



Reports of Cases

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

23 October 2012*

(Civil service — Officials — Referral back to the Tribunal after setting aside — Waiver of the immunity of staff of an institution in respect of words spoken or written by them in the course of legal proceedings — Appointment to a post of head of unit — Rejection of candidature — Action for annulment — Interest of unsuccessful candidate in bringing proceedings — Res judicata — Procedural irregularity — Weighing up the interests involved — Action for damages — Non-material damage suffered as a result of an irregularity)

In Case F-44/05 RENV,

REFERENCE BACK of an action originally brought under Article 236 EC and Article 152 EA,

Guido Strack, a former official of the European Commission, residing in Cologne (Germany), represented by N.A. Lödler and H. Tettenborn, lawyers,

applicant,

v

European Commission, represented by H. Krämer and B. Eggers, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

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

Registrar: W. Hakenberg,

having regard to the written procedure and further to the hearing on 19 January 2012,

gives the following

Judgment

- 1 The present action was referred back to the Tribunal by judgment of the General Court of the European Union of 9 December 2010 in Case T-526/08 P *Commission v Strack* ('the referral judgment'), setting aside in part the judgment of 25 September 2008 in Case F-44/05 *Strack v Commission* ('*Strack v Commission*') ruling on the action brought by Mr Strack, in which he sought annulment of the decision of the Office for Official Publications of the European Communities rejecting his candidature for the post of head of the 'Calls for tender and contracts' unit (A 5/A 4) of

* Language of the case: German.

that Office ('the post at issue'), annulment of the decision to appoint Mr A to the post at issue, and an order that the European Commission should pay compensation for the non-material damage he allegedly suffered.

Legal context

Provisions relating to the Publications Office

- 2 Article 1 of Decision 2000/459/EC, ECSC, Euratom of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities (OJ 2000 L 183, p. 12) provides that the task of the Publications Office is 'to publish the publications of the institutions of the European Communities and their departments under optimum technical and financial conditions, operating under the responsibility of those institutions'.
- 3 Article 6 of Decision 2000/459 states:

'1. The powers of the appointing authority in respect of officials or other servants in grades A 1, A 2, A 3 and LA 3 shall be exercised by the Commission as described below.

...

2. The powers of the appointing authority in respect of officials or servants other than those referred to in paragraph 1 shall be exercised by the Commission. The Commission may delegate these powers to the Director of the Office.

...

3. The administrative procedures connected with the official acts mentioned in paragraphs 1 and 2, and the day-to-day management of personnel, in particular with regard to retirement, sickness insurance, accidents at work, salaries and leave, shall be carried out in the same manner as for Commission staff serving in Luxembourg [(Luxembourg)].

...'

Provisions governing the procedure for filling vacancies

- 4 In a communication of 22 December 2000 [SEC (2000) 2305/5] entitled 'Appraisal, Selection and Appointment of Senior Commission Officials', the Secretariat-General of the Commission put forward proposed amendments to the composition, mandate and procedure of the consultative committees.
- 5 Article 2(3) of the Commission Decision on middle management staff, dated 28 April 2004 and published in *Administrative Notices* No 73-2004 of 23 June 2004 ('the decision of 28 April 2004'), provides: '[i]n case of filling a post pursuant to Article 29 of Staff Regulations [of Officials of the European Union], and except in the specific cases set out in the implementing rules referred to in Article 16(2), the Director-General concerned shall appoint a preselection board comprising at least three members of grade and management function equal or superior to that of the post to be filled, including one from another Directorate-general'.

- 6 Article 16 of the Decision of 28 April 2004 states that that decision repeals and replaces, inter alia, the Communication of 22 December 2000 in so far as the provisions relating to middle management are concerned. According to Article 17 of the Decision of 28 April 2004, that decision entered into force on 1 May 2004.
- 7 The Publications Office has a manual concerning the procedure for the recruitment of heads of unit (A 5/A 4). That manual, in the version in force at the material time, sets out the details of the procedure as follows:

- ‘1. Preparation of the notice of vacancy.
2. Publication within all the institutions of the notice of vacancy adopted by the Director of the Publications Office. The notice must give a precise description of the profile of the post to be filled and the duties to be performed. Candidatures are to be sent direct to the Publications Office.
3. Appointment of a rapporteur by the Directorate-General for Personnel and Administration ... of the Commission.
4. The Director of the [Publications Office] appoints [three] heads of unit to form a preselection [board].
5. The preselection [board]:
 - (a) examines the candidatures (eligibility under the Staff Regulations),
 - (b) interviews the candidates and assesses them on the basis of a set of predefined assessment criteria and
 - (c) draws up a detailed, reasoned report (strengths, weaknesses and shortcomings of each candidate) and a [short-list], in alphabetical order, which [are] sent to the Director of the [Publications] Office and the rapporteur.
6. Within a period of [five] working days of receiving the report of the preselection [board], the rapporteur sends the Director of the [Publications] Office his opinion on the report.

(Where necessary, in the light of the opinion of the rapporteur, the Director of the [Publications] Office may recommence the procedure from stage 5.)

7. The Director of the [Publications] Office interviews the candidates on the [short-list] and any other candidate whom he wishes to interview. He may be assisted by heads of unit or directors whom he designates. The rapporteur takes part in these interviews.
8. [Following] those interviews minutes are prepared and sent to the Directorate-General for Personnel and Administration and the rapporteur.
9. The [Directorate-General for Personnel and Administration] refers the matter to the Consultative Committee on Appointments (CCN) under a written procedure and sends the opinion issued by the CCN to the Director of the [Publications] Office.
10. The Director of the [Publications] Office takes his decision on the basis of the report from the preselection [board], the opinion of the rapporteur, the minutes prepared by the Director of the [Publications] Office following the interviews ([Stage 7]) and the opinion of the CCN.

11. The [Directorate-General for Personnel and Administration] prepares the instrument of appointment.
12. The instrument of appointment is signed by the Director of the [Publications] Office in his capacity as [the appointing authority].

Provisions governing retirement and the award of an invalidity allowance

- 8 The Staff Regulations of Officials of the European Union, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, entered into force on 1 May 2004 ('the Staff Regulations' or 'the new Staff Regulations'). Those provisions replaced those which had been applicable until 30 April 2004 ('the old Staff Regulations'). Article 53 of the Staff Regulations provides that '[a]n official to whom the Invalidity Committee finds that the provisions of Article 78 apply shall automatically be retired on the last day of the month in which the appointing authority recognises his permanent incapacity to perform his duties'.

- 9 Article 78 of the Staff Regulations reads:

'An official shall be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity allowance in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his function group.

Article 52 shall apply by analogy to recipients of an invalidity allowance. If the recipient of an invalidity allowance retires before the age of 65 without having reached the maximum pension entitlement, the general rules on retirement pensions shall be applied. The amount of the retirement pension shall be based on the salary for the grade and step occupied by the official when he became an invalid.

The invalidity allowance shall be equal to 70% of the official's last basic salary. ...

Where the invalidity arises ... from an occupational disease ..., the invalidity allowance may not be less than 120% of the minimum subsistence figure. In such cases, moreover, contributions to the pension scheme shall be paid in full from the budget of the institution or body referred to in Article 1b.'

- 10 Article 13 of Annex VIII to the Staff Regulations reads:

'1. Subject to the provisions of Article 1(1), an official aged less than 65 years who at any time during the period in which he is acquiring pension rights is recognised by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his service ... shall be entitled, for so long as such incapacity persists, to invalidity allowance as provided for in Article 78 of the Staff Regulations.

2. ...

The recipient of the allowance shall be required to provide on request any written proof which may be requested and to notify his or her institution of any factor that may affect entitlement to the allowance.'

- 11 The first and second paragraphs of Article 14 of Annex VIII of the Staff Regulations read:

'The right to receive payment of invalidity allowance shall have effect from the first day of the calendar month following the official's retirement under Article 53 of the Staff Regulations.

When the former official ceases to satisfy the requirements for payment of the allowance he must be reinstated in the first post corresponding to his career bracket which falls vacant in his category or service, provided that he satisfies the requirements for that post. If he declines the post offered to him, he shall retain his right to reinstatement when the next vacancy corresponding to his career bracket occurs in his category of service subject to the same provision; if he declines a second time, he may be required to resign.'

