parental leave or leave for military service), but who had a shorter period of service.
- 26 The applicant claims that the condition at issue also infringes the principle of equal treatment in so far as candidates were treated differently, without any objective reason, depending on the type of leave they had taken during the 12 months preceding the closing date for registering for internal competition COM/02/AST/16 (AST 2). According to the applicant, the appointing authority is mistaken in considering that that principle was complied with because all the candidates who had taken leave on personal grounds or unpaid leave were treated in the same way. Furthermore, that difference in treatment cannot be explained by the fact that, unlike agents taking leave on personal grounds, agents who take parental or family leave continue to be covered by the Joint Sickness Insurance Scheme of the EU and to acquire pension rights.
- 27 Lastly, the applicant disputes that his leave was a personal choice unrelated to the interests of the service. First, under Article 17 of the CEOS, such leave is only granted if the request is in accordance with the interests of the service. Secondly, that leave enabled him to facilitate his further training and instruction, which ought to be taken into account under Article 24a of the Staff Regulations.

- 28 In the second place, the applicant argues that the objective of regularising the situation of agents who have worked at the Commission has no basis in the competition notice. Moreover, that notice provides in particular that candidates must have experience of service of at least 42 months, not necessarily consecutively.
- 29 For those reasons, according to the applicant, the condition at issue infringes Articles 24a and 27 of the Staff Regulations, since it is unrelated to the merits of the agents who apply for internal competition COM/02/AST/16 (AST 2).
- 30 The applicant claims, in essence, that in any event, as his leave was short, the condition at issue produces an outcome disproportionate to the objective pursued by the competition notice.
- 31 The Commission disputes the applicant's arguments.

Findings of the Court

- 32 According to Article 24a of the Staff Regulations:
- 'The Union shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests.
- Such training and instruction shall be taken into account for purposes of promotion in their careers.'
- 33 The first paragraph of Article 27 of the Staff Regulations provides as follows:
- 'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Union. No posts shall be reserved for nationals of any specific Member State.'
- 34 In the first place, it is necessary to call to mind the principles laid down by the case-law on the conditions and procedure for holding a competition.
- 35 First, the essential role of a notice of competition is to give those interested the most accurate information possible as to the conditions of eligibility for the post to be filled, in order to enable them to decide whether they should apply for it (see judgment of 31 January 2006, *Giulietti v Commission*, T-293/03, EU:T:2006:37, paragraph 63 and the case-law cited).
- 36 Secondly, in this connection, the institution has a wide discretion in deciding upon the criteria of ability required for the posts to be filled and in specifying, on the basis of those criteria and in the interests of the service, the conditions and procedure for organising a competition (see, to that effect, judgments of 9 October 2008, *Chetcuti v Commission*, C-16/07 P, EU:C:2008:549, paragraphs 76 and 77 and the case-law cited; of 31 January 2006, *Giulietti v Commission*, T-293/03, EU:T:2006:37, paragraph 63 and the case-law cited; and of 13 December 2006, *Heus v Commission*, T-173/05, EU:T:2006:392, paragraph 36 and the case-law cited).
- 37 However, the exercise of the discretion enjoyed by the institutions with respect to the holding of competitions, in particular as regards setting the conditions for admission, must be compatible with the mandatory provisions of the first paragraph of Article 27 and of Article 29(1) of the Staff Regulations. The terms in which the first paragraph of Article 27 of the Staff Regulations defines the aim of any recruitment and in which Article 29(1) of the Staff Regulations lays down the framework of the procedures to be followed to fill vacant posts are mandatory. That power must therefore always be exercised in the light of the requirements of the positions to be filled and, more generally, of the

interests of the service (see judgment of 13 December 2006, *Heus v Commission*, T-173/05, EU:T:2006:392, paragraph 37 and the case-law cited; see, also, to that effect, judgment of 17 November 2009, *Di Prospero v Commission*, F-99/08, EU:F:2009:153, paragraphs 28 and 29 and the case-law cited).

