JUDGMENT OF THE COURT (Third Chamber)
10 December 1987 *

In Joined Cases 181 to 184/86

Sergio Del Plato, Giovanni Ferrari, Massimo Paruccini and **Enrico Rodari,** officials of the Commission of the European Communities (Joint Research Centre, Ispra), represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, rue Philippe-II,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser Dimitrios Gouloussis, acting as Agent, assisted by Robert Andersen, of the Brussels Bar, with an address for service in Luxembourg at the office of G. Kremlis, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for

(1) the annulment of four decisions dated 4 April 1986 whereby the Commission rejected their complaints against decisions of the *ad hoc* committee responsible for assessing the ability of Category B officials and temporary staff in the scientific and technical services to perform Category A duties and refused to enter their names on the list of persons capable of performing Category A duties;

(2) a declaration pursuant to Article 184 of the EEC Treaty and Article 156 of the EAEC Treaty that the Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services, published in *Administrative notices* No 409 of 24 June 1983, are inapplicable;

* Language of the Case: French.

(3) an order, in so far as is necessary, that the procedure be recommenced and a declaration that the express rejection of their complaints is null and void;

(4) an order requiring the Commission to produce all the documents concerning the applicants,

THE COURT (Third Chamber)

composed of: J. C. Moitinho de Almeida, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: J. Mischo
Registrar: J. A. Pompe, Assistant Registrar

having regard to the Report for the Hearing and further to the hearing on 24 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 October 1987,

gives the following

Judgment

1 By four applications lodged at the Court Registry on 21 July 1986, Mr Del Plato, Mr Ferrari, Mr Paruccini and Mr Rodari, Category B officials in the scientific and technical services employed at the Joint Research Centre at Ispra, brought actions for the annulment of four decisions notified to them by letter of 16 September 1985 whereby the *ad hoc* committee responsible for assessing the ability of Category B officials and temporary staff in the scientific and technical services to perform Category A duties decided not to enter their names on the list of suitable candidates.

2 Mr Del Plato, Mr Ferrari, Mr Paruccini and Mr Rodari also claim that the Court should, on the basis of Article 184 of the EEC Treaty and Article 156 of the EAEC Treaty, declare inapplicable the 'Procedures' adopted by the Commission. Finally, they claim that the Court should 'in so far as is necessary' order the procedure to be recommenced, annul the decisions rejecting their complaints and order the Commission to produce all the documents drawn up by the selection board concerning them.

3 In 1983 the applicants applied for transfer to Category A. Those applications were examined by an *ad hoc* committee pursuant to the 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services' (hereinafter referred to as the 'Procedures') adopted by the Commission on 3 June 1983 (*Administrative notices* No 409 of 24 June 1983).

4 At the close of the procedure the chairman of the *ad hoc* committee and the Director-General for Personnel and Administration of the Commission informed the applicants by letter dated 16 September 1985 that the *ad hoc* committee had decided not to enter their names on the list of candidates capable of performing Category A duties. Mr Del Plato, Mr Ferrari, Mr Paruccini and Mr Rodari each made a complaint through official channels against those decisions but those complaints were rejected by decision of the Commission of 4 April 1986.

5 The applicants' main claim is for the annulment of all those decisions; in support of their claim they plead the *ad hoc* committee's lack of competence, breach of the rules concerning competitions set out in Annex III of the Staff Regulations, breach of the principle of equal treatment, irregularities in the conduct of the individual interviews, failure to observe the timetable for the tests, lack of precision in the committee's report, which did not reveal how their marks were calculated, breach of the *audi alterem partem* principle inasmuch as a questionnaire was sent to their superiors to which they were not given an opportunity to reply, and finally, as regards Mr Paruccini, the fact that the dissertation which he presented was not examined in a sufficiently serious and competent manner.

6 Reference is made to the Report for the Hearing for the legal background to the dispute and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 Before submitting its defence on the merits the Commission raises an objection of inadmissibility, which should be considered first of all.

The objection of inadmissibility raised by the Commission against certain submissions

8 The Commission argues that most of the submissions relied on by the applicants are inadmissible inasmuch as they question the legality of the Procedures which were adopted in 1983 and have become final since they were not challenged at the proper time.

9 In this respect it must be pointed out that in the context of the right of action made available by Article 91 of the Staff Regulations and in the case of a measure of a general nature designed to be implemented by a series of individual decisions, an official may invoke the illegality of that measure in order to attack the individual decision affecting him (see the judgment of 18 March 1975 in Joined Cases 44, 46 and 49/74 *Acton* v *Commission* [1975] ECR 383).