- 12 Article 15 of Annex VIII to the Staff Regulations states that '[w]hile a former official drawing invalidity allowance is aged less than 63 years, the institution may have him medically examined periodically to ascertain that he still satisfies the requirements for payment of the allowance'.

Other relevant provisions

- 13 Article 3 of the Staff Regulations provides:

'The instrument appointing an official shall state the date on which the appointment takes effect; this date shall not be prior to the date on which the official takes up his duties.'

- 14 Article 30 of the Rules of Procedure of the Tribunal provides:

'1. The parties' representatives, appearing before the Tribunal or before any judicial authority to which it has addressed letters rogatory, shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. The parties' representatives shall enjoy the following further privileges and facilities:

- (a) papers and documents relating to the proceedings shall be exempt from both search and seizure; in the event of a dispute the customs officials or police may seal those papers and documents; they shall then be immediately forwarded to the Tribunal for inspection in the presence of the Registrar and of the person concerned;
- (b) the parties' representatives shall be entitled to such allocation of foreign currency as may be necessary for the performance of their duties;
- (c) the parties' representatives shall be entitled to travel in the course of duty without hindrance.

3. The privileges, immunities and facilities specified in paragraphs 1 and 2 are granted exclusively in the interests of the proper conduct of proceedings.

4. The Tribunal may waive the immunity where it considers that the proper conduct of proceedings will not be hindered thereby.'

Facts and procedure

Background to the dispute

- 15 The applicant entered the service of the Commission on 1 September 1995 and was appointed to a post at the Publications Office with effect from that date. On 1 January 2001 he was promoted to Grade A 6 (which became, following the entry into force of the new Staff Regulations, with effect from 1 May 2004, A*10, and subsequently, with effect from 1 May 2006, AD 10). On 1 April 2002 he left the Publications Office to work in Unit C 4 of the Commission's Directorate-General (DG) for Enterprise. With effect from 16 February 2003 the applicant was assigned to Eurostat.

- 16 On 25 March 2004 the Publications Office published notice of vacancy COM/A/057/04 with a view to filling the post at issue ('the notice of vacancy').
- 17 Section III of the notice of vacancy, entitled 'Candidatures', stated:
- ' ...
- Officials of the [i]nstitutions of the European Communities in Grades A 4, A 5, or A 6 who are eligible for promotion, who consider they possess the necessary qualifications may apply for this post.
- ...'
- 18 Section IV of the notice of vacancy, entitled 'Selection procedure', stated that 'candidatures [would] be considered by a selection [board], which ... [would] draw up a [short-list] of candidates who [would] be called for interview'.
- 19 On 31 March 2004 Ms B was appointed rapporteur for the procedure for filling the post at issue.
- 20 By e-mail dated 15 April 2004 the applicant applied for the post at issue.
- 21 By note of 7 June 2004, the applicant was invited to attend an interview with the members of the preselection board, which took place on 21 June 2004. The board was composed of Mr C, a director at the Publications Office and Mr D and Mr E, both heads of unit at the Publications Office, with administrative coordination being provided by Mr E.
- 22 A note from the preselection committee dated 25 June 2004 states inter alia that although all the candidates were eligible under the Staff Regulations only seven of them attended interviews with the preselection board. The same note gives, in alphabetical order, the names appearing on the short-list resulting from the interviews: Mr A, Mr F, Mr G and Mr H. Three of those candidates were at that time in Grade A 5 and one candidate was in Grade A 4.
- 23 By e-mail of 5 July 2004, the applicant asked Mr E about the state of progress of the selection procedure. By e-mail of 6 July 2004, Mr E told him that no information could be provided until the selection procedure had ended.
- 24 On 13 July 2004 the four candidates named on the short-list were interviewed by the Director General of the Publications Office, in his capacity as the appointing authority, assisted by Ms B. At the end of those interviews, also on 13 July 2004, the Director General of the Publications Office chose Mr A.
- 25 The report dated 15 July 2004, signed by the appointing authority and Ms B, entitled 'R[e]port of the appointing authority following the interviews with the candidates chosen by the preselection board', states that Mr A 'is the candidate offering the best assurances for the proper functioning of [the]unit'.
- 26 By e-mail of 7 September 2004, the applicant again asked Mr E about the state of progress of the selection procedure. That e-mail went unanswered. The applicant claims to have repeated his request one last time, by e-mail of 18 November 2004. That request was not answered by the administration.
- 27 On 22 November 2004 the applicant contacted Mr E by telephone. Mr E informed him that the selection procedure had ended some time before but that the administration had omitted to inform the unsuccessful candidates of that fact.
- 28 On 24 November 2004 the applicant received a note dated 19 November 2004, in which the Publications Office informed him that his candidature had been unsuccessful.

- 29 On 26 November 2004 the applicant submitted a complaint under Article 90(2) of the Staff Regulations, by which he sought, first, annulment of the decision of the appointing authority appointing Mr A to the post at issue and of the decision rejecting his own candidature for that post and, secondly, payment of damages to compensate for the non-material damage he suffered as a result of the unlawful appointment of Mr A and the delay in informing him of the decision to reject his candidature.
- 30 By decision of 18 March 2005, the appointing authority rejected the applicant's complaint. That decision was sent to the applicant by letter posted on 22 March 2005, which he received on 23 April 2005.
- 31 Meanwhile, on 14 March 2005, the Invalidity Committee, which must be consulted in accordance with Article 53 of the Staff Regulations, found that the applicant was suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket and, on that ground, suspended his service with the Commission. The Invalidity Committee stated that the possible link between the invalidity and the applicant's previous occupation ought to be discussed by the Committee at a later date, once the relevant evidence was available.
- 32 By decision of the appointing authority of 31 March 2005, which took effect the same day, the applicant was retired and was granted an invalidity allowance, calculated in accordance with the provisions of the third paragraph of Article 78 of the Staff Regulations.
- 33 On 26 October 2005 the applicant was invited to attend a medical examination in accordance with Article 73 of the Staff Regulations, which was scheduled for 14 December 2005.
- 34 By letter of 8 November 2006 the Commission informed the applicant that it recognised, on the basis of the medical examination which he had undergone, that his state of health had deteriorated, and therefore the costs of medical treatment directly related to that deterioration would be reimbursed in accordance with Article 73 of the Staff Regulations until his state of health had stabilised. It was also stated in that letter that, in accordance with Article 19 of the common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, the applicant was to keep the administration informed of developments in his state of health. Accordingly, the applicant was requested to ask his regular doctor to complete a medical certificate. In that regard, the letter stated that if the administration did not receive the completed certificate by 8 May 2007 at the latest the applicant would be considered to have recovered.
- 35 On 28 March 2007 the Commission reminded the applicant that under Article 15 of Annex VIII to the Staff Regulations the institution may periodically examine former officials drawing an invalidity allowance who are aged less than 63 years. The Commission therefore requested the applicant to present a medical certificate informing it of his current state of health and 'establishing' whether or not his status as an invalid should be maintained.

The proceedings at first instance

- 36 On 17 June 2005 the applicant, who was 40 years of age at the time, brought an action before the Court of First Instance of the European Communities, which was registered as Case T-225/05, seeking annulment of the decision of the appointing authority rejecting his candidature for the post at issue and annulment of the decision to appoint Mr A to that post.