- 38 Specifically as regards conditions limiting the registration of candidates for a competition, although such conditions are indeed liable to restrict the ability of the institutions to recruit the best candidates for the purposes of the first paragraph of Article 27 of the Staff Regulations, it does not follow that any condition containing such a restriction is contrary to that provision. The administration's discretion in the organisation of competitions, and more generally in the interests of the service, allows the institution to impose the conditions which it considers to be appropriate and which, while restricting access of candidates to a competition, and thus, necessarily the number of candidates registered, does not, however, entail the risk of compromising the objective of ensuring the registration of candidates of the highest standard of ability, efficiency and integrity within the meaning of the first paragraph of Article 27 of the Staff Regulations (see, to that effect, judgment of 17 November 2009, *Di Prospero v Commission*, F-99/08, EU:F:2009:153, paragraph 30).
- 39 In that respect and as the Commission submits, the case-law has already held that there is no obligation to admit to a competition internal to the institution every person working for that institution. Such an obligation would, in practice, undermine the wide discretion afforded to the institution (see, to that effect, judgments of 9 October 2008, *Chetcuti v Commission*, C-16/07 P, EU:C:2008:549, paragraphs 70 to 76, and of 24 September 2009, *Brown v Commission*, F-37/05, EU:F:2009:121, paragraph 68). The agents and officials of an institution do not, therefore, have any absolute right to take part in an internal competition (see, to that effect, judgments of 6 March 1997, *de Kerros and Kohn-Bergé v Commission*, T-40/96 and T-55/96, EU:T:1997:28, paragraph 39, and of 8 November 2006, *Chetcuti v Commission*, T-357/04, EU:T:2006:339, paragraph 42).
- 40 Accordingly, it is only conditions limiting access of candidates to a competition that entail a risk of compromising the objective of ensuring the registration of candidates of the highest standard that are held to be contrary to the first paragraph of Article 27 of the Staff Regulations (see, to that effect, judgments of 6 March 1997, *de Kerros and Kohn-Bergé v Commission*, T-40/96 and T-55/96, EU:T:1997:28, paragraph 40, and of 17 November 2009, *Di Prospero v Commission*, F-99/08, EU:F:2009:153, paragraph 32).
- 41 Thirdly, in view of the institutions' wide discretion in this field, review by the General Court of whether the institution has complied with the condition relating to the interests of the service must be confined to the question of whether the institution remained within reasonable and proper bounds and did not manifestly misuse its discretion (see, to that effect, judgment of 19 June 2015, *Z v Court of Justice*, T-88/13 P, EU:T:2015:393, paragraph 106).
- 42 In the second place, it is also necessary to summarise the conditions under which institutions may require candidates in an internal competition to provide evidence of a period of service.
- 43 It has already been held in that respect that requiring a particular number of years' service is an appropriate means of ensuring that officials have the qualities set out in the first paragraph of Article 27 of the Staff Regulations and, therefore, of safeguarding the interests of the service. Having a particular period of service, and therefore meaningful experience within the EU institutions, is a 'clear indication' of the qualities referred to above (see, to that effect, judgment of 13 December 2006, *Heus v Commission*, T-173/05, EU:T:2006:392, paragraph 40 and the case-law cited).
- 44 Such a service requirement ensures that the people admitted to the internal competition have been subject, for a particular period, to the regime applicable to the administrative staff of the institutions, inter alia, to the rules relating to staff reports and discipline, and that they have demonstrated their abilities in that context. The recruitment procedure therefore secures for the institution the services of

officials who have the highest standard of ability, efficiency and integrity, as assessed by the institutions themselves (see, to that effect, judgment of 13 December 2006, *Heus v Commission*, T-173/05, EU:T:2006:392, paragraph 41).

