

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
20 June 2001 *

(Officials – Open competition – Refusal to admit to the written tests –
Admissibility – Act adversely affecting a candidate – Time-limit –
Legitimate expectation – Compensation)

In Case T-243/99,

Marie-Laurence Buisson, residing in Ankara (Turkey), represented by I. Forrester QC,
E. Wright, Barrister, and F.M. Murray, Barrister, with an address for service in
Luxembourg,

applicant,

v

Commission of the European Communities, represented by J. Currall, acting as
Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the decision of 13 July 1999 rejecting the applicant's
request for reconsideration of the decision of the selection board not to admit her to the
written tests forming part of the selection procedure in Open Competition
COM/A/10/98, and for compensation for the non-material damage incurred in that
regard,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 March 2001,

gives the following

Judgment

Facts

- 1 On 31 March 1998 a notice of an open competition for the recruitment of Commission administrators at Grade A7/A6 (COM/A/10/98; ‘the notice’) was published in the Official Journal (OJ 1998 C 97 A, p. 23).
- 2 Section III of the notice set out the conditions of eligibility for the competition. These were: (A) general conditions; (B) knowledge of languages; and (C) special conditions relating to the age-limit, qualifications and professional experience.
- 3 Section IV.3 of the notice stated: ‘The selection board will draw up a list of candidates who meet the condition set out at III.C.1 above [relating to age] on the basis of the information provided by candidates on their application form and are therefore to be admitted to the competition and the preselection tests.’

4 Section IV.5 stated:

'On the basis of the preselection tests the selection board will draw up the list of candidates to be admitted to the written tests, i.e. those who both meet all the conditions for admission set out at III above and have obtained the 200 best results in the preselection tests.'

5 The first sentence of Section IV.6 stated: 'Before candidates are admitted, their profile will be checked to ensure that it corresponds to the conditions specified in the notice of competition.'

6 Section V of the notice provided:

'Any candidate who feels that a mistake has been made regarding eligibility may ask to have his/her application reconsidered. Within thirty calendar days of the date postmarked on the letter stating that he/she has not been admitted to the competition, the candidate should send a letter quoting the number of the competition (COM/A/10/98) to the chairman of the selection board ...'

7 Section VIII.1 of the notice stated:

'The following candidates will be admitted to written tests (e) and (f): the 200 candidates who meet the conditions for admission set out at III above and have obtained the highest marks in the preselection tests; they must have obtained a pass mark in each test.'

8 The applicant submitted her application for the competition within the prescribed period. Her application was accepted and she participated in the preselection tests held on 14 September 1998 and 2 February 1999.

- 9 By letter of 30 April 1999, which the applicant duly received, the chairman of the competition selection board informed her of the following:

‘The selection board for the abovementioned competition has now completed the marking of the preselection tests which you sat.

I am pleased to inform you that the marks which you received for those tests, in accordance with Sections IV.5 and VIII.1 of the competition notice, place you among the candidates whose applications will now be examined by the selection board. The purpose of this examination is to ensure that all the conditions of eligibility, set out in Section III of the notice, have been complied with.

The written tests will be held on 16 July 1999. You will be informed later as to whether you have been admitted.’

- 10 On 5 May 1999 the chairman of the selection board sent, by ordinary mail, a fresh letter to the applicant, which had the following heading in bold type: ‘THIS LETTER CANCELS AND REPLACES THAT SENT ON 30 APRIL 1999’.

- 11 The letter then stated as follows:

‘The selection board for the abovementioned competition has now completed the marking of the preselection tests which you sat.

I am pleased to inform you that the selection board will now examine the applications, as provided for by Section IV.6 of the competition notice. Thereafter, and in accordance with Section VIII.1 of that notice, the selection board will draw up the list of candidates who have obtained the 200 highest marks and satisfy the conditions of admission provided for by the competition notice.

At the beginning of June, you will receive a letter inviting you to the written tests, which will be held on 16 July 1999, or informing you that you have not been admitted to those tests.’

- 12 The applicant states that she never received this further letter.

- 13 On 25 May 1999 the applicant sent a fax to the Commission explaining that she would be moving from Tallinn (Estonia) to Ankara (Turkey) on 14 June 1999 and asking to be allowed to sit the written tests in Frankfurt.

- 14 By letter of 16 June 1999, which the applicant received on 17 June 1999, the chairman of the competition selection board informed her that she had not been admitted to the written tests. The letter stated that, although the marks obtained by her were higher than or equal to the pass mark, they were not sufficient to enable the selection board to include her name on the list of candidates admitted to those tests.