- 37 On 3 October 2005 the Commission raised, by a separate document, under Article 114(1) of the Rules of Procedure of the Court of First Instance, a plea of inadmissibility against the applications for annulment and against the claim for damages submitted in Case T-225/05. On 15 November 2005 the applicant lodged his observations on the plea of inadmissibility. By order of 8 December 2005, the Court of First Instance reserved the plea of inadmissibility until final judgment.
- 38 By order of 15 December 2005, the Court of First Instance, in pursuance of Article 3(3) of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7), referred the case to the Tribunal. The action was registered at the Registry of the Tribunal as Case F-44/05.
- 39 On 10 September 2007 the applicant asked the Tribunal, inter alia, to transmit to the competent criminal prosecution authorities a copy of the documents in the case and to report an offence on the part of the Commission arising from the inaccurate statements contained in those documents concerning the date on which the preselection board began its work. The applicant also asked the Tribunal to take into account the inaccuracy of the Commission's statements, in the context of its decision on the claim for damages. In that regard, the applicant asked the Tribunal to exercise its unlimited jurisdiction in order to require the Commission to pay appropriate compensation for the non-material damage which the Commission's inaccurate statements had caused him.
- 40 On 25 September 2008 the Tribunal (Second Chamber) delivered the judgment in *Strack v Commission*, in the operative part of which, in point 1, it dismissed as inadmissible the application for annulment of the decision to appoint Mr A to the post at issue, in point 2, it annulled the decision to reject the applicant's candidature for the post at issue, in point 3, it ordered the Commission to pay the applicant the sum of EUR 2 000 by way of damages, in point 4, it dismissed the remainder of the action, in point 5, it ordered applicant to pay half his costs, and, in point 6, it ordered the Commission to pay its own costs and half of the costs incurred by the applicant.
- 41 In that judgment the Tribunal held, with regard to the applicant's application for a copy of the documents in the case to be sent to the competent criminal prosecution authorities and for an offence to be reported accordingly, that it could not grant that application since it did not come within its jurisdiction (*Strack v Commission*, paragraph 49).
- 42 As regards the subject-matter of the action, the Tribunal held that the applicant's claims for annulment should be understood as seeking, first, annulment of the decision to appoint Mr A to the post at issue and, secondly, annulment of the decision to reject the applicant's candidature (*Strack v Commission*, paragraph 54).
- 43 On completion of its examination of the claims for annulment, the Tribunal rejected the claim for annulment of the decision to appoint Mr A to the post at issue as being inadmissible (*Strack v Commission*, paragraph 80) and upheld in part the claim for annulment of the decision rejecting the applicant's candidature (*Strack v Commission*, paragraph 202).
- 44 Giving reasons for the inadmissibility of the claim for annulment of the decision to appoint Mr A to the post at issue, the Tribunal stated that the applicant had been retired and granted an invalidity allowance with effect from 31 March 2005 so that, when the present action was brought on 17 June 2005, there was no longer any question of his working at the Commission and he was no longer entitled to occupy the post at issue. It was, of course, still possible to reinstate the applicant in his employment with the Commission, but the Tribunal pointed out that, where the interest in bringing proceedings pleaded by an applicant concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain. The applicant's reinstatement in his employment with the Commission was only a possible event, the occurrence of which was uncertain. In those circumstances the Tribunal held that it was incumbent on the applicant to establish the existence of a special circumstance proving a current, personal interest in bringing proceedings for the annulment of

the decision to appoint Mr A to the post at issue and, finding that the applicant had not managed to establish the existence of such a circumstance, it concluded that the applicant did not have an interest in seeking annulment of the decision to appoint Mr A to the post at issue. However, the Tribunal did find that the applicant, although he had been retired, still had an interest in a declaration that the decision to reject his candidature for the post at issue was unlawful so that, if appropriate, he could obtain compensation for any damage which that decision might have caused him.

- 45 As to the substance, the Tribunal upheld the claim for annulment of the decision to reject the applicant's candidature for the post at issue, on the ground that the composition of the preselection board was not in accordance with Article 2(3) of the Decision of 28 April 2004. That decision provided that the preselection board must include at least one member from a Directorate-General other than that concerned by the post to be filled. All the members of the preselection board were employed at the Publications Office (*Strack v Commission*, paragraph 116) and the parties did not dispute the fact that the Decision of 28 April 2004 applied to that Office (*Strack v Commission*, paragraph 106). Accordingly, the Tribunal upheld in part the applicant's claim for damages, on the ground that he had been denied the right to a proper review of his candidature, and ordered the Commission to pay the applicant the sum of EUR 2 000 in respect of the non-material damage he had suffered (*Strack v Commission*, paragraph 220).

Appeal proceedings

- 46 By document lodged at the Registry of the Court of First Instance on 3 December 2008, the Commission brought an appeal against the judgment in *Strack v Commission*, registered as Case T-526/08 P. According to the Commission, the Tribunal, first, erred in law by taking the view that the applicant had an interest in bringing an action for annulment of the decision to reject his candidature, secondly, erred in law by inferring the existence of the non-material damage alleged by the applicant solely from the finding that the latter had been denied the right to a proper review of his candidature and, thirdly, had failed to set out the reasons why the applicant's non-material interest had been harmed, thereby providing in its judgment an insufficient statement of reasons.
- 47 On 10 February 2009 the applicant submitted his response, in which he also lodged a cross-appeal against the judgment under appeal. According to the applicant, the Tribunal erred in law by denying him any interest in bringing an action for annulment of the decision to appoint Mr A, provided insufficient grounds by failing to give reasons for the finding that it lacked jurisdiction to entertain the application to send a copy of the documents in the case to the competent criminal prosecution authorities and to report an offence on the part of the Commission arising from the inaccurate statements contained in those documents, and erred in law by ruling to that effect. The applicant also complained that the Tribunal had failed to take into account the non-material damage caused to him as a result of certain irregularities in the selection procedure of which he had complained in his original action in *Strack v Commission*. In his written pleadings the applicant had also asked the Court of First Instance to send a copy of the documents in the case to the competent criminal prosecution authorities and report an offence on the part of the Commission arising from the inaccurate statements contained in those documents.
- 48 In the referral judgment, the General Court, first, upheld the Commission's appeal on the grounds that the Tribunal had made three errors in law, the first in assessing the applicant's interest in bringing an action for annulment of the decision rejecting his candidature specifically and separately from his interest in bringing an action for annulment of the decision to appoint Mr A (referral judgment, paragraph 46), the second in basing the admissibility of the application to annul the decision to reject the candidature on an incorrect assessment of the applicant's interest in bringing proceedings (referral judgment, paragraph 51), the third in interpreting and applying the rules under which the European Union incurs non-contractual liability, since the Tribunal had upheld the applicant's claim for damages without specifically examining, as it was required to do by law, whether the non-material

damage alleged was separable from the unlawfulness justifying annulment of the decision to reject his candidature and hence incapable of being entirely remedied by that annulment (referral judgment, paragraph 59).

- 49 The General Court also upheld in part the applicant's cross-appeal. It found that the Tribunal had erred in law in rejecting as inadmissible the claim, contained in the application, for annulment of the decision to appoint Mr A on the basis of grounds which were not such as to establish that the applicant had no interest in bringing an action for such annulment (referral judgment, paragraph 75 et seq.).
- 50 However, the General Court rejected the remainder of the cross-appeal. Inter alia, it held that the Tribunal was right to find that it had no jurisdiction to rule on an application by one party to the case before it seeking in essence, first, that it should find that the conduct of the other party to the case during the proceedings is liable to be characterised as criminal, secondly, that the competent criminal authorities should be informed of that conduct and, thirdly, that an offence should be reported to those authorities. The General Court stated, however, that that finding did not mean that it was not possible for the applicant to ask the Tribunal, by virtue of the powers which the latter has under Article 30(4) of its Rules of Procedure, to waive the immunity enjoyed by representatives of the parties before it in respect of words spoken or written by them concerning the case or the parties in order to refer that conduct to the competent criminal authorities (referral judgment, paragraph 82).
- 51 As regards the applicant's claim that the General Court should send a copy of the documents in the case to the competent criminal prosecution authorities and report an offence on the part of the Commission, the General Court rejected that claim as inadmissible on the ground that the rules governing the procedure for an appeal against a decision of the Tribunal do not provide for a right of recourse allowing one party to the proceedings at first instance to refer to it a claim seeking, in essence, that it should find that the conduct of the other party to the case during the proceedings at first instance is liable to be characterised as criminal, and that it should decide that the competent criminal authorities should be informed of that conduct (referral judgment, paragraph 124).
- 52 In short, the General Court first set aside points 1, 2, 3, 5 and 6 of the operative part of the judgment in *Strack v Commission* (referral judgment, paragraph 127) and rejected the cross-appeal for the remainder. Secondly, the General Court held that it was not in a position to rule either on the claim for annulment of the decision to appoint Mr A and of the decision to reject the applicant's candidature on the ground that there had been no exchange of argument as to whether Mr A's interest precluded such annulment, or on the claim for damages in the sum of EUR 2 000 since the Tribunal had not considered whether the non-material damage the applicant had had to suffer was separable from the unlawfulness it had established. Accordingly, the General Court referred the case back to the Tribunal for a ruling on the claim for annulment of the decision to appoint Mr A to the post at issue and of the decision to reject the applicant's candidature for that post and on the claim for damages in the sum of EUR 2 000 (referral judgment, paragraph 128). Lastly, the General Court reserved the costs of the appeal proceedings.
- 53 By letters of 15 December 2010, the Registry of the Tribunal, in accordance with Article 114(1), of the Rules of Procedure, informed the applicant and the Commission that they had a period of two months, extended on account of distance by a single period of 10 days, from the time the judgment of the General Court was served, within which to lodge their statements of written observations.
- 54 This case was assigned to the Second Chamber, composed at that time of H. Tagaras, President, I. Boruta and S. Van Raepenbusch, Judges. Following the expiry of the term of office of the President of the Chamber and the reorganisation of the chambers of the Tribunal on 10 October 2011, the composition of that chamber was altered.