- 45 Accordingly, the case-law has already allowed conditions regarding length of service of 3 years (judgments of 6 March 1997, *de Kerros and Kohn-Bergé v Commission*, T-40/96 and T-55/96, EU:T:1997:28, paragraph 47, and of 17 November 2009, *Di Prospero v Commission*, F-99/08, EU:F:2009:153, paragraph 31), of 5 years (judgment of 13 December 2006, *Heus v Commission*, T-173/05, EU:T:2006:392, paragraphs 38, 40 and 42) and of 10 years (judgment of 21 November 2000, *Carrasco Benítez v Commission*, T-214/99, EU:T:2000:272, paragraphs 56 and 61), in so far as, in those cases, the institution in question had exercised its wide discretion in accordance with the condition relating to the interests of the service.
- 46 By contrast, a further condition — in addition to one imposing a particular period of service — whereby candidate-officials or agents must have worked without interruption for the institution for that period of service, may have the effect of excluding from the internal competition officials or agents who can prove that they have a period of service that is the same as or longer than that required by the period of service condition. It follows that, in the absence of a justification provided by the institution, such a requirement must be found to be unlawful (see to that effect, judgment of 6 March 1997, *de Kerros and Kohn-Bergé v Commission*, T-40/96 and T-55/96, EU:T:1997:28, paragraphs 48 to 54).
- 47 In the present case, it has been established that, in section III of the competition notice, entitled ‘Eligibility’, Article 2.1(a) and (b) requires candidates not only to have at least 42 months’ service, not necessarily consecutively, but also to have spent the 12 months preceding the closing date for online applications in the Commission and, during those 12 months, to have been in an administrative position of active employment, on leave for military service, on parental or family leave, on secondment in the interests of the service, or on secondment at the candidate’s own request for a period not exceeding 6 months.
- 48 Accordingly, the competition notice requires, during the 12-month period preceding the closing date for online applications, that candidates have been working for the Commission without interruption in one of the administrative positions listed in paragraph 47 above, which do not include, notably, leave on personal grounds.
- 49 The condition at issue has the effect of excluding from the internal competitions covered by the competition notice certain officials or agents who can prove a period of service longer than the 42-month period required by the competition notice, solely on the ground that they were not in the service of the Commission without interruption for the 12-month period preceding the closing date for online applications, for example, because they took leave on personal grounds, even where that leave was short. That is in fact the situation of the applicant, who provided evidence of 69 months’ service but had taken 2 months’ leave on personal grounds in the 12 months preceding the closing date for online applications.
- 50 In order to justify the condition at issue, the Commission merely states that the objective of that condition was to recruit officials who were not only of merit and highly skilled, but also immediately operational by virtue of their proven experience. That objective was, admittedly, mentioned expressly under the heading ‘General background’ of the competition notice. However, the Commission has not indicated any specific circumstance, related to the characteristics of the positions to be filled, implying that only agents who had worked for the Commission without interruption for 12 months preceding the closing date for online applications would have been immediately operational, and that would therefore justify excluding from the internal competition at issue agents who had not worked for the Commission without interruption for that period, because, inter alia, they may have taken leave on personal grounds, even where they can prove a longer period of service than the 42 months required.

- 51 In those circumstances, the Commission must be considered to have used its discretion in a manifestly incorrect manner by including in the competition notice a condition — additional to that relating to length of service — requiring candidates to have worked for the Commission without interruption for the 12-month period preceding the closing date for online applications.
- 52 In any event, it cannot be inferred that one agent is more highly skilled or more immediately operational than another merely because each took a different kind of leave. That conclusion is all the more compelling in so far as the condition at issue has the paradoxical effect of excluding certain agents, such as the applicant, even though, because their leave was shorter, they have spent more time in a Commission department during the last 12 months than other agents who are nevertheless eligible to apply for the internal competition in question. Moreover, that finding refutes the Commission's assertion — made in response to a written question from the Court — that the condition at issue made it possible to give agents who had demonstrated, through their service and actual performance as most recently assessed and thus in the most reliable manner possible, that they deserved to be appointed as an established official, the opportunity to be so appointed.
- 53 Excluding agents who have taken leave on personal grounds is therefore not justified either in the light of the objectives pursued or in the light of the first paragraph of Article 27 of the Staff Regulations.
- 54 The alleged risk, to which the Commission referred at the hearing, that the principle of non-discrimination would have been infringed had different eligibility requirements been envisaged according to whether the agents concerned were contract or temporary agents, does not undermine that finding.
- 55 Contrary to what the Commission contended in response to a written question from the Court, it is irrelevant that these were the first internal competitions open to contract agents since the 2013 reform of the Staff Regulations and that, accordingly, there was no earlier practice to the contrary. That factor is even less relevant in so far as, in the present case, the applicant was not a contract agent, but a temporary agent. Moreover, the Commission was in any event free to align the eligibility conditions for contract agents with those for temporary agents, in compliance with the principles laid down by the case-law.
- 56 In the light of all those considerations and without it being necessary to rule on whether Article 24a of the Staff Regulations or the principle of equal treatment has been infringed, the plea of illegality must be upheld inasmuch as the condition at issue infringes the first paragraph of Article 27 of the Staff Regulations and, therefore, the contested decision must be annulled.

