

JUDGMENT OF THE COURT (Third Chamber)
7 May 1986 *

In Case 52/85

Jean-Pascal Rihoux, an official of the Commission of the European Communities, residing at 3 rue Jean-Pierre-Kommes, 6988 Hostert, Luxembourg;

Henri Derungs, an official of the Commission of the European Communities, residing at 17 rue des Champs, 8356 Garnich, Luxembourg;

Robert Van Sinay, an official of the Commission of the European Communities, residing at 4 rue Beaumont, Luxembourg;

Klaus Raatz, an official of the Commission of the European Communities, residing at 22 rue Kiem, 6187 Gonderange;

represented by F. Herbert, of the Brussels Bar, 116 avenue de Broqueville, 1200 Brussels, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 avenue Marie-Thérèse, BP 335,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building,

defendant,

APPLICATION

- (1) for the annulment of the decision of the Selection Board of 11 July 1984 not to include the applicants in the list of suitable candidates drawn up following the tests in competition COM/A/390;
- (2) in the alternative, for the annulment of steps taken in that competition (oral and written tests),

* Language of the Case: French.

THE COURT (Third Chamber)

composed of: U. Everling (President of Chamber), Y. Galmot and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 13 March 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By an application lodged at the Court Registry on 22 January 1985, Messrs Rihoux, Derungs, Van Sinay and Raatz, officials of the Commission in Category B, brought an action principally for the annulment of the decision of the Selection Board of 11 July 1984 not to include them in the list of suitable candidates drawn up following the tests in competition COM/A/390 and in the alternative for the annulment of steps taken in that competition.
- 2 Notice of Competition No COM/A/390 (Official Journal 1983, C 345, p. 10) concerned an open competition based on tests to constitute a reserve of administrators in Grade A 7/A 6 whose duties would consist essentially in the study and checking of data regarding safety at the sites of nuclear installations.

- 3 The nature of the tests was summarized in part IV of the notice, which indicated that there would be a written test consisting of a 'series of multiple choice questions to assess the candidate's knowledge in the relevant field (two hours)' and an oral test in the form of an 'interview with the Selection Board for the purpose of assessing, in the light of the information contained in the application papers, the candidate's general knowledge . . . and suitability for the duties described . . . '.
- 4 Each of the tests was marked out of 50. Paragraph VI of the notice laid down two conditions for inclusion on the list of suitable candidates: candidates had to obtain an aggregate of at least 60 marks in the written and oral tests and obtain not less than 30 out of 50 in the oral test.
- 5 The applicants were admitted to the tests, but by letter of 11 July 1984 they were informed that in view of their results the Selection Board had decided not to include them in the list of suitable candidates. None of them had obtained the minimum of 60 marks required, or the minimum of 30 marks in the oral test.
- 6 In July 1984 the applicants submitted identically worded complaints pursuant to Article 90 (2) of the Staff Regulations concerning only the written tests. In view of the indivisibility of the written and oral tests, they requested the annulment of all the tests. After the Commission decided on 20 November 1984 to reject those complaints, the applicants brought these proceedings.

Admissibility

- 7 The Commission submits that the applicants cannot make submissions to the Court on matters which were not raised in their complaint. It argues that once an official has decided to submit an administrative complaint rather than bring proceedings directly before the Court, all the consequences of that decision must follow; in particular, a subsequent application to the Court must be based on the same submissions as the administrative complaint. In this case, if the candidates had

submitted no complaint, their application would be inadmissible as out of time, since it was not brought within three months of the decision of the Selection Board. Only the submission regarding the irregularity of the written test is therefore admissible, and the other submissions must be dismissed as inadmissible.

- 8 In answer to that objection of inadmissibility, which concerns only certain submissions, the applicants rely on the Court's case-law according to which the submission to the appointing authority of a complaint regarding a decision of a Selection Board cannot have the result that the action of an official who decides to do so becomes time-barred (judgment of 5 April 1979 in Case 117/78 *Orlandi v Commission* [1979] ECR 1613; judgment of 14 July 1983 in Case 144/82 *Detti v Court of Justice* [1983] ECR 2421). It follows that in such circumstances the applicants are not bound by the terms of their complaint.
- 9 It must be pointed out first of all that, as the Court held in its judgment of 14 June 1972 (Case 44/71 *Marcato v Commission* [1972] ECR 427), a complaint directed against a decision of a Selection Board would appear to be pointless, since the institution concerned has no authority to annul or amend the decisions of a Selection Board, and therefore the only legal remedy open to those concerned by such a decision normally lies in a direct application to the Court.
- 10 However, as the Court has consistently held (see in particular the judgment of 5 April 1979 in *Orlandi v Commission*, referred to above), if, in such circumstances, instead of bringing the matter directly before the Court the person concerned relies on the provisions of the Staff Regulations in order to refer the question to the appointing authority by means of a complaint through official channels the effect of such a step, whatever its legal significance, must not be that the period for bringing the matter to the attention of the Court expires whilst he is awaiting a reply.
- 11 That does not mean that those judgments, which reflect a wish to protect the legal rights of officials who have submitted a complaint under Article 90 (2) rather than

applying directly to the Court, permit the persons concerned to ignore the procedural constraints associated with the path which they have chosen, that of a preliminary complaint through administrative channels. To decide otherwise would have the effect of granting them rights greater than those of officials who have chosen to bring proceedings directly before the Court regarding a decision of a selection board.