- 55 The applicant and the Commission each lodged a statement of written observations, on 21 February 2011 and 12 April 2011, respectively.
- 56 In his statement of written observations on the referral judgment, in addition to the observations, the applicant submitted several claims: first, that the Tribunal should suspend the proceedings until the adoption of a new provision replacing Article 113(2) of the Rules of Procedure; secondly that it should waive the immunity enjoyed by the Commission representatives in respect of words spoken or written by them in the course of the proceedings in *Strack v Commission*; thirdly, that the President of the Tribunal should remove Judge Van Raepenbusch; and, fourthly, that the Tribunal should award the applicant compensation for the excessive duration of the proceedings and, if the Tribunal were to hold that that claim for damages could not be dealt with directly in the context of the present proceedings but should form the subject of a separate action, that the claim should be forwarded to the competent court.
- 57 Among those claims, the claim that the Tribunal should suspend the proceedings until the adoption of a new provision replacing Article 113(2) of the Rules of Procedure and the claim that the President of the Tribunal should remove Judge Van Raepenbusch were rejected by order of the President of the Second Chamber of 8 December 2011 and by decision of the President of the Tribunal of 29 September 2011, respectively.

Law

- 58 As a preliminary matter, it is necessary to determine the subject-matter of the present case.
- 59 First of all, two of the claims made by the applicant have not yet been dealt with: the claim that the Tribunal should waive the immunity enjoyed by the Commission representatives in respect of words spoken or written by them in the course of the proceedings leading to the judgment in *Strack v Commission* and the claim that the Tribunal should award the applicant compensation for the excessive duration of the proceedings.
- 60 Moreover, it should be noted that since the General Court set aside part of the operative part of the judgment in *Strack v Commission* and subsequently referred the case back to the Tribunal, the latter, under Article 113 of the Rules of Procedure, is seised by the referral judgment of the forms of order and pleas raised by the applicant in Case F-44/05 *Strack v Commission*, with the exception of the elements of the operative part not set aside by the General Court, and of the findings which constitute the necessary basis for those elements, since those elements have acquired the force of *res judicata*.
- 61 In order to determine the precise claims and pleas on which the Tribunal must rule, it must be recalled that in *Strack v Commission* the applicant had claimed that the Tribunal should:
- take formal note of the action brought under Article 91 of the Staff Regulations;
 - declare the action to be admissible and well-founded;
 - annul the appointing authority's decision of 22 March 2005 rejecting his complaint;
 - annul the Commission's decision of 19 November 2003 rejecting his candidature;
 - annul selection procedure COM/A/057/04;

- order the Commission to pay damages to the applicant in the amount of EUR 5 000 in respect of the non-material damage suffered by him on account of the unlawfully implemented selection procedure and the delay in taking the decision to reject his candidature;
- order the Commission to pay the costs.

- 62 However, it is to be inferred from *Strack v Commission* that the claim that the Tribunal should take formal note of the action brought by the applicant under Article 91 of the Staff Regulations and the claim that the Tribunal should declare the action to be admissible and well-founded were held by the Tribunal to constitute purely formal statements in respect of which there was no need to give a ruling since the judgment concerned contained no comment on those claims. The referral judgment does not cast doubt on that finding.
- 63 Moreover, in *Strack v Commission*, the Tribunal held that all the claims for annulment made in the application should be regarded as seeking annulment both of the decision to appoint Mr A and of the decision to reject the applicant's candidature (*Strack v Commission*, paragraph 54). The General Court did not cast doubt on that definition of the subject-matter of the action in the referral judgment. However, following the setting aside by the General Court of points 1, 2, 3, 5 and 6 of the operative part of *Strack v Commission* in the referral judgment, the Tribunal must give a further ruling on the claim for annulment and the claim for compensation.
- 64 More specifically, it is clear from paragraph 46 of the referral judgment that, as regards the claim for annulment, the Tribunal must re-examine its admissibility, considering this time, in an overall and unified way, the applicant's interest in obtaining annulment of the decision to appoint Mr A and his interest in obtaining annulment of the decision rejecting his candidature.
- 65 On that point the General Court held in paragraphs 47 to 51 of the referral judgment that the applicant's interest in bringing an action for annulment cannot be deduced from the fact that he has an interest in establishing that a decision is unlawful in order to obtain subsequently compensation for the damage which that decision may have caused him. Moreover, the General Court held, inter alia in paragraphs 73 to 75 of the referral judgment, that the applicant's interest in bringing proceedings cannot be denied him solely because he was automatically retired due to permanent total invalidity recognised by the Invalidity Committee pursuant to Articles 53 and 78 of the Staff Regulations, since that situation is reversible.
- 66 As to whether the pleas for annulment are well-founded, it is not apparent from the referral judgment that the Tribunal erred in law by upholding the first plea and rejecting the others. The referral judgment states, however, that the question whether the interest of Mr A, who was appointed to the post at issue, precludes annulment of the appointment decision and the decision to reject the applicant's candidature must be examined by the Tribunal (referral judgment, paragraph 128).
- 67 As regards the claims for damages in so far as they relate to damages unconnected with the irregularity of the composition of the preselection board, it should be noted that in paragraph 211 et seq. of *Strack v Commission*, the Tribunal rejected them all. In the referral judgment, the General Court confirmed that those claims were unfounded. Since the conclusion reached in *Strack v Commission* has acquired the force of *res judicata*, no doubt can be cast on it in the context of the present proceedings following referral back.
- 68 As regards the claim for damages in so far as it relates to the non-material damage the applicant allegedly had to suffer as a result of the irregularity in the composition of the preselection board, the General Court referred it back in order that the Tribunal determine whether the non-material damage alleged is separable from the unlawfulness justifying those annulments and hence incapable of being entirely remedied by those annulments (referral judgment, paragraphs 59 and 128).

69 Consequently, it is appropriate to rule in the context of the present case on:

- the applicant's claim that the Tribunal should waive the immunity enjoyed by Commission representatives in respect of words spoken or written by them in the course of the proceedings leading to *Strack v Commission*;
- the claim that the Tribunal should award the applicant compensation for the excessive duration of the proceedings;
- the claims for annulment of the decision to appoint Mr A and for annulment of the decision rejecting the applicant's candidature in so far as it concerns whether they are admissible and, in that case, whether Mr A's interest precludes annulment of those decisions;
- the claim for damages in so far as it relates to the non-material damage the applicant allegedly had to suffer as a result of the irregularity in the composition of the preselection board.