- 15 By letter of 30 June 1999 from her lawyer to the chairman of the competition selection board, the applicant challenged the legality of the decision not to admit her to the written tests, arguing in particular that, on the basis of the letter of 30 April 1999, she had concluded that, subject to confirmation of her eligibility under Section III of the competition notice, she would be admitted to the written tests. The letter of 30 April 1999 thus created a legitimate expectation on her part that she would be admitted to those tests. She accordingly called on the selection board to reconsider the decision expressed in its letter of 16 June 1999.

- 16 The chairman of the selection board replied to the applicant by letter of 5 July 1999, attaching a copy of his letter of 5 May 1999 and pointing out that this letter had cancelled and replaced the letter of 30 April 1999. He also confirmed the decision notified to the applicant by his letter of 16 June 1999.

- 17 By letter of 9 July 1999 from her lawyer to the chairman of the competition selection board, the applicant countered that she had not received the letter of 5 May 1999. Stating that the Commission was responsible for the non-delivery of the letter, she submitted that it ought to remedy that failure by admitting her to the written tests on 16 July 1999.

- 18 By letter of 13 July 1999, the chairman of the selection board replied that it was not by admitting the applicant to the written tests that he could remedy a mailing error and indeed expressed doubt as to whether that error had actually occurred. In addition, he again confirmed the decision notified to the applicant by his letter of 16 June 1999.

Procedure

- 19 By application lodged at the Registry of the Court of First Instance on 19 October 1999, the applicant brought the present action.
- 20 Upon hearing the Report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure.
- 21 The parties presented oral argument and answered the questions put to them by the Court at the hearing which took place on 21 March 2001.

Forms of order sought

- 22 The applicant claims that the Court should:
- annul the decision of the Commission of 13 July 1999 rejecting her appeal against her exclusion from the written tests in Open Competition COM/A/10/98;
 - require the Commission either to permit the applicant to take an appropriate written test or to adopt alternative measures to correct the damage suffered by her due to the Commission's unlawful act;

- award pecuniary damages in the sum of BEF 100 000;
- order such other or further relief as justice may require;
- order the Commission to pay the costs.

23 The Commission contends that the Court should:

- dismiss the action;
- make an appropriate order as to costs.

Law

Admissibility

Arguments of the parties

- 24 Without raising a formal objection in this regard, the Commission expresses doubts as to whether the action is admissible. It notes that, according to the applicant herself, the act adversely affecting her is the decision contained in the letter of 16 June 1999, which she received on 17 June 1999. Since a decision by a selection board is involved, the applicant had, according to the Commission, two possible avenues of recourse.
- 25 The first possibility was to challenge that decision directly before the Court of First Instance. In that case, the application should have been lodged by 18 October 1999 at the latest, given the time-limit of three months under the Staff Regulations and the extension on account of distance of a maximum of one month for Turkey. Since the application was lodged on 19 October 1999, it was out of time.

- 26 The second possibility open to the applicant was to follow the pre-litigation procedure by lodging a complaint against the decision of 16 June 1999 under Article 90 of the Staff Regulations. However, the applicant did not make such a complaint. In particular, the letter of 30 June 1999 cannot be treated as a complaint of this kind, since it was addressed to the chairman of the competition selection board and not to the appointing authority as required by Article 90(2) of the Staff Regulations. In the Commission's submission, the letter of 30 June 1999 comes under the special procedure set out in Section V of the competition notice, which provides for different time-limits.
- 27 The applicant argues that her application is admissible. She submits that the act adversely affecting her is the decision of 16 June 1999 refusing her admission to the written tests. She stresses that she lodged a complaint against that decision by letter of 30 June 1999. She therefore brought her action in good time, that is to say within the period of three months – extended on grounds of distance by at least two weeks for Turkey – from 16 July 1999, the date on which she received the reply of 13 July 1999 to her complaint.
- 28 At the hearing, the applicant submitted that her letter of 30 June 1999 could if necessary be treated as a request for reconsideration in accordance with Section V of the competition notice in so far as the present action is considered to be admissible on that basis.

Findings of the Court

- 29 First of all, the letter of 30 June 1999 from the applicant's lawyer, seeking reconsideration of the decision disclosed by the letter of the chairman of the selection board of 16 June 1999, was addressed to the chairman of the selection board for the competition at issue. The form and content of the letter of 30 June 1999 show, moreover, that that letter may be regarded as a request for reconsideration pursuant to Section V of the competition notice.