10 As the Court has already held (judgment of 9 October 1984 in Joined Cases 80 to 83/81 and 182 to 185/82 *Adam and Others* v *Commission* [1984] ECR 3411), although the Procedures may not be regarded as rules of law which the administration is always bound to observe they nevertheless form rules of practice from which the administration may not depart without giving the reasons which led it to do so, which must be compatible with the principle of equal treatment. It follows that the Procedures constitute a measure of a general nature. Consequently, even though the Procedures have not been directly challenged the officials and other staff concerned may invoke their illegality in support of an action against the individual decisions taken on the basis of the Procedures.

11 It follows that the Commission's objection of inadmissibility must be dismissed.

Lack of competence of the *ad hoc* committee

12 The applicants argue that although Article 98 of the Staff Regulations derogates from Article 45 (2), which provides that 'an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition', Article 45 (1), which provides that 'promotion shall be by decision of the appointing authority', remains applicable. Consequently, the Commission could not confer on the *ad hoc* committee established by the Procedures the power to draw up the list of candidates who could be transferred from one service or category to another.

13 It must first be recalled that under Article 45 (1) of the Staff Regulations promotion is effected by appointment to the next higher grade in the category or service to which the official belongs. The provisions of Article 45 (1) are therefore of no relevance when, as in the present case, the officials concerned are transferred from one category to another.

14 Secondly, it must be stressed that although Article 45 (2) of the Staff Regulations sets out the principle that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition, the second paragraph of Article 98 provides that 'Article 45 (2) shall not apply to officials covered by Article 92'. While these provisions taken together allow the appointing authority to transfer officials in the scientific and technical services to a higher category without holding a competition, they have neither the object nor the effect of prohibiting it from holding one.

15 Bearing in mind its discretion in the present case, the Commission was legally entitled to institute a *sui generis* procedure which differed in several respects from the competition procedure under the Staff Regulations, and it was equally entitled to adopt aspects of that procedure, in particular by conferring on the *ad hoc* committee the power to draw up a final list of suitable candidates from which the appointing authority was obliged to choose the officials to be transferred to another category.

16 The submission based on the alleged lack of competence of the *ad hoc* committee must therefore be dismissed.

Breach of the rules concerning competitions contained in Annex III of the Staff Regulations

17 The applicants argue that in reality the Commission organized a competition and that it was therefore obliged to observe the rules on competitions in Annex III of the Staff Regulations.

18 As stated above, what the Commission held in the present case was not a competition but a *sui generis* selection procedure. Consequently, the applicants cannot legitimately argue that the Procedures should have complied with all the rules contained in Annex III of the Staff Regulations, in particular the provision to the effect that the list of suitable candidates must contain at least twice as many names as the number of posts to be filled (and in any event this obligation is qualified by the words 'wherever possible').

Breach of the principle of equal treatment to the detriment of candidates holding a diploma from a university or equivalent institution

19 The applicants argue that the fact that the Procedures exempted candidates holding a degree or diploma from a university or comparable scientific or technical establishment from being required to present a dissertation in fact placed them at a disadvantage in relation to the other candidates.

20 The Procedures could be considered irregular only if the selection procedure was carried out in such a way that in fact the exemption from presenting a dissertation was likely to harm the exempted candidates. The documents before the Court, however, reveal that this was not the case.

21 In particular, the interview on technical topics with the candidates was devoted, in the case of candidates who had presented a dissertation, to a talk on the dissertation and, in the case of graduate candidates who were exempted from presenting a dissertation, to a talk on a subject chosen by them from their area of special

knowledge. The applicants, who were graduates and were therefore exempt from the dissertation requirement, cannot legitimately argue that unlike their competitors who were not graduates they were obliged to deal with subjects far removed from their knowledge.

22 In those circumstances the candidates holding a university degree or a diploma from a comparable establishment cannot be considered to have been placed at a disadvantage by the nature of the Procedures or by their application, and this submission must therefore be dismissed.

Irregularity in the conduct of the interview

23 The applicants maintain that the interview which lasted a quarter of an hour was of too general a nature and was too short.

24 The interview of a general nature which took place under identical conditions for both categories of candidates followed a talk by the candidate and an interview of a technical nature, either on the dissertation submitted by the candidate or on the subject chosen by him within an area of special knowledge. There was nothing to preclude the *ad hoc* committee from adding a wider-ranging interview designed to assess the candidates' general knowledge, in particular in the scientific or technical field, since such knowledge was necessary for carrying out the duties to which the candidates aspired.

25 There is nothing in the documents before the Court to indicate that the conditions in which the interviews were conducted or the questions raised were likely to prejudice particular candidates.