The application for waiver of the immunity enjoyed by Commission representatives in respect of words spoken or written by them in the course of the proceedings

- 70 In the context of the proceedings in *Strack v Commission*, the applicant stated that two documents produced by the Commission representatives during those proceedings were inconsistent with the statement, made by those same representatives in the defence, that the preselection board had begun work before 1 May 2004 with the result that the new rules concerning selection boards were not applicable. Being uncertain whether the Commission representatives had been guilty of attempting to circumvent the rules in the proceedings, the applicant requested, in his statement of written observations, that the Tribunal waive the immunity enjoyed by the Commission representatives concerned, on the basis of Article 30(4) of the Rules of Procedure. In the applicant's submission, the proper conduct of proceedings would not be hindered by waiver of the immunity of the Commission representatives concerned, since the proceedings in the present case, following a referral after partial setting aside, are at a stage where the parties have finished putting forward their arguments.
- 71 In answer to a question put by the Tribunal, the Commission representatives concerned, in letters dated 6 March 2012, each submitted observations on the applicant's application for waiver of immunity. The applicant and the Commission then commented on those observations in letters dated 16 April 2012 and 26 March 2012 respectively.
- 72 In that regard, it is appropriate first of all to note that, under Article 30(1) of the Rules of Procedure of the Tribunal, '[t]he parties' representatives, appearing before the Tribunal or before any judicial authority to which it has addressed letters rogatory, shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties'. Article 30(3) and (4) provide that such immunity is granted 'exclusively in the interests of the proper conduct of proceedings' and that the Tribunal may waive the immunity 'where it considers that the proper conduct of proceedings will not be hindered thereby'.
- 73 It should be pointed out that those provisions must be interpreted in the light of the fifth paragraph of Article 19 of the Statute of the Court of Justice of the European Union, which provides their legal basis and which states that '[s]uch agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure'.
- 74 It is also necessary to take into account in the interpretation of that provision the fact that the immunity of the parties' representatives reflects the freedom of expression for lawyers enshrined in Article 11 of the Charter of Fundamental Rights of the European Union and in Article 10 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). In that regard, the European Court of Human Rights has held with regard to the freedom of expression of a defence lawyer in criminal proceedings, that '[t]he special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Article 10 [of the ECHR] protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. [A] lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless ... it is only in exceptional circumstances that restriction ... of defence counsel's freedom of expression can be accepted as necessary in a democratic society' (*Kyprianou v. Cyprus* §173 and 174 ECHR, 15 December 2005).

- 75 Although proceedings before the Tribunal are not criminal proceedings, Article 10 of the ECHR, as interpreted by the European Court of Human Rights, provides general protection for the freedom of expression of lawyers and contributes to the achievement in practice of the right to a fair hearing. Thus, the European Court of Human Rights held in paragraph 175 of *Kyprianou v. Cyprus* that '[f]or the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. ... It follows that any "chilling effect" [liable to be caused by the imposition of a penalty on a lawyer] is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice'.
- 76 Lastly, in order to interpret Article 30 of the Rules of Procedure, it is necessary to take into account Article 47(1) and (2) of the Charter, which is designed to ensure the fundamental right to an effective remedy before a tribunal, including the possibility of being advised, defended and represented (see, with regard to the right to receive legal aid, judgment of 22 December 2010 in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, paragraphs 45 and 46).
- 77 It is in the light of the foregoing that it would be appropriate to examine the application for waiver of the immunity enjoyed by the Commission representatives concerned during the proceedings in *Strack v Commission*.
- 78 However, before examining the merits of the applicant's application it is necessary to consider its admissibility. The General Court stated in paragraph 82 of the referral judgment that any of the parties had an opportunity, in order for such party to be able subsequently to seise the competent criminal authorities, to apply to the Tribunal for waiver of immunity, although it should be noted that during the original proceedings the applicant had not asked for the immunity of the Commission representatives to be waived so the General Court could not have been led to rule in the referral judgment on the scope of Article 30 of the Rules of Procedure of the Tribunal. Therefore, no decision of the Tribunal on that point can have been the subject of examination by the appeal court. Consequently, the referral judgment must be regarded as being a mere *obiter dictum*, formulated in response to an argument put forward by the applicant to the effect that holding that the Tribunal lacks jurisdiction to find that the conduct of a party is liable to be characterised as criminal would constitute a denial of justice.
- 79 However, Article 30 of the Rules of Procedure does not state expressly that an application for waiver of immunity may be made by one of the parties. Given that the immunity provided for in Article 30 of the Rules of Procedure is designed to protect parties' representatives against possible prosecution and, in view of the ratio legis of that provision as set out above, the Tribunal considers that it is under no obligation to adjudicate on an application for waiver of immunity unless that application is made by a court or competent national authority. Since that is not the case, the Tribunal finds that it cannot grant an application for waiver of immunity made by a party, since such an application does not fall within the Tribunal's jurisdiction.

80 It follows that in the circumstances of the present case the applicant's application for waiver of immunity must be rejected as being inadmissible.

The claim for damages for the excessive duration of the proceedings

81 The claim for damages in respect of the excessive duration of the proceedings, contained in the statement of written observations lodged by the applicant in the present referral proceedings, was dealt with in a separate order (order of 7 December 2011 in Case F-44/05 RENV *Strack v Commission*). In that order the Tribunal explained that, to support his claim, the applicant relied on the duration of three separate procedures, namely the administrative procedure for filling the post at issue, the pre-litigation procedure and the judicial proceedings.

82 Considering that it did not have jurisdiction to adjudicate on the claim for damages based on the duration of the judicial proceedings, since the damage alleged did not originate in the employment relationship between the applicant and the Commission but rather in the delay in adjudicating that could allegedly be attributed to the Courts of the European Union, the Tribunal referred to the General Court, by order of 7 December 2011 in Case F-44/05 RENV *Strack v Commission*, the applicant's claim for damages in so far as it concerned the excessive duration of the judicial proceedings. That claim for damages was registered at the Registry of the General Court as Case T-670/11.

83 By letter lodged at the Registry of the General Court on 12 January 2012, the applicant requested that his claim for damages for the excessive duration of the judicial proceedings be considered to have become devoid of purpose and that Case T-670/11 should be removed from the register of the General Court.

84 On 16 February 2012 the applicant lodged an appeal against the order of 7 December 2011 in Case F-44/05 RENV *Strack v Commission* referring the claim for damages for the excessive duration of the judicial proceedings to the General Court. That appeal was registered at the Registry of the General Court as Case T-65/12 P.

85 By order of the President of the General Court of 26 January 2012, Case T-670/11 was removed from the register of the General Court.

86 By order of 12 June 2012 in Case T-65/12 P *Strack v Commission*, the General Court dismissed the applicant's appeal against the order of 7 December 2011 in Case F-44/05 RENV *Strack v Commission* referring the claim for damages for the excessive duration of the judicial proceedings to the General Court, on the ground that the order under appeal did not constitute an act against which an appeal could be lodged.

87 As regards the claim for damages in so far as it concerns the excessive duration of the administrative procedure for filling the post and the pre-litigation administrative procedure, it should be noted that, in support of that claim the applicant complains that the Commission intentionally prolonged those procedures, by implementing a vacancy procedure that was manifestly incorrect, by not informing him directly of the result of that procedure and by failing to adopt the necessary remedial measures in the context of the pre-litigation procedure, in respect of which it had in practice used up the time-limits.

88 In that connection, as regards the administrative procedure proper, it should be noted that, according to the principle of sound administration, the appointing authority is required to conduct an administrative procedure within a reasonable time (see, to that effect, judgment of 11 April 2006 in Case T-394/03 *Angeletti v Commission*, paragraph 163).

- 89 In the present case, the administrative procedure for filling the post at issue began on 24 March 2004 with the publication of the notice of vacancy for that post, and ended so far as the applicant was concerned on 19 November 2004 when he was informed that his candidature had not been successful. Accordingly, the duration of the administrative procedure was approximately eight months, which cannot be regarded as unreasonable, given inter alia that the closing date for lodging candidatures for the post at issue was 15 April 2004 and that the selection procedure comprised four stages: first, examination of the candidatures by the preselection board in order to draw up a short-list; secondly, an interview between the appointing authority and the candidates on the short-list or any other candidate whom it wished to interview; thirdly, referral to the Consultative Committee on Appointments for an opinion; and, fourthly, adoption by the appointing authority of the instrument of appointment.
- 90 As regards the duration of the pre-litigation procedure, it was three months and thirty days, which is not excessive. In any event, the duration of the pre-litigation procedure cannot, as a matter of principle, be excessive since, as a result of the various time-limits laid down in Articles 90 and 91 of the Staff Regulations, where it is initiated by a request it cannot exceed 14 months and 10 days and where, as in the present case, it is initiated by a complaint, it cannot exceed 10 months and 10 days.
- 91 Consequently, the claim for compensation must be rejected in so far as it is based on the excessive duration of the administrative procedure for filling the post and of the pre-litigation procedure.