- 12 Among those procedural constraints is the principle consistently upheld by the Court according to which Article 91 of the Staff Regulations is designed to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. In order to comply with that requirement it is essential that the administration should be in a position to know with sufficient certainty the complaints or wishes of the person concerned. On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the legal basis nor the subject-matter of the complaint (judgment of 1 July 1976 in Case 58/75 *Sergy v Commission* [1976] ECR 1139 at p. 1153; judgment of 20 March 1984 in Joined Cases 75 and 117/82 *Razzouk and Bedoun v Commission* [1984] ECR 1509; judgment of 23 January 1986 in Case 173/84 *Rasmussen v Commission* [1986] ECR 197).
- 13 After the expiry of the time-limit for bringing an application directly before the Court, therefore, an official who has preferred to make a complaint through administrative channels first may not submit to the Court conclusions with a subject-matter other than those raised in the complaint or put forward heads of claim based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint, but must be closely linked to it.
- 14 In this case the four identically worded complaints addressed by the applicants to the appointing authority contained a single head of claim concerning only the written test, asserting that it was not in conformity with the description in the notice of competition. The annulment of all the tests in the competition was requested only because the written and oral tests were indivisible.

- 15 In those circumstances it must be pointed out that although the conclusions in the application to the Court do not alter the subject-matter of the complaint, a number of the submissions relied on in support of those conclusions raise heads of claim whose legal basis is unrelated to that of the single head of claim put forward in the complaint. That is true of:
- (i) the submission that the oral test was improperly conducted, on the ground of the alleged irregular composition and chairmanship of the Selection Board;
 - (ii) the submission that the requirement of secrecy in the work of the Selection Board was not observed and the principle of equal treatment was infringed, on the ground that pressure was allegedly exerted on the Selection Board during the oral tests;
 - (iii) the allegation of a misuse of powers, on the ground that the final list of suitable candidates was drawn up in such a manner that internal candidates of considerable merit such as the applicants were excluded and external candidates who did not meet the conditions laid down in the notice of competition were accepted.

Those submissions, which were made after the expiry of the time-limit for the institution of proceedings before the Court, must be rejected as inadmissible.

Substance

- 16 The Court must, however, examine the head of claim concerning the irregularity of the written tests, in support of which the applicants put forward three submissions.
- 17 First of all it is argued that the notice of competition was not complied with, since the first 25 minutes of the written test were taken up by a 'psycho-technical test' which was not provided for in that notice. The second test, which was in conformity with the notice of competition, therefore lasted only 95 minutes, instead of the two hours provided for in the notice of competition. The psychological test was in fact intended not to assess the candidates' knowledge but to establish their 'psychological profile'.

- 18 According to the Commission, the notice of competition was strictly complied with, since the general structure of the written test, made up of multiple choice questions, was in the form of four sets of questions, A, B, C and D. The first paper, says the Commission, was Part C of the test, 25 minutes long, containing numerical and logical problems, while the second paper, 95 minutes long, was made up of Parts A, B and D. There was certainly no 'psycho-technical test', and the sole object of the questions put was to assess the candidates' knowledge, not their 'psychological profile'. Tests of this type are normal in Commission competitions.
- 19 Examination of the papers administered in the written test, which were submitted to the Court at its request before the public hearing, shows that the papers set were in conformity with the specifications of the notice of competition and were in no way intended to establish the 'psychological profile' of the candidates. Furthermore, the manner in which the written test was organized, as explained by the Commission, was not improper in any way and was not likely to prejudice the candidates.
- 20 Secondly, the applicants argue that what they call the 'second test', that is to say, the second paper, 95 minutes long, was disrupted for a period of about 10 minutes because of a translation error in the German version of the test and the resulting confusion. As the applicants themselves state in their reply, they do not dispute the marking method used in order to compensate for the fact that German-speaking candidates were placed at a disadvantage. They simply argue that the fact that the secretary of the Selection Board, present during the test, was obliged hurriedly to obtain the correct text of the German version of one of the 60 questions in the second paper resulted in noise and disturbance incompatible with the concentration necessary for the proper conduct of the test at the examination centre in Luxembourg.
- 21 As the Commission admits, there was indeed an error in one of the questions in the German version of Part D of the written test. Regrettable though it may be, the slight disturbance which that incident may have caused cannot in this case be regarded as having been of such a nature as to invalidate the tests. The error was

committed in all the examination centres and was rapidly discovered; during the few minutes necessary to amend the incorrect question, the candidates were able to carry on with the numerous other questions set. Furthermore, it does not appear from the documents before the Court that the candidates who sat the tests in Luxembourg were placed at a disadvantage in relation to those who sat the tests in the other examination centres.

22 Finally, the applicants argue that the written test was conducted improperly since no members of the Selection Board were present; the Selection Board was represented only by its secretary at the tests administered in Luxembourg. The presence of a member of the Selection Board would have made it possible to avoid the disruptions of the test which particularly affected that centre.

23 It must be emphasized in that regard, as the Commission has correctly argued, that no provision of the Staff Regulations or general principle of law requires that a member of the Selection Board should be present during the written tests of a competition. Furthermore, desirable though it may be for a member to be present, that would in practice be difficult or even impossible where, as in this case, the competition is organized in several geographically distant centres. Consequently, and since it has not been established that any discrimination between candidates resulted from the presence or absence of members of the Selection Board in one centre or another, that argument must be rejected.

24 The action must therefore be dismissed, and there is no need to hear the evidence which the applicants have offered to adduce.

Costs

25 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, pursuant to Article 70 of the Rules of Procedure, the costs incurred by the institutions in cases brought by officials of the Communities are to be borne by the former.

On those grounds,

THE COURT (Third Chamber)

hereby:

- (1) Dismisses the application.**
- (2) Orders the parties to bear their own costs.**

Everling

Galmot

Kakouris

Delivered in open court in Luxembourg on 7 May 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber