OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 30 JUNE 1983 [1]

Mr President,
Members of the Court,

1. The application which initiated these proceedings contains a number of claims made by Miss Armelle Detti, an official of the Court of Justice of the European Communities, against that institution concerning the entry of her name on the reserve list for "secretary/shorthand-typists" in Competition No CJ 49/79, her appointment in Career Bracket C 3 - C 2, the annulment of the decision rejecting her complaint through official channels, the production of the report of the selection board and the shorthand test, and the reassessment of that test by a new selection board.

2. The facts may be summarized as follows. The applicant worked as a typist at the Court of Justice first as a member of the auxiliary staff (4 September 1979 to 31 October 1980, initially in Category C, Group VII, Class 3, and ultimately in Category C, Group VI, Class 1). She was then employed as a temporary servant from 1 to 31 July 1981, in Grade C 4, Step 3, and finally as an official, from 1 August 1981 with the same grade and step. In 1980, she took part in Open Competition No 49/79 to constitute a reserve for future recruitment of French-Language secretary/shorthand-typists. On 12 December 1980, the selection board for that competition submitted its final report. By letter of 27 January 1981, the Director of Administration of the Court informed the applicant that she had been admitted to the reserve list; he did not however specify whether she appeared on that list as a shorthand-typist or as a typist. Miss Detti addressed a memorandum dated 19 July 1981, but in all probability written in August of that year, to the Registrar of the Court, in which she disputed the assessment which the board had given her and requested a "serious reassessment" of the shorthand test. It appears that — and this, as will be seen, is the crux of the case — the procedure in the shorthand tests (which involved the taking-down of 240 words in three minutes) was not identical in both the centres at which the competition was held (Luxembourg and Brussels). It is common ground that the title of the test, consisting of 11 words, was not dictated to the candidates in Luxembourg, including Miss Detti. However, the selection board considered that it was required to ensure the equality of treatment of all the candidates and, therefore, to compensate for the potential advantage derived from the dictation of a shorter text in the same time. It therefore decided to apply a corrective factor in the marking of the scripts of the candidates who had taken the test in Luxembourg. At that point, the Director of Administration asked the board for a supplementary report. In that report, which was drawn up in September 1981 and sent by the

1 — Translated from the Italian.

Registrar to Miss Detti on 14 October 1981, the board pointed out the difficulty in establishing a fresh assessment of the candidate more than nine months after the submission of the final report and, in any event, maintained that it was not able to alter the decision which it had taken. However, the Board admitted that for the correction of the scripts it had taken into account the fact that in Luxembourg 'the dictation had been slower'.

In the menatime, on 13 October 1981, the applicant submitted to the appointing authority a request within the meaning of Article 90 (1) of the Staff Regulations of Officials, in which she asked that the decision of 11 August 1981 concerning her appointment as a probationary official in the capacity of typist in Grade C 4 be set aside and that a new appointment be made, with the same seniority, as a secretary/shorthand-typist in Grade C 3. Miss Detti based her claim on the fact that the Selection Board for Competition No CJ 49/79 had not entered her name on the reserve list as a shortland-typist because it had counted the 11 missing words of the title of the test as mistakes. By memorandum of 5 November 1981, which was also sent to the appointing authority, the applicant asked that her request of 13 October 1981 be considered as a complaint through official channels within the meaning of Article 90 (2) of the Staff Regulations of Officials.

In response to that complaint and to the doubts expressed by the Staff Committee concerning the regularity of the selection board's actions (memorandum of 23 October 1981), the Director of Administration again communicated with the board. By memorandum of 24 November 1981, the board more or less clarified the method of correction adopted. In view of the fact that "the candidates ... in Luxembourg were not required to take down the title of the shorthand test (11 words)" and "in order to ensure that all the candidates were treated equally", the Board stated, it "corrected the text of the test more severely. In order to do so, first and without having examined the candidates' scripts" it attributed "a certain weight to the various types of possible mistakes." It proceeded therefore "to correct the scripts of the Luxembourg candidates on the basis of those criteria".

By decision of 11 February 1982, the President of the Court, in his capacity as appointing authority, rejected Miss Detti's complaint. In that decision, he acknowledged that the failure to dictate the title of the shorthand test amounted to a factual error, but considered that the compensation effected by the board in the course of the marking of the tests was "reasonable". According to the appointing authority, the factual error "did not have consequences which were so harmful as to vitiate the procedure". Nor did the method of correction employed ("a slightly more severe correction") produce unfair results since several candidates who took the test in Luxembourg were ultimately placed on the reserve list.