26 The applicants also argue that a record should have been kept of each interview. In this respect it is sufficient to observe that the Procedures did not provide for that formality and, in the light of all the documents placed on the files, the absence of such a record could not prejudice the candidates' interests or impede the Court's review of the selection procedure.

27 This submission must therefore be dismissed.

The failure of the *ad hoc* committee to observe the dates fixed in the 'Notice to officials and temporary staff in the scientific and technical services — Category B' of 24 June 1983

28 In its notice to the officials and temporary staff concerned setting out the Procedures the Commission announced that the *ad hoc* committee would 'probably' meet 'towards the end of October/beginning of November 1983' and would complete its work 'by December 1984'. The applicants point out that this timetable was not adhered to.

29 It is apparent even from the notice itself that the dates announced were only for guidance. Failure to observe them cannot therefore impugn the legality of the decisions challenged.

Failure of the committee's report on its work to indicate how the marks of the various candidates were calculated

30 The applicants maintain that the report drawn up by the committee does not indicate how the marks awarded to the various candidates were decided.

31 The Court's function is solely to examine whether the assessment of the merits of the various candidates and the methods of assessment used by the *ad hoc* committee are vitiated by manifest error (see the judgment of 16 June 1987 in Case 40/86 *Kolivas* v *Commission* [1987] ECR 2643). However, the *ad hoc* committee is not obliged by any provision of the Procedures or any general principle to reveal in the report on its work the details of the methods of assessment used.

32 In this respect it appears from the documents placed in evidence that each of the candidates was awarded a mark after each of the two interviews. The mark for the first interview was weighted by the award of a bonus for candidates who could

submit 'good' or 'excellent' publications. This mark counted for one-third and the mark for the second interview counted for two-thirds of the final mark.

33 It does not appear that those methods of assessment were vitiated by any manifest error capable of impairing the equal treatment of candidates or a correct evaluation of their merits. The submission must therefore be dismissed.

The questionnaire sent to the candidates' superiors

34 The applicants maintain first of all that the committee was not entitled to send a questionnaire to the candidates' superiors since Section III (2) of the Procedures provided only for 'where appropriate, a personal interview with the candidate and/or his superiors to obtain additional information'. Secondly, they argue that no account should have been taken of these questionnaires without the candidates being given an opportunity to discuss their content.

35 As regards the first part of the submission, it is apparent from the wording of Section III (2) (a) of the Procedures that the purpose of those provisions is to allow the committee to add to the candidates' files information obtained *inter alia* from their superiors. The committee did not misinterpret those provisions by taking the view that a standard-form questionnaire sent to the superiors of the persons concerned could be regarded as providing guarantees equivalent to an interview with them.

36 As regards the second part of the submission, the Court has held in relation to a competition that if a selection board is to base its judgment on factors such as information and opinions obtained from candidates' superiors the candidates must first have been given the opportunity of stating their views on the opinions expressed by their superiors (see the judgment of 11 March 1986 in Case 294/84 *Adams and Others* v *Commission* [1986] ECR 977). However, the failure to observe that formality in the present case was not such as to vitiate the selection procedure.

It is apparent from the file and from the argument before the Court that the replies of their superiors were all favourable to the applicants and stated that they had the necessary ability to carry out Category A duties. It cannot therefore be concluded that if the irregularity had not been committed the decisions challenged would have been different. This submission must therefore be dismissed.

The submission by Mr Paruccini that the dissertation which he presented was not properly examined

37 It must be pointed out first of all that although the applicant maintains that his dissertation was not examined by the selection board he has put forward no evidence in support of his allegation, which is contradicted by the documents before the Court.

38 The applicant also maintains that because of its technical nature his dissertation should have been examined by an expert. However, the Procedures provide only that 'the committee may call on the assistance of experts when the dissertation is presented and examined in the candidate's presence'; they do not oblige the committee to do so. Furthermore, it does not appear from the documents before the Court that the subject of the dissertation was of such a technical nature that recourse to an expert was necessary in order to assess it and that it could not be validly assessed by the committee's chairman himself.

39 It follows from all the foregoing considerations that the claims for the annulment of the contested decisions must be dismissed. The supplementary claims, which were submitted only in the event that the claims for annulment should be upheld, must therefore also be dismissed, and there is no need to rule on their admissibility.

40 The action of Mr Del Plato, Mr Ferrari, Mr Paruccini and Mr Rodari must therefore be dismissed in their entirety.

Costs

41 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the rules institutions are to

bear their own costs in proceedings brought against them by staff of the Communities.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the applications.

(2) Orders the parties to bear their own costs.

Moitinho de Almeida Everling Galmot

Delivered in open court in Luxembourg on 10 December 1987.

P. Heim
President

J. C. Moitinho de Almeida
President of the Third Chamber