JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 December 1997

Case T-225/95

Fotini Chiou
v
Commission of the European Communities

(Officials – Internal competition for transfer of officials from category C to category B – Decision of the Selection Board failing candidates at the oral test – Consistency between the complaint and the application – Principle of equal treatment for men and women – Principle of non-discrimination – Assessment by the Selection Board)

Application for: annulment of the decision of the Selection Board in Internal Competition COM/B/9/93 to award the applicant a mark lower that the minimum required and not to enter her name on the list of suitable candidates.

Decision: Application dismissed

Abstract of the Judgment

In 1992 the applicant, an official of the Commission in category C, took part in an internal competition based on tests for transfer from category C to category B (COM/B/4/92). As she was not awarded the minimum mark required in the oral test her name was not entered on the list of suitable candidates. She disputed the results of that competition and also brought an action on the subject before the Court of First Instance. That Court dismissed the action in its entirety (see Case T-46/93 *Michaël-Chiou* v *Commission* [1994] ECR-SC II-929).

In 1993 the applicant again applied to take part in an internal competition (COM/B/9/93) for transfer from category C to category B. The purpose of that competition was to draw up a list of suitable candidates for posts as administrative assistants in grades 5 and 4 of category B to carry out executive duties, under supervision, comprising routine office work in the capacity of administrative assistant, secretarial assistant or technical assistant. The Selection Board had the same chairman as in Competition COM/B/4/92.

Having achieved a satisfactory result in the preselection test and the essay paper, the applicant was admitted to the oral test which took place on 17 October 1994.

By letter of 18 November 1994 the applicant was informed that, as she had not obtained the minimum mark in the oral test, her name had not been entered on the list of suitable candidates.

On 15 February 1995 the applicant lodged a complaint pursuant to Article 90 of the Staff Regulations applicable to officials of the European Communities (Staff Regulations) against the decision not to enter her name on the list of suitable candidates.

That complaint was later supplemented by three further notes, dated respectively 5 April, 10 April and 5 May 1995.

The complaint was considered at a meeting of the Interservice Group of 6 April 1995 and subsequently, after expiry of the period prescribed for that purpose, was expressly rejected by the Commission on 25 July 1995. The applicant was notified of that rejection on 13 September 1995.

Admissibility

Rather than referring the decision of the Selection Board to the Court of First Instance directly, the applicant lodged an administrative complaint with the appointing authority. Having chosen that course of action, she is bound to observe the procedural constraints associated with the option she has chosen of lodging a prior complaint (paragraph 26).

See: 52/85 *Rihoux* v *Commission* [1986] ECR 1555, para. 11

In order to be admissible, a plea put forward before the Community judicature must first be raised in the pre-litigation procedure, so that the appointing authority is in a position to know in sufficient detail the criticisms which the person concerned is making against the contested decision. The plea must also be raised in the complaint

itself. Of course, a plea referred to in the complaint can be developed in the course of the pre-litigation procedure by additional notes, provided that the criticism made in them is based on the same cause of action as the points at issue in the complaint. That condition also applies if a plea is to be put before the Court of First Instance (paragraphs 27 to 29).

See: T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143, paras 8 and 9; T-58/91 *Booss and Fischer* v *Commission* [1993] ECR II-147, para. 83; T-262/94 *Baiwir* v *Commission* [1996] ECR-SC II-739, paras 40 and 41

However, it is a different matter if a plea which has no connection with the points at issue in the complaint is put forward for the first time after expiry of the periods prescribed by Article 90 of the Staff Regulations. The complaints procedure laid down by that article is subject to strict time-limits which serve the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (paragraph 30).

See: 276/85 *Cladakis* v *Commission* [1987] ECR 495, para. 11

Accordingly, in respect of each plea alleged to be inadmissible, it must be ascertained whether the Commission, interpreting the complaint with an open mind, was in a position to know in sufficient detail the criticisms which the applicant had made of the decision in issue (paragraph 31).