The claim for annulment of the decision to appoint Mr A and of the decision to reject the applicant's candidature

Admissibility of the claim for annulment

– Arguments of the parties

- 92 In its defence lodged in Case F-44/05, which refers to the considerations set out in the plea of inadmissibility submitted by separate document, the Commission contends that the applicant does not have an interest in bringing proceedings since he cannot benefit from annulment of the contested decisions. Having been automatically retired on the ground of total permanent invalidity pursuant to Articles 53 and 78 of the Staff Regulations before the action was brought, the applicant cannot expect to occupy the post at issue.
- 93 In its written observations in the present proceedings following referral back the Commission states that the referral judgment confirms that the claim for annulment of the decision to appoint Mr A and the decision to reject the applicant's candidature are inadmissible on the ground that the applicant cannot benefit from annulment of those decisions.
- 94 First, the Commission states that in order to find that an official, such as the applicant, who is recognised by the Invalidity Committee as being in a state of total permanent invalidity and has been automatically retired pursuant to Articles 53 and 78 of the Staff Regulations, retained an interest in bringing an action for annulment, the General Court relied on the judgment of 22 December 2008 in Case C-198/07 P *Gordon v Commission*. In that judgment, the Court of Justice held that such is not the case where the possibility of reinstating the official in a state of invalidity is not real but merely hypothetical. Considering that in the present case there is no reason to believe that the applicant may be fit for service again in the near future, the Commission concludes that the applicant has no interest in bringing proceedings.

- 95 Second, the Commission argues that the General Court held in the referral judgment that an applicant cannot have an interest in bringing an action for annulment of a decision to appoint an official to a post where, taking into account the seriousness of the irregularity and after weighing up the interests concerned it appears that annulment of the unlawful decision constitutes an excessive penalty in relation to the legal flaw with which that decision is vitiated. In the present case, annulment of the decision to appoint Mr A constitutes an excessive penalty. First of all, the irregularity contained in that decision is not an error of law or a manifest error of assessment but a simple procedural irregularity, a negligible one moreover, since it affected the decision of the preselection board and not that of the appointing authority. Also, the principle of legal certainty precludes annulment of the decision to appoint Mr A since over seven years have elapsed since it was adopted. Lastly, it would not be in the interest of the service to recommence a procedure for filling a post where the applicant does not provide any evidence to establish that he could expect to occupy it in the near future.
- 96 The applicant, for his part, considers that annulment of the contested decisions is likely to benefit him. As regards the decision rejecting his candidature, the applicant contends that since his automatic retirement on the ground of total permanent invalidity is not final it cannot be excluded that he might one day occupy the post at issue. As regards the decision to appoint Mr A, since the claim for annulment of that decision was lodged within the time-limit, Mr A has no right to be retained in the post at issue. In any event, the applicant considers that the Commission cannot rely on Mr A's interest rather than the applicant's to put forward a plea of inadmissibility, and that such a plea is out of time since the Commission made no mention of it in its defence lodged in the original proceedings before the Tribunal.

– Findings of the Tribunal

- 97 It is settled case-law that, in order for an official or a former official to be entitled, in the context of an action brought under Articles 90 and 91 of the Staff Regulations, to seek annulment of a measure adversely affecting him, within the meaning of Article 90(2) of the Staff Regulations, that person must, at the time when they bring their action, have a sufficiently clear, real and current interest in having that measure annulled, it being assumed with such an interest that the outcome of the action will bring them an advantage (see judgment of 29 November 2006 in Joined Cases T-35/05, T-61/05, T-107/05, T-108/05 and T-139/05 *Agne-Dapper and Others v Commission and Others*, paragraph 35 and the case-law cited, and referral judgment, paragraph 43). As a condition for admissibility, the applicant's interest in bringing proceedings must be assessed at the time the proceedings are brought (see, to that effect, order of 28 June 2005 in Case T-147/04 *Ross v Commission*, paragraph 25 and the case-law cited, and referral judgment, paragraph 44).
- 98 As regards an official who is recognised by the Invalidity Committee as being in a state of total permanent invalidity and is automatically retired pursuant to Articles 53 and 78 of the Staff Regulations, the situation of that official is distinct from that of an official who has reached the age of retirement, or who has resigned or been dismissed, because it is reversible. An official in a state of total permanent invalidity may one day resume his duties within an EU institution. In that regard, the general provision of Article 53 of the Staff Regulations must be read in conjunction with the specific provisions of Articles 13 to 15 of Annex VIII to the Staff Regulations. The employment of an official who is declared to be in a state of invalidity is merely suspended, since the evolution of his position within the institutions is subject to the continued existence of the conditions which justified that invalidity, which can be reviewed at regular intervals (*Gordon v Commission*, paragraphs 46 and 47, referral judgment, paragraph 69).
- 99 Moreover, since there is a possibility that an official recognised as being in a state of total permanent invalidity may be reinstated to a post within an institution, that official retains an interest, within the meaning of the case-law referred to in paragraph 94 above, in seeking, in the context of the selection procedure for filling a vacancy in which he has been invited to participate, annulment of the decision

rejecting his candidature and the decision to appoint another candidate, in order to continue to be eligible, in the event of reinstatement, for the post in question or even simply to avoid in such a case the alleged irregularities concerning the rules of the selection procedure recurring in the future in the context of a similar procedure in which he might seek to take part. That interest in bringing proceedings follows from the first paragraph of Article 233 EC (now the first paragraph of Article 266 TFEU), under which the institutions whose act has been declared void are required to take the necessary measures to comply with the judgment (see, to that effect, judgment of 7 June 2007 in Case C-362/05 P *Wunenburger v Commission*, paragraphs 50 and 51 and case-law cited, and referral judgment, paragraph 70).

- 100 In its written pleadings the Commission contends that the abovementioned case-law, and in particular *Gordon v Commission*, requires, in order for an official automatically retired pursuant to Articles 53 and 78 of the Staff Regulations to retain an interest in bringing proceedings, that the possibility of reinstatement of that official should be real and not merely hypothetical.
- 101 However, although the Court of Justice did find in paragraph 48 of *Gordon v Commission* that ‘the possibility of reinstating the appellant was not merely hypothetical but real’, in order to rule that although he had been automatically retired the appellant retained an interest in bringing proceedings, that finding does not mean that an official in such a situation retains an interest in bringing proceedings only if it is already established that he will be fit for service again in the near future; the finding merely means that so long as it is not excluded that that official may return to service he retains an interest in bringing proceedings. It is apparent from paragraph 48 of *Gordon v Commission* that in order for an official automatically retired on the ground of total permanent invalidity to retain an interest in bringing proceedings, it is sufficient that the possibility that he may be reinstated in the service exists, which is the case so long as the total permanent invalidity has not acquired definitive status. Certainty that the official will be reinstated is therefore by no means required in order for that official to be recognised as having an interest in bringing proceedings. As was recalled in paragraph 97 above, the interest in an applicant having an act annulled assumes that he may benefit from such annulment and not that he will definitely benefit from it.
- 102 In order to respond to the Commission’s argument in full, the General Court held in the referral judgment that an official who is retired automatically on the ground of total permanent invalidity pursuant to Articles 53 and 78 of the Staff Regulations is denied an interest in bringing proceedings only in certain particular cases in which examination of that official’s specific situation reveals that he is no longer likely to resume his duties one day within an institution, in view, for example, of findings of the Invalidity Committee responsible for examining his situation of invalidity from which it is clear that the condition resulting in invalidity is permanent and that no medical review will therefore be needed, or of statements by the official concerned which make clear that in any event he will not resume his duties within an institution (referral judgment, paragraph 71).
- 103 In the present case, the applicant was recognised by the Invalidity Committee as being in a state of total permanent invalidity and was automatically retired pursuant to Articles 53 and 78 of the Staff Regulations. However, his situation was reversible, the administration having moreover taken the trouble on 28 March 2007 to remind the applicant that it could periodically examine former officials drawing invalidity allowance who were aged less than 63 years (paragraph 35 above). Moreover, there is nothing on the file to show that since the date on which the applicant was automatically retired it has been definitively established that he will never resume his duties. In any event, it will be for the medical committee to assess, when the time comes, whether the applicant is to resume his duties and since that assessment is of a medical nature the administration must not prejudge the content of the committee’s future decision. Consequently, it must be held that the applicant continues to be entitled to occupy the post at issue and that he therefore retains an interest in bringing an action for annulment of both the decision to appoint Mr A and the decision to reject his candidature, decisions which, in the circumstances of this case, are inseparable (‘the contested decisions’).

- 104 In its written observations in the present proceedings on referral, the Commission also contends that the applicant has no interest in challenging the contested decisions since according to settled case-law he cannot obtain annulment of a decision appointing an official or agent.
- 105 However, it should be noted that case-law has established on several occasions the admissibility of a claim for annulment of the decision to appoint an official or other member of staff, brought by a third party to that decision (see, for example, judgment of 14 November 2006 in Case T-494/04 *Neirinck v Commission*, paragraphs 66 and 67) and that the Courts of the European Union have already annulled, on appeal by a third party, several decisions appointing officials or other staff (see, for example, judgment of 23 January 1975 in Case 29/74 *Dapper v Parliament*, paragraph 16, and judgment of 20 July 2001 in Case T-351/99 *Brumter v Commission*, paragraph 97).
- 106 Where the act to be annulled benefits an official or agent, which is the case of an appointment decision, the Courts must first determine whether annulment would constitute an excessive penalty for the irregularity committed (judgment of 5 June 1980 in Case 24/79 *Oberthür v Commission*, paragraph 13, and judgment of 10 July 1992 in Case T-68/91 *Barbi v Commission*, paragraph 36), but that obligation on the Courts has no effect on the interest of a third party to the decision – the applicant for annulment – in bringing proceedings (see, to that effect, judgment of 22 October 2008 in Case F-46/07 *Tzirani v Commission*, paragraph 38).
- 107 Examination by the Courts of the question whether annulment is an excessive penalty for the irregularity committed can take place only following an examination of the lawfulness of the contested decision, that examination taking into account inter alia the seriousness of the irregularity established (*Tzirani v Commission*, paragraph 38).
- 108 However, even where annulment of a decision constitutes an excessive penalty in the light of the irregularity established, an applicant may benefit from a claim for annulment directed against that decision, since, according to settled case-law, the fact that annulment of a decision vitiated by illegality constitutes an excessive penalty does not preclude the Courts upholding the claim but referring back to the administration the task of seeking a just solution of the case (judgment of 6 July 1993 in Case C-242/90 P *Commission v Albani and Others*, paragraph 13, and judgment of 29 September 2010 in Case F-5/08 *Brune v Commission*, paragraph 18), or even of its own motion ordering the institution to pay compensation for the irregularity committed (*Oberthür v Commission*, paragraphs 13 and 14, and judgment of 5 May 2010 in Case F-53/08 *Bouillez and Others v Council*, paragraph 90).
- 109 It is clear from the foregoing that none of the arguments put forward by the Commission in support of the plea of inadmissibility with regard to the claim for annulment of the contested decisions is well founded. Accordingly, that plea of inadmissibility must be rejected.

The merits of the claim for annulment

- 110 The applicant puts forward five pleas, alleging, first, infringement of the Decision of 28 April 2004 in so far as that decision lays down certain rules for the composition of the preselection board; secondly, infringement of Article 11a and Article 22a(3) of the new Staff Regulations; thirdly, a manifest error of assessment; fourthly, infringement of Article 25 of the new Staff Regulations; and fifthly, infringement of the principle of sound administration and the duty of care.
- 111 In *Strack v Commission*, the Tribunal held that the plea alleging infringement of the Decision of 28 April 2004 must be upheld, since Article 2(3) of that decision, which is applicable in the circumstances of the present case, provided that the preselection board must comprise at least three members of grade and management function equal or superior to that of the post to be filled,

including one from another Directorate-General, and in the present case all the members of the preselection board were employed at the Publications Office. However, it rejected the other pleas as being unfounded.

- 112 In the referral judgment the General Court did not cast doubt on the conclusion reached by the Tribunal with regard to the merits of the pleas for annulment put forward by the applicant. Accordingly, the conclusion reached by the Tribunal in *Strack v Commission* in respect of the pleas for annulment acquired the force of *res judicata* (judgment of 8 December 2005 in Case T-237/00 *Reynolds v Parliament*, paragraph 46). No doubt can therefore be cast on it following the reference of the present case. It follows that the plea alleging infringement of the Decision of 28 April 2004 must be upheld and that the other pleas must be rejected.
- 113 Before determining whether, as the referral judgment requires, Mr A's interest precludes the contested decisions being annulled, it should be noted that, in its statement of observations, the Commission submits in essence that infringement of the Decision of 28 April 2004 cannot bring about annulment of the contested decisions, since that irregularity did not have a significant effect as regards the merits of those contested decisions, for a number of reasons. First of all, since the preselection board is only a consultative body, the irregularity affecting its composition did not have a significant effect on the contested decisions. Secondly, since the persons comprising the preselection board had been appointed in accordance with the rules applicable at that time, the fact that the Decision of 28 April 2004 amending the rules relating to the composition of the board was not applied retrospectively does not create a presumption that the irregularity in the composition of the board which followed from this could have had any influence with regard to the decision to appoint Mr A. Lastly, the decision to appoint Mr A is correct, since the Tribunal, without having its conclusion overturned by the General Court on this point, held that the decision to appoint Mr A was not vitiated by a manifest error of assessment.
- 114 On that point, it should be noted that the irregularity affecting the opinion of the preselection board is akin to a procedural irregularity, since the preselection board does not exercise the powers devolved to the appointing authority but plays a purely consultative role. As the abovementioned arguments of the Commission concerning a procedural irregularity are intended to make clear, in order for that irregularity to justify annulment of the contested decisions it must be established that, had it not been for that procedural irregularity, the outcome of the procedure might have been different (see, *inter alia*, judgment of 21 March 1990 in Case C-142/87 *Belgium v Commission*, paragraph 48). However, the applicant is not required to show that the measure would necessarily have been different if it had not been vitiated by the procedural irregularity at issue and it is sufficient that it is not totally excluded that the administration might adopt a different decision in order for the existence of a irregularity in its formal legality to lead to the annulment of the measure concerned (see, as regards a staff report drawn up without prior dialogue between the staff member and the assessor, judgment of 13 September 2011 in Case F-4/10 *Nastvogel v Council*, paragraph 94).
- 115 Accordingly, without there being any need to determine whether or not, by its argument, the Commission is challenging the force of *res judicata*, since in *Strack v Commission* the Tribunal held that the irregular composition of the preselection board justified annulment of the decision to reject the applicant's candidature and the General Court did not cast doubt on that analysis in its referral judgment, it suffices to say, in order to reject that argument, that it cannot be excluded that if the preselection board had been properly composed – that is to say, if there had been at least one member who did not belong to the Publications Office – the content of the board's opinion would have been different and so the appointing authority might have chosen another candidate to occupy the post at issue.