- 30 The request for reconsideration thus fits into a procedural framework with which the defendant undertook to comply and which therefore binds it. Consequently, it is not the initial decision, but the decision which followed that prescribed reconsideration, that must be regarded as the act adversely affecting the applicant.
- 31 Next, the decision contained in the letter of 13 July 1999 cannot be regarded as a purely confirmatory act *vis-à-vis* either the decision of 16 June 1999 or the letter of 5 July 1999. It was, it is supposed, only by means of the letter from the chairman of the selection board of 5 July 1999 that the applicant became aware of the letter of 5 May 1999, correcting the letter of 30 April 1999, and was put in a position to make known her point of view in that regard.
- 32 In the letter of 13 July 1999, the chairman of the selection board sets out, for the first time, his position on the applicant's argument that the principle of the protection of legitimate expectations had to result in her admission to the written tests, taking account of the new fact, put forward by the applicant, that she had never received the letter of amendment of 5 May 1999. The decision of 13 July 1999 was accordingly made after a genuine reconsideration, taking account of the new facts put forward by the applicant (see Case T-186/98 *Inpesca v Commission* [2001] ECR II-0000).
- 33 In those circumstances, the letter from the chairman of the selection board of 13 July 1999 must be regarded as the act adversely affecting the applicant against which the present action has been brought.
- 34 The letter of 13 July 1999 was, according to its final paragraph, also sent by fax to the applicant. On the basis that the applicant, who has not disputed the correctness of that paragraph, received the letter on 13 July 1999 at the earliest, the present action, commenced by lodging the application at the Registry on 19 October 1999, was in any event brought within the period of three months provided for by Article 91(3) of the Staff Regulations, extended on account of distance in this instance by at least two weeks.

- 35 Finally, it is to be remembered that under the case-law an action may be brought directly before the Court of First Instance, within the period of three months laid down by the Staff Regulations, without any obligation to observe the prior requirement of an appeal through administrative channels under Article 90(2) of the Staff Regulations, in particular where a decision of a competition selection board is at issue (see, for example, Case T-133/89 *Burban v Parliament* [1990] ECR II-245).
- 36 It follows that the action generally is admissible.
- 37 On the other hand, the applicant's second head of claim, seeking an order requiring the Commission to adopt certain measures, is inadmissible. It is settled case-law that the Court may not, in the exercise of its jurisdiction, issue directions to the Community institutions or assume the role assigned to them, since the jurisdiction of the Community judicature is limited to reviewing the legality of the contested measure (see, for example, Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraphs 83 and 84).
- 38 In addition, the fourth head of claim is inadmissible since its object is imprecise.

Substance

Claim for annulment

Arguments of the parties

- 39 The applicant relies on a single plea in law alleging breach of the principle of the protection of legitimate expectations. It follows, in her view, from the letter of 30 April 1999 from the competition selection board that she had been admitted to the written tests and would in due course be informed of where those tests were to be held. In support of this submission, she notes that that letter contained a reference to the fact that her results in the preselection tests were in accordance with the provisions of Sections IV.5

and VIII.1 of the competition notice, both of which referred to the top 200 candidates in those preselection tests.

- 40 The resulting legitimate expectation on her part was reinforced by the fact that, following her fax of 25 May 1999, she received no communication from the Commission suggesting that her expectations were mistaken. As for the letter of amendment of 5 May 1999 which the Commission claims to have sent to her, the applicant submits that simply to send a letter by ordinary mail, particularly to a country outside the Community, is insufficient to correct an error concerning the applicant's position and expectations. The Commission ought at least to have sent that letter by registered mail.
- 41 The applicant also cites the judgments of the Court of Justice in Case 14/81 *Alpha Steel v Commission* [1982] ECR 749, Case C-365/89 *Cargill* [1991] ECR I-3045 and Case C-90/95 P *De Compte v Parliament* [1997] ECR I-1999 in support of her argument that the letter of 30 April 1999 was a favourable administrative act which created a legitimate expectation on her part that she would be admitted to the written tests in the competition. In the absence of any appropriate measure on the Commission's part withdrawing that act within a reasonable time, the applicant's legitimate expectation continued for seven weeks, until she received the Commission's letter of 16 June 1999. In those circumstances, the applicant considers that she was entitled to rely on the apparent legality of the decision contained in the letter of 30 April 1999 and to claim that it should be upheld.
- 42 The applicant argues, finally, that the principle of the protection of legitimate expectations is a superior rule of law (Case 74/74 *CNTA v Commission* [1975] ECR 533). Since the Commission has infringed that principle, the Community has been rendered liable. She submits that it is for the Court to decide the appropriate remedy, whether this be condemnation of an unlawful act, an award of damages, annulment of the competition, or a requirement that the applicant be permitted to sit a test of equal difficulty to the test to which she was not admitted.