See: 133/88 *Del Amo Martinez* v *Parliament* [1989] ECR 689, para. 11; *Baiwir* v *Commission*, cited above, para. 42

First, the plea alleging infringement of the notice of competition, by which the applicant complains that the competition Selection Board had been unduly severe in entering the names of only 37 successful candidates on the list of suitable candidates whereas the notice of competition provided for a list of the 60 best candidates, can be considered to have been raised in the complaint (paragraph 32).

The Commission, interpreting the complaint with an open mind, was in a position to be aware that the applicant was of the opinion that the Selection Board had not observed the conditions laid down in the notice of competition. As it was based on the same cause of action as the points at issue in the complaint, this plea is therefore admissible (paragraphs 34 and 35).

Second, the applicant's plea alleging a manifest error of assessment by the Selection Board in awarding her a mark lower than the minimum required in the oral test is closely linked to the points at issue in the complaint, inasmuch as it is clear from the complaint that the applicant considered herself capable of performing category B duties (paragraphs 36 and 37).

As for the pleas alleging breach of Article 14 of the Staff Regulations and breach of the rules governing the work of a Selection Board, it is common ground between the parties that the criticisms contained therein did not appear in the complaint (paragraph 38).

Accordingly, since the applicant's criticisms are not based on the same causes of action as the points at issue in her complaint and the additional notes containing them were submitted after expiry of the period prescribed by Article 90 of the Staff Regulations for submission of a complaint, those pleas must be declared

inadmissible for want of conformity between the administrative complaint and the application (paragraph 39).

The fact that the Commission was none the less able to address the substance of those pleas in its explicit rejection of the complaint, without emphasising that they were submitted late, cannot make them admissible since that would be contrary to the system of public policy time-limits set up by Articles 90 and 91 of the Staff Regulations and, therefore, would reinstate a right of action which was time-barred (paragraph 40).

See: T-130/89 *B* v *Commission* [1990] ECR II-761, summary publication; T-6/90 *Petrilli* v *Commission* [1990] ECR II-765, summary publication; T-19/90 *von Hoessle* v *Court of Auditors* [1991] ECR II-615, para. 23

Substance

The first plea, alleging breach of the principle of equal treatment for men and women

To ascertain whether there has been discriminatory treatment, the treatment of two categories of person whose factual and legal circumstances disclose no essential difference must be compared (paragraph 48).

See: T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, para. 68

In this case, the applicant alleges that the fact that, as the statistics show, the posts to be filled in competitions for transfer from category B to category A are always filled, unlike the posts in competitions for transfer from category C to category B, constitutes unequal treatment. She maintains that it is for the Commission to justify that difference (paragraph 49).

That argument cannot be accepted. The competitions compared each have their own character and autonomy as regards the results they lead to. Moreover, it is indisputable that the statistics cited by the applicant concern competitions in which the number of candidates and of posts to be filled were different and for which the rules set out in the notice of competition, and the membership of the Selection Board, were different. Moreover, these are two distinct categories (B and C) and not two types of work of equal value (paragraph 50).

There are therefore essential differences in the factual and legal circumstances alleged by the applicant to indicate the existence of unequal treatment (paragraph 51).

The second plea, alleging breach of the principle of non-discrimination between candidates in a competition

Whilst it is true that an official may not, in support of an action challenging a decision of a Selection Board in a competition, put forward submissions based on an alleged irregularity in the notice of competition if he has not challenged in good time the provisions of the notice which, in his view, adversely affect him, a candidate in a competition cannot be deprived of the right to challenge all aspects, including those set out in the notice of competition, of the merits of the individual decision adopted concerning him and applying the terms set out in that notice, inasmuch as only that implementing decision defines his legal position and enables

him to know with certainty how and to what extent his particular interests are affected (paragraph 62).

See: T-132/89 *Gallone* v *Council* [1990] ECR II-549, para. 20; T-60/92 *Noonan* v *Commission* [1993] ECR II-911, paras 21 and 23

The part of the plea concerning the passage in the introduction to the notice of competition according to which the Selection Board was to ascertain, in the oral test, 'the ability [of the candidates] to adapt to new duties at a higher level, rather than theoretical knowledge' must be declared inadmissible as the applicant did not challenge the notice within the period prescribed (paragraph 63).