- 116 It is clear from the above that the plea alleging infringement of the Decision of 28 April 2004 must, in principle, entail annulment of the contested decisions. However, as was recalled in paragraph 106 above, where, as in the present case, the decisions to be annulled benefit an official other than the applicant, the Courts must first determine whether annulment would constitute an excessive penalty for the irregularity committed (*Bouillez and Others v Council*, paragraph 82 and the case-law cited).
- 117 In that regard, it should be noted that the inferences which the Courts of the European Union draws from the irregularity of decisions adopted following a recruitment competition are not the same in the case of decisions adopted following a competition to constitute a reserve list as in the case of decisions adopted following a competition held in order to fill a particular post through an appointment. In the case of a competition to constitute a reserve list, annulment of all the individual decisions entering the names of each of the successful candidates on that list constitutes, in principle, an excessive penalty (*Bouillez and Others v Council*, paragraph 83). However, in the case of decisions adopted following an internal competition to fill a particular post, the Courts of the European Union carry out a case-by-case examination, in which they take into consideration the nature of the irregularity and weigh up the interests involved.
- 118 Where, as in the present case, the issue is a procedural irregularity in the context of an internal competition to fill a particular post, the Courts consider whether that irregularity affected examination of the applicant's candidature only or whether it vitiated examination of all the candidatures. In the former case, the procedural irregularity must be regarded as not justifying annulment of the decision appointing the successful candidate. In the second, the Courts weigh up the interests involved, which must be assessed at the time the action is brought (see, to that effect, *Bouillez and Others v Council*, paragraph 85).
- 119 In that connection, the Courts take into consideration, first, the applicant's interest in benefiting from a selection procedure free of any irregularities and, secondly, the interest of the official appointed following the defective selection procedure and the interest in his being able to rely in good faith on the lawfulness of the decision appointing him. Lastly, the Courts examine the interests of the service, that is to say, in particular, respect for legality, the budgetary consequences of annulment of the unlawful decision, possible difficulties in complying with the judgment delivered, any adverse effects on the continuity of the service and the danger of a deterioration in the social atmosphere within the institution (see, by analogy, *Bouillez and Others v Council*, paragraphs 87 to 89).
- 120 In the present case, the Commission's failure to take account of the rules relating to the composition of the preselection board affected examination of all the candidatures for the post at issue. It is appropriate therefore to weigh up the interests involved.
- 121 In that regard, the Tribunal holds, in so far as the applicant's interest in obtaining annulment of the contested decisions is concerned, that he has an interest that is by no means insignificant. In the event of annulment of the contested decisions, the Commission would have to go back and examine the candidatures at the point where the preselection board was asked for its opinion, on the basis of the evidence available to it on the date on which the preselection board became involved, so it could not be excluded that, contrary to what the preselection board stated in its note of 25 June 2004, the applicant would be one of the candidates selected by that board, or indeed that he would be chosen to occupy the post at issue and subsequently be promoted, in accordance with the notice of vacancy, to Grade A 4 or A 5. Of course, if the applicant were chosen to occupy the post at issue, the administration could not appoint him retrospectively to that post, since Article 3 of the Staff Regulations provides expressly that an instrument appointing an official must not take effect on a date prior to the date on which the person concerned takes up his duties, although in such a situation the applicant would still benefit from bringing an action, since the administration would have to compensate him for the damage he suffered as a result of his not being appointed on the date on which he would have been appointed in the absence of the irregularity established.

- 122 Likewise, although the appointing authority is not required to pursue a selection procedure, it should be noted that, according to settled case-law, if it decides to do so that decision must be taken on grounds that are objective and sufficient and were unknown when it began that procedure (see, to that effect, judgment of 14 April 2011 in Case F-113/07 *Šimonis v Commission*, paragraph 90). In the present case, even if such conditions were considered to be met, the applicant's interest in obtaining annulment of the contested decisions cannot be denied, since, in that event the administration would have to compensate him for the loss of the chance to have his candidature properly considered by the preselection board in June 2004.
- 123 As regards the interest of the official, Mr A, appointed following the defective selection procedure, the Tribunal finds that he cannot rely on the legitimate expectation that his appointment will be maintained, even though eight years have elapsed since the adoption of the contested decisions, since those decisions were challenged within the prescribed periods (*Bouillez and Others v Council*, paragraph 88). Mr A could not be unaware in those circumstances that his appointment would only be definitive if the applicant's action were to be rejected.
- 124 In any event, it must be held that the decision to appoint Mr A is no longer valid since, according to the information provided by the parties inter alia at the hearing, he no longer occupies the post at issue and, under the provisions of Article 3 of the Staff Regulations, the administration could not, even in the event of annulment of that decision, appoint another candidate retrospectively to the post.
- 125 As regards, lastly, the interest of the service, the Tribunal notes that annulment of the contested decisions would allow the principle of legality to have full effect and that the Commission has not shown that annulment of the contested decisions would encounter particular difficulties.
- 126 It is clear from the foregoing that: the contested decisions must be annulled since the preselection board was not properly composed; it cannot be excluded that that board would have issued a different opinion if it had been properly composed; and Mr A's interest does not preclude such annulment.

The claim for damages in so far as it relates to the non-material damage the applicant had to suffer as a result of the irregularity in the composition of the preselection board

- 127 The applicant claims to have suffered damage as a result of the irregularity in the composition of the preselection board.
- 128 However, it should be pointed out that the annulment of an act of the administration contested by an official may in itself constitute appropriate and, in principle, sufficient reparation for any non-material damage which that official may have suffered, unless that official demonstrates that he suffered non-material damage separable from the irregularity justifying the annulment and incapable of being entirely remedied by that annulment. That is the case, first, where the annulled act contains an expressly negative assessment of the applicant's abilities likely to cause him prejudice, secondly, where the irregularity committed is particularly serious and, thirdly, where annulment is deprived of all practical effect, and thus cannot constitute appropriate and sufficient reparation for the non-material damage caused by the contested act (judgment of 12 May 2011 in Case F-66/10 *AQ v Commission*, paragraphs 105, 107 and 109).
- 129 In the present case, the non-material damage relied on by the applicant originates in the decision-making behaviour of the Commission. According to the criteria of the case-law referred to in the preceding paragraph, annulment of the contested decisions constitutes appropriate reparation for any non-material damage which the applicant may have suffered because, first, those decisions do not contain any expressly negative assessment of his abilities likely to cause him prejudice, secondly, even if the applicant did experience feelings of frustration and injustice as a result of the irregularity

committed, that irregularity is not so serious that it justifies separate compensation and, thirdly, annulment of the contested decisions would not be deprived of all practical effect since it is not entirely excluded that the applicant could be appointed to the post at issue.

- 130 It follows from the foregoing that the claim for damages, in so far as it relates to the non-material damage which the applicant had to suffer as a result of the irregularity in the composition of the preselection board, must be rejected as unfounded.

Costs

- 131 Points 5 and 6 of the operative part of the judgment in *Strack v Commission*, by which the applicant was ordered to bear half of his own costs and the Commission was ordered to bear its own costs and half of the costs incurred by the applicant, were set aside by the General Court (see referral judgment, paragraph 127). In its referral judgment, the General Court reserved the costs. It is therefore for the Tribunal to rule in the present judgment on the costs relating to the various stages of the proceedings.
- 132 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. Under Article 87(2), if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.
- 133 It follows from the reasoning set out above that the Commission has been unsuccessful in the essential aspects of its submissions. Furthermore, in its pleadings the applicant expressly requested that the Commission be ordered to pay the costs. Since the circumstances of this case do not warrant application of the provisions of Article 87(2) of the Rules of Procedure, the Commission must pay its own costs in Case F-44/05 *Strack v Commission*, Case T-526/08 P *Commission v Strack*, and Case F-44/05 RENV *Strack v Commission* and must be ordered to pay the costs incurred by the applicant in those cases.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. **Rejects the application for waiver of the immunity enjoyed by staff of the Commission of the European Communities in Case F-44/05 *Strack v Commission* as inadmissible;**
2. **Rejects the claim for damages for the excessive duration of the administrative procedure for filling the post and for the excessive duration of the pre-litigation procedure as unfounded;**
3. **Annuls the decision to appoint Mr A and the decision of the Commission of the European Communities, of 19 November 2004, rejecting Mr Strack's candidature for the post of head of the 'Calls for tender and contracts' unit of the Office for Official Publications of the European Communities;**
4. **Dismisses the action as to the remainder;**
5. **Declares that the European Commission shall pay its own costs in Case F-44/05 *Strack v Commission*, Case T-526/08 P *Commission v Strack*, and Case F-44/05 RENV *Strack v Commission* and orders it to pay the costs incurred by Mr Strack in those cases.**

Rofes i Pujol

Boruta

Bradley

Delivered in open court in Luxembourg on 23 October 2012.

W. Hakenberg
Registrar

M.I. Rofes i Pujol
President