3. The defence of the defendant institution, in the first place, objects that the action is inadmissible and cites various grounds; it alleges that the action is out of time, that the subject-matter of the complaint through official channels was different from that of the action before the Court and that the applicant acquiesced.

Let us first examine the objection concerning the belatedness of the action. According to the defendant, the action was not brought within the prescribed period inasmuch as Miss Detti had become aware at the latest on 23 April 1981 that her name had not been entered on the reserve list, since that was the date on which the administration offered her a temporary contract as a typist. That argument seems to me to be unfounded. Indeed the defendant has not established that the applicant had been informed and was therefore aware from that date of the results of the competition. Moreover, the letter made no allusion to those results; it contained only the offer of a post as a typist. In addition, the memorandum which Miss Detti received from the Director of Administration of the Court on 27 January 1981 also failed to clarify whether her name appeared on the reserve list as a shorthand-typist or as a typist. In fact, the subject-matter of the memorandum and its wording, in which the fact that her name was entered only on the list of typist is by no means specified, instead encourage the view that the applicant had also been successful in the shorthand test. In reality, Miss Detti was aware of the results of the test only after the Registrar's communication of 14 October 1981.

Nor can the action be considered out of time on the ground that the memorandum which Miss Detti sent to the Registrar on 19 July 1981 is to be regarded as a complaint through official channels. The memorandum is not drawn up as a complaint, if only inasmuch as it is not addressed to the appointing authority. In any event, as I have already said, at that time, the applicant had not yet been informed that her name was not entered on the list of shorthand-typists. In other words, she was not aware of the act which adversely affected her.

The defendant, in its defence, also infers the inadmissibility of the action from the fact that the subject-matter of the complaint differed from that of the action. It is true that whilst the complaint is directed against the selection board's decision, the action questions the appointment of the applicant as a probationary official. However, that ground of the objection must also be rejected. By challenging the appointing authority's decision, Miss Detti by implication contested the board's decision by requesting that it should be amended. I may add that the Court has accepted an interpretation of the relevant provisions of the Staff Regulations according to which the prior submission of a complaint is not indispensable requirement for the admissibility of an action before the Court and is "devoid of purpose" where a complaint is directed against the decisions of a selection board since the appointing authority is not empowered to review such decisions. Therefore "the general plan both of the administrative procedure and of the Court procedure militates against an interpretation of Article 91 (2) which, if taken literally, would merely result in a futile prolongation of the procedure" (judgment of 16 March 1978, Case 7/77 *von Wüllerstorff und Urbair* v *Commission* [1978] ECR 769, paragraphs 7 and 8 of the decision).

The defendant argues that a further ground for the inadmissibility of the action is to be seen in the official's

acquiescence. That follows from the fact that she unreservedly accepted the post of typist, first as a temporary servant (29 April 1981) and subsequently as a probationary official (11 August 1981). That argument cannot be accepted either. As I have already shown in relation to the objection concerning the belatedness of the action, the results of the competition came to Miss Detti's notice only on 14 October 1981 and, clearly, it is not possible to suggest that a person acquiesces in a situation adversely affecting him of which he is unaware. Moreover, as Mr Advocate General Capotorti observed in his opinion in Case 145/80, if "an individual's behaviour is to be treated as amounting to a waiver of particular legal situations, that behaviour must unambiguously indicate the clear and incontestable intention of the individual in question to abandon a right" ([1981] ECR 1975 at pp. 1990 and 1991). In this case, the acceptance of the post of typist can in no circumstances be regarded as an intention to abandon a right.

4. I may now therefore consider the objections concerning the substance.

The applicant alleges various defects in the procedure for the competition and, in particular: the failure to observe the rules relating to the time at which the criteria for the assessment of the tests must be fixed; the factual error which the selection board committed by failing to dictate the title of the shorthand test, which constituted a breach of the principle of equality of treatment; the method of correction of the tests (referred to as "offsetting advantages"), similarly in relation to the principles of equality and proportionality; finally the breach of the principle of the protection of legitimate expectation. She notes in that respect that candidates in competitions must be able to rely on examining boards' not committing factual errors; and, in any event, the administration's communication of the result of the tests gave rise to the expectation of a favourable result.

The defendant refuses to accept that the Board committed factual errors and considers that the assessment of the tests falls within a discretionary power the use of which the Court is not empowered to review. Thus it claims that the applicant's argument that the rules governing the determination of the criteria for correction of the tests were not observed and that the compensation applied was contrary to the principle of the equality of treatment is deprived of its basis. Finally, Miss Detti's legitimate expectation was in no way frustrated.