On the other hand, as regards the other part of the plea, the applicant could hardly be aware how her interests would be affected before it became apparent that no file to be dealt with in the essay paper corresponded to her particular experience. The general terms of the notice of vacancy did not preclude a file, particularly one on 'administration', from covering matters connected with secretarial services. It was therefore not until she was faced with choosing which file to deal with that she was in a position to know with certainty how and to what extent her particular interests were affected. Accordingly, that part of the plea must be declared admissible (paragraph 64).

However, the applicant's argument cannot be accepted. There is a breach of the principle of equal treatment laid down in Article 5(3) of the Staff Regulations when two categories of person whose factual and legal circumstances disclose no essential difference are treated differently (paragraphs 65 and 66).

See: *Tagaras* v *Court of Justice*, cited above, para. 68

Without its being necessary to determine whether the applicant interpreted the notice of competition correctly as providing that the written and oral tests had to cover the same subjects, it is clear that the applicant, who did pass the written test, has furnished no evidence whatsoever that the oral questions put to her covered subjects which did not come within the area covered by her professional experience (paragraph 68).

Accordingly, given the wide discretion which the appointing authority enjoys in deciding upon the criteria of ability required for the posts that are to be filled and in determining, in the light of those criteria and in the interests of the service, the rules and conditions under which a competition is organized, the absence of an option solely concerning secretarial services cannot constitute discriminatory treatment (paragraph 69).

See: *Gallone* v *Council*, cited above, para. 27

The third plea, alleging breach of the fifth paragraph of Article 5 of Annex III to the Staff Regulations

The notice of competition provides that 'The Selection Board will draw up a list of suitable candidates containing no more than the top 60. These candidates must have obtained at least 50% in each of the eliminatory tests a), b) and c)'. Accordingly, as the Selection Board is bound by the wording of the notice of competition, it was not entitled to draw up a list of more than 60 candidates (paragraph 81).

See: T-158/89 *van Hecken* v *ESC* [1991] ECR II-1341, para. 23

The fifth paragraph of Article 5 of Annex III to the Staff Regulations provides that the list of suitable candidates drawn up by the Selection Board should wherever possible contain at least twice as many names as the number of posts to be filled; this is, however, only a recommendation to the Selection Board, intended to facilitate the decisions of the appointing authority, and does not entitle the Selection Board to ignore the framework set by the notice of competition (paragraph 82).

See: 122/77 *Agneessens and Others* v *Commission* [1978] ECR 2085, para. 22

The fourth plea, alleging breach of the notice of competition

It is clear from the wording of the notice of competition, according to which the Selection Board is to draw up a list of suitable candidates containing no more than the top 60 candidates who have obtained the best marks in tests (a), (b) and (c), that the Selection Board was entitled to draw up a list of suitable candidates containing less than 60 names (paragraph 87).

See: *Michaël-Chiou* v *Commission*, cited above

Moreover, the fact that the Selection Board decided that only 37 candidates had obtained the minimum marks required in the various tests of the competition does not prove that the Selection Board had been unduly strict (paragraph 88).

The fifth plea, alleging a manifest error of assessment by the Selection Board as regards the applicant's ability to perform category B duties

Selection boards have a wide discretion and the merits of their value judgments are subject to review by the Community judicature only where there is a flagrant breach of the rules governing their work (paragraph 93).

See: T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, para. 90; T-6/93 *Pérez Jiménez* v *Commission* [1994] ECR-SC II-497, para. 42; *Michaël-Chiou* v *Commission*, cited above, para. 48

It is therefore not the role of the Court of First Instance to review the assessment made by the Selection Board of the ability of the applicant to perform category B duties (paragraph 94).

In any event, whatever the the merits of the applicant, they could not be such as to establish the existence of a manifest error in the assessment of the applicant's performance in the oral test, particularly as this was a competition based on tests and not on qualifications (paragraph 95).

See: T-125/95 *Belhanbel* v *Commission* [1996] ECR-SC II-115, para. 33

It follows from the foregoing observations that the applicant's claims, apart from those seeking annulment of the contested decision, concerning *inter alia* certain requests for information and for the production of documents, are devoid of purpose (paragaph 97).

Operative part:

The application is dismissed.