- 43 The Commission considers that the applicant was not entitled to found any legitimate expectation on the letter of 30 April 1999. In its submission, that letter did not say that the applicant had been admitted to the written tests, nor did it contain any promise in that regard.
- 44 The Commission adds that, even if there were such a promise, it would not be lawful, since the selection board is bound by the terms of the competition notice. Even if the letter of 30 April 1999 had created legitimate expectations, the administration would have been entitled to withdraw it in the interest of the candidates who really had obtained the highest marks. The Commission refers in this regard to the judgment in Case T-157/96 *Affatato v Commission* [1998] ECR-SC I-A-41, II-97. For the same reason, there can be no question of annulling the entire competition, which would harm the interests of the successful candidates.

Findings of the Court

- 45 It is settled case-law that the right to protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is clear that the Community administration has, by giving him precise assurances, led him to entertain reasonable expectations (see, for example, Joined Cases T-66/96 and T-221/97 *Mellet v Court of Justice* [1998] ECR-SC I-A-449, II-1305, paragraph 104).
- 46 It must therefore be established whether the letter of 30 April 1999 gave the applicant precise assurances which could have led her to entertain reasonable expectations.
- 47 It is true that that letter could give the impression, in particular to a candidate with an interest in a favourable interpretation, that admission was secured once compliance with the conditions set out in Section III of the notice was established.

- 48 However, the letter does not in any way state that the selection board had actually drawn up the list of the 200 best candidates and that the applicant was among them. The letter refers only to Sections IV.5 and VIII.1 of the notice in order to point out that the conditions to be checked are in two parts, one relating to the conditions of eligibility and the other to inclusion in the group which obtained the 200 best results in the preselection tests. Nor is there anything in the letter to suggest that, as at 30 April 1999, the competition selection board had already drawn up the definitive list of candidates admitted to the written tests in the competition.
- 49 Accordingly, while it should be acknowledged that the letter of 30 April 1999 was capable of being regarded as ambiguous and lacking in clarity, it cannot, however, be regarded as giving the applicant precise assurances which could have led her to entertain reasonable expectations.
- 50 In view of the foregoing considerations, the applicant's claim for annulment of the decision of 13 July 1999 must be dismissed.

Claim for damages

Arguments of the parties

- 51 The applicant contends that she is entitled to compensation for the wasted effort in preparing for the written tests, and for dashed expectations. In her application she asks for compensation of BEF 100 000. At the hearing she stated that the amount was less important than the principle of compensation.
- 52 The Commission argues that there can be no question of compensation, since it in any event took steps to inform the applicant by the quickest reasonable means. Even if she did not receive the letter of 5 May 1999, she did receive the negative decision in mid-June 1999. As a subsidiary argument, the Commission has objected to the amount mentioned by the applicant in her application.

Findings of the Court

- 53 As has been found above, the letter of 30 April 1999 is ambiguous and lacks clarity. It was for that reason that the Commission withdrew it and replaced it with the letter of 5 May 1999. That lack of clarity could have encouraged the applicant to harbour the misconception that she would be admitted to the written tests, prompting her to continue to prepare for them. In that sense, the letter of 30 April 1999 amounts to maladministration by the Commission. The misconception could have persisted until the applicant received the letter of 16 June 1999, since she did not receive the letter of amendment of 5 May 1999, a fact which is no longer disputed by the Commission in view of its position in this regard at the hearing.
- 54 The non-material harm which thus arises from the ambiguous nature of the letter of 30 April 1999 must, in the circumstances of this case, result in token damages of EUR 1.
- 55 It follows from the foregoing that the claim for damages must be allowed in part.

Costs

- 56 Since the claim for damages has been allowed in part and dismissed as to the remainder, the Commission must be ordered under Articles 87(3) and 88 of the Rules of Procedure to pay, in addition to its own costs, half of the applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses as inadmissible the claim for an order requiring the Commission to adopt certain measures and the claim for other or further relief;**
2. **Orders the Commission to pay to the applicant the sum of EUR 1 in compensation for the non-material damage;**
3. **Dismisses the remainder of the application;**
4. **Orders the Commission to pay, in addition to its own costs, half of the applicant's costs.**

Meij

Potocki

Pirrung

Delivered in open court in Luxembourg on 20 June 2001.

H. Jung
Registrar

A.W.H. Meij
President