That last observation seems to me to be correct. It is always open to the persons concerned to bring an action before the Court in respect of factual or legal errors which a board may make. Moreover the administration's communication in respect of the results of the tests did not cause the applicant any injury because it clearly did not prevent her from bringing this action within the prescribed period.

I consider Miss Detti's claim that the procedure is vitiated, because the board altered criteria which had already been fixed, to be valid as an abstract proposition, but irrelevant in this particular case. I would remind the Court that Article 1 (1) (e) of Annex III (Competitions) to the Staff Regulations

of Officials states that the notice must specify "where the competition is on the basis of tests, what kind they will be and how they will be marked". However, apart from that provision — with which, in any event, the notice in this instance seems to be in conformity — the Staff Regulations contain no express provisions as to the time by which the criteria must be fixed. There is indeed a general principle which may be extracted from the laws of Member States concerning access to a civil service career and meeting a logical requirement of efficient administration. That principle requires that the criteria for assessment be fixed prior to the opening of the folders containing the scripts. However, in this case, it has not been established that such a principle was breached, in other words that the board altered the criteria during marking.

We now come to the most difficult question in the case, namely the breach of the principales of equality of treatment and of proportionality in relation to the way in which the tests were conducted and the scripts marked.

It seems to me that there is one point on which the parties are in agreement. It concerns the failure to dictate to the candidates in Luxembourg 11 words which represented the title of the shorthand test. Even if the defendant does not acknowledge it as such, the board's error is in fact manifest and the legal consequences to be drawn are clear. In that context, the Court has pertinently stated that: "When the competition is on the basis of tests, the principle of equality necessitates that the tests shall be on the same conditions for all candidates, and in the case of written tests the practical difficulties of comparison require that the written tests for all candidates should be the same" (judgment of 27 October 1976 in Case 130/75 *Prais* v *Council* [1976] ECR 1589, paragraph 13 of the decision). The difference between the scripts of the Luxembourg candidates and those of the candidates in Brussels therefore invalidates the competition procedure because it is in breach of the principle of equality.

However, it is precisely that principle on which the selection board and the appointing authority rely in order to justify the criteria adopted to offset the advantage enjoyed by the candidates in Luxembourg, arising from the fact that they took down in the same time a smaller number of words (to be exact 11 of 240). The fundamental problem is therefore to establish whether that compensation or the way in which it was effected may be challenged.

As I have already stated, according to the appointing authority that compensation falls within the scope of the discretion vested in examining boards and may not be reviewed by the Court. It considers it to be, in addition, both reasonable and fair. I do not find those statements convincing. It is doubtless possible, in principle, to have recourse to a corrective factor, but it must be based on strictly objective criteria. Only criteria of that nature enable the Court to determine whether the assessment *really* complies with the principles of equality and of proportionality. Moreover, the extension of the sphere of discretion beyond all bounds undermines legal certainty and has the effect of excluding the possibility of review by the Court.

In this case, the defendant — on whom the onus lies — has not provided the Court with any evidence concerning the

criteria adopted by the board. It has not even submitted any material which would enable the objective nature of those criteria to be assessed. It follows that it is impossible for this Court to review directly the way in which compensation was effected or the results thereof, or, for the same reason, the presumption that it was irregular.

The procedure for the competition seems to be definitively compromised. Among the various claims which she puts forward, Miss Detti does not seek its annulment. In any event, I consider that the Court's case-law in relation to the refusal of admission to tests is applicable in this case. The Court has stated: "As this was an open competition to constitute a reserve for future recruitment, the rights of the applicant will be sufficiently protected if the selection board reconsiders its decision, without its being necessary to question the whole of the results of the competition or to annul appointments made in consequence thereof" (judgment of 5 April 1979 in Case 117/78, *Orlandi* v *Commission* [1979] ECR 1613, paragraph 25 of the judgment; the following judgments adopt the same line: of 28 June 1979 in Case 255/78 *Anselme* v *Commission* [1979] ECR 2323; of 30 November 1978 in Joined Cases 4, 19 and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403; and of 4 December 1975 in Case 31/75 *Costacurta* v *Commission* [1975] ECR 1563).

However, the applicant's claim to be appointed to a post in Career Bracket C 3 - C 2 with retroactive effect is inadmissible. The Court reviews exclusively the legality of the measure contested. In no circumstances may the Court substitute itself for the appointing authority.

5. In the light of all the considerations which I have set out, I propose, in conclusion, that the Court declare the action of 10 May 1982 brought by Armelle Detti admissible and annul the decision of the Selection Board for Competition No CJ 49/79 in so far as that decision relates to the failure to enter the applicant's name on the reserve list of secretary/shorthand-typists.

As regards the costs, they must be borne by the defendant institution, which has been unsuccessful.