Claim for compensation

- 57 In so far as, according to the applicant, annulment of the contested decision is insufficient to constitute reparation for the non-pecuniary damage he claims he suffered, the applicant applies to the Court to order the Commission to pay the sum of EUR 5 000. The Commission contends that, unless the contested decision is unlawful, those claims, made for the first time before the General Court, must be dismissed. In any event, even assuming that decision to be unlawful, its annulment would be sufficient to constitute reparation for the non-pecuniary damage alleged.
- 58 According to settled case-law, the annulment of an unlawful act can in itself constitute appropriate and, in principle, sufficient compensation for any non-material damage which that act may have caused (judgment of 9 November 2004, *Montalto v Council*, T-116/03, EU:T:2004:325, paragraph 127; see, also, to that effect, judgment of 9 July 1987, *Hochbaum and Rawes v Commission*, 44/85, 77/85, 294/85 and 295/85, EU:C:1987:348, paragraph 22).

- 59 Nonetheless, the annulment of an unlawful act cannot in itself constitute adequate compensation where, first, the contested act involves an explicitly negative and potentially damaging assessment of the applicant's abilities (see, to that effect, judgments of 7 February 1990, *Culin v Commission*, C-343/87, EU:C:1990:49, paragraphs 27 to 29; of 23 March 2000, *Rudolph v Commission*, T-197/98, EU:T:2000:86, paragraph 98; and of 13 December 2005, *Cwik v Commission*, T-155/03, T-157/03 and T-331/03, EU:T:2005:447, paragraphs 205 and 206) and, secondly, the applicant demonstrates that he has suffered non-material damage which is separable from the unlawfulness giving rise to the annulment and which cannot be fully compensated for by the annulment (judgments of 6 June 2006, *Girardot v Commission*, T-10/02, EU:T:2006:148, paragraph 131, and of 19 November 2009, *Michail v Commission*, T-49/08 P, EU:T:2009:456, paragraph 88).
- 60 In the present case, the applicant asserts that the non-material damage caused to him arises because the Commission cannot reinstate him in the same circumstances as those in which the competition should have been held in order to ensure equal treatment for all the candidates and objective marking.
- 61 Clearly, the applicant is not criticising the Commission for any negative and potentially damaging assessment of his abilities; nor has he demonstrated that he suffered any non-material damage separable from the unlawfulness giving rise to the annulment.
- 62 In those circumstances, applying the case-law summarised in paragraphs 58 and 59 above, the Court finds that any non-material damage that the applicant may have suffered as a result of the illegality of the contested decision is appropriately and sufficiently remedied by annulling that decision. The claim for compensation must therefore be dismissed.
- 63 It follows from all the foregoing considerations that the action must be upheld in so far as it seeks annulment of the contested decision and must be dismissed as to the remainder.

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. In the present case, as the Commission has, essentially, been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Annuls the decision of the selection board for internal competition COM/02/AST/16 (AST 2) rejecting RS's candidature;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission to pay the costs.**

Gervasoni

Kowalik-Bańczyk

Mac Eochaidh

Delivered in open court in Luxembourg on 12 September 2018.

[Signatures]